

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1988-20

IN RE:
PROTEST OF BYTES & TYPES) O R D E R
_____)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on February 13, 1989, on the appeal by Bytes & Types of the Chief Procurement Officer's ("CPO") decision not to award it costs after it successfully defended a vendor complaint brought against it by the Legislative Audit Council ("LAC").

Present at the hearing before the Panel were the Legislative Audit Council, represented by Edwin E. Evans, Esq., of the South Carolina Attorney General's Office, and Division of General Services, represented by Helen Zeigler, Esquire. Bytes & Types was present and represented by its owner, Naccalula M. Moon.

FINDINGS OF FACTS

The appellant Bytes & Types was under state contract to perform maintenance on certain computers owned by LAC (Record, pp. 45, 47-54). While the contract was still in effect, LAC put out for bid the job of installing hard cards on the computers. The winning vendor was NAYCO. The evidence before the Panel and the CPO indicated that, prior to NAYCO's attempt at installing the hard card, the computer in question operated properly. After NAYCO's attempt, it did not. Bytes & Types claims, and the CPO agreed, that in

the course of installing the hard card, NAYCO damaged LAC computer.

On June 21, 1988, Lois D. Tarte, an Assistant Director of LAC, notified Bytes & Types' owner Naccalula M. Moon that it was having trouble with the computer and the installation of the hard card. Ms. Tarte suggested that Bytes & Types might want to be present for the second attempt to install the card on June 22 at 2:30 p. m.¹ Ms. Tarte also reported to Bytes & Types that the computer in question had a broken ground plug.

The next morning, Ms. Moon arrived at LAC at 10:30 a.m. (rather than 2:30 p.m. as requested) at which time she repaired the broken ground plug. Without being instructed by LAC², she also performed a diagnosis of the computer and determined that it had a blown system board most likely caused by the NAYCO serviceman failing to ground himself properly.

¹Ms. Moon testified before the Panel that during the June 21, 1988, telephone conversation, she advised Ms. Tarte that it did not appear that the repair of the damaged computer was covered by the standard maintenance contract. Ms. Tarte testified that she had no recollection of Ms. Moon' telling her this. Contemporaneous notes of the conversation made by Ms. Moon support Ms. Tarte's testimony. In any event, resolution of this discrepancy is not crucial to the Panel's determination.

²Ms. Tarte testified that it was usual procedure for Bytes & Types to deal only with clerical personnel in responding to service calls and to make repairs without first advising LAC officials.

After she had made the repair to the ground plug and performed the diagnostic test on the malfunctioning computer, Ms. Moon met with Ms. Tarte and prepared an invoice for the diagnosis in the amount of \$248.60.³ (Record, p. 43). When Ms. Moon made the invoice out to NAYCO, Ms. Tarte requested that she make it out to LAC instead. According to Ms. Tarte, she advised Ms. Moon that LAC would do what it could to get the invoice paid.

On June 28, 1988, without referencing a specific section of the Consolidated Procurement Code, LAC filed a vendor complaint with General Services against Bytes & Types alleging that the diagnosis of the computer was covered by the maintenance contract and that Bytes & Types' rate of \$113 per hour was unreasonable. After an unsuccessful attempt to resolve the matter through negotiation, the CPO scheduled a hearing pursuant to S. C. Code Ann. §§ 11-35-4220, and -4230 (1976). Section 4220 provides for the debarment or suspension of a vendor from doing business with the State in the event of a serious breach of contract. Section -4230 empowers the CPO to resolve contract controversies between the State and a vendor.

In his decision dated December 12, 1988, the CPO, pursuant to his authority in §-4230, found that NAYCO had damaged the computer and that Bytes & Types was not

³The repair of the ground plug was covered by the maintenance contract.

responsible under the maintenance contract for service made necessary by other vendors. The CPO further found that, while Bytes & Types should have advised LAC that the diagnostic service it was performing might not be on contract, LAC accepted the service when it advised Bytes & Types to bill it rather than NAYCO. The CPO ordered LAC to pay Bytes & Types the amount of the invoice. The CPO declined to award Bytes & Types interest or costs.

After the CPO issued his decision, LAC tendered to Bytes & Types a check for the amount of the invoice. Ms. Moon testified that she did not cash the check because it contained a release of all claims. On December 20, 1988, Bytes & Types applied to the Panel for costs in the amount of \$6900.59 (Pltf.'s Ex. 4) and late charges in the amount of \$22.32.

One day prior to the hearing before the Panel, LAC moved to dismiss Bytes & Types' appeal arguing that no authority exists to award costs in a §-4230 contract controversy case. LAC contends that the Panel may award costs pursuant only to §-4210(7) in the case of a bid protest. All parties concede that the maintenance contract in question does not provide for costs.

The Panel denied LAC's motion at the inception of the hearing because issues other than cost were presented for consideration. In addition, neither Bytes & Types nor General Services had received the motion which was served by mail. LAC, joined by General Services, renewed the motion

to dismiss at the close of Bytes & Types case and then presented evidence subject to its motion.

LAC argues that Ms. Moon's fifty plus hours at the rate of \$113 per hour is unreasonable in light of the small amount of money in controversy (\$248.60). Bytes & Types responds that the time spent was warranted because it faced debarment from doing business with the State as a result of LAC's complaint.⁴ The record reveals that, although LAC did not so state in its complaint to the CPO, Bytes & Types had reason to believe that debarment was an issue in the hearing before the CPO based on the notice of hearing dated November 7, 1988. (Record, p. 25). Bytes & Types also presented evidence that \$113 per hour is its standard charge for computer consultation and repair.

LAC further offered the affidavit of Nick Foster, a Word Systems technician, stating that, some time after Bytes & Types diagnosed the computer in question as having a blown system board, he reassembled the parts and the computer worked properly without the need for repair. (Def.'s Ex. 1). In response to the affidavit, Bytes & Type questioned the chain of custody of the system board and pointed to the inability of LAC, NAYCO, or Bytes & Types to get the computer to work in June 1988.

CONCLUSIONS OF LAW

⁴Ms. Moon testified that approximately one-third of Bytes & Types' business is with the State.

Based on the evidence presented to it and the CPO, the Panel concludes that the problem with LAC's computer was caused by NAYCO and that Bytes & Types was not responsible for service under its maintenance contract with the State. The Panel further finds that, even though LAC did not originally request a diagnosis of the computer, it nevertheless accepted Bytes & Types' services in that regard when it instructed Bytes & Types to bill LAC rather than NAYCO. The Panel upholds the CPO insofar as he orders LAC to pay Bytes & Types \$248.60 for the diagnosis performed by it.

Bytes & Types also asks the Panel to award it late charges of \$22.32, which is 1 1/2% per month for six months. LAC and General Services argue that under S.C. Code Ann. 11-35-45 the State is not required to pay interest until it is satisfied with the services and, even then, it cannot pay more than 15% per annum (1 1/4% per month). The Panel finds that, assuming §11-35-45 applies to this situation, LAC accepted Bytes & Types' services on June 22, 1988 when Ms. Tarte instructed Ms. Moon to make the invoice out to LAC rather than NAYCO. From that time until the date of the CPO's decision after which LAC tendered payment is approximately six months. At 15% per annum, the late charges due Bytes & Types total \$18.60.

Finally, Bytes & Types requests the costs incurred by it in defending against LAC's complaint. LAC and General Services contend that the Panel does not have the authority

to award costs in a § -4230 action.⁵ Section 11-35-4230 provides:

(1) This section applies to controversies between the State and a contractor . . . , which arise by virtue of a contract between them. . . .

(2) The appropriate chief procurement officer is authorized to settle and resolve a controversy described in subsection (1) of this section.

Appeal from the CPO's resolution of a contract controversy is to the Panel and is de novo. §§11-35-4230(5) and -4410(5). Section -4230 does not define or limit what remedies may be applied by the Panel.

Section 11-35-4410(1), which creates the Panel charges it to provide a review of ". . . a decision concerning the resolution of a contract or breach of contract controversy, or any other decision, policy or procedure arising from or concerning the expenditure of state funds for . . . procurement."

The General Assembly intentionally granted the Procurement Review Panel broad discretion to oversee procurement matters. Florence Crittendon Home v.

⁵LAC and General Services also argue that §11-35-4210(7), which Bytes & Types cites in its appeal, applies only in the bid protest situation. Because the Panel holds that it has the inherent authority to award costs as part of its authority to resolve contract controversies under §-4230, it is not necessary to decide whether §4210(7) also applies in this case. Further, Bytes & Types was not represented by counsel and the Panel does not hold its request for relief to be strictly under §11-35-4210(7).

Procurement Review Panel, Order of Judge John Hamilton Smith (June 18, 1984). Such broad power is necessary to carry out the Panel's function to resolve bid protests, contract controversies, and other matters which come before it. An agency generally has such powers as are expressly conferred and such powers which are necessary by reasonable implication or are incidental to powers expressly conferred. In re: Protest of Zupan and Smith Sand & Concrete Company, Case No. 1988-3.

The awarding of costs allows vendors to come forward with perceived problems in the State's procurement system without economic penalty and, therefore, furthers the purposes and policies set forth in §11-35-20(d), (e), (g), and (h), i.e., to promote increased public confidence in public procurement, to ensure fair and equitable treatment of all who deal with State procurement, to foster competition and to provides safeguards for the maintenance of a procurement system of quality and integrity with defined rules of ethics and behavior.

The Panel finds that inherent in its mandate to review contract controversies is the power to resolve them by awarding costs, fees or such other relief as justice dictates. This power is irrespective of whether there are contract provisions which provide for such relief.

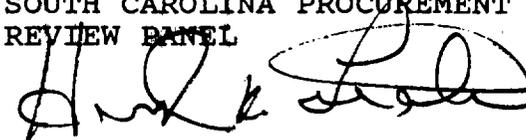
Considering the issues involved, the amount originally in controversy and the statement submitted by Bytes & Types, the Panel finds that a reasonable reimbursement amount in

this case is \$512.45, which represents 10 hours of Ms. Moon's time at \$50.00 per hour plus expenses in the amount of \$12.45. (Record, p. 5). The Panel finds that no reimbursement is warranted for the participation of any Bytes & Types' employee other than Ms. Moon.

For the foregoing reasons, the December 12, 1988 decision of the CPO is modified as stated above and Legislative Audit Council is ordered to pay to Bytes & Types \$248.60 plus \$18.60 interest for services performed by it, plus \$512.45 in costs within 60 days of receipt of this Order.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Hugh K. Leatherman, Sr.
Chairman

2-21-, 1989
Columbia, S. C.