

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 1991-7

IN RE:)	
)	
<u>APPEAL OF BUFORD GOFF & ASSOCIATES</u>)	O R D E R
)	<u>APPEALED</u>

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on May 10, 1991, on the appeal by Buford Goff & Associates ("Buford Goff") under S.C. Code Ann. §11-35-4230 (1976) of a decision by the Chief Procurement Officer ("CPO") resolving a contract controversy between the Division of Information Resource Management ("DIRM") and Buford Goff.

Present and participating in the hearing before the Panel were Buford Goff, represented by William F. Austin, Esq., and Richard L. Witt, Esq.; DIRM, represented by Thomas W. Lavender, Esq., and William L. Hirata, Esq.; and the Division of General Services, represented by Helen Zeigler, Esquire.

FINDINGS OF FACT

On July 1, 1982, DIRM and Buford Goff entered into an contract whereby Buford Goff agreed to produce a feasibility study for an integrated microwave communications system for the State. (Record, pp. 70-98). The proposed system consisted of two parts - a video network which would serve South Carolina ETV and a voice and data network which would link state agencies. The contract provided for compensation to Buford-Goff in the amount of \$81,900. (Record, p. 78).

The feasibility study issued by Buford Goff on February 7, 1983, contained the following recommendations:

It is concluded that with the trend toward digital systems and the commitment of the State to develop a user network which employs digital techniques at the end terminals, emphasis should be directed toward the implementation of a digital network. However, it is recommended that the voice and data network implementation be delayed approximately one year in order to evaluate progress in equipment development and provide time for the State switched network to be evaluated more closely. If within this time interval, digital equipment is not developed to support the desired network, then an analog network could be implemented to support the voice and data communication requirements.

(Emphasis added) (Record, p. 162).

In March of 1983, DIRM issued Amendment #1 to the contract to begin Phase II of the project. (Record, p. 99). In Phase II, Buford Goff agreed to solicit proposals for path survey and frequency coordination effort, execute a contract for the same, prepare and submit construction permits, initiate development of site and building plans, conduct preliminary design of multi-frequency antenna system, provide preliminary design for video radio services, and analyze tower structure to determine design considerations. (Record, p. 100). The total cost to the State for these services was \$295,000.00. (Record, p. 101). Phase II was completed during late 1983.

On December 21, 1983, DIRM issued Amendment #2 to cover Phase III of the project. (Record, p. 102). Phase III required Buford Goff to design and develop specifications

for construction of the system at a fixed cost of \$1,610,060, plus certain reimbursement charges. Although the feasibility study recommended a year's delay to allow for development of voice and data digital technology, ETV's time requirements for its video network dictated that Phase III begin in late 1983. Because of the integrated nature of the system, Buford Goff was required to design the video and voice and data systems at the same time.

Amendment #2 did not specify whether the voice and data system should be digital or analog. However, no digital radios which met project specifications were available in 1983. Therefore, Buford Goff proceeded to design an analog voice and data network.

Although Mr. Goff testified that DIRM knew of and accepted Buford Goff's decision to proceed with an analog system, later correspondence between the parties suggests that no final decision on what system to use was made until mid-1985.

On March 6, 1985, DIRM wrote Buford Goff:

As a result of our meeting of March 1, 1985, regarding the preparation of the solicitation documents for the voice and data equipment by your firm within the scope of its existing contract with DIRM, the following is my understanding of what was agreed to:

1. DIRM will prepare a listing of all existing circuits, including, where applicable, line speed routing, circuit numbers, whether it is two or four wire, and circuit conditioning, i.e., update the Blue Book.

* * *

4. Upon completion of the revised Blue Book by DIRM as stated in Item #1, Buford Goff & Associates, shall, in a timely manner, provide a cost estimate of both analog and digital system options which will meet the State's requirements, in order that a determination may be made of the most cost effective system alternative.

5. Buford Goff & Associates shall consult with and make available to DIRM, financial data concerning DACS and other leading edge technology that may be used in a digital microwave system for data circuits.

6. DIRM in consolidation [sic?] with Buford Goff & Associates, will select either an analog or a digital system, based upon the cost and feasibility data compiled by Buford Goff & Associates.

* * *

Please let me know if my understanding of our March 1, 1985, meeting is inconsistent with your intentions in this matter.

(Emphasis added)(Record, pp. 180-181).

Buford Goff & Associates responded by letter of March 28, stating, "I have reviewed the tasks presented in the above referenced letter and with the exception of items two and three, all other tasks outlined are consistent with our contracted obligations." (Emphasis added)(Record, p. 182).

On July 3, 1985, Buford Goff issued a report entitled, "SOUTH CAROLINA MICROWAVE VOICE AND DATA NETWORK DIGITAL FEASIBILITY." (Record, p. 195). Buford Goff presented the report data to DIRM at a July 15, 1985, project review meeting. At that meeting DIRM decided to implement a digital voice and data system. (Record, p. 208). At the

time the decision to implement the digital system was made, Buford Goff had already designed 75% of an analog system.

Mr. Goff testified that the change to digital required Buford Goff to perform extra design work at additional cost to it. According to Mr. Goff, DIRM and Buford Goff agreed that DIRM would perform certain tasks, valued at approximately \$80,000 to \$100,000, involving channelization of the voice and data network. Buford Goff was otherwise obligated to perform this task under Amendment #2. (Record, p. 128, item E, task 1). Mr. Goff testified that in exchange for the State's undertaking this work, Buford Goff agreed to perform the extra design services required by the digital system and all other required services for the amount remaining under the contract.

This alleged agreement was never committed to writing and signed by DIRM and Buford Goff, as required by Article 13 of the contract between the parties.¹ Neither is the agreement referenced in any written correspondence between the parties, as far as that correspondence is reflected in the record.

Buford Goff points to certain statements in letters from DIRM which indicate that DIRM will perform certain work

¹Section 13.1 provides, "This Agreement represents the entire and integrated agreement between the Owner and the Architect and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Architect." (Record, p. 77).

which would result in speeding the project schedule.² However, there is no mention of Buford Goff's undertaking to exchange design services for DIRM's work. Further, although numerous references to Buford Goff's compensation appear in later correspondence between the parties, there is never mention of the alleged exchange.

At the July 15 project review meeting, DIRM requested that Buford Goff update the implementation schedule for the voice/data network. In response Buford Goff wrote DIRM on August 1 that the project could not be completed until May 1987. (Record, pp. 209-210). On September 11, 1985, DIRM responded in part as follows:

Additionally, as you know, we have chosen to undertake our design network on the basis of channel capacity requirements rather than attempting to accomplish individual circuit designs. We believe that we will be able to optimize the use of the system and include future growth at each node location by establishing known channel capacity requirements and designing for modular expansion at each node location. We clearly believe that this design process will significantly reduce the scope of the Buford Goff & Associates requirements for developing specifications to be included in the solicitation document. Consequently, we do not feel that an extended specification development schedule is warranted.

²See, DIRM's letters of September 11, 1985 (Record, pp. 211-212 and November 21, 1985 (Record, p. 220), portions of which are set forth in this Order.

(Emphasis added) (Record, p. 211-212). Buford Goff responded by letter of September 27, indicating that Buford Goff considered the compressed schedule "unreasonable" and noting that the delay was caused by DIRM's slowness in providing needed information. (Record, p. 214).

On November 21, 1985, DIRM wrote Buford Goff:

Most recently, we have received letters from your office indicating that the project schedule has been extended well into calendar year 1987. As we indicated in our letter of September 11, this extended schedule is unacceptable. Your office has attempted to place the responsibility for these delays upon the lack of information necessary to allow this project to proceed. We strongly object to this suggestion and believe that any information or decisions remaining would only minimally effect [sic] the development and release of final specifications.

* * *

In July, 1985, a final decision was made to proceed with the digital rather than analog system. Approximately ninety-five percent (95%) of the specifications could then have been completed from that point forward. Again it appears that no progress on these items has been made. . . .

Following vendor presentations on September 5, 1985, the remaining items could have been prepared with the exception of the channel multiplex equipment requirements, which have subsequently been removed from the contract requirements.

* * *

To date, the Board has paid approximately two-thirds (2/3) of the December 21, 1983 contract price of 1.6 million dollars. Additionally, the Board has paid approximately \$375,000.00 to your firm in connection with the initial contract. Overall, the State has paid your firm 1.5 million dollars including the contract extensions and subcontractor fees even though

a significant amount of work remains to be completed. This contract was to be compensated on a percentage of completion basis.

(Record, pp. 219-220). Buford Goff replied on November 25, 1985, and stated:

In your letter you addressed engineering fees expended to date and stated that compensation for engineering services are made on a percentage of completion basis. Please be advised that this is not the case and that compensation is made on the basis of engineering effort expended to date. This is very significant in that our contract did not provide for this extended delay in the project schedule and did not provide for additional engineering effort required for a digital radio system.

* * *

To this point, I have not made an issue concerning the additional engineering costs and it was our objective to support the additional costs for the digital radio system without modifying our contract. The additional tasks that you have requested of us and the time delay have eroded the fee margin to the point where it will be difficult or impossible to assume additional tasks or delays without additional engineering compensation.

It is our objective to provide quality engineering services and to provide reasonable flexibility in modifications to engineering tasks within the limits that we are reasonably compensated for our services. It is not intended that we absorb losses as a result of changes and/or delays which have resulted due to actions beyond our control.

(Emphasis added) (Record, p. 224-225).

Buford Goff did not file a request for additional compensation or seek an amendment to change the scope of the work. Instead, Buford Goff continued to work on the project

and in March, 1986, sent DIRM the final draft voice and data system specifications. (Record, pp. 237-238).

On May 7, 1987, DIRM sent Buford Goff a letter advising that review of the project was underway. DIRM advised:

The contract between BG&A and the State consists of a number of separate documents. . . .At the time of the execution of the most substantial portion in December, 1983, it was anticipated that the voice and data transmission equipment would be included. As you know, we have not finalized this phase of the project for a variety of reasons

As part of our contract, BG&A agreed to designate in its periodic statements for services to the State, which portion of those activities were to be attributed to the video transmission efforts and which portion was for voice and data. Your organization, at its discretion, selected a two-thirds one-third breakdownAs a consequence, substantial amounts have been paid to your firm for the voice and data effort, although the voice and data portion, once again, has not been finalized. At the same time, not all of the contract's compensation has been paid and it is my general understanding that this amounts to approximately \$250,000.

* * *

1. If the state proceeds with the completion of the voice and data component, I seek BG&A's assurances that they will complete this work for an amount not to exceed the initially agreed upon contract price; and

2. If the voice and data component is not pursued, it is incumbent upon the State to seek and secure from BG&A a complete and detailed recapitulation of the work effort for this part of the total project. . . .

Overall, whether voice and data will be included in the microwave backbone transmission system is not yet finally decided. As we consider all components, including engineering costs, of the various options available to us, I have been asked to confirm the situation between the State and your firm. . . I would also ask that you review your records to make sure we agree on the unexhausted amount. Again, I understand it to be around \$250,000.

(Record, pp. 239-240). Buford Goff did not respond to this letter.

On October 27, 1987, the Budget & Control Board decided not to proceed with the voice and data portion of the project. Cancellation of the voice data network relieved DIRM of performing the channelization work.

Buford Goff learned of the cancellation through a newspaper editorial in early November. On November 24, 1987, Buford Goff wrote DIRM, making its first written claim for \$65,553.75 in additional engineering fees because of the switch to a digital system. (Record, p. 241 and 246).

DIRM responded on December 30, 1987, as follows:

As you will recall, I wrote you in May of this year concerning the amount of the unearned fee attributable to the voice/data component of the project. At that time, we projected an unearned fee in an approximate amount of \$250,000 and asked for your verification of this amount. In connection with that request, I presented to you the possibility that the voice/data component might not be pursued. Since I received no response from you until your letter of November 24, I assumed that our estimate was valid and that you had no concerns regarding the possibility that the voice/data portion was questionable. . . Although we do not

disagree that a substantial portion of the voice/data microwave system design has been completed, we are unable to agree entirely with your Contract Summary.

. . . Although we agree that you have experienced an alteration of the project to include digital voice/data capabilities, you advised us in November, 1985, that you would not seek an increase in fees for this item but would insist that additional tasks beyond the scope of the project include additional compensation. Consequently, we do not take issue with any of the items referred to in item 5(a) or the reimbursable amount. We did rely upon your representation that we would not incur additional expense for the digital design and this amount has been deleted.

(Record, pp. 248-249).

Following a meeting in early January, DIRM wrote Buford Goff restating its position that Buford Goff had previously advised that the design change would not result in additional fees and denying compensation therefor. (Record, p. 252). Various correspondence between the parties from February to May 1988 indicates that the additional fees for digital design continued to be the subject of dispute. (Record, pp. 255-359).

In a series of letters from July to September 1988, DIRM and Buford Goff discussed the possibility that an informal third party could resolve the matter. (Record, pp. 373-377). On July 13, 1988, Buford Goff wrote DIRM requesting that the controversy be heard by the State Engineer. (Record, p. 376). On September 16, 1988, DIRM advised Buford Goff that DIRM could not receive Buford

Goff's request to resolve the contract controversy and that such a request needed to be directed to the State Engineer. (Record, p. 377). This advice is in accord with S.C. Code Ann. 11-35-4230.

On January 14, 1991, some 2 years, 4 months later, Buford Goff filed a request with the State Engineer to resolve its claim for additional compensation. (Record, p. 378). Buford Goff delayed filing a request for resolution because of a breakup among its partners and the resulting "turmoil."

Buford Goff now claims it is owed \$164,341.00 in total additional compensation, including \$140,141.00 for additional design services accompanying the switch from analog to digital. (Record, p. 52). To date, Buford Goff has been paid a total of \$2,058,323.24, plus termination expenses of \$13,891. The total original contract amount was \$2,150,932.74. (Record, p. 263).

CONCLUSIONS OF LAW

Buford Goff claims that it is entitled to additional compensation caused by DIRM's decision to implement a digital, rather than analog, voice and data system.

Buford Goff first argues that the switch from analog to digital was an increase in the scope of work for which it is entitled to additional compensation under section 14.7.1 of the contract. That section provides, "IF THE SCOPE of the Project or of the Architect's Services is changed

materially, the amounts of compensation shall be equitably adjusted." (Record, p. 79).

DIRM denies that the additional design work was outside the scope of the services to which Buford Goff agreed. The initial recommendations by Buford Goff in the feasibility study were to use a digital system and to wait one year to allow technology to develop. Amendment #2, which covered the design and construction work, did not specify either a digital or analog system. Buford Goff chose to design an analog system because digital technology was unavailable and this work commenced in December 1984.

The correspondence between the parties indicates that the question of which system would be used was open as late as March 1985 when DIRM wrote Buford Goff confirming that Buford Goff would, in consultation with the DIRM, select either an analog or digital system. (Record, p. 180-181). Buford Goff responded that the task requested was "consistent with our contract obligations." (Record, p. 182).

There is nothing in the record to indicated that Buford Goff objected to DIRM's intention to choose between digital and analog after Buford Goff had already started designing the analog. Further, Buford Goff did not indicate that extra compensation would be due if the State finally selected digital technology.

On July 3, 1985, Buford Goff in fact issued another feasibility study and, based on those recommendations, DIRM

selected to proceed with a digital network. Not until November 1985 did Buford Goff indicated that it had been required to perform extra work in connection with the digital design. Even then, Buford Goff indicated that it had not "made an issue" of the extra work and intended to "support the additional engineering costs for the digital radio system without modifying our contract." (Record, p. 225).

Although it appears that Buford Goff's ongoing work was altered when DIRM opted to proceed with digital rather than analog technology, the Panel is not prepared to characterize this change as a change in the scope of the project under section 14.7.1 of the contract. The Panel reaches this conclusion particularly in light of Buford Goff's agreeing in March 1985 that selection of analog or digital technology was within its contractual obligations and its failure for more than a year to notify DIRM that it had undertaken extra work because its recommendations were followed.

Buford Goff also claims that DIRM breached the alleged oral agreement between the parties that DIRM would perform certain channelization work in exchange for Buford Goff's agreeing to perform the extra design work and other required services for the amount remaining under the contract. Buford Goff contends that it performed the digital design work but the State never performed the channelization work because of the decision to cancel the voice/data system and

that Buford Goff did not receive the total amount remaining under the contract because the contract was never completed.

This alleged agreement between the parties is not in writing signed by both and, therefore, violates section 13.1 of the contract. Further, the agreement is not fully memorialized in written correspondence between the parties. To the contrary, as noted above, the correspondence is ambiguous regarding whether Buford Goff was entitled to extra compensation at all. Not until November 1987, did Buford Goff state unequivocally that it was claiming extra compensation for work done in 1985.

Because there is nothing in writing to confirm the details of the alleged agreement between DIRM and Buford Goff, the Panel cannot hold that such an agreement, even assuming it existed, is enforceable against the State. The Panel declines to set the dangerous precedent of allowing parties to escape the plain written obligations of a contract in favor of ill-defined, ambiguous oral ones.

Finally, the Panel notes that Buford Goff's claim is not timely made under the equitable principle of laches, that is a claimant may not sit on its rights to the prejudice of another. Although, §11-35-4230 does not specify a time limit on when a claim can be filed with the State Engineer, the Panel believes that, under the facts of this case, Buford Goff waited too long to present its claim.

Buford Goff knew on July 15, 1985 that DIRM has decided to use a digital system. It said nothing until

November 25, 1985, at which time it advised DIRM that, "To this point, [we] have not made an issue concerning the additional engineering costs and it was our objective to support the additional costs for the digital radio system without modifying our contract." (Record, p. 225). Buford Goff advised that further tasks would result in claims for extra compensation.

Buford Goff continued to work on the digital system after its November 1985 letter and did not file a claim for extra work until November of 1987 after DIRM decided not to go forward with the voice and data system. The claim was filed some 20 months after completion of the work.

When the claim was finally made, DIRM denied that additional compensation was due and, finally advised Buford Goff in September of 1988 that the only way to resolve the claim was file with the State Engineer. Buford Goff then waited over two years to file a formal claim with the State Engineer. This delay was caused by partnership changes within Buford Goff & Associates. The Panel does not believe that Buford Goff's neglect of its alleged claim from July 1985 to November 1987 and then from September 1988 to January 1991 is reasonable.

DIRM has paid Buford Goff \$2,058,323 on a contract for \$2,150,932. In addition, DIRM has paid Buford Goff \$13,891 in termination fees. After two years DIRM had a right to assume that Buford Goff had been satisfactorily compensated

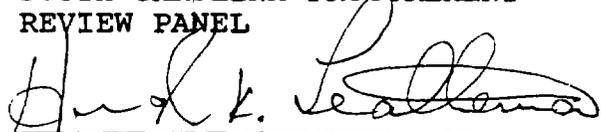
and no further claims were outstanding. DIRM would have been justified in closing its account on this project.

By failing to reasonably and promptly pursue its claim, the Panel believes that Buford Goff has waived it.

For the reasons stated above, the Panel finds that Buford Goff is not entitled to any additional compensation under its contract with the Division of Information Resource Management to design a microwave backbone system for the State.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.
6-6, 1991