



(1) by finding that RMS and American Southern properly submitted a joint bid and thus, together, met the requirement of responsibility<sup>1</sup> ;

(2) by finding that RMS did not need a reinsurance intermediary's license; and

(3) by finding that the joint bid submitted by RMS and American Southern was sufficient to qualify for the resident vendor preference;

The Court will address each of these arguments in turn.

## II.

### STANDARD OF REVIEW

Under the APA, "the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6)(Law. Co-op. Supp. 1999). The court will not "... overrule an agency's decision unless:

substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Leventis v. South Carolina Department of Health and Environment, 340 S.C. 118, \_\_\_\_, 530 S.E.2d 643, 649 (Ct. App. 2000) (quoting S.C. Code Ann. § 1-23-380(A)(6)).

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<sup>1</sup> Confusion and controversy has surrounded the identity of the actual bidder. RMS executed the resident vendor certificate in the bid. The notice of award was issued in favor of RMS alone. Companion's bid protest assumed RMS to be the bidder. When Companion prevailed before the CPO, RMS appealed to the Panel in its own name. At the de novo hearing before the Panel, RMS and American asserted that the two entities were "joint bidders."

The court must affirm an agency's decision "...unless it is 'clearly erroneous' in view of the substantial evidence on the whole record. Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion..." that the agency reached. Nettles v. Spartanburg School District # 7, 535 S.E.2d 146 (Ct. App. 2000) (citing Miller v. State Roofing Co., 312 S.C. 452, 441 S.E.2d 323 (1994)). "The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's finding from being supported by substantial evidence.'" Leventis v. South Carolina Department of Health and Environment, 340 S.C. 118, \_\_\_, 530 S.E.2d 643, 650 (Ct. App. 2000)(quoting Grant v. South Carolina Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995)).

"This Court's review is limited to deciding whether the ... decision is unsupported by substantial evidence or is controlled by some error of law." Gibson v. Spartanburg School District # 3, 338 S.C. 510, 517, 526 S.E.2d 725, 728 (Ct. App. 2000)(citing Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999).

### III.

#### FINDINGS

As a preliminary matter, to the extent that they do conflict with this Order, this Court accepts the findings of fact of the Panel. However, it holds that the Panel's "decision ... is controlled by some error of law." Gibson v. Spartanburg School District # 3, 338 S.C. 510, 517, 526 S.E.2d 725, 728 (Ct. App. 2000)(citing Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999).

1. Did the Panel err by finding that RMS and American Southern had properly

submitted a joint bid and thus, together, met the requirement of responsibility?

Because this is a judicial review of the agency's final decision, as outlined in the Panel's Order after a de novo review, this Court holds that this issue was properly before the Panel at the time it ruled.

The Panel is the primary authority in the State on government contracts and the South Carolina Consolidated Procurement Code. See S.C. Code Ann. § 11-35-4410 et seq. As such, their interpretation of procurement law is entitled to deference by this Court. See Byerly Hospital v. South Carolina State Health and Human Services, 319 S.C. 225, 229, 460 S.E.2d 383, 386 (1995)(holding that great deference on interpretation of Medicaid laws and regulations is accorded to the state agency designated for implementation of those laws); South Carolina Police Officers Retirement System v. City of Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990)(holding that in interpreting statutes great deference is given to the administering agency's interpretation).

The Panel found that RMS and American were "... joint participants in submitting the bid to the State... ." (Order, p. 7). The Panel relied on past custom and practice to justify the validity of the joint bid here. Previously, American had successfully bid with the Davis-Garvin Agency. Nine of the eleven bids submitted in response to the IFB were from agencies acting as joint participants with insurance companies.

The Panel also found that, therefore, RMS and American were responsible bidders (to the extent that section III. 2. of this Order may also be partially determinative of this issue, please see same).

Therefore, in deference to the Panel's position as the ultimate decision-making authority with regard to the procurement statutes and regulations, and after having given considered past

practice and custom, the Court holds that the Panel's decision was based on substantial evidence and is not based on an error of law.

2. Did the Panel err by finding that RMS did not need a reinsurance intermediary's license?

The issue of insurance licensing is an issue within the primary jurisdiction of the Department of Insurance. See S.C. Code Ann. § 38-3-110 et seq.; see also Medical University of South Carolina v. Taylor, 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987)(stating the general rule that courts will not grant injunctive relief prior to an agency decision where the agency is vested with primary jurisdiction of the question in issue).

The Panel heard testimony from both the Insurance Commissioner and the General Counsel for the Department of Insurance. Prior to the hearing, the General Counsel, Ms. Fuller, rendered a preliminary opinion that, under the terms of Solicitation No. 00-S2641, a reinsurance intermediary manager's license would be needed by RMS. However, at the hearing, Ms. Fuller testified that she had based her opinion on language in a preliminary agreement between RMS and American<sup>2</sup> (which was later abandoned).

At the hearing, representatives from both RMS and American testified that American *had not* given RMS the authority to bind or manage all or part of American's reinsurance business and that the preliminary agreement upon which Ms. Fuller had relied to come to her opinion had been

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<sup>2</sup>After the bid had been awarded, this agreement was drawn by RMS and American for the purpose of securing an intermediary's license, if required. After determining that such license would not be required, they abandoned the agreement. Ms. Fuller stated in her opinion letter, dated January 10, 2000, that the "agreement between RM&S and American Southern dated January 7, 2000 indicates that RM&S will be functioning in the capacity of reinsurance intermediary."

abandoned. This testimony is uncontroverted. At the hearing, Ms. Fuller agreed that without that authority RMS was not a reinsurance intermediary manager. Therefore, pursuant to the Reinsurance Intermediary Act and the uncontroverted evidence characterizing the relationship between American and RMS, RMS is not a reinsurance intermediary manager as defined in S.C. Code § 38-46-20(7), and was not, therefore, required to obtain a reinsurance intermediary's license.

Therefore, the Court concurs with the result below, and finds that the Panel's decision was supported by substantial evidence and did not constitute an error of law.<sup>3</sup>

3. Can American qualify for the South Carolina resident vendor preference by bidding through, or with, a local insurance agency (RMS)?

A. *The Panel explicitly ruled on this issue*

In sustaining Companion's bid protest, the CPO refrained from ruling on the 7% resident vendor preference issue. At the hearing before the Panel, the attorney for the Materials Management Office, Keith McCook, requested, without objection, that the resident vendor preference issue be remanded to the CPO for determination *if* the Panel reversed the CPO on the issue of licensing. The Panel never explicitly agreed to remand the matter and did not address the issue in its order. In its order reversing the CPO on the licensing issue, the Panel addressed the resident vendor issue directly:

“The panel finds that the State has a moral obligation to honor the vendor preference

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<sup>3</sup>There is no real issue as to whether or not RMS' role as agent of American made it a reinsurance intermediary broker, as that term is defined in S.C. Code § 38-46-20(6), because American is not a ceding insurer -- a reinsurance intermediary broker is “a person ... who solicits, negotiates, or places reinsurance cessions or retrocessions on behalf of a ceding insurer....” At the hearing, Ms. Fuller and Mr. Finkel concurred in this conclusion.

it gave to the RMS-American bid. There is evidence in the records that American sought guidance from General Services as to how the South Carolina vendor preference could be obtained. American received information from general services and thereafter relied on it.” (Order, 8).

Immediately following the foregoing discussion, the Panel concluded:

“For the foregoing reasons, the decision of the Chief Procurement Officer is reversed, . . . and the State is hereby ordered to reinstate the award of solicitation 00-S2641.” (emphasis added).(Order, 8).

RMS and the Panel contend this did not constitute a ruling by the Panel on the issue of the 7% resident vendor preference.

If American had not been given the 7% resident vendor preference, Companion would have been the low bidder. However, after the Panel’s decision was published, American was awarded the contract without any further discussion about the 7% resident vendor preference. Therefore, the contracting agency must have found that the Panel had either ruled, in its order, that American was entitled to the 7% preference, or that the Panel’s refusal to remand the issue (in accordance with Mr. McCook’s request) had resurrected the original agency decision to grant the 7% preference. If the Panel had understood that the latter was going to be the case, it would not have needed to make a finding on the matter (a finding that it asserted was supported by evidence in the record.)<sup>4</sup> If nothing else, the Panel did decide that it needed to justify the award of the 7% preference on moral grounds.

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<sup>4</sup>“The Panel finds that the State has a moral obligation to honor the vendor preference it gave to the American-RMS bid. There is evidence in the record that....” (emphasis added). (Order, 8).

If the Panel was not actually ruling on the matter, than it would not have found it necessary to justify itself (the CPO had explicitly refrained from ruling on the matter). Indeed, even if the Panel had not addressed the issue, the preference would have been awarded automatically (without need for justification). Therefore, the Panel's declaration that the State had a moral obligation to grant the preference, could have only been intended as a ruling on that issue.

B. *American's joint bid with RMS enabling it to be awarded the resident vendor preference is in derogation of the legislative intent expressed by the codification of §11-35-1524 and §11-35-310*

Other than the vague assertion that American associated RMS as "local eyes and ears", there is no real dispute about the reason American associated RMS as an alleged "joint-bidder" – to obtain the 7% resident vendor preference. Clearly, if any non-resident vendor can associate any resident agent and identify that agent as its "joint bidder" for purposes of obtaining the resident vendor preference, S.C. Code §11-35-1524 is completely eviscerated -- essentially an empty, worthless section of the Code. This Court does not believe that legislature wasted its time and the taxpayers' money by enacting a statute that could be so easily circumvented. Therefore, it is this Court's opinion that construing the resident vendor preference statute to allow such circumvention is in derogation of the legislature's intent as expressed by the codification of S.C. Code §11-35-1524.

In 1997 the legislature further expressed its intent to favor bona fide South Carolina businesses by adding a definition of "office" to S.C. Code §11-35-310. Resident vendor is defined in S.C. Code §11-35-1524 (B)(6). A resident vendor is one who, inter alia, "maintains an office in the State, . . ." In 1997, the General Assembly clarified what constituted an "office" when it enacted Act 153 (Act 153 added a definition of "office" to §11-35-310). "(O)ffice means a non-mobile

place for the regular transaction of business . . . and staffed by at least one employee on a routine basis.” (emphasis added). It is elementary that under South Carolina law an agent (especially within the specialized field of insurance) is not the same as an employee. See Crim v. Decorator’s Supply 291 SC 193, 352, SE2d 520 (S.C. App. 1987). There is no evidence in the record showing that RMS is an employee of American, or that American maintains an office in this state that is manned by one of its employees. The 1997 amendment, defining “office,” prevents a non-resident from qualifying for the resident vendor preference by contracting for a transitory presence in South Carolina.

To hold that a foreign corporation can qualify for resident vendor status by contracting with a resident agent for the term of a single contract would undermine the purpose of the resident vendor preference –to favor bona fide South Carolina businesses, and, primarily, to recirculate state tax revenues (in the form of state contract expenditures) back through the State’s economy (for instance, Companion has hundreds of employees in South Carolina).

Therefore, this Court holds that the Panel, by ruling that the agency’s grant of the 7% resident vendor preference to the American-RMS bid comported with South Carolina law, made a material error of law. This Court finds that such a ruling was in violation of the spirit and letter of the resident vendor statute, was arbitrary, capricious, and an abuse of discretion, was in excess of the agency’s statutory authority, and that, as a result, substantial rights of the Petitioner have been prejudiced.<sup>5</sup>

#### IV.

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<sup>5</sup>If the American-RMS bid had not been granted the 7% resident vendor preference, Companion would have had the low bid.

**REMEDY**

S.C. Code §11-35-4310(3) discusses the remedies potentially available when a procurement contract has been awarded in violation of law. Such a contract can be ordered canceled and re-awarded to the lowest responsible and responsive bidder, when such re-award is in the best interest of the State. In that regard, counsel for the IRF addressed this Court at the hearing on this appeal. It appears that the IRF takes no position regarding the feasibility of a re-award in this matter, but requests a transition period of ninety days prior to re-awarding the contract.

**NOW, THEREFORE, IT IS ORDERED, that the decision of the Panel be reversed and that the contract be canceled and re-awarded to the lowest responsive and responsible bidder at the conclusion of ninety days from the date of this Order.**

**IT IS SO ORDERED this 11 day of December, 2000.**



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The Honorable G. Thomas Cooper, Jr.  
Resident Judge, Fifth Judicial Circuit

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