

**OPINION
98-L-206**

July 20, 1998

Mr. Rod Backman
Director
Office of Management and Budget
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Rod:

Thank you for your letter asking whether the State Purchasing Division of the Office of Management and Budget (OMB) could make any changes subsequent to a bid award without first having received a written appeal from a vendor. You state that the State Auditor's Office faulted OMB for reinterpreting bid specifications after the bid was awarded and then adding additional vendors to an approved vendors list for certain products.

From the information you submitted, I understand that the original specifications for the bid to be an approved vendor contained certification requirements that were interpreted differently by some vendors and by OMB. Once this ambiguity in the certification requirements was drawn to your attention, the requirements were reviewed. OMB determined that both interpretations were valid and acceptable to the state. Consequently, OMB changed the bid award to place additional vendors on the approved vendor list. This process did not result in deleting any of the vendors who had initially been placed on the approved vendor list.

N.D. Admin. Code § 4-03-15-01 provides that any decision rendered by the purchasing division "may be appealed" to the director of OMB by filing a written statement setting forth all facts and circumstances and the basis for the appeal. Certainly this avenue would have been available to any vendor who had submitted a bid and who was not placed on the approved vendor list. Likewise, vendors on the approved list could have appealed the addition of other vendors to the list after the reevaluation; however, none did. The fact that this remedy was available for any disappointed vendor does not prevent OMB from reevaluating the certification requirements and clarifying those requirements when it became apparent that they were ambiguous.

In this situation, multiple vendors were generally awarded an annual contract to sell computers to the state with separate purchase orders to be sent in by the individual state agencies to the approved vendor of their choice as the need for purchasing computers arose. Under these circumstances, no purchase order was awarded to the lowest and best bidder, but vendors who were willing to sell computer hardware which met specified requirements at a set price were placed on an approved vendor list. The

vendors on this list may or may not actually receive any purchase orders from state agencies. Consequently, no purchase orders have been voided or cancelled due to the addition of approved vendors. Because this situation does not involve one bidder being awarded a contract and every other bidder being rejected, requiring every bidder who was not placed on the approved vendor list to file an individual written appeal before the bidder's adherence to the reexamined and redefined certification criteria could be assessed is neither required nor practical. The certification requirements contained in the bid specifications were reinterpreted because it became apparent that some of the bidders and OMB had interpreted the requirements differently. No bids were retracted; some bids were determined to be acceptable which previously had not been. OMB's resolution of the matter is not prohibited by the statutes and rules bearing on the bid process. See N.D.C.C. §§ 54-44.4-05, 54-44.4-06, N.D. Admin. Code §§ 4-03-07-01(I), (5), and 4-03-15-01. An agency's construction of a statutory scheme it is entrusted to administer is entitled to appreciable deference. Delorme V. Dept. of Human Services, 492 N.W.2d 585, 587 (N.D. 1992); Montana-Dakota Util. Co. v. Public Service Comm'n, 413 N.W.2d 309, 312 (N.D. 1987).

Because the revised interpretation of the requirements could affect all of the bidders, the analysis of all the bids under the revised interpretation was a reasonable, nondiscriminatory method of handling the matter.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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