

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

IN RE: APPEAL BY BUFORD GOFF & ASSOCIATES

Division of Information
Resource Management,

Petitioner,

vs.

Buford Goff & Associates
and the South Carolina
Procurement Review Panel,

Respondents.

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ORDER

C/A No.: 93-CP-40-0730

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

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FILED

This matter came before the Court on Petition of Division of Information Resource Management (hereinafter called Petitioner) for judicial review of the Final Order on Remand of the South Carolina Procurement Review Panel, dated January 22, 1993, relevant to the above-named parties. This Court has jurisdiction over this matter pursuant to §1-23-380, S.C. Code Ann., (1986).

A hearing was held in this matter on June 14, 1993, before the Honorable Frank P. McGowan, Jr., Counsel for the Petitioner, Respondent Buford Goff & Associates (hereinafter called "BGA") and the Respondent South Carolina Procurement Review Panel (hereinafter called "Panel") were present.

A written Reply to DIRM's Petition was received from BGA. Counsel for the Petitioner, BGA and the Panel were heard in oral argument, and the record from the Panel below was received.

PROCEDURAL HISTORY

DIRM is an agency of the State of South Carolina. Pursuant to §11-35-4230 of the Code, Division of General Services adjudicated this contract dispute between DIRM and the Respondent BGA at the preliminary hearing stage. The April 5, 1991 decision was unfavorable to BGA. Panel is an administrative agency of the State of South Carolina and, pursuant to §11-35

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4410 of the Code, was next authorized to adjudicate the dispute. The Panel's decision of June 6, 1991 was unfavorable to BGA. BGA had exhausted all administrative remedies of §1-23-380, and sought review of the Panel's decision by the Court of Common Pleas. Counsel for the parties filed briefs and were heard in oral argument on August 11, 1992, before the Honorable Luke N. Brown, Jr., who ruled in favor of BGA. The Court found the Panel's Order was based upon unlawful procedure and other error of law and reversed the same. Judge Brown's Order of October 7, 1992, remanded the case. Supplemental Order of Judge Brown, dated December 28, 1992, directed that the Panel reconvene, be instructed on current South Carolina law by its counsel and render a decision based on the evidence in the record before it. The Panel's Order on Remand, dated January 22, 1993, ordered DIRM to pay \$92,609.50 to BGA, and DIRM appealed.

STANDARD OF REVIEW

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The Court finds the proper scope of review in this appeal to be governed by S.C. Code Ann. §1-23-380(G)(1986), as interpreted by the Supreme Court in Lark vs. Bi-Lo, Inc., 276 S.E. 2d 304, 306 (1981). Specifically:

This court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative finding, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

ISSUES

The Petitioner's issues for review can be set forth as follows:

(1) The Panel's Order on Remand contained "erroneous findings of fact and conclusions of law, was made upon unlawful procedure, violated constitutional and statutory provisions" because (Petition, Paragraphs 41 through 45):

"The Panel's membership has changed and was made up of a membership not in a position to judge the credibility of the witness, ask questions of the attorneys, properly review the record or have a personal familiarity with the records' content and the documentary evidence contradicts the oral testimony".

(2) The computation of damages awarded to the Respondent was erroneous and, "contrary to substantial evidence" (Petition, Paragraph 46);

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(3) The decision of the Panel was arbitrary and capricious because the Panel did not consider the whole record and was based on erroneous factual foundations. The documentary evidence contradicts the oral testimony, and the decision was characterized by the above abuse of discretion", (Petition, Paragraph 47);

(4) The Order of the Honorable Luke N. Brown, Jr., dated October 7, 1992, and the Supplemental Order of Judge Brown on December 28, 1992, prejudiced the substantial rights of the Petitioner and denied the Petitioner the right to substantive due process (Petition, Paragraph 48).

FINDINGS OF FACT

FIRST ISSUE

The Court finds that the Panel membership had "changed" only to the extent that some Panel members who heard the witness testimony had left the Panel by the time of the Order on Remand, and that all members comprising the Panel who issued the Order on Remand had personally heard the witness testimony and were in a position to judge the credibility of the witness.

Counsel for the Panel corroborated the information as to the Panel's composition. The Petitioner did not dispute BGA or the Panel's contentions as to the composition of the Board. The Petitioner now complains about the Panel's composition, but cannot choose to sit on its complaints and await a possible favorable outcome from the Panel before complaining. The Court finds case law which prohibits this, "One cannot tolerate an irregularity in a proceeding, take his chances of success, and reserve the right to appeal upon losing the case." Garrel v. Blankon, et al., Davis Slip Opinion No. 1961, filed March 1, 1993.

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Accordingly, this Court finds that the composition of the Panel did not lead to the Order on Remand being made upon unlawful procedure or being violative of constitutional or statutory provisions.

As to Petitioner's claim that, "the documentary evidence contradicts the oral testimony." A mere contradiction of the evidence is not sufficient grounds for this Court to reverse the Panel's decision. I find that "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Also, that "[a] judgment upon which reasonable men might differ will not be set aside." Lark v. Bilo, Inc., 276 S.E.2d 304, 307 (1981).

The Panel's Order contains appropriate citations to the voluminous documentary record for its findings of fact. This Court finds this to be substantial evidence to support the Panel's decision despite the contention of the Petitioner that the documentary evidence contradicts the oral testimony.

SECOND ISSUE

Petitioner cites no case law to support the proposition that this Court may second guess the Panel's thought processes as to components of an award and remand the case to the Panel.

Notwithstanding the above, the Court considered the issue of the computation of damages. The Court finds that BGA claimed expenses exceeding \$140,000.00, which were greater than the \$92,609.50 it was awarded. Additionally, BGA claimed and was paid contract termination charges of \$13,891.43, after the contract was terminated by the Petitioner.

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The Court notes that the Panel's Order on Remand refers to the termination charges in its Findings on Page 4 and also on Page 6 in its Conclusions of Law. The Panel clearly considered the issue of termination charges and compensated BGA for the contract damages of \$92,609.50 notwithstanding the recovery, years earlier, of termination charges.

The total original contract amount of \$2,150,932.74 (Record P. 263) did not contain the later determined termination charges of \$13,891.43. Therefore, the Panel computed BGA's damages by subtracting the amount BGA received \$2,058,323.24 (Record P. 263), from the total original contract amount of \$2,150,932.74, leaving a balance of \$92,609.50 in damages owing to BGA. The Panel's Order on Remand, with citations to the record, in addition to witness testimony, shows a substantial evidentiary basis for its award of \$92,609.50 and will not be reversed by this Court.

THIRD ISSUE

The Court finds that BGA presented the only witness testimony, that BGA's witness testimony ran 141 typed pages when transcribed, and that BGA's witness was cross-examined by Petitioner's Counsel and questioned by Panel members. This Court will not substitute its opinion and judgment for the Panel's and since the record contains appropriate citations to the documentary record to show substantial evidentiary support for its findings, they must stand. This, plus the lengthy witness testimony are substantial evidence to support the Panel's Order on Remand.

The Panel's Order on Remand shows clearly that the Panel considered all the evidence and decided in BGA's favor. The Panel's Order on Remand states:

Although some contradictory evidence exists, the Panel holds that the weight of the evidence supports a finding that the parties entered into an oral agreement whereby Buford Goff agreed to trade its fee for performing channelization work for its increased cost of performing the additional digital design work and, thereafter, to complete the contract for the original amount.

Panel's Order on Remand, Page 6.

The Petitioners are simply asking this Court to substitute its judgment for that of the Panel, by calling the Court's attention to various places in the documentary record which they alleged would show support for the Petitioner's claims. However, "[a]n agency's decision will be overturned only where there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." Lark v. Bilo, 276 S.E.2d 304, 307 (1981).

Petitioner had opportunity to call a witness to rebut BGA's witness but did not, therefore, this Court finds a reasonable probability that the facts were as related by the witness. This Court finds that the Panel's

Order on Remand was not arbitrary and capricious, that the Panel considered the whole record, that no abuse of discretion is found and that there was substantial evidence of record to support the Panel's decision. Based on the foregoing, this Court will not reverse the Panel's decision.

FOURTH ISSUE

Since the Petitioner did not avail itself of relief under the South Carolina Rules of Civil Procedure regarding the October 7, 1992 Order and December 28, 1992 Supplemental Order of the Honorable Luke N. Brown, Jr., this Court finds that the Orders are the law of this case.

Complaints about the Orders of Judge Brown are not a proper component of a Petition for Judicial Review of the Decision of the Panel. Notwithstanding the above, the Court considered this issue. Since Petitioner did not complain about the Orders, but waited for the outcome of the Panel's decision, then the application of South Carolina case law is clear. It was obvious that Judge Brown's Orders would form the foundation for the Panel's decision, and the following applies, "One cannot tolerate an irregularity in a proceeding, take his chances of success, and reserve the right to appeal upon losing the case." Garrell v. Blankon, et al., Davis Slip Opinion No. 1961, filed March 1, 1993.

This Court finds that the October 7, 1992, and December 28, 1992, Orders of the Honorable Luke N. Brown, Jr., are the law of this case and that substantive due process rights of the Petitioner have not been violated.

CONCLUSIONS OF LAW

Counsel for BGA renewed its request for interest as the prevailing party. Counsel for BGA and DIRM were heard in oral argument on the matter of interest on the judgment. This Court concludes that BGA, as the prevailing

party, is entitled to receive interest on the January 22, 1993, award of the Panel, (\$92,609.50), along with pre-judgment interest of 8 3/4% from the January 22, 1993, date of the Panel's Order on Remand until the date of this hearing, June 14, 1993.

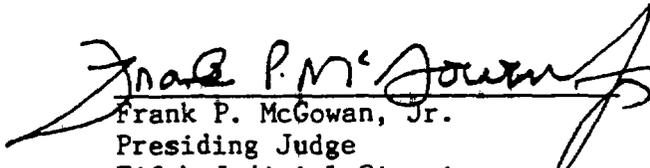
Based on the foregoing, and Townes Assoc., Ltd. v. City of Greenville, 221 S.E.2d 773 (1976), this Court concludes that the Panel acted within constitutional provisions and its statutory authority. Additionally, that the Panel ruled within the limits of the applicable case law, within its discretion, upon proper procedure, and made its findings based upon substantial evidence of the whole record, and therefore, the Order of the Panel on Remand must be affirmed by this Court.

THEREFORE, IT IS ORDERED that the decision of the Panel of January 22, 1993, as related to the parties herein is Affirmed; and

IT IS FURTHER ORDERED that BGA be awarded judgment interest on the Panel's award of \$92,609.50 as of June 15, 1993; and prejudgment interest on the Panel's award of \$92,609.50 as of the Panel's Order on Remand of January 22, 1993, until the date of this hearing, June 14, 1993; and

IT IS FURTHER ORDERED that the Petition for Judicial Review of DIRM is Hereby Dismissed.

AND IT IS SO ORDERED.


Frank P. McGowan, Jr.
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

June 18, 1993.