

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND) CASE NO. 1990-2

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

This case comes before the South Carolina Procurement Review Panel ("Panel") on the appeal by Smith Setzer and Sons, Inc. ("Smith") of a decision by the Chief Procurement Officer ("CPO") dismissing Smith's protest challenging the constitutionality of the South Carolina resident vendor preference found at S.C. Ann. §1-35-1520(e) (1989 Cum. Supp.) and the South Carolina product preference found at Reg. 19-446.1000. At the request of Smith (Exhibit 1, attached hereto), the Panel decides this case upon the record sent up by the CPO and will not conduct a hearing in this matter.¹

FINDINGS OF FACTS

On December 18, 1989, the South Carolina Department of Highways and Public Transportation issued an Invitation for Bids on a contract to provide reinforced concrete culvert pipe to various Highway Department locations. Award was to

¹The Panel is required by S.C. Code Ann. §11-35-4410(1) and (6) to conduct an administrative review of procurement decisions upon the filing of a protest, however, it is not required to hold a hearing. Section 11-35-4210(5) provides, "The protestant may also request an interview with the Panel." (Emphasis added). Further, section 11-35-4410(5) authorizes the Panel to interview any person it deems necessary and to hold necessary hearings.

be made on a per lot basis, with bidders being eligible to receive one or more lots. (Record, pp. 32-33).

According to its protest letter to the CPO, Smith was advised on January 4, 1990, that it was the actual low bidder on at least one lot but would not be awarded the contract because of application of the South Carolina resident vendor preference and South Carolina product preference. Smith protested to the CPO on January 12, 1990 on the following grounds:

[Smith] was the low Bidder and was not awarded the contract because of application of the South Carolina product preference or the South Carolina resident vendor preference . . . , which percentage preference the bidder protests as being illegal as contrary to the law of the land, that is Bidder protests and respectfully claims any rights and benefits it may be entitled to under the law of South Carolina or under the law of the land, to wit provisions of the United States Constitution with respect to unlawful tariffs between the states of the United States.

- o Further Bidder protests for: (1) that the South Carolina Resident Vendor Preference, as set out at S.C. Code of Laws § 11-35-1520(e), is unconstitutional; and (2) that the South Carolina Product Preference as provided by Regulation 19-446.1000 is unconstitutional.

(Record, pp. 30-31).

The CPO in his decision dated January 29, 1990, held that he lacked the jurisdiction to determine the constitutional issues raised by Smith. The CPO based his decision on the limited authority granted him in § 11-35-4210 and the Panel's decision in an earlier case brought by

Smith, In re: Protest of Smith Setzer & Sons, Inc., Case No. 1989-21.

Smith appealed the CPO's decision dismissing its protest to the Panel on February 7th, stating as grounds:

. . . [T]he bidder protests and respectfully claims any rights and benefits it may be entitled to under the Law of South Carolina or under the Law of the Land, to wit the provisions of the United States Constitution with respect to unlawful tariffs between the states of the United States, the privileges and immunities provisions of Article IV, section 2, and the Commerce Provisions of Article I, Sections 8 and 10, all without limitation.

In addition [Smith] was adversely affected by the improper application of the exception to the preference found in Reg. 19-446.1000, which Reg. provides an exception such that the preference shall not apply to "(1) to any procurement of permanent improvements for real estate, or (2) to any prime contractor or subcontractor providing materials or services relating to permanent improvements on real estate."

(Record, pp. 3-4).

CONCLUSIONS OF LAW

Smith raises two issues in its protest letter to the Panel. First, Smith asserts that the South Carolina resident vendor and South Carolina product preferences²

²Section 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 hundred thousand dollars, if the bid does not exceed the lowest qualified bid from a nonresident by more than two
(Footnote Continued)

violate Article I, §§ 8 and 10 of the United States Constitution, which prohibit states from laying imposts or duties on imports and exports or in any other way regulating or interfering with interstate commerce. Smith also alleges that South Carolina's preference for its own residents and products abridges the privileges and immunities granted citizens of other states by Article IV, § 2 of the United States Constitution.

As to the contention that the South Carolina resident vendor preference violates the provisions of the Commerce Clause (Article I, § 8), this Panel is bound by the determination of the South Carolina Supreme Court in Gary Concrete Products, Inc. v. Riley, 285 S.C. 498, 331 S.E.2d 335 (1985) that "[a]s a market participant, South Carolina can impose restrictions on itself and not run afoul of the Commerce Clause." 331 S.E.2d, at 338. Gary upheld the constitutionality of the resident vendor preference against Commerce Clause and equal protection challenges.

As to the contention that the resident vendor preference and the South Carolina product preference violate

(Footnote Continued)

percent of the latter bid, and if the resident vendor has made written claim for the preference at the time the bid was submitted"

The South Carolina product preference found in Reg. 19-446.1000 provides in relevant part, "Competitive procurements made by governmental bodies . . . shall be of end-products made, manufactured or grown in South Carolina, if available"

the provisions of the Privileges and Immunities Clause (Article IV, §2), the Panel is bound by the determination of the United States Supreme Court that corporations, such as Smith Setzer & Sons, Inc., are not entitled to the protection of the Privileges and Immunities Clause because they are not "citizens." Asbury Hospital v. Cass County, 326 U.S. 207, 66 S.Ct. 61, 90 L.Ed. 6 (1945). The Panel, therefore, finds that Smith is without standing to raise this issue.

As to Smith's contentions that the South Carolina product preference violates the Commerce Clause and that both preferences violate Article I, § 10, and other provisions of the United States Constitution, the Panel holds that, as an administrative agency, it is without authority to determine the constitutionality of a statute. Although it can find no South Carolina law on this question, the Panel believes that South Carolina courts would favor the majority rule that an administrative agency is not the appropriate forum in which to consider questions of constitutional import.³ The Panel must presume, therefore,

³ See, eg., Duncan v. Missouri Board for Architects, 744 S.W.2d 524 (Mo.App. 1988); Palm Harbor Special Fire Control District v. Kelly, 516 So.2d. 249 (Fla. 1987); Prisk v. City of Poulsbo, 732 P.2d 1013 (Wash. App. 1987); Sunshine Promotions, Inc. v. Ridlen, 483 N.E.2d 761 (Ind. App. 1985); Aetna Life Ins. Co. v. Park, 678 P.2d 1101 (Hawaii App. 1985); First Bank of Buffalo v. Conrad, 350 N.W.2d 580 (N.D. 1984); Jarussi v. Board of Trustees, 644 P.2d 316 (Mont. 1983); Crocker v. Colorado Dept. of Revenue, 652 P.2d (Footnote Continued)

that, as duly enacted laws of the General Assembly, the South Carolina resident vendor and product preferences are constitutional. See, In re: Protest of Smith Setzer & Sons, Inc., Case No. 1989-21 and the cases cited therein.

Smith's second and final ground of protest is that the State incorrectly applied the South Carolina product preference in this case because this procurement fits into the statutory exceptions for permanent improvements to real estate and/or prime or subcontractors related to real estate.⁴ The Panel holds that because Smith raised this ground for the first time in its appeal to the Panel filed February 7, 1990, this ground is not timely under §11-35-4210(1), which requires that issues be raised within ten days of the date a protestant knows or should know

(Footnote Continued)

1067 (Colo. 1982); Wronski v. Sun Oil Co., 310 N.W.2d 321 (Mich. App. 1981); Christian Bros. v. Northern N. J. Interschol League, 432 A.2d 26 (N.J. 1981); Belco Petroleum Corp. v. State Board of Equalization, 587 P.2d 204 (Wyo. 1978); Higgins v. Salewsky, 562 P.2d 655 (Wash. App. 1977); Flint River Mills v. Henry, 216 S.E.2d 895 (Ga. 1975).

⁴The South Carolina resident vendor preference states, "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 is more than ten thousand dollars. §11-35-1520(e).

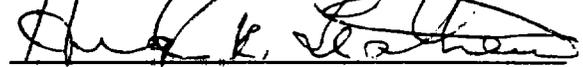
The South Carolina product preference provides, "This regulation shall not apply: (1) to any procurement of permanent improvements for real estate, or (2) to any prime contractor or subcontractor providing materials or services relating to permanent improvements on real estate" Reg. 19-446.1000.

of the facts giving rise thereto and in no case later than thirty days after notice of award.

For the reasons stated above, the January 29, 1990 decision of the Chief Procurement Officer is affirmed and the protest of Smith Setzer & Sons, Inc., is hereby dismissed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Hugh K. Leatherman, Sr.
Chairman

FEBRUARY 22nd, 1990
Columbia, South Carolina