STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1989-21

IN RE: PROTEST OF SMITH SETZER & SONS, INC.	) O R D E R

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on December 7, 1989, on the appeal by Smith Setzer and Sons, Inc. ("Smith") of a decision by the Chief Procurement Officer ("CPO") to award to Carolina Concrete Pipe Company certain lots of a contract to supply concrete culvert pipe to the State for a year.

Present at the hearing before the Panel were Smith Setzer and Sons, Inc., represented by Susan B. Lipscomb, Esq., Carolina Concrete Pipe Company and Tarmac-Carolinas, Inc. (sometimes referred to collectively herein as "Carolina/Tarmac"), represented by William C. Hubbard, Esq., and the Division of General Services, represented by Helen T. Zeigler, Esquire.

FACTS

The facts of this case are essentially undisputed and are found by the Panel to be as follows.

1. On August 13, 1989, State Procurement issued an Invitation for Bids for a one-year contract to supply concrete culvert pipe to state agencies and political subdivisions. Award was to be made on a per lot basis, there being one lot for each of South Carolina's forty-six counties. The contract contained an option to renew for one year.

2. William N. Setzer, President of Smith, testified that the pipe was to be delivered by the contractor to the State for storage and ultimate use by the State in building and maintaining storm drains, driveways, and secondary highways. The contractor was not required to deliver pipe to construction or maintenance sites.

3. Also included in the bid package were forms on which a vendor could claim the South Carolina product preference provided by S.C. Code Ann. Reg. 19-446.1000 and the South Carolina resident vendor preference provided by S.C. Code Ann. §11-35-1520(9)(e)(1988 Cum. Supp.). Smith, a North Carolina resident, did not claim either preference. Smith did claim the United States product preference set forth in Reg. 19.446-1000.

4. According to Louis Turner, Sales Manager for Smith, and Mr. Setzer, representatives of Smith spoke with State Procurement a week or so before bid opening and were told that preferences would be applied such that the total advantage given a qualifying bid would not exceed 3% of the lowest nonqualifying bid.[1] The preferences were ultimately calculated to give a 7% advantage.

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[1]Carolina Concrete Pipe and Tarmac-Carolinas argue that Smith's protest is untimely insofar as it challenges the constitutionality and application of the preferences because Smith knew at least a week prior to the August 18th bid opening that the State intended to apply the preferences to this procurement if someone claimed them. The Panel holds that Smith's protest is timely because Smith was not

(Footnote Continued)

5. Bids were opened on August 18th and awards were made as follows:

Vendor	Lot #
Gossett Concrete Pipe	1,4,11,23,24,30,33,37,39,42,44
Carolina Concrete Pipe	2,6,14,21,25,28,31,32,40,43
Tarmac-Carolinas	3,5,7,8,10,15,18,22,27,38,45
Smith Setzer & Sons	9,12,13,16,17,19,21,26,29,34, 36,41,46

6. Soon after award, State Procurement discovered that the resident vendor and South Carolina product preferences had been incorrectly calculated.

7. The preferences were recalculated and on September 19, 1989, new awards were made which resulted in Carolina Concrete Pipe's award increasing from 10 to 22 counties and Smith Setzer & Sons' award decreasing from 14 to 2 counties. Gossett and Tarmac-Carolinas' awards remained unchanged.[2]

8. On September 29, 1989, Smith protested the reaward to Carolina Concrete Pipe on the grounds that the South Carolina product and resident vendor preferences are unconstitutional or, in the alternative, are not applicable

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(Footnote Continued)
aggrieved until it lost the contracts it had previously been awarded. Smith received notice of that loss on or after September 19th. It protested on September 29th, within the ten-day limitation.

[2]At the start of the hearing, Carolina Concrete Pipe and Tarmac-Carolinas, Inc., moved to be admitted as parties in the hearing before the Panel. The petition was granted on the grounds that Carolina and Tarmac-Carolinas' awards could be adversely affected if the Panel granted the relief requested by Smith.

by their terms. Smith also claims that, at the very least, two percent United States product preference should have applied to its bid to offset the South Carolina preferences given the next low bidder.

ISSUES

Smith's protest raises five issues. First, Smith claims that the use of the resident vendor and South Carolina product preferences violates the United States and South Carolina Constitutions. Prior to the hearing, Smith was notified that the Panel would not hear questions of constitutionality but would presume that all duly enacted laws of the General Assembly are constitutional. See, In re: Protest of Honeywell, Inc., Case No. 1982-4; In re: Protest of American Scientific Products, Case No. 1986-5.[3]

Smith's second contention is that the resident vendor preference is not applicable to this procurement because of the prime contractor/subcontractor exception. Section 11-35-1520(9)(e)(1988 Cum. Supp.) provides:

> 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

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[3]The South Carolina Supreme Court has held the South Carolina resident vendor preference constitutional against Commerce Clause and Equal Protection challenges. Gary Concrete Products v. Riley, et al., 285 S.C. 498, 331 S.E.2d 335 (1985). Smith apparently seeks to challenge the resident vendor preference upon Due Process and Privileges and Immunities grounds and the South Carolina product preference upon Commerce Clause, Equal Protection, Due Process and Privileges and Immunities grounds.

> hundred thousand dollars, if the bid does not exceed the lowest qualified bid from a nonresident 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 . . . . Preferences under this subsection do not apply to either prime contractors or subcontractors as relates to the construction industry nor to a vendor of goods whether in quantity or not when the price of a single unit of the item involved in more than ten thousand dollars.

(Emphasis added). Smith claims that the resident vendor preference does not apply to this procurement because it involves prime contractors or subcontractors as relates to the construction industry. General Services and Carolina/Tarmac argue that this exception is not available because the bidders in this case are not prime or subcontractors but vendors of goods the price of which is less than ten thousand dollars per unit.

Carolina/Tarmac cite the definition of "prime contractor" found in Reg. 19-445.2145(A)(3), dealing with the procurement of construction services, as "a person who has a contract with the State to build, alter, repair, improve or demolish any public structure or building, or other real property improvements of any kind to any public real property." They argue that the winning bidder in

this case will not build, alter, repair, improve or demolish any structures and is, therefore, not a prime contractor.[4]

The Panel agrees that the bidders in this procurement do not qualify as prime contractors or subcontractors related to the construction industry. As Mr. Setzer testified, the contract in this case requires delivery of a quantity of concrete pipe to a maintenance shed, where the pipe will stay until the State uses it to build or repair drains, roads and driveways. The winning bidder in this procurement acts as a supplier of goods to the State and not as a contractor related to the construction industry. The Panel finds the resident vendor preference applicable to this procurement.

Smith makes a similar argument regarding the South Carolina product preference. That preference is found in Reg. 19-446.1000, which provides in relevant part:

> Competitive procurements made by governmental bodies . . . shall be of end-products made, manufactured or grown in South Carolina, if available . . . .
>
> This regulation shall not apply: (1) to any procurement of permanent improvements for real estate, or (2) <u>to any prime contractor or subcontractor providing materials or services relating</u>

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[4]The winning bidders in this procurement cannot be considered subcontractors because they have a direct contractual relationship with the State and not with a general or prime contractor. Section 11-35-310(28)(1988 Cum. Supp) defines a subcontractor as "any person having a contract to perform work or render service to a prime contractor as part of a prime contractor's agreement with a governmental body."

to permanent improvements on real estate

. . . .

(Emphasis added).

Smith contends that it is a "prime contractor providing materials or services related to permanent improvements on real estate." General Services, citing the Panel's decision in In re: Protest of Zupan and Smith Sand & Concrete Co., Case No. 1988-3, agrees. Carolina/Tarmac argue, as with the resident vendor exception, that because Smith will not build, alter, repair, improve or demolish any structures, it is not a prime contractor.

The Panel holds that the prime contractor exception to the product preference does not apply to this procurement. As noted earlier, the winning bidder in this case acts more like a vendor of goods than a construction contractor or supplier. Zupan can be distinguished from this case because the product being supplied in Zupan was Ready-mix concrete, which had to be delivered directly to a construction site. In Zupan, the only foreseeable use of the concrete was incorporation into permanent improvements. In this case, the concrete culvert pipe is a finished good which is to be delivered to a supply point for use by the State whenever and however desired.[5] The South Carolina product preference is applicable to this procurement.

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[5]In the Zupan case, the Panel cautioned that, "this case should not be construed to cover situations involving

(Footnote Continued)

Smith additionally contends that, assuming the preferences apply, they were calculated incorrectly in that Smith should have received credit for the 2% United States product preference because it is the only bidder which completed the appropriate affidavit. Smith argues that its bid should have been increased by only 5% rather than 7%.

The Panel disagrees. The United States product preference applies only against goods from a foreign country and not against South Carolina goods whether or not an affidavit is filled out. The enabling legislation for this preference requires the State to develop a policy whereby the State "must obtain products made, manufactured, or grown in South Carolina <u>if available</u> or must obtain products made, manufactured, or grown in the United States <u>if similar South Carolina products are not available</u> before any foreign made, manufactured, or grown products may be procured." (Emphasis added) S.C. Code Ann. §1-11-35 (1976).

The United States product preference is given <u>only</u> when South Carolina products are not available. Because South Carolina products are available in this case, the United States preference may not be applied to benefit Smith.

Finally, Smith contends that the CPO erred in recommending rebid of the contract as a remedy. Smith

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(Footnote Continued)
other materials and other conditions." <u>Zupan</u>, Case 1988-3 (<u>Decisions of the South Carolina Procurement Review Panel 1982-1988</u>, page 422).

claims that rebid is too harsh because bid prices have already been exposed. Smith asks the Panel to order State Procurement to recalculate the awards applying the appropriate preferences, if any.

In this case the Panel finds that recalculation and reaward is a reasonable remedy. The errors complained of here concern the application of preferences, which occurred after bid opening. No evidence was produced which suggests that reaward is inappropriate because of potential liability to the State or partial performance by the contractors. It appears that the State can easily use the bids as originally submitted to recalculate the final bid amounts by correctly applying the South Carolina resident vendor and product preferences.

In conformity with the above discussion, the November 2, 1989, decision of the Chief Procurement Officer is affirmed as to the application of the resident vendor preference and reversed as to the nonapplication of the South Carolina product preference and rebid as a remedy. It is hereby ordered that State Procurement apply and recalculate applicable preferences consistent with this opinion and reaward the contract by lots based on those calculations.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

Hugh K. Leatherman, Sr.
Chairman

1-4-90, 1990
Columbia, South Carolina