

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF RICHLAND ) CIVIL ACTION #91-40-CP-4853

Barber-Colman Company,  
Petitioner,  
-vs-  
Johnson Controls, Inc., et al.,  
Respondents.

IN RE: PROTEST OF JOHNSON CONTROLS  
INC.

O R D E R

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BARBARA A. SPOTT  
C.C.C. & G.S.

BACKGROUND

This case arises pursuant to the Administrative  
Procedures Act, §§ 1-23-310, et seq., (1986) on Barber-  
Colman's Amended Petition for Review of a decision by the  
South Carolina Procurement Review Panel reawarding a state  
contract to Johnson Controls.

At issue is application of the South Carolina resident  
vendor preference found at S. C. Code Ann. § 11-35-1520(9)(e)  
(1991 Cum. Supp.). The resident vendor preference states:

Competitive procurements made by any  
governmental body must be made from a  
responsive and responsible vendor  
resident in South Carolina: (i) for  
procurements under two million, five  
hundred thousand dollars, if the bid  
does not exceed the lowest qualified bid  
from a nonresident vendor by more than  
two percent of the latter bid, and if  
the resident vendor has made written  
claim for the preference at the time the  
bid was submitted . . . . A vendor is  
considered to be a resident of the State  
if the vendor is 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  
assessed taxes. . . .

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Without applying the two percent preference, Johnson Controls was the low bidder at \$54,900. Barber-Colman was the second low bidder at \$55,230.

Both vendors sought to claim the resident vendor preference, however, Johnson Controls neglected to have the affidavit affirming resident vendor status notarized. The state procurement officer disallowed Johnson Controls' claim for the preference because its affidavit was not notarized. Barber-Colman's claim for the preference was granted because its affidavit was completed correctly. Both Johnson Controls and Barber-Colman otherwise qualify as South Carolina resident vendors.

After the preference was applied against Johnson in favor of Barber-Colman, Barber-Colman became the low bidder and was awarded the contract on July 17, 1991.

On July 8, 1991, Johnson Controls protested the application of the preference and award to Barber-Colman to the Chief Procurement Officer under the procedures set forth in S. C. Code Ann. § 11-35-4210(1)(1986). The Chief Procurement Officer found in favor of Johnson Controls but lacked the authority to reaward the contract or award damages. Johnson Controls then applied to the South Carolina Procurement Review Panel for relief pursuant to S. C. Code Ann. § 11-35-4210(7). Barber-Colman also appealed to the Procurement Review Panel contesting the merits of the Chief Procurement Officer's decision.

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The Procurement Review Panel issued its order dated August 30, 1991, affirming the merits of the Chief Procurement Officer's decision. After a subsequent hearing on appropriate remedies, the Procurement Review Panel issued its order dated September 6, 1991, reawarding the contract to Johnson Controls and directing the Division of General Services, Office of State Procurement, to pay to Barber-Colman the sum of \$1644.85, which represented Barber-Colman's uncompensated expenses, overhead and profit incurred in performing the contract to the date of reaward.

Barber-Colman now appeals both Panel decisions to this Court.

#### CONCLUSIONS OF LAW

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The sole question is, "Does the failure of Johnson Controls to notarize its resident vendor preference affidavit allow the State to apply the preference against Johnson Controls even though it is, in fact, a South Carolina resident vendor?"

The Panel answered this question in the negative based on the reasoning of Judge Harrison in his December 13, 1983 order in In the Matter of Honeywell, reversing the Panel's decision in In re: Protest of Honeywell, Case No. 1982-4, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 37.

In Honeywell, Honeywell was the actual low bidder on a state contract but failed to complete the affidavit claiming resident vendor preference even though it was qualified.

The second low vendor, Richland Memorial Hospital, completed the affidavit. When bids were opened, the preference was applied against Honeywell in favor of Richland Memorial, which was awarded the contract. Honeywell protested and the Panel held that Honeywell's failure to complete the affidavit allowed the preference to be applied against it.

Judge Harrison reversed, holding that, by its terms, the resident vendor statute applies only in the case of a resident vendor against a nonresident vendor and that the statute does not make claiming the preference in writing a prerequisite to having resident vendor status. Resident vendor status is gained by meeting the requirements set forth in the statute - that is, being authorized to conduct business in South Carolina, maintaining an office and representative inventory in South Carolina and paying all assessed taxes.

This Court finds the reasoning of Judge Harrison in the Honeywell decision persuasive. The resident vendor preference cannot be applied against Johnson Controls, who is in fact a South Carolina resident vendor, simply because it failed to complete the affidavit attesting to its resident vendor status.

This Court further finds this interpretation of the resident vendor statute is entirely consistent with the policy reasons behind the preference statute. Applying the preference against a vendor who is a South Carolina resident deprives the State of the benefits of the low bid without

bestowing the benefit of the preference, that is, giving economic support to South Carolina employers and employees over out-of-state businesses.

Barber-Colman seeks to distinguish the Honeywell decision on the grounds that the Invitation For Bids in this case states "no vendor is presumed to qualify . . . for protection from the imposition of a preference if the vendor has not made written claim on the enclosed affidavit at the time the bid is submitted." Barber-Colman claims that this bid provision somehow alters the terms of the preference as stated in §11-35-1520.

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The Court is not persuaded by this argument. The Invitation For Bids cannot be used to extend application of the resident vendor statute beyond its terms to subvert the requirements of the Consolidated Procurement Code that award of contracts be made to the lowest responsive and responsible bidder except as otherwise allowed by the Code. See S.C. Code Ann. §11-35-1510 (1986). An administrative agency cannot by rule or practice materially alter or add to the requirements of a statute. Lee v. Michigan Millers Mutual Insurance Co., 250 S.C. 462, 158 S.E.2d 774 (1968).

Additionally, the Court finds that the State met the requirements of the Invitation for Bids in this case. The relevant provision states only that "no vendor is presumed" to be qualified for protection against the preference. State Procurement initially applied the preference against Johnson Controls and did not presume that Johnson was

protected as a South Carolina vendor. Only after Johnson exercised its right to protest pursuant to S. C. Code Ann. § 11-35-4210(1) was the determination made that Johnson was in fact a South Carolina vendor and that the preference could not be applied against it.

Finally, Barber/Colman argues that the State cannot waive Johnson Controls' failure to notarize its affidavit because the omission does not qualify as a minor technicality under S.C. Code Ann. Reg. 19-445.2080 (1976). Barber-Colman's reliance on this regulation is misplaced.

*PJH*  
The State is not seeking to grant Johnson Controls resident vendor status by waiving the requirement that it notarize the affidavit. The State contends, and this Court has so held, that no such requirement exists under the terms of the statute. In the absence of a requirement to be waived, Reg. 19-445.2080 does not even come into play.

CONCLUSION

For the reasons stated above, this Court affirms the August 30, 1991 and September 6, 1991 decisions of the Respondent Procurement Review Panel and dismisses Barber-Colman's Amended Petition for Review.

*L. Henry McKellar*

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Judge L. Henry McKellar  
Presiding Judge  
Fifth Judicial Circuit

Columbia, S.C.  
April 5, 1992