

**THE STATE OF SOUTH CAROLINA**  
**In The Court of Appeals**

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Companion Property and Casualty Insurance Company,

Respondent,

v.

The South Carolina Procurement Review Panel; Rooney, McArthur &  
Suggs, Inc., and the South Carolina Insurance Reserve Fund,

Defendants,

Of whom Rooney, McArthur & Suggs, Inc., is

Appellant.

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Appeal From Richland County  
G. Thomas Cooper, Jr., Circuit Court Judge

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Unpublished Opinion No. 2003-UP-174  
Submitted December 9, 2002 – Filed March 4, 2003

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**REVERSED AND REMANDED**

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John E. Schmidt, III, and Melissa J. Copeland, of Columbia, for  
appellant.

Daniel T. Brailsford, of Columbia, for respondent.

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**PER CURIAM:** Rooney, McArthur & Suggs, Inc. (RMS) appeals a circuit court's order reversing the South Carolina Procurement Review Panel's (Panel's) award of a contract jointly to RMS and American Southern Insurance Company (American). We reverse and remand.

**FACTUAL/ PROCEDURAL BACKGROUND**

RMS, a South Carolina corporation, and American, a Kansas corporation, jointly submitted a bid to provide reinsurance services to the South Carolina Insurance Reserve Fund (Fund) during a competitive bidding process. Their bid was reduced seven per cent under the South Carolina Resident Vendor Preference statute, which provides:

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 as set forth in this section.

S.C. Code Ann. § 11-35-1524(A) (Supp. 2002). A vendor who qualifies as a "resident vendor" under the statute:

- (a) is an individual, partnership, association, or corporation that is authorized to transact business within the State,
- (b) maintains an office in the State,
- (c) maintains an inventory for expendable items which are representative of the general type of commodities on which the bid is submitted and located in South Carolina at the time of the bid having a total value of ten thousand dollars or more based on the bid price, but not to exceed the amount of the contract, or is a manufacturer which is headquartered and has at least a ten million dollar payroll in South Carolina and the product is made

or processed from raw materials into a finished end-product by such manufacturer or an affiliate of such manufacturer, and (d) has paid all assessed taxes.

S.C. Code Ann. § 11-35-1524(B)(6) (Supp. 2002).

In December 1999, Fund issued an “intent to award” letter stating it planned to award the contract to RMS.<sup>1</sup> The second-lowest bidder was Companion Property and Casualty Insurance Company (Companion), which also received resident vendor preference.

Companion filed a protest of the Fund’s decision to the Chief Procurement Officer. Among the arguments raised in its protest letter, Companion contended, “Neither [RMS] nor American was entitled to the seven percent resident vendor preference provided for by South Carolina Code § 11-35-1524 A (sic), as neither maintains in this state both an office and a representative inventory.” Companion asked the Chief Procurement Officer to cancel the intent to award and instead award the contract to it.

After conducting a hearing to review Companion’s protest, the Chief Procurement Officer sustained the protest finding that as RMS was not licensed as an insurer, reinsurer, or a reinsurance manager, it was a non-responsible bidder. He did not reach the issue of whether RMS’s joint bid with American was entitled to the resident vendor preference. He instructed the State Procurement Office to cancel the award to RMS and reissue the notice of intent to award to the next lowest responsible and responsive bidder.

RMS appealed the Chief Procurement Officer’s decision to the Panel. Its letter of appeal did not address the issue of whether the joint bid was sufficient to qualify for the resident vendor preference. However it did assert that “RMS was in fact the lowest responsible and responsive bidder.”

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<sup>1</sup> The Intent to Award document only lists RMS as the company to which the award was made and does not mention American. Similarly, the “Bid Comparison” chart’s list of vendors only lists RMS.

The Panel conducted a hearing in March 2000. At the beginning of the hearing, the attorney for the Materials Management Office asked the Panel not to consider the issue of whether RMS was entitled to the resident vendor preference because the Chief Procurement Officer's order did not address the issue. Instead, he asked the Panel to remand the matter to the Chief Procurement Officer if it decided he erred on the other issues.

During the hearing, a witness for RMS testified that the "majority of the purpose" of the joint-bid from RMS and American was to obtain the resident vendor preference. It added American "made it perfectly clear . . . that they needed local representation here."

Later, RMS's attorney asked a witness whether a joint-bid from a resident vendor and non-resident vendor would qualify for the resident vendor preference. The attorney for the Materials Management Office objected, arguing the case was limited to issues stated in their letter appealing the Chief Procurement Officer's ruling. The attorney withdrew the question.

The Panel reversed the decision of the Chief Procurement Officer and reinstated the bid award to RMS. In its order, the Panel found:

[T]he State has a moral obligation to honor the vendor preference it gave to the RMS-American bid. There is evidence in the record 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.

It did not remand any issues to the Chief Procurement Officer.

Companion appealed the Panel's order to the circuit court. The circuit court first considered whether the Panel explicitly ruled on the issue of the resident vendor preference. It found that the Panel's

determination that the State had a “moral obligation to honor the vendor preference it gave the RMS-American bid” could have only constituted a ruling on the issue. The court noted that if the Panel did not actually intend to rule on the issue, “it would not have found it necessary to justify itself.” Considering the issue’s merits, the court ruled American could not qualify for the resident vendor preference by bidding through, or with, a local insurance agency such as RMS. The circuit court ordered the contract be cancelled and awarded to the lowest responsive and responsible bidder.

### **STANDARD OF REVIEW**

The Panel has de novo review over requests to review determinations of the Chief Procurement Officer. S.C. Code Ann. § 11-35-4410(1) (Supp. 2002). The Panel’s decision is final as to administrative review, and may be appealed to the circuit court under the provisions of the South Carolina Administrative Procedures Act (APA). S.C. Code Ann. § 11-35-4410(6) (Supp. 2002). The APA provides the reviewing court has the power to reverse or modify an administrative agency decision if the findings and conclusions of the administrative agency are affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380 (Supp. 2002).

### **LAW/ANALYSIS**

RMS argues that the circuit erred in finding that the Panel decided the issue of Resident Vendor Preference, contending the issue was never properly raised to the Panel in a “Request for Review Letter.” We disagree.

In asserting the Panel lacked jurisdiction to consider the Resident Vendor Preference issue, RMS relies on Hitachi Data Sys. Corp. v. Latimer, 309 S.C. 174, 420 S.E.2d 843 (1992). We find its reliance on

this case unavailing. In Hitachi, the Panel launched an independent investigation of an award of a contract although no party had objected to or filed a protest in connection with the contract and no written decision was ever issued by a Chief Procurement Officer. The supreme court held the Panel was not authorized to conduct an investigative hearing. Rather, it held, "The scope of the Panel's authority is limited to appellate review of written determinations, decision, policies and procedures governed by the Procurement Code when such review is initiated by protest or application as provided by the statute. Hitachi, 309 S.C. at 179, 420 S.E.2d at 846.

In the present case, this matter was brought to the Panel through a protest. In its letter of protest, Companion raised the issue that RMS and American were not entitled to the seven percent resident vendor preference. Although this issue was clearly before him, the Chief Procurement Officer did not address the issue as he found in favor of Companion on another ground Companion had raised. Companion, as the "winner" with the Chief Procurement Officer, was not required to file a "Request for Review Letter" to bring the issue of vendor preference to the Panel. Cf. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions.").

The Panel has de novo review of the Chief Procurement Officer's order. It was free to make its own findings of fact on the issue of the issue of the resident vendor preference. We agree with the circuit court that the Panel's language that the "State has a moral obligation to honor the vendor preference it gave to the RMS-American bid" can only be construed as a ruling on the issue as it ordered the State to reinstate the award to RMS. However, we find the Panel's decision to grant RMS the vendor preference because of a "moral obligation" is based on an error of law.

The Panel has not considered whether RMS and American are entitled to the resident vendor preference under the Procurement Code. As the Panel is charged with the execution of the Procurement Code, the courts must accord great weight to its interpretation of the statutes. See S.C. Cable Television Ass'n v. Southern Bell Tel. & Tel. Co., 308 S.C. 216, 417 S.E.2d 586 (1992) Accordingly, we remand the matter for the Panel to determine whether under its interpretation of § 11-35-1524 RMS and American are entitled to the resident vendor preference.

As we remand for the foregoing reason, we need not address RMS's remaining issues.

**REVERSED AND REMANDED.**

**GOOLSBY, HUFF, and SHULER, JJ., concur.**

IMPORTANT NOTICE

Any Petition for Rehearing filed must be received in the Clerk's office on  
~~MAR 19 2003~~ by 5:00 p.m.(POSTMARK DATE IS NOT ACCEPTABLE.)  
If the Petition for Rehearing is received after the due date it will be  
returned. If no Petition for Rehearing is filed the remittitur will be sent the  
following business day.

Original and Six Copies Required

\$25.00 Filing Fee Required