

STATE OF SOUTH CAROLINA)
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COUNTY OF RICHLAND)
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In re:)
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Protest of Companion Property and)
Casualty Insurance Company;)
)
Appeal of: Rooney, McArthur &)
Suggs, Inc.)
_____)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 2000-1

ORDER ON REMAND

Background

This case came before the South Carolina Procurement Review Panel (Panel) on remand from the South Carolina Court of Appeals. A hearing was held on February 24, 2004. At the hearing before the Panel, Rooney, McArthur & Suggs (RMS) was represented by Melissa J. Copeland, Esquire. Companion Property and Casualty Insurance Company (Companion) was represented by Daniel T. Brailsford, Esquire. Keith McCook, Esquire, represented the Chief Procurement Officer (CPO). RMS took no position in the matter and therefore made no argument and presented no evidence. Both Companion and the CPO argued their positions, but neither presented testimony choosing instead to rely on the Record in the case.

Companion argued that if we find the resident vendor preference should not have been granted to RMS and American Southern, then the contract was awarded in error. Therefore, Companion argued that the provisions of S.C. Code Ann. §11-35-4310 should be applied. The section provides that the Panel may award bid preparation costs to a party when the contract ultimately is awarded in violation of law. The CPO argued it is inappropriate for the Panel to hear this issue. We held this issue in abeyance pending the submission of briefs by the parties within 20 days of the date of the hearing. That matter will be decided by separate order.

Findings of Fact

Based on the Record in this matter, we make the following findings of fact:

On December 13, 1999 the Materials Management Office of the Budget and Control Board posted a notice of intent to award a contract to provide reinsurance on the state vehicle fleet to Rooney, McArthur & Suggs (RMS). This award came after RMS submitted a joint bid with American Southern Insurance Co. RMS is a South Carolina company and American Southern is a Kansas Company. American Southern did have a Certificate of Authority to do business in insurance in South Carolina. Companion protested the award to the CPO. Both RMS/American Southern and Companion had been given the 7% resident vendor preference (See §11-35-1524 attached - "A preference of seven percent must be provided to vendors who are residents of South Carolina....").

The CPO found RMS to be a non-responsible bidder and cancelled the award to them. The CPO did not address the question of resident vendor preference. RMS appealed to the Panel.

The Panel heard the matter on March 23, 2000. Both the witness for American Southern (Roy Thompson) and the witness for RMS (Tommy Suggs) were clear in their testimony that American Southern and RMS submitted a joint bid in order to obtain the resident vendor preference. American Southern sought a South Carolina company with which to submit a joint bid.

The Panel reversed the CPO and again awarded the contract to RMS/American Southern, finding the pair were responsible bidders. In its holding the Panel ruled that the State had a "moral obligation to honor the vendor preference it gave to the RMS-American bid" because they sought guidance from the State on how to obtain vendor preference. Without the resident vendor preference, RMS would not have been the low bidder.

Companion appealed from the Panel to the Circuit Court. The Circuit Court reversed the Panel and held that American Southern could not contract with a resident agent (RMS) for the purpose of gaining the resident vendor preference. The Circuit Court held that the Panel did in effect decide the issue of resident vendor preference with its “moral obligation” language and that its holding violated state law concerning the vendor preference. The Circuit Court found that an agent was not an employee so American had no office staffed by an employee in the state. The Circuit Court found it of no importance that the agent, RMS, is a resident vendor of South Carolina.

RMS then appealed to the South Carolina Court of Appeals. The Court of Appeals found that the Panel ruled on resident vendor preference, but did not rule under the Procurement Code which is its responsibility. Therefore, the court remanded the case to the Panel “to determine whether under its interpretation of §11-35-1524 RMS and American are entitled to the resident vendor preference.”

The contract on which this case is based has expired. It expired one month after the Panel received the remittitur from the Court of Appeals.

Issue

Was the RMS/American Southern bid entitled to the Resident Vendor Preference of S.C. Code Ann. §11-35-1524?

Conclusions of Law

South Carolina through its legislature affords a resident vendor preference to companies who can meet the statutory requirements. S.C. Code of Laws, §11-35-1524 provides in part, “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....” It goes on to define a

“resident vendor” in part as a vendor who is an individual, partnership, association, or corporation that is authorized to transact business within the State and who maintains an office in the State. In 1997 the legislature added a definition of “office” to S.C. Code Ann. §11-35-310. The definition reads, “[O]ffice means a nonmobile place for the regular transaction of business or performance of a particular service and staffed by at least one employee on a routine basis.”

It appears to be undisputed that American Southern could not have received the resident vendor preference but for its association with RMS. American Southern was not at the time a South Carolina company for purposes of §11-35-1524. The record shows the company was authorized to do business in the State, but did not maintain an office. The resident vendor statute is a detailed statute clearly intended to provide a benefit to South Carolina companies. A seven percent preference can many times determine who receives the award and to have the preference used contrary to its purpose would make the legislation meaningless. American Southern knew that it was not entitled to the preference and sought a company that was so that they could submit a joint bid. In considering this issue on the law, we conclude that allowing American Southern to associate itself with RMS in order to obtain the resident vendor preference based on the agent’s residency, does completely “eviscerate” S.C. Code Ann. §11-35-1524 as stated by the Circuit Court. Therefore, we conclude that under our interpretation of S.C. Code Ann. §11-35-1524 the resident vendor preference should not have been awarded to the American Southern/RMS bid.

This case is troubling to the extent that the contract has expired and it does not appear there is a justiciable controversy any longer. This was evident in the fact that there was no opposing position presented at the hearing. RMS was present through counsel, but did not participate. RMS asserted that it had completed the contract and the case was now moot.

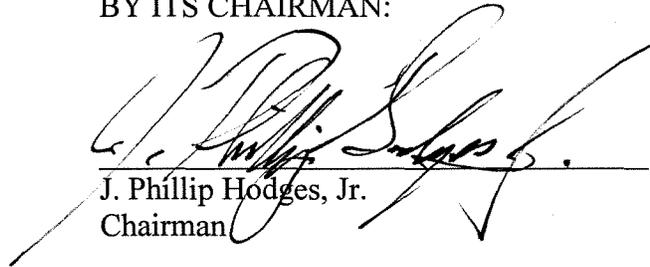
Nevertheless, this Panel was instructed by the Court of Appeals to render a decision on the resident vendor preference so we feel compelled to do so. In light of these concerns, this case should be limited to its facts and Panel reserves the right to revisit this issue when an active and justiciable controversy regarding the resident vendor requirement is before it.

Order

IT IS HEREBY ORDERED that American Southern and RMS should not have been given the resident vendor preference on the bid and award discussed herein.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW
BY ITS CHAIRMAN:



J. Phillip Hodges, Jr.
Chairman

This 18th day of March, 2004