

affidavit notarized. (Record, p. 18). The IFB stated that "no vendor is presumed to qualify for a preference or 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." The affidavit was required to be notarized. (Record, p. 16).

The state procurement officer disallowed Johnson Controls' claim for the preference because its affidavit was not notarized. Barber-Colman's claim was granted because its affidavit was completed correctly.

After the preference was applied against Johnson in favor of Barber-Colman, Barber-Colman became the low bidder. The Notice of Intent to Award to Barber-Colman was issued on July 1, 1991 and took effect on July 17.

On July 8, 1991, Johnson Controls protested the application of the preference and award to Barber-Colman. The CPO found in Johnson Control's favor but lacked the authority to reaward the contract or award damages. Johnson Controls has applied to the Panel for relief under S. C. Code §11-35-4210(7). Barber-Colman appeals the merits of the CPO's decision and, in the alternative, asks for relief under §11-35-4210(7).

CONCLUSIONS OF LAW

The sole issue here is whether the failure of Johnson Controls to notarize its affidavit allows the resident vendor preference to be applied against it.

The Panel believes that it is compelled to find in favor of Johnson in this case based on In the Matter of Honeywell, December 13, 1983 order of Judge Harrison, 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 contract to provide maintenance service to the Department of Mental Retardation. Based on the Department's representations that it was unimportant, Honeywell did not complete the affidavit claiming resident vendor preference even though it qualified. Richland Memorial Hospital did complete the affidavit.

When bids were opened, the preference was applied against Honeywell in favor of Richland, which got the contract. Honeywell protested and the Panel held that Honeywell's failure to fill out the affidavit allowed the preference to be applied against it.

The circuit court reversed, holding that, by its terms, the resident vendor statute - S. C. Code Ann. §11-35-1520(9) (e) - applies only in the case of a resident vendor against a nonresident vendor. Further, the statute does not make claiming the preference in writing a prerequisite to having resident vendor status. One need meet only the requirements of being authorized to conduct business in South Carolina, maintaining an office and representative inventory in South Carolina and paying all assessed taxes.

As Judge Harrison states, "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 . . . would be contrary to the plain language of the statute." Decisions, p. 41.

Honeywell does not stand for the proposition that a vendor can take benefit of the preference if it fails to fill out the affidavit; it simply means that the preference cannot not be applied against a vendor who was is in fact a South Carolina resident just because the vendor failed to complete the affidavit.

The policy reasons for such an interpretation are clear. Applying the preference against a vendor who is in fact a South Carolina resident deprives the State of the low bid without bestowing the benefit of the preference, that is, giving support to South Carolina employers and employees.

The Panel finds Honeywell to be exactly on point with this case.¹ Therefore, the Panel concludes that award in

¹Barber-Colman argues that Honeywell can be distinguished from this case because in Honeywell the Invitation for Bids required the preference form to be completed only if a vendor was seeking to claim the preference. In this case, the IFB required completion of the affidavit both to claim the preference and to avoid having the preference applied against the bidder.

The Panel finds this to be a distinction without a difference. Judge Harrison's decision is clearly predicated
(Footnote Continued)

this case should have been made to the responsive and responsible low bidder without regard to the South Carolina resident vendor preference.

Having determined that award in this case was improperly made with reference to the resident vendor preference, there remains only the question of remedy. Barber-Colman's branch manager, Tom Nieders, testified that Barber-Colman had incurred costs in performing this contract for two months beyond the amounts which it has been paid. Mr. Nieders was not prepared to elaborate on the exact amounts Barber-Colman is claiming.

The Panel directs Barber-Colman to file a notarized statement with the Panel no later than September 6, with copies to Johnson Controls, Inc., and General Services' attorney, itemizing the amounts claimed by Barber-Colman under §11-35-4210(7).

The Panel further directs that Johnson Controls, Inc., Barber-Colman and General Services appear before the Panel on September 12, 1991, at 12:00 Noon for a hearing on the appropriate remedy to be granted in this case. Parties should bring with them all documents in support or derogation of the claim for costs, including bid workpapers, time sheets, invoices, records of payment, etc.

(Footnote Continued)
upon his interpretation of § 11-35-1520(9)(e) and contrary terms in the IFB cannot alter the requirements of the statute.

For the reasons stated above, the Panel affirms the August 8, 1991, decision of the Chief Procurement Officer and directs the parties to act in accordance with the above instructions.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 

Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.
August 30, 1991