

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

} BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 1990-20

IN RE:

} APPEAL OF WESTBERRY OFFICE  
MACHINES, INC.

} O R D E R

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This case comes before the South Carolina Procurement Review Panel ("Panel") on the appeal by Westberry Office Machines, Inc. ("Westberry") of a decision by the Chief Procurement Officer ("CPO") upholding R. L. Bryan Company's ("Bryan") protest of award of a contract to supply video typewriters to several state and local entities.

Present at the hearing before the Panel were Westberry, represented by Ronald Hall, Esq.; Bryan, represented by Richard Smith, Esq., and Elizabeth Holderman, Esq.; and the Division of General Services, represented by Helen Zeigler, Esquire.

#### FINDINGS OF FACT

On September 19, 1990, State Procurement issued an Invitation for Bids ("IFB") on a one-year contract to provide various state and local agencies with Olivetti ETV 2700 modular video typewriters with dual 3.5" disk drives. (Record, p. 42). Bids were opened on October 9 and the responses of three vendors were tabulated. (Record, p. 17).

Westberry claimed the South Carolina product preference available under Reg. 19-446.1000, alleging that its typewriter was "made" in South Carolina. (Record, p. 53).

Bryan, which bid a similar machine, did not claim the product preference. (Record, p. 68).

Upon application of the five percent product preference, Westberry was determined to be the low bidder and a Notice of Intent to Award was issued on October 11, 1990. (Record, p. 18). Without the preference, Bryan was the low bidder.

Bryan filed a protest with the Chief Procurement Officer on October 16 on the grounds that the South Carolina product preference does not apply in this case and that Westberry's affidavit is false. (Record, pp. 25-26). The Intent to Award was rescinded on October 17, 1990, as a result of Bryan's protest. (Record, p. 19).

The CPO, in his decision dated November 8, 1990, found that the typewriter offered by Westberry was not made in South Carolina and that the South Carolina product preference does not apply. The CPO ordered that award of the contract be made without regard to the five percent product preference. Westberry appealed the CPO's decision to the Panel on November 19, 1990. (Record, p. 1).

The Invitation for Bids in this case specifies an Olivetti ETV 2700 modular video typewriter with dual drive and a video support arm, an OLISPELL 2700 program, and an extended memory chip. (Record, p. 55). The IFB also requests prices on certain options (among them, further memory expansion), which are described as "operator installable." (Record, p. 56).

In response to the IFB, Bryan bid an Olivetti 2700 Model No. 07114Y. This particular model of machine comes from the Olivetti factory in Italy with a dual disk drive and extended memory already incorporated. To comply with the IFB, Bryan has to unpack the machine, attach the video support arm on which the monitor rests and power up the machine, i.e., plug it in.

Westberry chose not to bid the Olivetti model offered by Bryan but instead elected to upgrade a lesser model in order to meet the requirements of the IFB. Westberry purchased an Olivetti 2700 Model No. 07059, which comes from the Olivetti factory in Italy with a single drive and basic memory chip, and upgraded it by adding an extended memory chip and a dual drive. The memory chip and dual drive are not manufactured in South Carolina.

At the de novo hearing before the Panel, Westberry's service technician, Ben Willis, demonstrated the procedure used by Westberry to produce the typewriter offered by it. Mr. Willis opened the back panel of the typewriter case, removed the cover of the printed circuit board compartment, removed the basic memory chip and replaced it with an extended memory chip, and closed the compartment cover and back panel. Mr. Willis then removed or "cracked" the case of the machine, removed the single disk drive housing, took the single disk drive from its housing, placed the new dual drive into a new dual drive housing, connected the cables for the dual drive, and replaced the outer machine case.

Once Mr. Willis performs the above-described procedure, Westberry's typewriter meets bid specifications, except for installation of the video arm and plugging in the machine. Preparing Westberry's typewriter to bid standards takes approximately twenty minutes per typewriter. The IFB estimates that the winning vendor will have to supply twenty-five typewriters under the contract.

#### CONCLUSIONS OF LAW

The issue is whether the typewriter offered by Westberry was "made" in South Carolina for purposes of the South Carolina product preference set forth in Reg. 19-446.1000. That regulation provides:

Subsection A. General Policy. It is the policy of the State of South Carolina that governmental bodies including the General Assembly, in performing assigned duties and functions, procure necessary end-products which are made, manufactured, or grown in South Carolina if available . . . .

Subsection B. Definitions. The following words, unless the context clearly indicates otherwise, shall mean:

Item 1. Made: To assemble, fabricate or process component parts into a finished end-product.

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Item 4. End-product: The item sought by a governmental body of the State and described in the solicitation including all component parts and in the final form and ready for the use intended by the governmental body.

Westberry argues that its typewriter was "made" in South Carolina, as that term is defined in Reg. 19-446.1000,

because Westberry assembled or fabricated component parts (i.e., the basic typewriter unit, the extended memory chip and dual drive) into the finished end-product called for in the IFB. Westberry contends that one purpose of the preference is to encourage vendors to do just what Westberry did - buy component parts and assemble them into finished products in South Carolina, thereby providing employment to South Carolinians rather than, in this case, Italians.

Bryan and the Division of General Services contend that the purpose of the preference is to provide meaningful long-term employment to South Carolinians, and, thereby, improve the overall economy of South Carolina. They argue that the twenty-minute procedure performed by one Westberry employee is a minor incorporation of parts which does not provide a sufficient amount of employment to justify application of the preference.<sup>1</sup> They point out that, at most, Westberry personnel will spend approximately 9 hours producing typewriters for this contract.

The Panel agrees that the intent of the buy-South Carolina law is to stimulate South Carolina's economy by providing employment for South Carolinians. The Panel also

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<sup>1</sup>Virgil Carlsen, the Director of State Purchasing, testified that State Procurement uses an informal rule-of-thumb to determine when the preference applies. Under the rule, the preference applies when the value added to the South Carolina economy by employment under a contract exceeds or equals the extra amount the State must pay when the five percent preference is added to the low bid. The amount of labor required is a factor in this rule.

agrees that, in concept, the State's economy should receive value at least equal to the amount the State government loses when it is forced to accept a higher bid because of application of the preference.

Despite its agreement in principle with State Procurement in this case, however, the Panel must find in favor of Westberry. The General Assembly in approving Reg. 19-446.1000 did not require that vendors expend a minimum amount of labor, employ a minimum amount of employees, or provide a minimum value to the economy in order to qualify for the preference. The regulation contains no qualifying language, such as "substantially" or "mostly" made in South Carolina, that might lend itself to the interpretation urged by Bryan and State Procurement. Reg. 19-446.1000 requires only that a vendor assemble, fabricate or process component parts in South Carolina into the end-product sought by the State.

A "component" is defined as "a constituent element, as of a system; a part of a mechanical or electrical complex." American Heritage Dictionary (Second Edition), p. 302. The definition of "assemble" is "to bring or gather together into a group or whole" or "to fit or join together the parts of." The definition of "fabricate" is "to make; create" or "to construct by combining or assembling." American Heritage Dictionary (Second Edition), p. 484. Finally, the definition of "process" is "to prepare, treat or convert by subjecting

to some special process." American Heritage Dictionary (Second Edition), p. 987.

In this case, Westberry took component parts - a base unit typewriter, an extended memory chip and a dual disk drive - and combined or joined them together in its Columbia office to get the typewriter requested in the IFB. The Panel finds that, however minimal it may have been, Westberry assembled the typewriter in question in South Carolina.<sup>2</sup>

It is settled law that an administrative body such as the Panel cannot by order materially add to, or alter, the law. S. C. Tax Commission v. S. C. Tax Board of Review, 278 S.C. 556, 299 S.E.2d 489 (1983), citing, Lee v. Michigan Millers Mut. Ins. Co., 250 S.C. 462, 158 S.E.2d 774 (1968). See also, Milliken & Company v. S.C. Dept. of Labor, 269 S.E.2d 763 (1980). Therefore, even though the Panel agrees in principle with State Procurement and Bryan in this case, the Panel feels that it lacks authority to add a time, labor or value condition to the definition of "made" in Reg. 19-446.1000. Such a change in the law must be left to the Legislature.

Because it finds in favor of Westberry, the Panel does not need to consider Bryan's request that Westberry be

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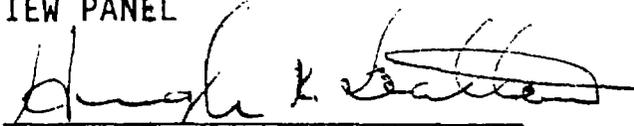
<sup>2</sup>Westberry concedes and the Panel agrees that setting up the video arm and plugging in the machine does not qualify as assembly but is rather installation. "Install" means "to set in position and connect or adjust for use." American Heritage Dictionary (Second Edition), p. 666.

debarred or suspended under Reg. 19-446.1000 and S. C. Code Ann. §11-35-4220(1976).

For the reasons stated above, the Panel overturns the November 8, 1990, decision of the Chief Procurement Officer and hereby dismisses the protest of R. L. Bryan and orders that award of the contract in question be made to the lowest responsive and responsible bidder after application of the South Carolina product preference.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

By: 

Hugh K. Leatherman, Sr.  
Chairman

Columbia, S.C.  
JANUARY 9, 1991