

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	CASE NO. 2002 - 1
In re:)	
Protest of Warren Truck Equipment, Inc.)	
)	ORDER
Appeal by Warren Truck Equipment, Inc.)	
)	

This case came before the South Carolina Procurement Review Panel ("Panel") for a hearing on February 28, 2002 on appeal by Warren Truck Equipment, Inc. ("Warren") of a decision by the Chief Procurement Officer ("CPO"). Present and participating in the hearing before the Panel were Warren, represented by M. Elizabeth Crum, Esquire, Lee Transport Equipment, Inc. ("Lee"), represented by John E. Schmidt, III, Esquire, and the Office of General Services of the Budget and Control Board ("General Services"), represented by Keith McCook, Esquire.

FINDINGS OF FACT

On August 27, 2001, the Materials Management Office ("MMO") issued an invitation for bids ("IFB") to procure statewide term contracts for dump, utility and flatbed truck bodies. The IFB which called for sixteen line items was structured into three lots as follows: Lot No. 1 - dump bodies (Items 1 - 4), Lot No. 2 - platform bodies (Items 5 - 9) and Lot No. 3 - utility and flatbed truck bodies (Items 10 - 16). On August 28, 2001, MMO issued Amendment No. 1 and Amendment No. 2 was issued on August 30, 2001. On September 18, 2001, MMO opened the bids. On October 5, 2001, MMO posted its notice of intent to award to Lee for all three lots.

On October 17, 2001, the Chief Procurement Officer received a protest letter from Warren alleging that Warren was the low bidder for Lot No. 1 and that Warren did not receive the South Carolina resident vendor preference request form. On December 14, 2001, the CPO dismissed Warren's protest after finding Lee was the low bidder for lot no. 1 (once the preferences were applied) and that the State had met its burden by giving Warren "adequate notice" of the IFB containing the resident vendor preference request form. On December 20, 2001, Warren appealed the CPO's decision to the Panel.

CONCLUSIONS OF LAW

ISSUE I: WAS WARREN THE LOWEST RESPONSIVE AND RESPONSIBLE BIDDER FOR LOT NO. 1 OF THE IFB?

South Carolina Consolidated Procurement Code ("Code") § 11-35-1520(10) provides in part the following:

Award. Unless there is a compelling reason to reject bids as prescribed by regulation of the board, notice of an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids shall be given by posting such notice at a location specified in the invitation for bids.

Section 11-35-1524 of the Code provides in part the following:

(A) A preference of seven percent must be provided to vendors who are residents of South Carolina or whose products are made, manufactured, or grown in South Carolina as set forth in this section.

(C) Application. Competitive procurements made by governmental bodies shall be made from vendors resident to South Carolina or vendors who bid end-products made, manufactured, or grown in South Carolina or in the United States if available, provided that (1) the bidder has certified in writing in the bid that he or she is resident to the State, or (2) the bidder has certified in writing in the bid that the end-product was made, manufactured, or grown in South Carolina or in the United States...

(E) Enforcement ... If the bidder has not requested the preference, he will neither be entitled to claim any preference against another bidder nor will he be protected from application of another bidder's claim to a preference against his bid in determining contract award.

(F) If a vendor qualifies as a resident vendor and is bidding a product made, manufactured, or grown in South Carolina, an additional three percent preference must be given if claimed by the bidder.

Warren argued that it submitted the lowest responsive and responsible bid and that the contract for Lot No. 1 should have been awarded to Warren. Warren's bid for Lot No. 1 was \$120,167 and Lee's bid for Lot No. 1 was \$125,875. Lee requested the South Carolina resident vendor preference as well as the SC end product preference. Warren did not request either preference.¹ An advantage of ten percent (10%) was applied to all other bids for IFB No. 02-S4558 in favor of Lee. After the requested preferences were applied, Warren's bid became \$132,183 and Lee's bid remained \$125,875. Therefore, Lee was the low bidder for Lot No. 1 and notice of an intended award to Lee as the lowest responsive and responsible bidder was posted in accordance with section 11-35-1520 (10) of the Code.

The Panel finds that Warren was not the lowest responsive and responsible bidder for Lot No. 1 once the preferences were applied in accordance with section 11-35-1524 of the Code.

¹ Warren applied for the US end product preference as provided in section 11-35-1524(B)(5) of the Code. The US end product preference applies when products made, manufactured or grown in the United States compete against products from a foreign country or territory. All of the bids for Lot No. 1 qualified for preferences as resident vendors or South Carolina end products, therefore, the US end product preference was not applied to Warren's bid.

DID MMO ERR BY APPLYING THE RESIDENT VENDOR PREFERENCE
STATUTE TO THIS IFB?

Section 11-35-1520(3) of the Code provides the following:

Notice. Adequate notice of the invitation for bids shall be given at a reasonable time prior to the date set forth therein for the opening of bids. Such notice shall include publications in a newspaper of general circulation in the State such as "South Carolina Business Opportunities" or through a means of central electronic advertising as approved by the Office of General Services.

Warren argued that it was eligible for the resident vendor preference and the SC end product preference, but could not have requested the preferences because it did not receive the original IFB that contained the resident vendor preference request form.

William D. Jackson, an employee of Warren, testified that Warren only received Amendment No. 1 to the IFB and it did not contain the resident vendor request form. Mr. Jackson further testified that he had been bidding State contracts since the mid-eighties and that he had knowledge of the difference between an original IFB and an Amendment to the IFB.

General Services argued that the MMO is only required to give bidders "adequate notice" and not actual notice of solicitations.² General Services further argued that MMO mailed the IFB to Twin States Equipment Co., 300 Planters Drive in Columbia which was purchased by Warren and remains at that address.

² In Case No. 1993-9, *In re: Protest of Eastern Data Inc.; Appeal by Eastern Data, Inc.*, the Panel refused to place the burden on the State to assure receipt of solicitation documents it mails to prospective bidders.

In Case No. 1994-18, *In re: Protest of Winyah Dispensary, Inc.; Appeal by Winyah Dispensary, Inc.* ("Winyah"), the Panel held that S. C. Code Ann. Section 11-35-1520(4) requires "adequate notice" not actual notice. In *Winyah*, the Panel stated, "...whether Winyah received the IFB or not, Winyah was given notice of the IFB through the notice published in SCBO... The Panel has previously determined that by placing documents in the mail, with proper postage, State Procurement gives adequate notice, as required by the law. The Panel further determined that actual notice, through certified mail, is not required of State Procurement."

Jeff Patterson, MMO Procurement Manager, testified concerning the computerized process by which IFBs are distributed. Mr. Patterson testified that the procurement manager reviews the previous bid file to see what vendors bid on the last contract and that information is used to develop a computerized bidders list. Vendors who contact MMO regarding the IFB are added to the bidders list by the procurement manager or a clerk in the bid room. The procurement manager reviews the IFB in the computer and receives the following computerized message, "Do you want to post?" The procurement manager must answer the message in the affirmative as well as e-mail the document to the editor of SCBO. A printer in the bid room is chosen and copies of the IFB are printed and labeled to each vendor in the system. Then a staff member staples the documents and takes them to the mailroom for distribution. Mr. Patterson testified that this process was followed for the distribution of the August 2001 IFB for statewide term contracts for dump, utility and flatbed truck bodies. General Services presented evidence showing a bidder distribution list for the IFB containing the names Twins States Equip. Co., Warren, Inc. and Warren Truck Equip. Inc. and Warren acknowledged receiving Amendment No. 1 to the IFB. Mr. Patterson further testified that he followed the computerized process whereby the original IFB was published on MMO's website and in South Carolina Business Opportunities (SCBO).

The Panel finds that the MMO met its burden of giving "adequate notice" of the IFB containing the resident vendor request form by publishing it on MMO's website and having it published in SCBO as required by Section 11-35-1520(3) of the Code.³ The Panel further finds that MMO committed no error in applying the resident vendor preference statute to this IFB when Lee properly requested it.

³ Mr. Patterson testified that Mr. Jackson or any employee of Warren could have downloaded the original IFB that contained the resident vendor request from MMO's website or copied it from SCBO. Mr. Jackson testified that he had access to public libraries that provide the public with Internet access.

CONCLUSION

For the foregoing reasons, the December 14, 2001 decision of the Chief Procurement Officer is upheld and the appeal by Warren is dismissed.

IT IS SO ORDERED

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY:

Patricia T. Smith

Patricia T. Smith, Chairman

Columbia, SC

March 26, 2002.