

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF RICHLAND ) CASE NO. 92-CP-40-4689

Chambers Medical Technologies of South Carolina, Inc.

Petitioner,

-vs-

The South Carolina Procurement Review Panel, Incendere, Inc., South Carolina Budget and Control Board, Division of General Services and Medical University of South Carolina,

Respondents.

IN RE: PROTEST OF CHAMBERS MEDICAL

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BARBARA A. SCOTT  
C.G.C. & G.S.

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This case is before the Court on Chambers Medical Technologies of South Carolina, Inc.'s ("Chambers") Petition for Judicial Review of an administrative decision of the South Carolina Procurement Review Panel.

The Respondent Procurement Review Panel ("Panel") provides final administrative review of disputes between vendors and the State over purchasing matters. The Respondent Budget & Control Board, Division of General Services ("General Services") is responsible for overseeing and implementing state procurement and for providing the initial administrative review of purchasing decisions. The Respondent Medical University of South Carolina ("MUSC") is the purchasing agency in this procurement. The Respondent Incendere, Inc. ("Incendere") is the bidder whom the State has determined is the lowest responsive and responsible bidder.

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## BACKGROUND

The following facts are as found by the Panel and are not disputed by the parties.

On March 25, 1992, General Services issued an Invitation for Bids for medical waste disposal services for MUSC. The Invitation required bidders to submit quotes on various kinds of waste packaging including the unit cost of box and bag disposal. The Invitation estimated weight at 40-60 lbs. per box. This information was issued to each bidder in Amendment #002 dated April 20, 1992.

Prior to bid opening on May 5, Chambers raised the question of the accuracy of the 40-60 lbs. per box estimate to General Services because of Chambers' experience and historical data that hospital waste boxes range from 20 to 25 pounds. General Services advised that the weight estimates came from MUSC and should be considered accurate.

The Invitation also contained an affidavit by which a bidder could claim the 2% South Carolina resident vendor preference given by S. C. Code Ann. §11-35-1520(9)(e)(1986). Both Incendere and Chambers claimed the preference.

In its bid, Incendere indicated that it planned to incinerate the waste collected from MUSC at its Norfolk, Virginia incinerator but pickup and transport of the waste would be handled through Incendere's Lexington, South Carolina office.

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On May 5, 1992, General Services opened the bids and determined that Incendere was the low bidder at \$679,925.00 and Chambers was the next low bidder at \$687,970.00. Because both Incendere and Chambers claimed the South Carolina resident vendor preference, the preference was not applied.

On May 11, 1992, State Procurement issued a Final Award Report indicating its intent to award the contract to Incendere. The Final Award Report stated that the contract would take effect on May 28, 1992.

On May 15, Chambers protested the award to Incendere pursuant to S. C. Code Ann. §11-35-4210(1)(1986) on the grounds that (1) the bid process did not give due weight to Chambers' status as a South Carolina corporation versus Incendere's status as a Virginia corporation; (2) the State failed to consider that award to Chambers, a South Carolina corporation, would generate approximately \$55,000 in fees which would be lost if Incendere received the contract; and (3) the bid specifications failed to provide actual box weights resulting in a flawed procurement process.

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On June 25, Chambers filed an additional protest seeking to disqualify Incendere on the ground that it could not meet the requirement that the contractor be able to handle reusable waste containers because Incendere's Virginia license allegedly prohibits it.

In his decision dated July 27, 1992, the Chief Procurement Officer found all of Chambers' grounds of protest untimely under S. C. Code Ann. §11-35-4210(1), which

requires a bidder to file a written protest setting forth its grievance within ten days of when the bidder knew or should have known of the facts of its protest but in no circumstances later than thirty days from notification of award of the contract.

Chambers appealed the Chief Procurement Officer's decision to the Panel on August 3, 1992. On October 26, 1992, the Panel issued its decision finding that Chambers' protest of Incendere's resident vendor status was timely but nevertheless lacked merit and that Chambers' protests of the bid specifications and of Incendere's alleged inability to handle reusable containers were not timely filed under S. C. Ann. § 1-35-4210(1) (1986).

On November 9, 1992, Chambers filed a Petition for Judicial Review of the Panel's order to this Court pursuant to the Administrative Procedures Act, S. C. Code Ann. § 1-23-310 et seq. (1986). Chambers sought reversal of the Panel's decision and an order pursuant to § 1-23-380(c) temporarily staying the enforcement of the Panel's decision pending the outcome of Chamber's appeal.

#### DISCUSSION

1. Resident Vendor Preference. Chambers' first ground of appeal is that, because Incendere does not own and operate an incinerator in South Carolina, the Panel erred as a matter of law in holding that Incendere met the requirements of the resident vendor preference (§ 11-35-1520(9)(e)) that a

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bidder maintain a "representative inventory of commodities on which the bid is submitted".

The Invitation for Bids defines "representative inventory" as "expendable items located in South Carolina at the time of this bid having a total value of \$10,000 or more based on bid price, but not to exceed the amount of the contract, which inventory is representative of the general type of commodities on which the bid is submitted."

The Panel held that neither the ordinary meaning of "commodities" nor the definition given in the IFB of "expendable items" requires Incendere to own an incinerator in South Carolina in order to qualify for the resident vendor preference.

The Court agrees. Although the representative inventory requirement is not readily applicable to a case such as this involving primarily the procurement of services, the only issue before the Court is whether the requirement compels ownership of a South Carolina incinerator. As the Panel holds, incinerators are neither "commodities" nor "expendable items" and, therefore, Incendere's lack of ownership of a South Carolina incinerator has no effect on its status as a resident vendor.

2. Specifications Related to Box Weights. Chambers argues as its second ground of appeal that the Panel erred in holding Chamber's protest of the accuracy of the box weights stated in the bid specifications untimely under

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§ 11-35-4210(1). Chambers challenged the accuracy of the box weights stated in Item B of Amendment #002 to the Invitation for Bids as being twice as high as Chambers' experience and historical data predict they should be.

The Panel found that § 11-35-4210(1) requires an aggrieved bidder to file a written protest within ten days of when it knows or should know of the facts giving rise to its protest. The Panel charged Chambers with knowing the facts giving rise to its protest of the allegedly inaccurate box weights when Chambers received Amendment #2 on or about April 20. Chambers did not file a protest until May 15, more than ten days later.

Chambers contends that the Panel erred in holding its protest untimely because Chambers did raise the question of the inaccurate box weights at the time Amendment #002 was issued but was advised by State Procurement that the weights came from MUSC and should be considered accurate. Chambers argues that it was not required to disbelieve State Procurement's affirmation of the box weights until bid opening when Chambers was able to theorize from the amounts bid by Incendere that Incendere had used lower box weights than those stated in the Invitation.

The substantial evidence in the record amply supports the Panel's finding that, prior to bid opening, Chambers had a "strong belief" that the 40-60 lbs. per box estimate was not accurate based on the experience and historical data Chambers had in its possession prior to bid opening. The

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substantial evidence also supports the Panel's finding that Chambers appreciated the effect of the alleged overestimate on Chambers' ability to bid because it raised the matter with State Procurement prior to bid opening.

The Court is not convinced that Chambers had reason to abandon its strong belief based on Chambers acknowledged expertise and its historical data indicating that the box weights were wrong simply because of State Procurement's statement that MUSC provided the weights and as far as State Procurement knew they were accurate.

I find that the substantial evidence in the record and the law supports the Panel's conclusion that, when Chambers received Amendment #002 on or about April 20, it knew or should have known of all of the facts giving rise to its complaint about the accuracy of the box weights and its protest filed more than ten days thereafter is not timely.

3. Incendere's Ability to Perform the Contract. As its third and final ground of appeal, Chambers contends that the Panel erred in holding untimely Chambers' protest that Incendere is not a responsible bidder because Incendere allegedly is not permitted by its Virginia waste disposal license to handle reusable containers at its Virginia facility. The Panel held this ground untimely under §11-35-4210(1), which requires that "in no circumstance" may a protest be filed "after thirty days of notification of award of contract."

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Chambers concedes that it first raised this ground on June 25, 1992, some 45 days after the issuance of the Final Award Report, which constituted notification of award in this case. However, Chambers argues that the thirty-day period was tolled when the Final Award report was rescinded on May 18 due to Chambers' original protest grounds filed on May 15.

The Court finds no support for Chambers' position under the plain words of §11-35-4210, that in "no circumstance" shall a protest issue be filed "after thirty days of notification of award of contract". The Final Award Report issued on May 11 constituted "notification of award of contract." Chambers remained on notice that the State considered Incendere the lowest responsive and responsible bidder even after the formal document which first gave notice was rescinded because of Chambers' initial protest issues.

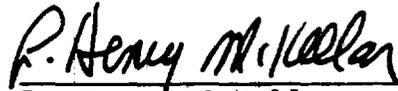
Because Chambers protest of Incendere's responsibility was filed more than thirty days after notification of award of contract, the Panel was correct in holding it not timely.

4. Temporary Stay. The above rulings of the Court make Chambers' request for a temporary stay of the decision of the Panel under §1-23-380(c) moot and Chambers' motion is therefore denied.

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For the reasons stated above, the Court affirms the October 26, 1992, decision of the Procurement Review Panel and dismisses Chambers' Petition for Judicial Review.

IT IS SO ORDERED.



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L. Henry McKellar  
Judge, Fifth Judicial Circuit

Columbia, S. C.  
November 10, 1992

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