STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1994-18

In re:

Protest of Winyah Dispensary, Inc.;
Appeal by Winyah Dispensary, Inc.

ORDER

This case came before the South Carolina Procurement Review Panel (Panel) on the appeal of Winyah Dispensary, Inc. (Winyah) of a decision by the Chief Procurement Officer (CPO) denying Winyah's protest. Because the threshold issues of standing and timelines can be determined by legal argument, the parties were given the opportunity to submit legal briefs on these issues. The Panel would not be aided by oral arguments, so the Panel makes the following decision based on the Record and the Briefs filed.

The parties are Winyah Dispensary, Inc. represented by Douglas L. Hinds, Esquire; Medical Arts Pharmacy, represented by John Bledsoe, III, Esquire; Department of Disabilities and Special Needs represented by James Hill, Esquire; and the Office of General Services of the Budget and Control Board represented by Delbert Singleton, Esquire. The Panel received a letter from the Department of Disabilities and Special Needs stating its position of neutrality. Winyah and General Services both filed briefs stating their positions.

FINDINGS OF FACT

The following facts are found in the Record and are not in dispute. On August 19, 1994, the Materials Management Office (MMO) of General Services, in conjunction with the Department of Disabilities and Special Needs (DDSN), issued a bid for pharmacy services in the Pee Dee Region. (Record p. 26). The "Official Solicitation Vendor List" includes two vendors, Winyah Dispensary, Inc. (Winyah) and Pee Dee Pharmacy (PDP). (Record p. 42). Notice of the Invitation

For Bid (IFB) was printed in the publication *South Carolina Business Opportunities* (SCBO) on August 25, 1994. (Record p. 37).

MMO alleges that it sent the IFB to the three vendors it knew of which are capable of providing the pharmacy services: Winyah, PDP, and Medical Arts Pharmacy, Inc. (MAP), as well as two other vendors at their request. (Record p. 44 & 43). Winyah, the incumbent provider of pharmacy services, states it did not receive the IFB. It is undisputed that Winyah did not submit a bid in response to the IFB.

On September 9, 1994, MMO opened the one bid it received in response to the IFB. On September 13, 1994, a notice of intent to award to MAP was issued. (Record p. 25). Winyah protested the solicitation and intent to award by letter dated September 15, 1994, and amended letter dated September 27, 1994. (Record p. 18 & 20). The CPO held a hearing on November 1, 1994, and issued a Decision on November 14, 1994. (Record p. 9).

CONCLUSIONS OF LAW

The threshold issues for determination are standing and timelines. Rather than holding a hearing for oral arguments, the parties were given the opportunity to submit written briefs on these issues.

The Panel has discussed the issue of standing in several previous cases, most notably, In Re: Protest of Laurens County Service Council for Senior Citizens, Case No. 1990-18. The Panel found that only an "actual bidder" to the IFB has standing to protest the award or intended award of the IFB. S.C. Code Section 11-35-4210(1) provides, in part, "any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer..." [emphasis added]. Winyah did not submit a bid in response to the IFB, so is not an "actual bidder". S.C. Code Section 11-35-4210(1) also provides, in part, "any

prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer..." [emphasis added]. Neither can Winyah be a prospective bidder once bids are opened, as no opportunity to submit a bid exists.

Most recently, the Panel upheld its prior decisions concerning standing in Case No. 1994-5, In re: Protest of Smith & Jones Distributing Co., Inc. As the Panel has previously determined, after bid opening, a vendor that has not submitted a bid, has no standing to protest a solicitation or award. Therefore, Winyah is not a "prospective bidder" or "actual bidder". The Panel finds that Winyah does not have standing to protest under S. C. Code Ann. Section 11-35-4210.

S. C. Code Ann. Section 11-35-4210(1) further states that a protest must be submitted "within fifteen days of the date of issuance of the Invitation For Bids". The IFB was issued on August 19, 1994, and Winyah's protest is dated September 15, 1994, beyond the fifteen day limitation. So, even if Winyah had standing as a prospective bidder, it's protest of the solicitation is untimely filed under S. C. Code Ann. Section 11-35-4210(1).

Also pertinent to this case is the Panel's decision in Case No. 1990-17, In Re: Protest of Quantum Resources, in which the Panel identified the issue as "whether State Procurement had the duty to send it [Quantum], an incumbent bidder, a copy of the IFB for the new contract." The Panel found that "nothing in the statute or regulations governing this procurement required State Procurement to send a copy of the IFB to Quantum Resources." S.C. Code Section 11-35-1520(2) provides:

> an invitation for bids shall be issued in an efficient and economical manner to at least three qualified sources on the bidders' lists appropriate for the particular procurement, and shall include

> specifications and all contractual terms and conditions applicable to the procurement. If the list does not contain three qualified sources, invitations for bids shall be issued to such qualified sources as are available.

The statute has not been amended since the Quantum decision, and the Panel maintains that the statute does not require the IFB to be sent to the incumbent bidder, simply because it holds the current contract. The statute requires the issuance of the IFB to three or more qualified sources on the bidders' list, which may or may not include the source currently supplying the product or service to be procured.

S.C. Code Ann. Section 11-35-1520(4) provides:

> 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 utilization of bidders' lists and may include publications in a newspaper of general circulation in the State such as *"South Carolina Business Opportunities"*

Again, the notice requirement does not provide special treatment for incumbent vendors. The Panel notes that whether Winyah received the IFB or not, Winyah was given notice of the IFB through the notice published in SCBO.[1]

S. C. Code Ann. Section 11-35-1520(4) requires "adequate notice" not actual notice. 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. *See*, Case No. 1993-9, In re: Protest of Eastern Data, Inc. It would be an undue burden if the State were required to assure receipt of solicitations. With the number of solicitations the

[1] The Panel also notes that as the incumbent, Winyah should be aware of the expiration date of the existing contract for the pharmacy services, and, thus be aware of the necessity for the State to issue an IFB to continue services.

State issues, the extra cost of sending solicitations, or notice of solicitations, by certified mail would be quite costly and burdensome. The Code specifically requires an IFB to be issued in "an efficient and economical manner", which clearly does not contemplate the additional cost and labor of utilizing certified mail. The Panel takes this opportunity to reiterate its previous decision that State Procurement gives adequate notice of a solicitation, as required by law, by placing documents in the mail with proper postage.

For the foregoing reasons, the Panel finds that Winyah does not have standing to protest, nor is the protest timely filed under S. C. Code Ann. Section 11-35-4210. Winyah's protest is dismissed. The CPO decision is upheld in as much as it is consistent with the Panel's findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

Gus J. Roberts, Chairman

Columbia, S.C.

Jan 20, 1995.