

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

IN RE:)	
)	ORDER ON REMAND
<u>APPEAL OF BUFORD GOFF & ASSOCIATES</u>)	
)	<u>APPEALED</u>

This case originally came before the South Carolina Procurement Review Panel ("Panel") for hearing on May 10, 1991, on the appeal of Buford Goff & Associates ("Buford Goff") under S.C. Code Ann. § 11-35-4230 (1986) from a decision by the Chief Procurement Officer ("CPO") resolving a contract controversy between the Division of Information Resource Management ("DIRM") and Buford Goff.

The Panel issued its order on June 6, 1991, affirming the CPO's decision that Buford Goff was not entitled to additional compensation under its contract with DIRM. On July 10, 1991, Buford Goff appealed the decision of the Panel to the circuit court under the Administrative Procedures Act, S. C. Code Ann. §§ 1-23-310, et seq. (1986). The circuit court reversed the Panel's decision on October 7, 1992, and remanded this matter for a new decision consistent with the law and facts.

In accordance with the order of the court, the Panel makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

DIRM and Buford Goff entered into an contract whereby Buford Goff agreed to perform a feasibility study to determine the needs of South Carolina to implement an integrated communications system for South Carolina

Education Television ("SCETV") and other state agencies. (Tr., p. 18, lines 5-10). Buford Goff completed the feasibility study and recommended among other things that the project be delayed for one year to allow for digital radio developments. (Tr., p. 21, lines 3-9).

On December 21, 1983, DIRM issued Amendment #2 to the contract requiring Buford Goff to proceed with the design and implementation of the integrated microwave communications system. (Tr., p. 34, lines 14-22; Record, p. 102). Although Buford Goff's feasibility study recommended a year's delay in designing and implementing the project to allow for development of digital technology, ETV's time requirements dictated that this work begin in late 1983. (Tr., p. 38, lines 2-16).

Amendment #2 did not specify whether the voice and data system should be digital or analog. (Tr., p. 58, lines 18-24). However, no digital radio meeting project specifications was available in 1983. (Tr., p. 38, lines 17-25). Buford Goff apprised DIRM of the unavailability of digital radios and proceeded to design an analog voice and data network. (Tr., p. 30, lines 10-20; p. 36, lines 8-13).

In July, 1985, the State made the decision to implement a digital rather than analog radio system. (Tr., p. 40, lines 6-8).

DIRM and Buford Goff orally agreed that Buford Goff would perform the extra design services required by the digital system and all other required services for the

amount remaining under the contract in exchange for the State's agreeing to relieve Buford Goff from performing channelization tasks valued at approximately \$80,000 to \$100,000. Buford Goff was otherwise obligated to perform this channelization task under Amendment #2. (Tr., pp. 43-44 through line 12; Record, pp. 128-130). In Mr. Goff's words, "[W]e were offsetting tasks. [Buford Goff] had increased design tasks. DIRM was going to take over some of the implementation tasks. And we saw that if we did those things, that we would not require a change in contract amount unless there were additional tasks that were beyond that agreement." (Tr., p. 44, lines 6-12).

Buford Goff completed its design duties in March, 1986. (Tr., p. 48, lines 17-18).

On November 11, 1987, Buford Goff learned from the newspaper that the State would not proceed with implementation of the system. (Tr., p. 82, lines 7-9). 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. (Tr., p. 83, lines 14 - 23; Record, p. 241 and 246). 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).

From July to September 1988, DIRM and Buford Goff discussed the possibility that an informal third party could resolve the matter. (Tr., p. 133; 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, Buford Goff filed a request with the State Engineer as CPO to resolve its claim for additional compensation. (Record, p. 378). Buford Goff delayed filing a request for resolution for 2 years, 4 months because of a breakup among its partners and the resulting "turmoil."¹ (Tr., pp. 135-136).

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. (Tr., p. 55, lines 23-25). To date, Buford Goff has been paid a total of \$2,058,323.24 as compensation under the contract, plus termination expenses of \$13,891.43. The total original contract amount was \$2,150,932.74. (Record, p. 263; Tr., p. 104, lines 14-17). The difference between the contract amount and that paid to Buford Goff is \$92,609.50. (Record, p. 263).

¹In all, Buford Goff waited approximately 3 years, 2 months from the date it first learned of the grounds of its case until the request for resolution. Section 11-35-4230 is silent on a time for filing a request for resolution.

CONCLUSIONS OF LAW

Buford Goff seeks additional compensation allegedly caused by DIRM's breach of the oral agreement between the parties whereby DIRM would relieve Buford Goff from performing channelization work in exchange for Buford Goff's performing digital design work and its remaining tasks for the amount remaining under the contract. Buford Goff contends that it performed the digital design work but, because of the cancellation of the voice/data system, Buford Goff was not able to recoup the amount remaining under the contract as agreed.

DIRM and General Services argue that the additional design work caused by the decision to implement a digital rather than an analog system was within the scope of Buford Goff's original contract and, therefore, Buford Goff is not entitled to additional compensation for it.

While it is true that Amendment #2 does not specify either a digital or analog system, the evidence is that both DIRM and Buford Goff knew that no adequate digital technology existed at the time DIRM directed Buford Goff to proceed.

Further, Buford Goff alleges the existence of an oral amendment by the parties to Amendment #2 dealing with the compensation due Buford Goff because of the decision to switch from analog to digital design. DIRM and General Services argue that the Panel cannot recognize the alleged oral amendment because section 13.1 of the contract forbids

any amendments except in writing. The Panel rejects the argument of DIRM and General Services because the law is to the contrary. Lazer Construction Company, Inc. v. Long, 296 S.C. 127, 370 S.E.2d 900, 902 (S.C. App. 1988).

Although some contradictory evidence exists,² 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. (Tr., p. 46, lines 19-21).

The Panel holds that the State's decision to cancel the contract after Buford Goff had performed all of the digital design work without allowing Buford Goff to complete performance and recoup the remaining contract amount breaches the oral amendment to the contract.

For breach of contract proper damages are those that serve to place the nonbreaching party in the position he

²In approximately five years' of correspondence about whether Buford Goff is entitled to additional compensation, including in its request for resolution, Buford Goff never mentions the alleged oral agreement. (See, Record, pp. 378-386) (The only possible reference occurs in a November 25, 1985, letter in which Mr. Goff notes that he has not made an issue of the additional engineering costs because the objective was to support them without modifying the contract. (Record, p. 225)). This is despite repeated assertions by the State that Buford Goff should have sought a change order for tasks it considered beyond the scope of its original contract. (Eg., Record, pp. 248, 252, 255-256, 356-357).

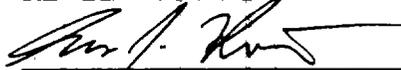
would have enjoyed had the contract been performed. South Carolina Federal Savings Bank v. Thornton-Crosby Development Co., 399 S.E.2d 8 (S.C. App. 1990). In this case, if Buford Goff had been able to perform the contract to completion, it would have recouped the amount it had bargained for the additional digital design services it performed prior to cancellation, in other words it would have received the total amount due under the contract.³

To date, DIRM has paid Buford Goff \$2,058,323.24 as compensation under the contract, plus termination expenses of \$13,891.43. The total original contract amount was \$2,150,932.74. The Panel holds that Buford Goff is entitled to the remaining \$92,609.50 as damages.

For the reasons stated above, the Panel reverses the decision of the Chief Procurement Officer and orders that DIRM pay to Buford Goff \$92,609.50 within sixty days of the date of this order.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Gus J. Roberts
Chairman

Columbia, S.C.
Jude, 1993

³Mr. Goff testified that, when it entered the oral agreement, Buford Goff accepted and agreed to the risk that the actual value of its services might be greater than the contract amount. (Tr, pp. 108, 114).