

# ORIGINAL

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

IN RE: PROTEST OF HONEYWELL, INC.

In the Matter of: )  
Honeywell, Inc., )  
 )  
Appellant, )  
 )  
vs. )  
 )  
Materials Management Office, )  
Division of General Services, )  
State of South Carolina, )  
 )  
Respondent. )  
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ORDER

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This matter came before me for a hearing on October 17, 1983, on appeal from a final decision of the South Carolina Procurement Review Panel, pursuant to the provisions of S. C. Code Ann., §1-20-380 (Supp. 1982). Both parties, as well as other interested persons who had appeared in the various administrative hearings, were represented by counsel at the hearing. Since this is an appeal from an agency decision, governed by the dictates of the South Carolina Administrative Procedures Act, S. C. Code Ann., §1-23-380, et seq., (Supp. 1982), I have considered only the record certified for appeal. Further, I am mindful of the limitations placed upon me by the provisions of S. C. Code Ann., §1-23-380(g) (Supp. 1982) which provides as follows:

The court [on review] shall not substitute its judgment for that of the agency as to the weight of the evidence on questions and fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The following statement of facts is taken primarily from the Transcript of the proceedings before Mr. Richard Campbell, Acting Materials Management Officer, South Carolina Division of General Services, held November 4, 1982, and the various administrative decisions. Certain documents referred to herein are a part of the record in this matter, having been attached to Honeywell's Protest and Memorandum.

On or about March 2, 1982, the Division of General Services, Central State Purchasing, of the State of South Carolina, solicited sealed bids (Bid Number 6-793-111620-01/31/82) for a contract to perform "preventive maintenance and repair service on Clinical and Biomedical Equipment from June 1, 1982, through May 31, 1985." Honeywell, Inc. (hereinafter "Honeywell"), and Richland Memorial Hospital (hereinafter "RMH"), among others, submitted bids in response to this bid invitation.

Honeywell was ultimately deemed low bidder at approximately \$200,000.00. RMH's bid was approximately \$400,000.00. Following the bid closing date, and on or about April 29, 1982, the contract administrator,

Roy G. Smarr, Jr., of the South Carolina Department of Mental Retardation, telephoned Gary R. Jones, Biomedical Account Manager, Instrumentation Services Division of Honeywell, and requested that Honeywell submit proposed revisions to Honeywell's previously submitted bid. By letter dated April 29, 1982, to Mr. Smarr, Honeywell proposed certain revisions to its bid. Thereafter, and on or about June 29, 1982, Mr. Smarr wrote Mr. Jones a letter requesting updating of Honeywell's original equipment inventory list, as revised, and advised Honeywell that the State of South Carolina, Department of Mental Retardation, would like to "go with your alternate bid . . ." and further advised Honeywell that "[u]pon receipt of updated and approved inventory list, we will include same list in [the] contract."

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Honeywell complied with Mr. Smarr's request and, based upon his representations, fully expected to be awarded the contract. However, on or about August 30, 1982, a revised bid invitation (Bid Number 6-793-116200-09/20/82-P) was issued by the State of South Carolina. Honeywell submitted the low bid, at \$156,000.00, in response to the second invitation to bid, and RMH submitted the next lowest bid, at \$156,297.00.

S.C. Code Ann., §11-35-1520(9)(d) (Supp. 1982) allows a governmental body to extend a preference to a responsive and responsible resident vendor, for procurements under \$2.5 million, if the bid of the resident vendor does not exceed the lowest qualified bid from a non-resident vendor by more than 2% of the non-resident vendor's bid and the resident vendor has made written claim for the preference at the time of

submission of bids. Honeywell is a corporation authorized to transact business within the State of South Carolina, maintains an office in the State of South Carolina, maintains a representative inventory of commodities on which the bid is submitted and has paid all taxes duly assessed, but Honeywell failed to claim the resident vendor preference on its bid, allegedly due to the fact that Messrs. Erich Tata and Roy Smarr of the Department of Mental Retardation advised Honeywell's employees that Honeywell did not qualify for the preference and the preference was unimportant. Messrs. Smarr and Tata denied making these representations. RMH, on the other hand, claimed the preference and, on or about October 8, 1982, Honeywell learned through a telephone conversation its counsel had with Ms. Barbara McMillan, of the South Carolina Attorney General's Office, that a Statement of Award and a Purchase Order had been issued sometime during the week of October 4, 1982, to RMH, awarding RMH the contract.

Honeywell mailed its protest in writing to Mr. Richard Campbell, Acting Materials Management Officer, Division of General Services of the State of South Carolina, on October 15, 1982, pursuant to S.C. Code Ann., §11-35-4201 (Supp. 1982), and submitted four grievances for consideration:

1. The preference accorded resident vendors does not apply in this case because both Honeywell and RMH are resident vendors;
2. RMH does not qualify for the preference, even if it is applicable in this case;

3. Even if the preference is applicable and RMH qualifies for the preference, the contract should be awarded to Honeywell due to the fact that Honeywell submitted the low bid and Honeywell's failure to claim the preference was due to mistake, inadvertence, and reliance upon representations of the State; and,
4. Even if the preference given resident vendors is applicable, such preference unconstitutionally discriminates against non-residents and, therefore, is void.

On November 4, 1982, a hearing on Honeywell's protest was held by Mr. Campbell and, as a result of that hearing, Mr. Campbell issued a decision, on or about November 12, 1982, which upheld the contract award and denied Honeywell's protest on the grounds that the resident vendor preference of §11-35-1520 had been correctly applied in this case. Honeywell's failure to claim the preference was not due to mistake, inadvertence or misrepresentation, RMH qualified for the preference and the resident vendor preference carried the presumption of constitutionality.

On or about November 16, 1982, Honeywell requested a review of the decision of the Acting Materials Management Officer before the South Carolina Procurement Review Panel, pursuant to §11-35-4410 of the S.C. Code (Supp. 1982), and a hearing was held before the Review Panel on December 7, 1982. Representatives of Honeywell, RMH and the S.C. Division of General Services were present and represented by counsel at this hearing. On December 13, 1982, the Review Panel issued its

Determination, affirming the decision of the Acting Materials Management Officer, in all respects.

Having exhausted all administrative remedies available and having been aggrieved by a final decision of the Review Panel, pursuant to the provisions of S.C. Code Ann., §11-35-4210, et. seq. (Supp. 1982), Honeywell, by Petition dated January 12, 1983, sought judicial review of the final decision of the Review Panel, pursuant to the provisions of S.C. Code Ann., §1-20-380 (Supp. 1982).

The in-state preference accorded by S.C. Code Ann., §11-35-1520(9)(d) (Supp. 1982) does not apply where, as here, the two lowest bidders are resident vendors. Section 11-35-1520(9)(d), in pertinent part, provides:

Competitive procurements made by any governmental body shall be made from a responsive and responsible vendor resident in South Carolina . . . if such bid does not exceed the lowest qualified bid from a nonresident vendor by more than two percent of the latter bid, and if such resident vendor has made written claim for such preference at the time the bid was submitted . . . (Emphasis added.)

Even a cursory reading of this statute reveals that there are two prerequisites set forth in the statute before the resident vendor preference can be applied: (1) the bid of a resident vendor must not exceed that of a nonresident vendor by more than 2%; and, (2) the resident vendor must claim the preference in writing at the time of submission of its bid. Under the plain wording of the statute, the preference may be applied only where the two low bidders are a resident and a nonresident vendor. If the two low bidders are resident vendors, the preference afforded by the statute

does not apply at all. The question becomes, therefore, whether or not Honeywell qualifies, under the statutory definition, as a "resident vendor."

The statute defines a "resident vendor" as "an individual, partnership, association or corporation that is authorized to transact business within the State, maintains an office in the State, maintains a representative inventory of commodities on which the bid is submitted and has paid all taxes duly assessed." S.C. Code Ann., §11-35-1520(9)(d). The statute does not require that the resident vendor preference be claimed, in writing, in order for a bidder to be classified as a resident vendor. Honeywell is authorized to do business in South Carolina, maintains offices in Columbia and Greenville, ~~maintains an inventory of all commodities needed for the performance of the contract~~ and has paid all taxes duly assessed by the State of South Carolina. Honeywell is, therefore, a resident vendor by definition and the in-state preference does not apply in this case.

The state procurement officer handling the bid apparently treated Honeywell as a nonresident vendor since Honeywell did not claim the preference on the bid invitation form and gave an out-of-state address on the bid forms. Requiring a bidder to claim the preference as a condition to treating the bidder as a resident vendor is contrary to the plain wording of both §11-35-1520(9)(d) and the bid invitation. Both the statute and the bid invitation require a bidder to sign the preference blank, only if the bidder is seeking to exercise the preference against nonresident vendor bidders.

Under well-settled canons of statutory construction, where the legislature has carefully employed a term in one portion of the statute and excluded it in another, it should not be implied where excluded. Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 515 (1963); Marshall v. Western Union Telegraph Company, 621 F.1d 1246, 1251 (3d Cir. 1980); 73 Am.Jr.2d, Statutes, §211, at 405 (1971).

In §11-35-1520(9)(d), the legislature carefully required bidders seeking to prevail on the basis of the resident vendor preference to make a written request for the preference. Within the same subsection of the statute, the legislature defined "resident vendor," but the legislature did not make claiming the resident vendor preference a condition for being treated as a resident vendor.

An examination of the language of the statute reveals that the first part of §11-35-1520(9)(d) concerns the conditions for granting an in-state preference to a resident vendor. It requires: (1) that the bid of a responsive and responsible resident vendor not exceed the bid of a nonresident vendor by more than two percent; and, (2) that the resident vendor claiming the preference make a written request for the preference at the time the bid is submitted. The second part of §11-35-1520(9)(d) defines a resident vendor to be a ". . . corporation that is authorized to transact business within the State, maintains an office in the State, maintains a representative inventory of commodities on which the bid is submitted and has paid all taxes duly assessed." Unlike the portion of the statute providing for the in-state preference, this portion of §11-35-1520(9)(d)

does not require a bidder to make a written request to be treated as a resident vendor nor should such a requirement be implied. Resident status occurs by reason of a bidder's falling within the statutory definition and is not lost by failure to request the in-state preference. Any other interpretation of §11-35-1520(9)(d) would be contrary to the plain language of the statute. For the foregoing reasons, it is clear that the Procurement Review Panel erred in applying the law to the facts of this case and, therefore, the decision of the Procurement Review Panel should be reversed.

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Having determined that the Procurement Review Panel erred in applying the law to the facts of this case, it becomes unnecessary to explore the remaining issues raised by Honeywell in this appeal.

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Under the circumstances, the Court would normally simply reverse the Procurement Review Panel and remand this matter to the Panel for consideration of the question of what relief Honeywell is entitled to. The Court has considered this option, but rejects it in the interest of judicial economy. If the Court were to simply reverse the Panel and remand this case to the Panel in order to allow the Panel to fashion appropriate relief, one or the other of the parties might be dissatisfied with the relief accorded and another appeal could result. RMH has been performing under the contract for over one year and the contract expires in less than two years. Accordingly, it is conceivable that this entire controversy could become moot by the time a final disposition is made of this case. It does not appear to the Court that the interests of justice would best be served by simply

remanding this matter to the procurement review panel for further proceedings.

The Court is of the opinion that the interests of justice dictate that the Court hold another hearing in this matter, at which time all parties and interested persons who have previously appeared in this cause will be given an opportunity to present their views as to what relief is appropriate to be awarded to Honeywell in this case. Should those appearing deem it necessary and helpful to the Court, the Court will admit additional evidence, otherwise admissible under the rules of evidence, which may bear upon the issue of what relief is appropriate. For example, and not by way of limitation, Honeywell has requested that it be awarded the contract. The record is silent as to what effect, if any, an order which awarded the contract to Honeywell would have upon the existing contract and the services being performed thereunder.

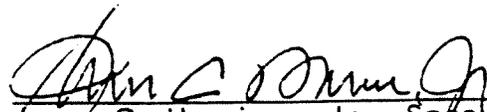
In view of the fact that an additional hearing as to relief is necessary, it is the intent of this Order that it be deemed interlocutory in nature and it shall not become final until appropriate relief has been fashioned. The Court does not wish to place the parties in the position of having to appeal this Order to protect their rights, as well as a later Order which will deal with what relief is appropriate in this case. Accordingly, this Order shall not become final until further Order of this Court. For the foregoing reasons,

IT IS, THEREFORE, ORDERED that the decision of the Procurement Review Panel be, and it is hereby, reversed. It is further

ORDERED that this matter be set for hearing before me to give all interested parties who have heretofore appeared in this cause an opportunity to present their views, including introduction of appropriate additional evidence, to the Court concerning what relief should be accorded Honeywell. It is further

ORDERED that this Court shall retain jurisdiction in this matter until final disposition of the matters and things herein discussed and that this Order shall not become final, for purposes of appeal, until further Order of this Court.

IT IS SO ORDERED.

  
James C. Harrison, Jr., Special Judge  
Fifth Judicial Circuit

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Columbia, South Carolina

*November 13*  
November 13, 1983.