



Twice during July, Ms. Mindy Steinkruger, the regional manager for Quantum, called State Procurement asking about the status of the 1990-91 Invitation for Bids. She was advised that the IFB was coming out shortly. Ms. Steinkruger does not know whether she spoke to a receptionist or a procurement officer.

On July 18, an advertisement about the IFB appeared in South Carolina Business Opportunities. (Record, p. 46). On July 30, 1990, the IFB was opened and bids from 4 vendors were publicly announced.

On August 17, Quantum learned that bids had been opened and contacted State Procurement to ask why Quantum had never been sent an IFB. Quantum learned that, through error, State Procurement had not sent a copy of the IFB for the 1990-91 contract.

Quantum had not requested to be put on the bidder's list because it had received copies of the IFB on previous contracts. State Procurement had in the past engaged in the practice of sending incumbents on this contract complimentary copies of the IFB. State Procurement has never advised incumbent vendors that they should rely on receiving copies of IFB's.

On August 21, 1990, Quantum filed a protest with the CPO, alleging that it should have received a copy of the IFB in this case as it had in the past. The CPO found that the Consolidated Procurement Code does not require State Procurement to send incumbents copies of the IFB and that

all the requirements of the Code were met in this case. The CPO dismissed Quantum's protest.

Quantum appeals the decision of the CPO to the Panel, alleging that:

(1) In spite of repeated attempts to get the IFB in a timely fashion, Quantum, through no fault of its own, and through the error of State Procurement, never received a copy of the IFB.

(2) Quantum had a right to rely on the rules of General Services and that its reliance on these has resulted in being omitted from the bidding list.

(Record, p. 1). Quantum requests that the contract be rebid, or that the contract be awarded to Quantum for those employees in place at present at the same price as the low bid in this case. Quantum also asks for its attorneys' fees and costs.

#### CONCLUSIONS OF LAW

The question raised by Quantum is whether State Procurement had the duty to send it, an incumbent bidder, a copy of the IFB for the new contract.<sup>2</sup>

The relevant sections of the Consolidated Procurement Code provide as follows:

(3) Bidders' List. All sources requesting to be put on a bidders' list shall be so enlisted, unless the chief

---

<sup>2</sup>Although the question was not raised by the parties, the Panel notes that its decision in In re: Protest by Laurens County Service Council for Senior Citizens, Case No. 1990-18, probably applies in this case. Under Laurens, Quantum would lack standing to bring a protest under §11-35-4210(1) because it is neither an actual nor a prospective bidder.

procurement officer or head of a purchasing agency makes a written determination that the source should not be enlisted in accordance with regulations of the board. Decisions to reject enlistment shall be appealable to the materials management officer and the board as specified in Article 15 of this chapter. The chief procurement officer and the heads of procurement agencies shall ensure that the bidders' list contain all known sources interested in bidding on state procurements. The chief procurement officer shall review periodically the bidders' lists of the various governmental bodies and shall require the addition to such lists of any appropriate sources which are not contained therein.

(4) 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 may include utilization of bidders' lists or publications in a newspaper of general circulation in the State within a reasonable time prior to bid openings.

(Emphasis added). Sections 11-35-1520(3) and (4)(1976).  
The relevant regulations require:

Regulation 19-445.2035. Bidders' List.

A. Application.

To prevent excessive administrative costs of a procurement, bidders' lists should be used in a way which will promote competition commensurate with the dollar value of the purchase to be made as follows:

(1) \$2,500.00 to \$4,999.99 solicit a minimum of 3 qualified sources;

(2) \$5,000.00 to \$9,999.99 solicit a minimum of 5 qualified sources;

(3) \$10,000.00 or more solicit a minimum of 10 qualified sources.

If the minimum number of qualified bidders required under this Regulation cannot be solicited, the appropriate Chief Procurement Officer or the head of the governmental body shall certify in writing that all know sources were solicited. The fact that less than an entire bidders' list for a commodity is not used shall not in itself preclude furnishing a bid upon request to a bidder not included in the solicitation.

Regulation 19-445.2040. The Official State Government Publication.

A. Specifications of Publication.

The name of the official state government publication shall be known as the "South Carolina Business Opportunities". It shall be published by the Division of General Services weekly. The purpose is to provide a listing of proposed procurements of construction, information technology, supplies, services and other procurement information of interest to the business community. The publication will be available to all interested parties by subscription and distributed by mail.

B. Availability in Public Libraries.

Each publication of the "South Carolina Business Opportunities" shall be mailed to public libraries within the State.

(Emphasis added).

The Panel holds that nothing in the statute or regulations governing this procurement required State Procurement to send a copy of the IFB to Quantum Resources. All that is required by the law is that the IFB be sent to at least ten qualified bidders and that it be advertised in South Carolina Business Opportunities. The evidence in this case indicates that this was done.

Quantum points to §11-35-1520(3), which requires the CPO to ensure that the bidders' list contains all known sources interested in bidding on state procurements. This section offers no comfort to Quantum, however, because there is no requirement that all persons listed on the bidder's list receive copies of IFB's. To the contrary, Reg. 19-445.2035, quoted above, requires that only a minimum number of bidders be solicited for each procurement.

Quantum further contends that, even if nothing in the statutory law entitled it to a copy of the IFB, State Procurement's past practice of sending IFB's to incumbents did. While it is true that customs and practices can sometimes create binding duties between parties to a contract, the Panel finds that that principle of law is not applicable in this case. The Administrative Procedures Act establishes a certain procedure which agencies must follow if they want to create binding rules and regulations. S. C. Code Ann. §1-23-10 et seq. (1976). This procedure includes advance notice, public comment and legislative approval. The Panel does not believe that General Services (or any agency, for that matter) can create binding procedure by informal conduct, thus bypassing statutory safeguards.

As explained by Virgil Carlsen, the State Procurement Officer, State Procurement considers it to be good business to solicit incumbents and, therefore, State Procurement tries to send IFB's to incumbents in every case possible.

However, State Procurement cannot guarantee every incumbent that it will receive a copy of every applicable IFB.

The Procurement Code provides several ways in which vendors can get notice of upcoming solicitations, including subscribing to, or at least reviewing, South Carolina Business Opportunities and/or applying to be put on the bidders' list. The Code does not favor one group of vendors, i.e., incumbents, over another in that regard. All vendors, including incumbents, have the responsibility to protect their own interests in doing business with the State.

The Panel believes that vendors have a right to rely that State Procurement will do those things required by law. The Panel does not believe that State Procurement's previous good faith actions to go beyond the minimum required to get competition should be construed against it.

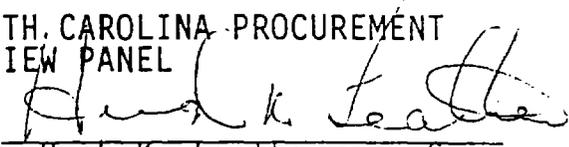
It is regrettable that State Procurement's inadvertence contributed to Quantum's not receiving a copy of the IFB. However, nothing in this case warrants depriving the other vendors who competed in good faith of their hard-won contracts, especially since no violations of the Procurement Code occurred and there was fair and open competition.

Quantum's request for attorneys' fees and costs is denied.

For the reasons set forth above, the Panel affirms the September 24, 1990, decision of the Chief Procurement Officer and dismisses the protest of Quantum Resources.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

By:

  
Hugh K. Leatherman, Sr.

Columbia, S.C.  
12-13 90, 1990