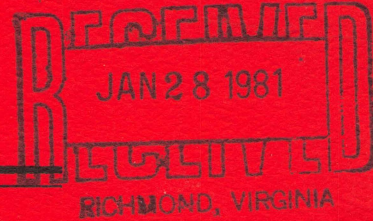


222 VA143

CLERK
SUPREME COURT OF VIRGINIA



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 801223

DAVID MOSTELLER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

JOINT APPENDIX

Vol. I

Reid M. Spencer, Esquire
Carl A. Eason, Esquire
WOLCOTT, SPENCER, RIVERS, WHEARY,
BASNIGHT & KELLY, P.C.
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Norfolk, Virginia 23510

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Marshall Coleman, Esquire
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830 East Main Street
Richmond, Virginia 23219

Counsel for Appellee

JOINT APPENDIX

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISIONI.....

October 10, 1979

(Date)

The GRAND JURY charges that:

August, 1976 and continuing
During ~~OR~~ or about thereafter until March 19 1977, in the City of Richmond

David Mosteller

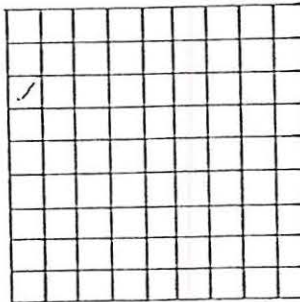
..... did

feloniously and unlawfully take, steal and carry away property whose value was in excess of one hundred dollars belonging to the Commonwealth of Virginia and its agency, Lynchburg Training School and Hospital.

And The Grand Jury further presents that during or about August, 1976 to March, 1977, within the City of Richmond, David Mosteller, did feloniously and unlawfully take, steal and carry away property whose value was in excess of one hundred dollars belonging to the Commonwealth of Virginia and its agency, Lynchburg Training School and Hospital.

Va. Code § 18.2-95
18.2-178

Charles D. Bryant



{ Witnesses sworn and sent by
the Court to the Grand Jury to
give evidence.

Edward L. Keill

Clerk

A TRUE BILL.

.....
Foreman

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISIONI.....

.....October 10, 1979.....
(Date)

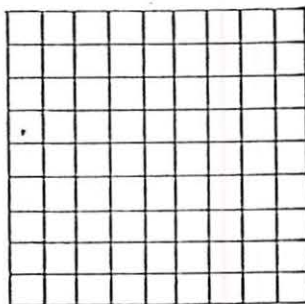
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August, 1976 and continuing there-
During ~~or~~ or about after until March....., 1977, in the City of Richmond
David Mosteller

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18.2-178

Charles D. Bryant



{ Witnesses sworn and sent by
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give evidence.

Charles D. Bryant

Clerk

A TRUE BILL.

Matthew J. [Signature]
Foreman

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISIONI.....

October 10, 1979

(Date)

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David Mosteller

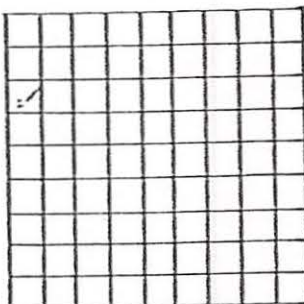
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feloniously and unlawfully take, steal and carry away property whose value was in excess of one hundred dollars belonging to the Commonwealth of Virginia and its agency, Lynchburg Training School and Hospital.

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Va. Code § 18.2-95
18.2-178

Charles D. Bryant



{ Witnesses sworn and sent by
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Edward L. Kidd

Clerk

A TRUE BILL.

.....
Foreman

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISIONI.....

.....October 10, 1979.....
(Date)

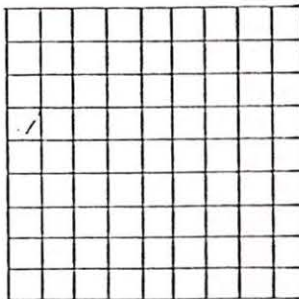
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Va. Code § 18.2-95
18.2-178

Charles D. Bryant



{ Witnesses sworn and sent by
the Court to the Grand Jury to
give evidence.

Edward L. Keith

Clerk

A TRUE BILL.

.....
Foreman

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I

October 10, 1979
(Date)

The GRAND JURY charges that:

During ~~or~~ about September, 1976 and continuing thereafter until May, 1977, in the City of Richmond

David Mosteller.....

did

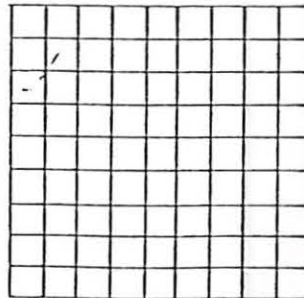
feloniously and unlawfully take, steal and carry away property whose value was in excess of one hundred dollars belonging to the Commonwealth of Virginia and its agency, Southern Virginia Mental Health Institution.

And The Grand Jury further presents that during or about September, 1976 and continuing thereafter until May, 1977, within the City of Richmond, David Mosteller, did feloniously and unlawfully take, steal and carry away property whose value was in excess of one hundred dollars belonging to the Commonwealth of Virginia and its agency, Southern Virginia Mental Health Institution.

And The Grand Jury further presents that, during or about September, 1976 and continuing thereafter until May, 1977, within the City of Richmond, David Mosteller, did feloniously and unlawfully take, steal and carry away property whose value was in excess of one hundred dollars belonging to the Commonwealth of Virginia and its agency, Southern Virginia Mental Health Institution.

Va. Code § 18.2-95
18.2-178

Charles D. Bryant



{ Witnesses sworn and sent by
the Court to the Grand Jury to
give evidence.

Edward L. Kidd Clerk

A TRUE BILL.

Foreman

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISIONI.....

October 10, 1979

(Date)

The GRAND JURY charges that:

During or about January, 1976 and continuing thereafter
until December, 1976, in the City of Richmond

David Mosteller

did

feloniously and unlawfully take, steal and carry away property whose value was in excess of one hundred dollars belonging to the Commonwealth of Virginia and its agency, Lynchburg Training School and Hospital.

And The Grand Jury further presents that during or about January, 1976 and continuing thereafter until December, 1976, within the City of Richmond, David Mosteller, did feloniously and unlawfully take, steal and carry away property whose value was in excess of one hundred dollars belonging to the Commonwealth of Virginia and its agency, Lynchburg Training School and Hospital.

Va. Code § 18.2-95
18.2-178

Charles D. Bryant

[illegible]

{ Witnesses sworn and sent by
the Court to the Grand Jury to
give evidence.

Edward L. Kidd

Clerk

3111.

Foreman

1 VIRGINIA.

2 IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

3 DIVISION I

4
5 -----
6 COMMONWEALTH OF VIRGINIA

7 vs.

8 DAVID MOSTELLER
9 -----

COPY

10 Complete transcript of the testimony and other
11 incidents in the above when heard on March 4, 1980, before
12 the Honorable James B. Wilkinson, Judge.
13

14
15
16
17
18 APPEARANCES:

19 Learned D. Barry, Esquire, Assistant Commonwealth's Attorney
20 for the City of Richmond, John Marshall Courts Building,
21 8th and Main Streets, Richmond, Virginia,
22 Joseph W. Kaestner, Esquire, Assistant Attorney General,
23 Fidelity Building, Richmond, Virginia;

24 Reid M. Spencer, Esquire, 607 Plaza One, Norfolk, Virginia,
25 Counsel for the defendant;

The defendant, David Mosteller, in person.

CRANE - SNEAD & ASSOCIATES, INC.

COURT REPORTERS

1108 EAST MAIN STREET

RICHMOND, VIRGINIA

PHONE 648 - 2801

2.

Hearing held on --

March 4, 1980

I N D E X

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Irving J. Brooks, Jr.	17			
Raymond J. Kyber	22	43	51 66	63
Francis X. McEntee, Jr.	67	73	75	75 79
Carl L. Phillips	83	87	94	96
J. Wesley Scarce	98			
Charles D. Bryant	104	111		

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	and 26	

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1
2 THE COURT: Which indictment
3 are we going forward with today?

4 MR. BARRY: We will proceed
5 on one this morning. The Clerk has been notified
6 of the indictment to proceed upon.

7 THE COURT: All right, three
8 counts of grand larceny?

9 MR. BARRY: That's correct.

10 THE COURT: Different acts,
11 different times?

12 MR. BARRY: That's correct.

13 THE CLERK: The case of
14 Commonwealth vs. David Mostaller.

15 The defendant is present in
16 court and represented by Mr. Spencer.

17 Mr. Spencer, are you prepared
18 for trial?

19 MR. SPENCER: Yes.

20 THE CLERK: David Mostaller,
21 the Grand Jury charges that during or about
22 September, 1976 and continuing thereafter until
23 May of 1977, in the City of Richmond, in the
24 jurisdiction of this Court, did feloniously and
25 unlawfully take, steal and carry away property whose

1 value was in excess of \$100.00 belonging to the
2 Commonwealth of Virginia and its agency, Southern
3 Virginia Mental Health Institution.

4 How do you plead to this
5 charge, guilty or not guilty?

6 DEFENDANT MOSTELLER: Not
7 guilty.

8 THE CLERK: And the Grand Jury
9 further presents that during or about September,
10 1976, and continuing thereafter until May of 1977,
11 within the City of Richmond, David Mosteller did
12 feloniously and unlawfully take, steal and carry
13 away property whose value was in excess of \$100.00
14 belonging to the Commonwealth of Virginia and its
15 agency, Southern Virginia Mental Health Institution.

16 How do you plead to this
17 charge?

18 DEFENDANT MOSTELLER: Not
19 guilty.

20 THE CLERK: And the Grand Jury
21 further presents that during or about September
22 1976, and continuing thereafter until May, 1977,
23 within the City of Richmond, David Mosteller did
24 feloniously and unlawfully take, steal and carry
25 away property whose value was in excess of \$100.00.

1 belonging to the Commonwealth of Virginia and its
2 agency, Southern Virginia Mental Health Institution.

3 How do you plead to this
4 charge?

5 DEFENDANT MOSTELLER: Not
6 guilty.

7 THE CLERK: On your pleas of
8 not guilty, do you wish to be tried by His Honor
9 the Judge or by a jury?

10 DEFENDANT MOSTELLER: Judge.

11 THE COURT: The Court will
12 waive trial by jury.

13 MR. BARRY: The Commonwealth
14 will waive.

15 THE COURT: All right, you
16 fully understand you have a constitutional right
17 to have a jury trial if you so desire?

18 DEFENDANT MOSTELLER: Yes, sir.

19 THE COURT: And you fully
20 understand the nature of the charges against you?

21 DEFENDANT MOSTELLER: Yes, I do.

22 THE COURT: And you discussed
23 both of these with your attorney?

24 DEFENDANT MOSTELLER: Yes, I
25 have.

1 THE COURT: And after discussing
2 it with your attorney, you have decided to plead
3 not guilty and be tried by the Court, is that
4 correct?

5 DEFENDANT MOSTELLER: Yes, it is,
6 Your Honor.

7 THE COURT: Are you ready
8 for trial?

9 DEFENDANT MOSTELLER: Yes, I am.

10 THE COURT: All right, you may
11 have your seat and proceed.

12 NOTE: At this point the
13 defendant is seated at counsel table by his counsel.

14 MR. SPENCER: Judge, if I could
15 inquire of the Clerk, the indictment you read is
16 I-10-965?

17 THE CLERK: That is correct.

18 MR. BARRY: Your Honor, the
19 Commonwealth will proceed today on this particular
20 indictment. It involves the Danville, Virginia
21 Southern Mental Health Institution, which is a part
22 of the Commonwealth of Virginia. This particular
23 case has been chosen to come into the court today
24 because it involves three items of larceny that
25 we feel will show very clearly that Mr. Mosteller

1 is guilty of grand larceny. It involves samples,
2 it involves installation, and it involves tamper
3 proofing.

4 Very briefly, what the evidence will
5 show today before the Court is that Mr. Mosteller
6 worked, or at one time worked for InterRoyal,
7 a furniture company. Whenever someone is involved
8 here in the Commonwealth of Virginia, such as
9 the Southern Virginia Mental Health Institution,
10 they will seek certain amounts of furniture for
11 their particular establishment. Salesmen will,
12 and perfectly legitimately, work with them as to
13 the specifications. The specifications are then
14 sent to the Department of Purchases and Supply
15 and put out in bids. The bids go to various vendors
16 and the vendors then are contacted by the
17 tradesmen to establish certain prices.

18 I think the evidence will
19 show on this particular case today that one of the
20 vendors contacted in this case Ginns Southern, who
21 at that time was represented by Mr. Kyber. He was
22 contacted, he found out that the bid was available,
23 Mr. Mosteller quoted him certain prices, he based
24 his bid on that, and the bid was accepted by the
25 Commonwealth of Virginia.

1 At first we will have representatives
2 of the Division of Purchases and Supply, Mr.
3 Brooks, with relevant documents showing how the
4 bid process works. Mr. Kyber will come in and
5 say how he relied on Mr. Mosteller to determine
6 the prices and things like that, and that Mr.
7 Mosteller said that he would take care of every-
8 thing. The InterRoyal factory representative will
9 come in and say that he did indeed receive certain
10 documents from Mr. Mosteller requiring that items
11 be delivered to the Danville institution, which
12 we will refer to as the Danville Job, and that
13 tamper proofing was to be performed. On the other
14 hand, Mr. Kyber will testify that his sheets
15 prepared by Mr. Mosteller mention nothing about
16 this at all. As a matter of fact, it specifically
17 required tamper proof fastenings to be sent. This
18 is not the normal procedure.

19 Then we find that not only
20 did the factory rely on Mr. Mosteller, Mr. Kyber
21 also relied on Mosteller, and even the individuals
22 down in Danville.

23 The furniture rolled up, Mr.
24 Mosteller's crew unloaded a few items and
25 disappeared, and it was left to the people of

1 Danville to do all the installation. To take it
2 a step further, Mr. Phillips and Mr. Scarce will
3 testify as to their involvement in the install-
4 ation, the fact that there were never any samples
5 left, nor any samples used in selling the job.
6 And when the furniture arrived, it already had
7 tamper proofing in it. That testimony will be
8 very crucial. X'

9 Without belaboring the point
10 any further or going into the other Commonwealth's
11 witnesses, one of the investigators, Charlie
12 Bryant, will testify that after advising Mr.
13 Mosteller of constitutional rights, he asked Mr.
14 Mosteller to explain the tamper proofing, and he
15 said, to which "that was a particularly fat job".
16 How you tamper proof is you go down to Danville
17 and put aluminum putty in the screws, and that is
18 how it happened, and that he and Mr. McIntyre
19 were involved in that. Mr. McIntyre's testimony,
20 of course, that no such thing occurred. There is
21 no aluminum putty in any screws in Danville. And
22 as a matter of fact, all of the jobs, except for
23 a few beds, came equipped with the screws.

24 So the Commonwealth will prove that this
25 is larceny, larceny by false pretenses,

1 misrepresentation of facts, preexisting facts or
2 present facts and actual fraud and misrepresenta-
3 tion throughout the entire thing showing that
4 Mr. Mosteller, from the very beginning, from the
5 very first day, intended to defraud the Commonwealth
6 of Virginia through a very intelligent and
7 elaborate criminal scheme.

8 THE COURT: Mr. Spencer?

9 MR. SPENCER: I believe Your
10 Honor that the evidence will show that the
11 Commonwealth acquires this sort of property on
12 competitive bids and that the invitation to bid
13 was sent out, that there were numbers of bidders,
14 that the low bidder got the job, and that the
15 Commonwealth got the furniture that it bid for,
16 and paid the price that it had agreed to pay
17 in accepting the bid.

18 THE COURT: All right, call
19 your first witness.

20 MR. BARRY: Mr. Brooks.

21 MR. SPENCER: Judge, I would
22 like to move, before he calls this witness, to
23 exclude the witnesses, if I may.

24 THE COURT: All right, all
25 who are going to testify, retire to the hall, please.

1 Do not discuss your testimony with each other.

2 NOTE: At this point the
3 witnesses are excluded from the courtroom, with
4 the exception of Mr. Brooks.

5
6
7
8
9 IRVING J. BROOKS, JR., a
10 witness called by the Commonwealth, first being duly sworn,
11 testifies as follows:

12 DIRECT EXAMINATION

13 BY MR. BARRY:

14 Q Sir, would you please tell the Court
15 your name and occupation?

16 A My name, Irving, that's I-R-V-I-N-G,
17 Brooks, B-R-O-O-K-S, Jr., occupation, Assistant Director,
18 Division of Purchases and Supply, Commonwealth of Virginia.

19 Q How long have you been employed in
20 that position, sir?

21 A I became Assistant Director approximately
22 in October a year ago. I was Administrative Director from
23 1962 until that time.

24 Q And in that position, then, are you
25 responsible as the custodian of all official State records

Brooks - direct

12.

1 in Purchases and Supply?

2 A That is correct.

3 Q Sir, I would specifically like to direct
4 your attention to what I will have marked as Commonwealth's
5 Exhibit 1 for identification, and tell me if you would
6 to begin with, is this an official record maintained by the
7 Department of Purchases and Supply?

8 A This is a requisition that is received
9 by the Department of Purchases and Supply from the Department
10 of Mental Health and Mental Retardation.

11 Q Specifically what is a purchase
12 requisition, to your knowledge?

13 A A requisition is a request from a State
14 institution issued to the Department of Purchases and Supply,
15 requesting us to purchase certain merchandise for them.

16 Q This specific requisition, where is the
17 requesting institution?

18 A This is to be delivered to the Department
19 of Mental Health and Mental Retardation, Southern Virginia
20 Mental Health Institute, 382 Taylor Drive, Danville, Virginia,
21 24541.

22 Q What is the actual normal procedure
23 followed in a purchase requisition through your Division of
24 Purchases and Supply? What is its function?

25 A It is to --

Brooks - direct

13

1 MR. SPENCER: If Your Honor
2 please, I don't believe that we can go into the
3 general procedure. I think what is pertinent is
4 what procedure was followed in this instance.

5 THE COURT: Well I think he
6 can give the Court the benefit of general procedure,
7 and then bring it down to what happened here.

8 I will overrule your objection.

9 MR. SPENCER: Note my exception.

10
11 Q If you would, just explain to the Court
12 the normal function followed in a purchase requisition.

13 A If I understand you correctly, the
14 purchase requisition arrives in the Department of Purchases
15 and Supply. At that point it is assigned to a specific buyer,
16 depending upon the commodity, primarily. And the buyer uses
17 that as a guide in order to place bids to the public to
18 secure prices.

19 Q Now are all the items placed on this
20 requisition binding, or is that actually sent to the purchaser
21 or the buyer?

22 A All the items listed on this particular
23 requisition -- do you mean -- repeat that.

24 Q The items in this purchase requisition,
25 is that actually what the purchaser is requiring the Department

Brooks - direct

14.

1 of Purchases and Supply to find for them?

2 A This is what they are indicating they
3 would like to have.

4 Q I would like to direct your attention
5 to the last page of the requisition, the note that you see
6 on the last page of the requisition. Is that an important,
7 or is that a vital portion? Is that given the same weight
8 and credibility as any of the other requests in the
9 requisition by the Department --

10
11 MR. SPENCER: If Your Honor
12 please, I believe that Mr. Barry is leading the
13 witness. He is characterizing a particular portion
14 of it and I think that if he wishes to have it
15 characterized, he must ask the witness how he
16 would characterize it.

17 THE COURT: All right, objection
18 sustained.

19
20 Q Mr. Brooks, will you tell the Judge, if
21 you can, what, if any, notations that appear on the requisition,
22 are they part of the requisition itself?

23 A All right, this reads: "All items to
24 be delivered and installed, items to be tag marked by room
25 location, furniture to be constructed with tamper proof hardware,

Brooks - direct

15.

1 adequate amount of hand tools for use with hardware should
2 be included, furniture utilizing floor guides should be
3 accompanied with 10% extra hardware for replacement". That
4 would be a part of the bid.

5 Q All right, thank you, sir.

6
7 MR. BARRY: The Commonwealth
8 offers this as Commonwealth's Exhibit No. 1.

9 NOTE: At this point the
10 above referred to requisition is marked and filed
11 as Commonwealth's Exhibit No. 1.
12

13 Q Sir, the next logical step that follows
14 in your particular business, after a requisition has been
15 entered, is what?

16 A The preparation of the bid to be made
17 to the public sector.

18 Q I would like to show you Commonwealth's
19 Exhibit No. 2 for identification, and tell me if you have
20 ever seen a document like this in the normal course of
21 business in Purchases and Supply that you work for?

22 A Yes, this is the buyer's handwritten
23 instructions to the typist as to who the bid should go to,
24 and certain pertinent data that should go on it as a result
25 of his reviewing the requisition.

Brooks - direct

16.

1 Q And again, the institution involved
2 or the agency involved in this particular proposal is
3 what institution?

4 A Southern Virginia Mental Health Institution,
5 Danville, Virginia.

6 Q All right, thank you.

8 MR. BARRY: The Commonwealth
9 offers that as Commonwealth's Exhibit No. 2.

10 NOTE: At this point the
11 above referred to handwritten instructions are
12 marked and filed as Commonwealth's Exhibit No. 2.

13
14 Q After the authority for preparing
15 proposal to bid has been sent out, what is the normal business
16 reaction followed in your particular field and area?
17 What is prepared next?

18 A Well the bid would be prepared next.

19 Q When you say bid, what specifically
20 are you speaking of?

21 A The invitation to bid that is mailed
22 to the vendors, various and sundry vendors that handle
23 that commodity.

24 Q What is the purpose of the invitation
25 to bid?

Brooks - direct

17.

- 1 A To secure prices from the vendors.
- 2 Q Let me show you Commonwealth's Exhibit
- 3 No. 3 for identification and tell me if you have ever seen
- 4 this particular document in the normal course of business?
- 5 A Frequently.
- 6 Q All right, specifically what agency is
- 7 involved in this exhibit?
- 8 A Southern Virginia Mental Health Institution,
- 9 Danville.
- 10 Q You stated the purpose of the invitation
- 11 to bid is what?
- 12 A To secure prices against the items that
- 13 are desired to be delivered to the institution.
- 14 Q Is this sent to various vendors throughout
- 15 the area?
- 16 A Various vendors.
- 17 Q This particular bid, where was it sent
- 18 to?
- 19 A This particular one I have got in my hand?
- 20 Q Yes, sir, that particular one.
- 21 A This one is a bid received from Ginns
- 22 Southern.
- 23 Q When you say received, what do you mean
- 24 by that?
- 25 A It is their bid being returned to the

Brooks - direct

18.

1 Commonwealth and signed by Ginns Southern and Raymond J.
2 Kyber, K-Y-B-E-R, President.

3 Q When that particular document is returned
4 to the Division of Purchases and Supply, what occurs?

5 A It is publicly opened, read and analyzed
6 by the buyer, and then purchase orders are thereafter
7 written.

8
9 MR. BARRY: The Commonwealth
10 offers this as Commonwealth's Exhibit No. 3.

11 NOTE: At this point the above
12 referred to invitation to bid is marked and filed
13 as Commonwealth's Exhibit No. 3.

14
15 Q What, if any, format is followed in using
16 or analyzing each of the bids that is returned on a particular
17 job? Do you use any tabulation at all?

18 A Yes, they do use a tabulation sheet
19 which is usually a long spread sheet.

20 Q And the specific function involved in
21 the tabulation of bids is to determine what?

22 A Primarily to evaluate the low bid and
23 make notations on it why you do not accept the low bid
24 conceivably.

25 Q Let me show you Commonwealth's Exhibit No.4,

Brooks - direct

19.

1 and tell me if you have ever seen this document in the
2 normal course of business?

3 A Yes, I have.

4 Q Specifically what is that?

5 A This is a tabulation of bids.

6 It is a tabulation of bids which appears to have been
7 received from 8 vendors.

8 Q Eight vendors, then, you are saying
9 bid on the job?

10 A Let me make sure there are eight on
11 all pages. Yes, that's correct.

12 Q All right, and the specific function
13 of that is to add up all the bids and determine who the
14 winner is?

15 A Who the low bid is.

16 Q On this particular job, what do your
17 records indicate as the low bidder?

18 A It appears to be Ginns at \$60,532.95.

19 Q Now the significance of that being,
20 sir, if there were no other problems, what comes next in the
21 normal chain of business events out of the Purchases and
22 Supply agency?

23 A It would be a purchase order would be
24 generated.

25

Brooks - direct

20.

1 MR. BARRY: I move to offer
2 this as Commonwealth's Exhibit No. 4.

3 NOTE: At this point the above
4 referred to tabulation of bids is marked and filed
5 as Commonwealth's Exhibit No. 4.

6
7 Q Let me show you Commonwealth's Exhibit
8 No. 5 for identification. I would like for you to tell me
9 if you have ever seen a document of this nature before
10 in the normal course of business?

11 A This is a purchase order generated in
12 our office.

13 Q Would that specifically be generated
14 by the form that you just explained to the Court?

15 A It would have been generated after the
16 evaluation of that form. It would actually have been generated
17 from the bid itself.

18 Q Specifically what agency does that
19 purchase order delineate as having furniture going to?

20 A The Department of Mental Health &
21 Mental Retardation, Southern Virginia Mental Health Institute,
22 Danville, Virginia.

23 Q And the particular vendor that has been
24 awarded the contract is what?

25 A The vendor was Ginns Southern in the amount

Breaks - direct

21.

1 of \$60,532.95.

2 Q Now specifically, sir, that amount, is
3 that what you would call the award, the payment to be made
4 by the Commonwealth?

5
6 MR. SPENCER: I object, Your
7 Honor please. Again, he is leading the witness
8 by characterizing the document as opposed to
9 inquiring of the witness what the document purports
10 to be.

11 THE COURT: All right, Mr.
12 Barry, rephrase the question.

13
14 Q What is the significance of the amount,
15 if any, \$60,532.95?

16 A That represents the amount of the bid,
17 also the amount of the purchase order and the amount that,
18 without a change order being involved, would be paid to the
19 vendor.

20 Q And you said paid, who actually pays
21 the bill?

22 A The invoices are processed by the
23 institution through the State Comptroller.

24 Q The Commonwealth of Virginia?

25 A Uh huh.

CRANE - SNEAD & ASSOCIATES, INC.

COURT REPORTERS
1108 EAST MAIN STREET
RICHMOND, VIRGINIA
PHONE 648 - 2801

Brooks - direct

22.

1
2 MR. BARRY: The Commonwealth
3 offers the purchase order as Commonwealth's
4 Exhibit No. 5.

5 NOTE: At this point the above
6 referred to purchase order is marked and filed
7 as Commonwealth's Exhibit No. 5.

8 MR. BARRY: Thank you, Mr.
9 Brooks.

10 MR. SPENCER: I have no questions.

11 THE COURT: Thank you, Mr.
12 Brooks. You may step down.

13
14 WITNESS STOOD ASIDE.

15
16
17
18
19 RAYMOND JOSEPH KYBER, a witness
20 called by the Commonwealth, first being duly sworn, testifies
21 as follows:

22 DIRECT EXAMINATION

23 BY MR. BARRY:

24 Q Mr. Kyber, how are you this morning?
25 A Fine.

Kyber - direct

23.

1 Q Would you please tell the Court your
2 full name and your occupation back in approximately September
3 of 1976?

4 A My name is Raymond Joseph Kyber. I
5 was Vice President of Operations of the MS Ginn Company,
6 t/a Ginns Southern, in Richmond, Virginia.

7 Q Now specifically, sir, could you tell
8 the Court what, if any, function that position held, or
9 what did you actually do?

10 A Well, in addition to Chief Operating
11 Officer, I also handled all of the State of Virginia contracts,
12 or it was handled through my office, contracts on anything
13 dealing with State of Virginia or the municipalities in the
14 State of Virginia.

15 Q Now in your particular office, did
16 you have occasion to be in control of all the business messages
17 and information that you received, correspondence wide from
18 the State?

19 A Yes, sir.

20 Q And you were in fact custodian of all
21 the business records at that time?

22 A Yes.

23 Q All right, sir, I would like to show
24 you what we have previously introduced as Commonwealth's
25 Exhibit 3. I would like for you to tell me if you have ever

Kyber - direct

24.

1 had an occasion to see this document before?

2 A Yes, sir.

3 Q What specifically is Commonwealth's
4 Exhibit No. 3?

5 A It is a bid to the Southern Virginia
6 Mental Health Institute on numerous pieces of furniture to
7 be delivered and installed.

8 Q And that is the normal procedure that
9 is followed in your business?

10 A Yes.

11 Q And that particular form was, I take it,
12 prepared by you?

13 A Yes.

14 Q How would you prepare a bid of this
15 nature?

16 A Well, you would contact the manufacturer
17 or the manufacturer's representative, get a delivered price
18 or price for the product, and then determine your margin of
19 profit, submit those figures to the State of Virginia for
20 the opening of the bids.

21 Q Now in this particular case, can you
22 remember who you contacted concerning this particular bid?

23 A Yes, Mr. Mosteller.

24 Q What did you know of Mr. Mosteller at
25 that time?

Kyber - direct

25.

1 A Well he had been a manufacturer's
2 representative for the InterRoyal Corporation and I had
3 had numerous dealing with him on other bids throughout the
4 period of about two years..

5 Q So you had dealt with him consistently
6 in the past?

7 A That is correct.

8 Q What procedure was always followed in the
9 past concerning any bids awarded through the State for
10 InterRoyal products?

11 A Well it was always more or less an
12 11th hour type of situation where he would contact you or
13 you would have to contact him in order to get the bid prices
14 so that you could do your calculations to submit it to the
15 State.

16 Q Now specifically can you remember the
17 procedure that was followed on the, let's call it the Danville
18 job?

19 A The Danville job?

20 Q Can you remember what procedure you
21 followed with Mr. Mosteller?

22 A Well I recall, I believe, that we requested
23 the figures and it was called in to us. I do not remember
24 the exact specifics. Sometimes he would bring the figures
25 down on a piece of paper, but most of the time they were

Kyber - direct

26.

1 submitted by telephone, either I took them or one of my
2 associates took them.

3 Q So your actual involvement in the
4 transaction was minor?

5 A That's correct.

6 Q Let me show you Commonwealth's Exhibit
7 No. 6, three separate sheets, if I could. Would you explain
8 if these particular documents which I have just handed
9 you were involved in the Danville job?

10 A Yes.

11 Q Those were records maintained in the
12 normal course of business?

13 A That is correct.

14 Q Would you specifically, and I am
15 referring to the top sheet, explain what if anything those
16 numbers are?

17 A Well these are figures that were taken
18 down and each item is numbered, which is associated to the
19 number of the item on the State bid. These are the unit
20 costs for each of those items that we would bid on.

21 Q And who did you receive this from?

22 A These were received, I would assume they
23 were received by telephone.

24

25

MR. SPENCER: I object to that, 0

Kyber - direct

27.

1 Your Honor.

2 THE COURT: I sustain the
3 objection.
4

5 Q Sir, based on these figures that you
6 have before you, did you place a bid on the job?

7 A Yes, I did.

8 Q Did there come a time that you were
9 awarded this bid?

10 A Yes, we were.

11 Q And what, if any, procedure followed
12 the awarding of the bid from Mr. Mosteller in your office?

13 A After the award was made or we found
14 out we had received the award, we did not go to the bid
15 opening at this particular time. First of all, with that
16 many number of items, and as many dealers that bid on this,
17 it would have probably not been decided that day, or you
18 couldn't have gotten all the figures. We were informed by
19 Mr. Mosteller that we had received the bid, and he said
20 that he would submit to me the necessary documents to follow
21 it up, including the ordering of the materials from the
22 InterRoyal Corporation.

23 Q Now directing your attention, then, to
24 the remaining two pages that I have handed you, will you
25 tell the Court what, if anything, they are?

Kyber - direct

28.

1 A Well this is a form of interoffice
2 correspondence to me that Dave would submit to InterRoyal
3 giving them the specifications of the job which he would
4 do prior to our submitting a purchase order to InterRoyal.

5 Q Why did you rely totally on Mr.
6 Mosteller, if at all, in this case?

7
8 MR. SPENCER: Your Honor
9 please, he has not testified to that fact.

10 THE COURT: Objection sustained. 0

11
12 Q What procedure would you normally follow
13 in this case?

14
15 THE COURT: Ask him what he
16 did in this particular case.

17
18 Q What did you do in this particular case?

19 A In this particular case what did I do?

20 Q Yes, sir.

21 A I was given the document papers by Dave
22 and then he in turn, from those papers, and from what he gave
23 me to make up his purchase order, we submitted those to the
24 InterRoyal corporation and the other people for the
25 installation of the work.

Kyber - direct

29.

1 Q And these are the documents that you
2 presently hold in your hand, is that correct?

3 A That is correct.
4

5 MR. BARRY: The Commonwealth
6 would offer this as Commonwealth's Exhibit No. 6.

7 NOTE: At this point the above
8 referred to price sheets are marked and filed as
9 Commonwealth's Exhibit No. 6.
10

11 Q Now sir, did there come a time that
12 you received certain documents in the normal course of
13 business from the InterRoyal Corporation?

14 A The InterRoyal Corporation, after a
15 purchase order either through the representative or through
16 the company was submitted to them, they would send us what
17 they call an acknowledgment document that the order had been
18 in house.

19 Q Did you yourself have any direct
20 communication with InterRoyal?

21 A I did not have any communication with
22 InterRoyal.

23 Q All right, sir, now I would like to show
24 you, if I may, Commonwealth's Exhibit 7 through 11. Tell
25 me if these particular items were maintained by your office

Kyber - direct

30.

1 in the normal course of business.

2
3 MR. BARRY: I am showing the
4 witness Commonwealth's Exhibit No. 7, Commonwealth's
5 Exhibit No. 8, Commonwealth's Exhibit No. 9,
6 Commonwealth's Exhibit No. 10 and 11.

7
8 Q (Continuing) Tell me, if you can, what
9 if any significance do you place upon those documents.

10 A Well these documents are a copy of the
11 invoices plus the bill of lading for the transmittal of
12 the equipment to the location said.

13 Q These are records maintained in the
14 normal course of business by your agency?

15 A They were kept in the records.

16 Q Specifically what do you look at when
17 you receive an invoice?

18 A We check the quantity, the unit cost
19 that we were quoted for the product as to the breakdown
20 of the original cost that was bid to us, and the total.

21 Q All right, specifically would you tell
22 the Court whether or not you placed any great emphasis on
23 this job or not?

24 A On this particular job?

25 Q As far as time.

Kyber - direct

31.

1 A Time? Yes. It consumed quite a bit of
2 my particular time because of the breakdown between
3 installation, cost of the material and other invoices that
4 we were sent in reference to this job.

5 Q Did you have occasion to note on that
6 invoice the presence of Robinsons screws, if at all?

7 A No, I did not.

8
9 MR. BARRY: The Commonwealth
10 would admit the invoices received from InterRoyal
11 as Commonwealth's Exhibits 7 through 11.

12 NOTE: At this point the above
13 referred to five invoices are marked and filed
14 as Commonwealth's Exhibits Nos. 7 through 11.

15
16 Q Did there come a time that you received
17 additional correspondence from Mr. Mosteller concerning
18 this job?

19 A Yes, he sent me an additional breakdown
20 of the total cost for the installation, a bill for tamper
21 proofing or a request for a bill for tamper proofing, and
22 for abandoned samples.

23 Q Specifically I will show you Commonwealth's
24 Exhibits 12, 13 and 14. Would you tell the Court if you
25 have ever seen these documents before, and if they were received

Kyber - direct

32.

1 in the normal course of business?

2 A Yes,

3 Q What specifically are they?

4 A They are invoices submitted by Dave
5 Mosteller for the abandoned samples and the installation of
6 the job.

7 Q Take a look at those a little closer if
8 you would.

9 A They are invoices for abandoned samples
10 at the Southern Virginia Mental Health Institute and one for
11 sample furniture. Well two were originally sent. All right,
12 I understand. Two were originally sent of a memo of the
13 total of the samples. This one was submitted as an invoice
14 for the total of the samples.

15 Q Let me take the first two that you
16 showed me. These are sample invoices that you received?

17 A Yes, sir.

18

19 MR. BARRY: The Commonwealth
20 would have these introduced as Commonwealth's
21 Exhibits 12 and 13.

22 NOTE: At this point, the above
23 referred to sample invoices are marked and filed
24 as Commonwealth's Exhibits 12 and 13.

25

Kyber - direct

33.

1 Q Now the item that you have in your hand,
2 previously marked for identification as Commonwealth's
3 Exhibit No. 14 for identification, tell me again what if
4 any significance that has.

5 A This is the actual invoice received
6 to make up the purchase orders that were originally
7 created for the abandoned samples.

8 Q What, if any, significance is there
9 to your initials placed at the bottom?

10 A \$6,113.27. Originally this invoice
11 called, as you see, for \$7,263.00. When I completed my
12 computation of the total job, including the cost from
13 InterRoyal, the cost of the installation work, the cost of
14 two pieces of furniture which were not furnished by Inter-
15 Royal Corporation, and the tamper proofing invoice, the
16 total of all of these put together came to more than the
17 total of the job computed so that I had to call Dave and
18 tell him that he must have made an error on this bill.
19 And he in turn authorized me to deduct \$1149.73 from this
20 invoice in order to give us our margin of profit that we
21 had originally computed in the job.

22 Q Mr. Kyber, what, if any, contact did
23 you ever have with any abandoned samples?

24 A None.

25 Q Did you question this bill at all?

Kyber - direct

34.

1 A No.

2 Q Did you wonder where the samples were,
3 per chance?

4 A No.

5 Q Is there any explanation for that at
6 this time?

7 A Well, in our industry, it is more or less
8 known that manufacturers' representatives, in order to show
9 furniture to a particular client, that the manufacturer will
10 ship in equipment, leave it on the premises. And in doing
11 that, I understand they charge the manufacturer's representa-
12 tive sample account, and in a lot of cases they leave that
13 particular product on the premises to complete the job.

14 Q So this seemed perfectly logical to you?

15 A It seemed logical under normal circumstances
16 in our industry.

17 Q Directing your attention now to Common-
18 wealth's Exhibit 15, will you tell the Court what, if any
19 significance this document has, if at all?

20 A This is the check which was sent from
21 the Ginn Company whose headquarters are in Washington, D.C.,
22 to Dave Mosteller to pay for this particular invoice.

23

24

25

MR. BARRY: The Commonwealth
would now offer the final bill for samples as

Kyber - direct

25

1 Commonwealth's Exhibit 14, and this will be 15,
2 which is the check for the abandoned samples.

3 NOTE: At this point the above
4 referred to invoice is marked and filed as
5 Commonwealth's Exhibit No. 14, and the above
6 referred to check is marked and filed as Common-
7 wealth's Exhibit No. 15.

8
9 Q Now sir, did there come a time that you
10 received, or you had occasion to receive, during the normal
11 course of business, any billings concerning installation?

12 A Yes.

13 Q Let me show you Commonwealth's Exhibit
14 16 for identification and tell me if you can recognize this
15 document.

16 A Yes, this is the invoice for the installa-
17 tion of the furniture as specified in the contract.

18 Q And again, who was the check to be made
19 payable to?

20 A Royal Installations.

21 Q Do you have any idea who Royal Installations
22 is?

23 A I knew that Royal Installations was Mr.
24 Mosteller's company.

25 Q Let me show you Commonwealth's Exhibit 17

Kyber - direct

36.

1 for identification. Again, do you recognize that document?

2 A Yes. This is the invoice for the two
3 items of furniture which were not supplied by the InterRoyal
4 Corporation which included a barber chair and a hair dryer.

5 Q Both of these records were maintained
6 in the normal course of business by your agency?

7 A Yes, sir.

8
9 MR. BARRY: The Commonwealth
10 would offer those as Commonwealth's Exhibits 16 and
11 17.

12 NOTE: At this point the above
13 referred to invoices are marked and filed as
14 Commonwealth's Exhibits 16 and 17.

15
16 Q Finally, did there come a time that you
17 paid for any of these items, sir, concerning installation?

18 A None of these items were paid for until
19 we received a release from the institution that the job
20 was complete.

21 Q Once receiving that, would you normally
22 pay?

23 A I then authorized payment.

24 Q Let me show you Commonwealth's Exhibit
25 18. Would you tell the Court what, if anything, that is, sir?

Kyber - direct

37.

1 A This is also a check from our home
2 office payable to Royal Installation for the installation
3 work.

4 Q On the Danville job?

5 A That's correct.

6
7 MR. BARRY: I would move this
8 as Commonwealth's Exhibit No. 18.

9 NOTE: At this point the above
10 referred to check is marked and filed as
11 Commonwealth's Exhibit No. 18.

12
13 Q Did you have occasion at any time to talk
14 to Mr. Mosteller about tamper proofing?

15 A Not particularly.

16 Q What, if any, understanding did you have
17 of tamper proofing on the Danville job?

18 A To be honest with you, I did not really
19 know what tamper proofing was involved. I assumed that,
20 dealing with the InterRoyal Corporation and their representa-
21 tive, I felt that they were a reputable company and that
22 whatever was specified or called for on the job, they would
23 take care of. If there were any complications, if the
24 institution would notify us of those, we in turn would go back
25 to the InterRoyal Corporation and have them take care of the

Kyber - direct

38.

1 problem.

2 Q All right, did there come a time that
3 you received any notification concerning installation of
4 tamper proof hardware?

5 A Again, in the original instance, after
6 the award was made and I was given the necessary documents
7 for the total of the job from Mr. Mosteller, there was an
8 invoice or a letter from a Dadson Enterprises in Virginia
9 Beach stating that there would be a \$5,000 charge for
10 tamper proofing the furniture.

11 Q Let me show you Commonwealth's Exhibit
12 No 19 for identification. Tell me if you recognize this
13 correspondence.

14 A Yes. This was the original document
15 that was submitted to me from which we created a purchase
16 order for this amount.

17 Q Now was this maintained in the normal
18 course of business in your files?

19 A Yes.

20 Q Specifically, what, if any, significance
21 do you place upon this letter?

22 A Only that it specifies that there would
23 be a \$5,000 charge for tamper proofing and it was included in
24 the total charge that we were quoted originally on the job.
25

Kyber - direct

39

1 MR. BARRY: The Commonwealth
2 would offer that as Commonwealth's Exhibit 19.

3 NOTE: At this point the
4 above referred to letter is marked and filed as
5 Commonwealth's Exhibit No. 19.

6
7 Q Did there come a time that you received
8 a final completion letter from the same agency?

9 A I received another letter.

10 Q Commonwealth's Exhibit 20 for identifica-
11 tion, I would like to show you at this time, and tell me if
12 you have ever received such a letter?

13 A Yes.

14 Q What, if anything, is Commonwealth's
15 Exhibit NO. 20?

16 A It is a letter stating that for our
17 purchase order issued 11/23 that the job had been completed
18 and for the submission of our remittance for the purchase order.

19 Q Again, I note your signature on the bottom.
20 What, if anything, is that?

21 A That also is an authorization to my home
22 office to pay this bill.

23
24 MR. BARRY: The Commonwealth
25 would offer that as Commonwealth's Exhibit 20.

Kyber - direct

40.

NOTE: At this point the above referred to letter is marked and filed as Commonwealth's Exhibit No. 20.

Q After receiving such a letter, would you then normally, in the normal course of business, simply forward on the request for final payment?

A Yes.

Q Let me show you Commonwealth's Exhibit 21 for identification, and tell me what, if anything, this item is?

A This is also a check from the Ginn Company for \$5,000 paying for the authorization of that invoice.

Q Again, this is payable to Eastern Enterprises?

A That is correct.

MR. BARRY: Thank you, sir.

THE COURT: What does PO mean? Your remittance in accordance with your P.O. will be appreciated? What does P.O. mean?

THE WITNESS: Purchase order.
That was a purchase order that we received.

THE COURT: Well it could have

Rybar - direct

41.

1 been police officer or probation officer, so I
2 didn't know.

3 Thank you.

4 MR. BARRY: I would like that
5 marked as Commonwealth's Exhibit No. 21.

6 NOTE: At this point the above
7 referred to check is marked and filed as Common-
8 wealth's Exhibit No. 21.

9
10 BY MR. BARRY: (Continuing)

11 Q Finally, sir, the final document which
12 I will show you, Commonwealth's Exhibit 22, I would like for
13 you to tell me what, if any, significance you place upon
14 this document.

15 A Yes, these are the invoices we received
16 from the InterRoyal Corporation for their individual costs
17 of each of the items that were delivered by them to the
18 institution.

19 Q All right, and again, these are maintained
20 in the normal course of business in your office file?

21 A That is correct.

22 Q And the significance being that when
23 you received this, if you received all the items, you would
24 then pay the bill?

25 A That is correct.

Kyber - direct

42.

1 Q And in this particular case, the final
2 payment to InterRoyal was in what amount?

3 A \$42,029.85.

4
5 MR. BARRY: I offer this as
6 Commonwealth's Exhibit 22.

7 NOTE: At this point the above
8 referred to invoices are marked and filed as
9 Commonwealth's Exhibit No. 22.

10
11 Q Sir, on a job of this nature, what, if
12 any, markup would you normally compute for your particular
13 agency?

14 A Since we do not do --

15
16 MR. SPENCER: If Your Honor
17 please, I think that as to this job, we are limited
18 to what he calculated for this job.

19 MR. BARRY: Certainly, I agree.
20 I will rephrase the question.

21
22 Q What, if any, calculation did you place
23 upon the Danville job?

24 A We calculated a little under 4%.

25 Q A little under 4% of the entire amount that

Kyber - direct

43.

1 you bid, is that correct?

2 A That's correct.

3
4 THE COURT: 4% of the sixty
5 thousand some odd dollars?

6 THE WITNESS: That is correct.

7 MR. BARRY: Thank you, sir.
8
9

10 CROSS-EXAMINATION

11 BY MR. SPENCER:

12 Q Mr. Kyber, would you tell us, please,
13 as close as you can, with just a quick calculation, what
14 your markup was on this job?

15 A 4%, under 4%.

16 Q Well you say under 4, and the job was
17 \$60,532.95?

18 A That is correct.

19 Q So it would have been something less
20 than \$2425?

21 A That is correct.

22 Q Now the documents that you have just
23 gone through, Exhibits 6 through 22, those documents that
24 were prepared by Ginn, the checks, the bids, the internal
25 invoices or requisitions to pay, they were the only things

Kyber - cross

44.

1 that were prepared by Ginn in this case, weren't they?

2 A That is correct.

3 Q Now what would that be, some five pieces
4 of paper?

5 A You mean total pieces of paper?

6 Q Yes.

7 A No, in this particular case I would
8 say that it was close to a hundred. We are talking about
9 62 items to bid, and there were numerous pieces of paper,
10 as you know, from InterRoyal.

11 Q But of all the pieces of paper on the
12 bid, they were the itemizations, the proposal for bids,
13 and you just filled in the amount that you charged per item?

14 A That is correct.

15 Q And then someone received the information
16 by telephone, and perhaps in this case you did?

17 A No, I did not receive the information
18 by phone. That is not my handwriting on that original
19 document.

20 Q I see. So you don't know who received it?

21 A One of my associates must have taken it.

22 Q And then you don't know who it came from?

23 A Well it came from Mr. Mosteller.

24 Q Well you say that because that is where
25 it usually came from?

Kyber - cross

45.

1 A That is correct.

2 Q But in this case you didn't take it,
3 so you don't know where it came from?

4 A Well that might be true.

5 Q Well you prepared, I believe, three
6 checks. I think we have offered three checks in evidence?

7 A I don't recall.

8 Q Three or four?

9 A It would be one to InterRoyal, one to
10 Royal Installations, one to Dadson and one, there was
11 another one to Royal Installations, both for the two pieces
12 of furniture plus the installation costs and the abandoned
13 furniture costs.

14 Q So perhaps four checks?

15 A Four or five checks.

16 Q And the only piece of paper that you
17 actually prepared from scratch was the internal requisition
18 for payment that you sent when you received the request for
19 final payment from Dadson?

20 A No, the purchase order to the InterRoyal
21 Corporation which was made from the information given after
22 the bid had to be submitted to InterRoyal. That was, I believe,
23 a six or seven page detailed purchase order.

24 Q Well now wasn't that just taken directly
25 from the proposal?

Kyber - cross

46.

1 A That is correct.

2 Q And normally what you did is take the
3 sheet from the proposal that included what you got and you
4 would X out the items on that sheet that you didn't get and
5 attached them to your --

6 A But I had to recalculate all 62 items
7 as to the cost to InterRoyal, the total cost for the
8 installation, the total cost for the abandoned furniture,
9 and the total cost for tamper proofing in order to come up
10 with an individual cost. And I believe there is an analytical
11 sheet showing all of this. And that is how I found out that
12 Mr. Mosteller had overcharged us the \$1176 before I submitted
13 the paper work to go to Washington to pay the bill.

14 Q When now you say you found out Mr.
15 Mosteller had overcharged you. Actually what you found out
16 was that the invoices included eleven hundred and some
17 dollars worth of things that had not been delivered by Inter-
18 Royal?

19 A I don't recall that. The figures were
20 given to me by InterRoyal's representative, who was Mr.
21 Mosteller. And I dealt with Mr. Mosteller and not with the
22 InterRoyal Corporation.

23 Q Well you already testified that you don't
24 know who the figures were given to you by, that you didn't
25 get them, someone else got them?

Kyber - cross

47.

1 A All right. But I did talk to Mr.
2 Mostellar at the conclusion of the bid.

3 Q I understand that.

4 A And the job, in order to come up with
5 these figures.

6 Q All right, now my question is: The
7 eleven hundred and some dollars, I believe on direct
8 testimony you said this was because of some items that were
9 not delivered?

10 A But these figures were taken off of a
11 Royal Installation invoice, not off an InterRoyal invoice.

12 Q I understand that, I understand that.
13 But it was for items that weren't delivered and therefore
14 the State wasn't going to pay you for them?

15 A That isn't correct.

16 Q That is not correct?

17 A That isn't what I was told. The figures
18 were incorrect for the total cost of the job, and Mr.
19 Mostellar gave me permission to take off that \$1176 from
20 his particular invoice.

21 Q Now you took it from the amount that
22 had been set aside for tamper proofing?

23 A Not for tamper proofing.
24 sorry, for samples and installation?

25 Q I'm
 A No, off of the sample account.

Kyber - cross

42.

1 Q Off of the sample account?

2 A That is correct.

3 Q So you reduced the amount, then, that
4 had been built into your bid for samples?

5 A That's correct.

6 Q Now going back to Exhibit 12, this
7 purports to be a copy of it, that is the memo you received
8 from Mr. Mosteller very early in the proceedings?

9 A That is correct. That was in order to
10 create a purchase order to him for this amount.

11 Q All right, sir. Now the body of that,
12 will you read the body of that to us, please?

13 A It says balance on abandoned sample
14 furniture utilized in selling Southern Virginia Mental Health
15 Institution.

16 Q All right, now it doesn't say that any
17 furniture was left at Southern Mental Health Institute,
18 does it?

19 A You are saying that.

20 Q Well I am asking you.

21 A It says balance of abandoned furniture
22 utilized in selling the job.

23 Q Utilized in selling. It doesn't say
24 where the abandoned furniture was left, does it?

25 A No.

Kyber - cross

49.

1 Q Now you testified a moment ago that it
2 was customary in your business for sales representatives
3 to have samples and to utilize them in selling furniture?

4 A That is correct.

5 Q And the fact that in your business a
6 manufacturer's representative or a sales person who knows
7 that at some point in the future the State of Virginia is
8 going to need to furnish a certain facility will way in
9 advance of any of the requisitions and bidding process will
10 have utilized the samples to show the potential purchaser
11 what he had and how it could fit his needs, and what he
12 might be able to use that this particular representative
13 sold?

14 A That is my understanding.

15 Q Now then, sir, the invitation to bid in
16 this case required that the furniture be set up and installed?

17 A That was my understanding.

18 Q And did Ginns normally have a crew to
19 go out around the State to set up and install this furniture?

20 A No, sir, we would not take on any
21 projects outside of the City of Richmond where it required
22 any installation work because we did not have the facilities
23 nor the crew in order to handle that type of job.

24 Q Then in order for you to bid, someone
25 would have to agree that they would undertake the installation?

Kyber - crose

50.

1 A That is correct.

2 Q And that is true in all jobs that require
3 installation, is it not?

4 A That is correct.

5 Q So this did not cause you any great
6 concern, either, that there was a figure in there for
7 installation?

8 A No, sir.

9 Q Were you familiar, sufficiently familiar
10 with InterRoyal to know whether, when a requisition was made
11 to them for furniture that included tamper proofing, to know
12 whether this was always on the furniture at the time it
13 was delivered?

14 A No, sir. I'm not a professional in the
15 furniture end of our business. Again, I only took on this
16 particular job because it was assigned in Richmond and I
17 again, I use the word assumed, that I was dealing with a man-
18 facturer and a manufacturer's representative that knew the
19 specifications. And normally they have the specifications
20 in the job.

21
22 MR. SPENCER: All right, thank
23 you.

24
25 REDIRECT EXAMINATION

Kyber - redirect

51.

1 BY MR. BARRY:

2 Q Mr. Kyber, the defense made reference
3 to Commonwealth's Exhibit 14. Let me show you Commonwealth's
4 Exhibit 14. If you would, direct your attention --

5 MR. SPENCER: Excuse me a
6 moment. The defense made no reference to 14.
7 My reference was to 12.
8

9 THE COURT: I think it was.

10 MR. BARRY: You spoke of the
11 credit authorized by David Mostellar, the
12 reduction, and that is on Commonwealth's Exhibit
13 14.

14 THE COURT: That was for the
15 samples?

16 MR. BARRY: That's correct,
17 that is what it was.

18 THE COURT: Yours was on the
19 samples, Mr. Spencer?

20 MR. SPENCER: Yes, sir, but
21 mine was 12, Your Honor. I have no quarrel with
22 him referring the witness to that, but this is
23 the one I referred him to, 12, and he is referring
24 him to 14.

25 THE COURT: All right, he only

Kyber - redirect

52.

1 went to 12, Mr. Barry.

2

3 Q Now I must have been confused. What, if
4 any, explanation was there for this \$1,149 credit?

5

6 THE COURT: I fully understand
7 that. He added it up and the bill was too high,
8 so he called him and said, "your bill is too high",
9 and he said cut it.

10

11 Q On this particular item, if you would
12 examine it, where does it say that these items were shipped to?

13 A These were sample furniture for the
14 Danville Southern Virginia Mental Health Institute.

15 Q So what is your understanding of the
16 shipped to?

17 A I would assume that they went there.

18

19 MR. BARRY: Thank you. I
20 have no further questions.

21 THE COURT: Any further
22 questions of this witness?

23

MR. SPENCER: No questions.

24

THE COURT: I have a few.

25

Exactly what is your job, sir? You are

Kyber -

53.

1 just a representative?

2 THE WITNESS: No, sir, I was
3 the Chief Operating Officer of the Richmond
4 Division of the Ginn Company.

5 THE COURT: Well what is the
6 Ginn Company? I am not familiar with them.

7 THE WITNESS: Well the Ginn
8 Company is an office products dealer which has a
9 main office in Washington, D. C.

10 THE COURT: Do you all manu-
11 facture any furniture?

12 THE WITNESS: We do not
13 manufacture furniture. We are what you would call
14 a dealer or a retail or commercial dealer in
15 office products and office furniture.

16 THE COURT: How did you actually
17 bid on this job, because you are in the furniture
18 business?

19 THE WITNESS: Because we are
20 in the furniture business and we have a representa-
21 tive of the InterRoyal Corporation as one of our
22 lines.

23 THE COURT: Oh, you represent
24 InterRoyal?

25 THE WITNESS: We have several

1 manufacturers of furniture that we sell. When I
2 say represent, we sell their product and they go
3 through dealers in order to bid. They do not
4 bid direct.

5 THE COURT: In other words
6 the State doesn't go directly to the manufacturer,
7 they go to the dealer?

8 THE WITNESS: That is correct.

9 THE COURT: And you are one
10 of such dealers?

11 THE WITNESS: That is correct.

12 THE COURT: Your company
13 manufactures no --

14 THE WITNESS: Well they have a
15 small manufacturing division that makes some
16 conference tables, but that's all. They are not
17 principally in the manufacturing of office
18 furniture.

19 THE COURT: When it came to the
20 invitation to bid, you got one?

21 THE WITNESS: Yes, sir.

22 THE COURT: So you bid on it,
23 but in order to get your figures, you had to go
24 to InterRoyal?

25 THE WITNESS: No, in this case

Kybar

55.

1 you don't go to InterRoyal because Mr. Mostaller
2 was their representative in the Virginia area.
3 In fact Mr. Mostaller, from what I understood,
4 wouldn't have bid to our parent company because
5 it was in the Washington, D. C. area. He would not
6 have received credit for that sale. So all the
7 bids went through the Richmond office, and that is
8 how we became involved here in Richmond.

9 THE COURT: So it would have to
10 be another step, I will put it proper this time,
11 I hope, you went to InterRoyal's representative
12 in Virginia?

13 THE WITNESS: That is correct.

14 THE COURT: Who happened to be
15 Mr. Mostaller?

16 THE WITNESS: That is correct.

17 THE COURT: Then you got the
18 information from him to make the bid, what he
19 could furnish?

20 THE WITNESS: That is correct.

21 THE COURT: Pursuant to that
22 bid, you presented one to the State that was
23 accepted?

24 THE WITNESS: That is correct.

25 THE COURT: After that, there

Kyber -

56.

1 was some question about samples. I don't quite
2 understand what the samples are. I know what a
3 sample is, I don't mean that. But how do you all
4 manage it in the industry?

5 THE WITNESS: Well within the
6 industry, if a manufacturer wants to sell their
7 product, they in turn, because of the specifications
8 to make sure that everything is what they want,
9 are sent to a purchasing department in some cases,
10 which I know of samples that were sent to the
11 State Purchasing Department here, examined on our
12 premises, and then sent back to the manufacturer
13 after that time. I know of a piece of furniture
14 right here in the City of Richmond that was here
15 for several years and no one picked it up, and we
16 had to come and get it and send it back to the
17 manufacturer.

18 THE COURT: That is not the
19 extra furniture for the Judge's Chambers, is it?
20 We have been looking for it for three years.

21 THE WITNESS: No, sir. But it
22 is a practice in the industry. If you wanted a
23 sample, to see if the qualification of that specifica-
24 tion were correct, it would be sent in, and also
25 looked at along with other manufacturers' products

Kybar

57.

1 to determine if that is the one you want to go
2 with.

3 THE COURT: But that is usually,
4 the sample is usually sent back to the manufacturer?

5 THE WITNESS: Not in all cases.
6 For example, they will have what we call conventions
7 or floor shows and they will ship the furniture
8 in there. That furniture is usually sold to some
9 dealer at a lesser price for him to take it off
10 their hands in that city rather than ship it back
11 to the manufacturer. But those samples are charged,
12 I understand, to the representative's account,
13 and he runs an account with that.

14 THE COURT: Now on the invoices
15 that were sent to you by, I assume, Mr. Mosteller,
16 representing InterRoyal Corporation for samples --

17 THE WITNESS: That is correct.

18 THE COURT: Now where was
19 that money to come from?

20 THE WITNESS: Where was it to
21 come from? It came in the original bid price.

22 THE COURT: It was in the
23 original bid price?

24 THE WITNESS: That is correct.
25 It was part of the total cost that we were given

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1 for that product.

2 THE COURT: In other words the
3 total bid you submitted included some ramping?

4 THE WITNESS: At the time that
5 we got the bid, we did not know what we were going
6 to be charged for. We did not know the allocation
7 of installation or the allocation of the temper
8 proofing. We didn't know all of that. What was
9 going to come up until we received the bid.

10 THE COURT: In other words
11 you would receive all the money from the State
12 for InterRoyal, the \$60,532, somewhere. In other words,
13 you would receive all of that from the State and
14 then in turn you would submit to InterRoyal?

15 THE WITNESS: No, we would
16 submit to each of the breakdowns that we were given
17 by Mr. Kestall which tallied that is what that
18 we were originally bid for each single item.

19 THE COURT: And so in determining
20 that, you would receive the money from the State,
21 and in turn pay your bill to InterRoyal as you
22 were invoiced from InterRoyal?

23 THE WITNESS: InterRoyal, Mr.
24 Kestall, Royal Installers, whatever invoice
25 tallied up the original total cost that we were told

Kybar -

59.

1 that that job would cost us.

2 THE COURT: But you got no more
3 than the \$60,500 some odd dollars?

4 THE WITNESS: That is correct.

5 THE COURT: Now on your invoice
6 to the State, you would not take into consideration
7 the installation because that didn't make any
8 difference to you, did it?

9 THE WITNESS: That is correct.

10 THE COURT: The sample really
11 made no difference to you?

12 THE WITNESS: That is correct.

13 THE COURT: And you also find
14 one mistake of eleven hundred and some odd dollars
15 in sample material?

16 THE WITNESS: Now, as sample
17 material. I found an error in the total of all
18 of the combined invoices both from the manufacturer
19 from Royal Installations and Dadson Corporation.
20 All of those totaled together did not come up
21 to the original estimate that I was given for the
22 total job. They did not specifically specify
23 any particular part of it, and it was the installer
24 who told me what invoice to take that off of.
25 If he had told me to take it off of the Royal's
invoice, I would have done that.

Kyber -

60.

1 THE COURT: What did he tell
2 you to take it off of?

3 THE WITNESS: I took it off
4 of the one for the abandoned samples. That was the
5 one that he told me to take it off of.

6 THE COURT: I get confused when
7 you say abandoned samples.

8 THE WITNESS: Well that is a
9 term that they are using here.

10 THE COURT: When you say
11 abandoned, that means just leaving it, but they
12 still charge you for abandoned samples?
13 That is in the invoice price?

14 THE WITNESS: We were charged
15 that, yes, sir.

16 ✓THE COURT: You have no knowledge,
17 personal knowledge, of what was received by the
18 State from the manufacturer?

19 THE WITNESS: As long as the
20 State considers the job complete, according to
21 our original bid, and they say that the job is
22 complete, we then process our invoices for payment
23 in order to pay our vendors.

24 THE COURT: You would have
25 been invoiced from Mosteller or InterRoyal?

Kyber -

61.

1 THE WITNESS: That is correct.

2 THE COURT: And in turn you
3 would invoice the State?

4 THE WITNESS: (Nodding head
5 indicating an affirmative answer)

6 THE COURT: And in turn, the
7 State would send you the money back and then you
8 would pay?

9 THE WITNESS: No, we would not
10 pay the invoices until we had billed the State
11 knowing that the job was complete.

12 THE COURT: You are more or
13 less just an agent to place the order, is that
14 correct?

15 THE WITNESS: That is correct,
16 we are an agent.

17 THE COURT: As far as the
18 manufacture of the goods, placing the goods,
19 installation, you have nothing to do with that?

20 THE WITNESS: If there had been
21 any problems it would have been up to the agency
22 to notify us, and we in turn would go back to the
23 manufacturer or the manufacturer's representative
24 to correct the mistake, and they could, if they
25 wanted to, they could hold up the payment until the

Kyber -

62.

1 correction is made, but we would see that that
2 would be taken care of because as an agent, we
3 would be indemnified by the manufacturer.

4 THE COURT: Do you have some
5 kind of rules in the trade or something or other
6 where you don't deal directly with the manufacturer,
7 you go through dealers?

8 THE WITNESS: Do we have such
9 a rule?

10 THE COURT: Not you, your
11 company.

12 THE WITNESS: Well I think it
13 is common practice that manufacturers go through
14 dealers in order to give them the opportunity,
15 in the commercial sector, to make a reasonable
16 profit.

17 THE COURT: In other words,
18 your agreement with InterRoyal is that InterRoyal
19 will not sell direct?

20 THE WITNESS: No, we don't
21 have such an agreement with InterRoyal. I think
22 that is just common knowledge that that is the
23 way it is done. They don't do it.

24 THE COURT: You don't have a
25 written one, just kind of an understanding?

Kyber-radirect

63.

1 All right, I understand.

2 Gentlemen, do you all have
3 any further questions? I wanted to be able to
4 follow all of the terminology that you use
5 in the purchase industry.

6 MR. SPENCER: Judge, you
7 touched on a couple of things that I think I better
8 pursue a little further.

9
10
11 RECROSS-EXAMINATION

12 BY MR. SPENCER:

13 Q On the last item, you say you had no
14 agreement with InterRoyal. Are you aware that the State
15 had a rule that they would not deal directly with the
16 manufacturers?

17 A No.

18 Q You are not aware of that?

19 A No.

20 Q So you don't know whether that is a fact
21 or not?

22 A No.

23

24 THE COURT: It is probably
25 a mutual understanding with big buyers.

1 MR. SPENCER: I think it will
2 come out later, Your Honor, as to the source of
3 the rule.

4
5 Q The amount shown on your bid to the
6 State was the total of \$60,500 and some dollars, and that
7 included everything that the State said it wanted in the
8 bid, invitation to bid?

9 A That's correct.

10 Q Now when the State notified you that
11 it had what it had contracted for, then you would ask the
12 State to pay you?

13 A That is correct.

14 Q And then you would take the \$60,500
15 and you would pay a portion of it to InterRoyal based on an
16 invoice that they would send you, in this case \$42,000 plus?

17 A Right.

18 Q And you would pay a portion to someone
19 else for installation?

20 A (Nodding head indicating an affirmative
21 answer)

22 Q And a portion for tamper proofing,
23 which was required under the contract?

24 A (Nodding head indicating an affirmative
25 answer)

Kybar - racross

65.

- 1 Q And a portion for samples?
- 2 A (Nodding head indicating an affirmative
3 answer)
- 4 Q And actually you don't know whether the
5 installation was difficult or easy, expensive or inexpensive?
- 6 A (Shaking head indicating a negative
7 answer)
- 8 Q You don't even know what the tamper
9 proofing is, I take it?
- 10 A That is correct.
- 11 Q And you have no idea whether any
12 samples were specifically left at Danville or at the State
13 Department of Purchases, or anywhere else?
- 14 A That is correct.
- 15 Q But among other things that you took
16 from this \$60,500, you took approximately \$2400 for Ginas?
- 17 A That is correct.
- 18 Q Now you were asked by the Judge a
19 question that caused you to answer, "if there were any
20 problems on the job, the agency would notify us and we
21 would go back to the manufacturer or the manufacturer's
22 representative".
- 23 Now in this case, is it not a fact that
24 any time you had a problem, you would go to Metteller?
- 25 A That is correct.

Kyber - recross

66.

1 Q And Mosteller was the one that had
2 arranged to put you in a position to meet all of the
3 requirements of the bid request proposal?

4 A That is correct.

5

6 MR. SPENCER: That's all.

7

8

9 RE-REDIRECT EXAMINATION

10 BY MR. BARRY:

11 Q So what you are saying in response to
12 the defense's questioning is that throughout the entire
13 transaction, you relied on Mr. Mosteller?

14 A Yes, sir.

15

16 MR. SPENCER: He has already
17 stated he did about 7 pieces of paper.

18 THE COURT: All right, any
19 further questions, gentlemen?

20 MR. BARRY: No, sir.

21 THE COURT: Thank you, sir.
22 You may step down.

23

24

WITNESS STOOD ASIDE.

25

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MR. BARRY: Could we have a
short recess?

NOTE: At this point a brief
recess is had, after which the hearing is resumed,
viz:

THE COURT: Next witness.

MR. BARRY: Frank McEntee.

FRANCIS X. McENTEE, JR., a
witness called by the Commonwealth, first being duly sworn,
testifies as follows:

DIRECT EXAMINATION

BY MR. BARRY:

Q Sir, would you tell the Judge your
name and occupation, please?

A My name is Francis X. McEntee, Jr.
I am employed in the Quotations Department of InterRoyal
Corporation.

THE COURT: What is your
name, please?

McEntee - direct

68.

1 THE WITNESS: Francis X. McEntee,
2 Jr., M-C-E-N-T-E-E.

3 THE COURT: And you are with
4 the InterRoyal Corporation?

5 THE WITNESS: Yes.

6
7 Q What specific function do you perform
8 for the InterRoyal Corporation?

9 A My function is to work with the factory
10 and with the salesmen in developing prices for competitive
11 bids, and if we receive the award, to process the orders
12 through to the plant.

13 Q You speak of orders. Do you have some
14 expertise in receiving or handling of orders in your job?

15 A Yes, sir.

16 Q Specifically what do you do, if at all,
17 about orders?

18 A Well if we receive a document, I would
19 have to break out the items to the various plants, what they
20 are to supply at what price.

21 Q Who or where would you receive documents
22 from?

23 A That could come from a vendor or an
24 end user.

25 Q And specifically in a factory type

McEntee - direct

69.

1 arrangement, you would receive these documents?

2 A Yes, sir.

3 Q I would like to direct your attention
4 back to around September of 1976. Were you then employed by
5 InterRoyal Corporation?

6 A Yes, I was.

7 Q Were you per chance performing the same
8 duties?

9 A Same functions.

10 Q Let me show you Commonwealth's Exhibit
11 23, for identification. Tell the Court what, if anything,
12 this is.

13 A This is a purchase order from Ginns
14 Southern written up on an InterRoyal purchase order form.

15 Q And what is the date, sir?

16 A 11/16, I believe, '76, but that's ripped
17 off.

18 Q Now what is this order, exactly?

19 A This is a two-page form with a carbon
20 in between. The top white sheet, you can see here, is the
21 form that would be sent to us. There is a yellow sheet that
22 was behind it. That is the salesman's copy of that.

23 Q In the normal course of business, who
24 retained that?

25 A That is the salesman.

McEntee - direct

70.

1 Q Now this particular job is the Southern
2 Virginia Mental Health Institute, is that correct?

3 A Yes, it is.

4 Q How many order blanks would you receive
5 on one job?

6 A One.

7 Q Now the documents that are underneath
8 the facing page, what if anything are they?

9 A That looks like a photocopy of a bid.

10 Q And from this bid, what if anything,
11 did the factory do?

12 A The factory would have to manufacture,
13 in accordance with the instructions given on both the top
14 cover sheet here and my cover letter to them.

15 Q Specifically in this case, would you
16 refer to the middle of the top sheet? In there it specifically
17 states tamper proof hardware only on, and then it lists
18 certain items. What, if any, explanation can you give to the
19 Court concerning tamper proofing on the order you have in
20 your hand?

21 A What I would have to do is notify the
22 plant that they have to supply this type of hardware on
23 these particular items or in that location.

24 Q That is a specific notation?

25 A That is a specific note that we would get.

McEntee - direct

71.

1 Q On this particular job, what do you have
2 concerning how many items were actually tamper proofed?

3 A From this document I have nothing at all.
4 I would need another document.

5 Q What is that?

6 A It would be an invoice.

7 Q Fine, I understand.

8 Is this document maintained in the
9 normal course of business for InterRoyal?

10 A Yes, sir.

11
12 MR. BARRY: The Commonwealth
13 would offer this as Commonwealth's Exhibit 23.

14 NOTE: At this point the above
15 referred to purchase order with attachments is
16 marked and filed as Commonwealth's Exhibit No. 23.

17
18 Q Sir, I would like to show you an exhibit
19 that has previously been marked as Commonwealth's Exhibit 6,
20 and tell me if you have ever seen this document in connection
21 with the Danville job?

22 A No.

23 Q Is that not also an order blank?

24 A This would be the second page to the
25 order blank that you just showed me.

McEntee - direct

72.

1 Q But they are not similar at all?

2 A No. There is no middle paragraph.

3 Q Now sir, you spoke of other documents
4 that you would need in determining whether or not InterRoyal
5 tamper proofed certain hardware. Let me show you Common-
6 wealth's Exhibits 7 through 11 on the Danville job, which
7 has been previously admitted. Are these the documents that you
8 are speaking of?

9 A These are the documents that I would have
10 been speaking of. The invoice, what we actually supply, and
11 it shows here on the invoice tamper proofed hardware.

12 Q Was included?

13 A Was included.

14 Q So by examining, Commonwealth's Exhibits
15 10 and 11, you can determine that tamper proof hardware was
16 already in the furniture?

17 A Was already in the furniture.

18 Q And this document issued forth, then,
19 from your factory?

20 A That is correct.

21

22 MR. SPENCER: If Your Honor
23 please, I would again object to the leading.

24 THE COURT: I will sustain
25 your objection. Stop leading, Mr. Barry, please.

McEntee - direct

73.

1 You are not a witness.

2 MR. BARRY: Yes, sir. That's
3 all from this witness.

4 Thank you, Mr. McEntee.

5 THE COURT: Any questions, Mr.
6 Spencer?

7 MR. SPENCER: Yes, sir, just
8 a few.

9 Could I ask the reporter to go
10 back to the question to which I objected rather
11 late?

12 NOTE: At this point the reporter
13 reads back the previous question and answer, viz:

14
15 Question: And this document issued forth, then,
16 from your factory?

17 Answer: That is correct.

18

19

20 CROSS-EXAMINATION

21 BY MR. SPENCER:

22 Q Now these are the documents you looked
23 at. Which ones, in particular, did you look at?

24 A The top page.

25 Q The top page?

1 A Also the pages here that are marked
2 InterRoyal MC 70516-0 and -1.

3 Q Now where were they made?

4 A One invoice was made in Plainfield,
5 Connecticut. The other one would have been made in Michigan
6 City, Indiana.

7 Q Did you make those documents?

8 A No, I did not.

9 Q Did you ever see this furniture?

10 A No, I did not.

11 Q Then you don't know, as a matter of fact,
12 whether the tamper proofing was ever installed?

13 A Only through the documents that if it
14 is documented there, that we have to supply it with tamper
15 proof hardware and we would be supplying it with tamper
16 proof hardware.

17 Q You are assuming that you would have done
18 what you were asked to do?

19 A Or what the plant was instructed to do,
20 yes.

21 Q Would you look at the top one of these
22 documents?

23 A Which section?

24 Q Right here. This makes reference to the
25 installed Robinson tamper proof hardware, is that right?

McEntee - cross

75.

1 A That's correct.

2 Q What are the next two words?

3 A If possible.

4

5 MR. SPENCER: Thank you. I
6 have no further questions.

7

8

9 REDIRECT EXAMINATION

10 BY MR. BARRY:

11 Q Going back to defense's question, Robinson
12 if possible, what if any explanation, as a factory representa-
13 tive, do you have for that?

14 A There are other types of tamper proof
15 hardware other than Robinson that could be supplied.

16

17 MR. BARRY: Thank you.

18

19

20 RECROSS-EXAMINATION

21 BY MR. SPENCER:

22 Q That is your explanation?

23 A That is my explanation.

24 Q But as a matter of fact, you had no
25 contact with this furniture?

McEntee - recross

76.

1 A No physical contact.

2 Q And you never had any contact, I gather,
3 with any of the furniture that you ordered?

4 A That's correct.

5 Q This particular job you did not price?

6 A No, I did not.

7 Q So all you know about this is that these
8 are the sort of documents that come through your office?

9 A That's correct.

10

11 MR. SPENCER: Thank you.

12 THE COURT: Anything further?

13 MR. BARRY: I have no further
14 questions of this witness.

15 THE COURT: I would like to
16 know, is this one supposed to be a carbon copy
17 of this?

18 THE WITNESS: The yellow page
19 should be a carbon copy of the white. There is a
20 carbon insert that goes between the two pages.

21 THE COURT: It has one to Ginns
22 here, and the other, to Royal up at the top.

23 THE WITNESS: Right. If this
24 was done, the to Royal should appear on this copy,
25 through the carbon.

1 THE COURT: In other words
2 this is the information you received from whom?

3 THE WITNESS: This would come
4 in from Dave Mosteller.

5 THE COURT: Can you tell if that
6 is the same order?

7 THE WITNESS: The same order?
8 It has the same name on it and the same sell to.
9 The top paragraph is similar. The second paragraph
10 is totally different. It should be the same order,
11 but I cannot tell if it was or not.

12 THE COURT: That was the
13 difficulty I was having. There is so much conflicting,
14 it is hard to tell.

15 What is the delivery, tailgate?

16 THE WITNESS: Tailgate would
17 mean it is not installed, InterRoyal is not
18 responsible for the installation, just take it to
19 the end of the truck and it is the responsibility
20 of the installer or the end user to take it from
21 the truck to its location.

22 THE COURT: Well the original
23 had attention Ted Juda . Who is that?

24 THE WITNESS: I have no idea
25 who he is.

1 I believe he may be someone at Southern Virginia.

2 MR. SPENCER: That is correct,
3 Your Honor. I think all counsel would stipulate
4 that Mr. Juda was at the institution.

5 THE COURT: All right, I just
6 wanted to get it straightened out.

7 In other words, you are sent
8 this schedule also?

9 THE WITNESS: Yes, that would
10 be attached just as you see it.

11 THE COURT: It would come
12 like that to you, you would get this?

13 THE WITNESS: I would get that
14 complete document.

15 THE COURT: Then you send it
16 out to the various companies?

17 THE WITNESS: What to manufacture
18 and what to ship.

19 THE COURT: It says all items
20 on sheet 2 through 13. When they come marked A-3-A-2,
21 Royal, it has got 2700 marked out, -2,2 place settee,
22 round tube, sixth cushion, GR-1. When that goes
23 to the factory, they would know?

24 THE WITNESS: They would know
25 what piece of furniture to manufacture from that

McEntee - recross

79.

1 description.

2 THE COURT: All right, gentlemen.

3 Do you all have any more questions after the
4 questions by the Court?

5 MR. SPENCER: Yes, sir.

6
7
8 RE-RECROSS EXAMINATION

9 BY MR. SPENCER:

10 Q I understand InterRoyal did not handle
11 installation?

12 A The purchase order to InterRoyal did
13 not include installation.

14
15 THE COURT: One other thing,
16 you say there are more than one tamper proof
17 hardware, there is more than one make?

18 THE WITNESS: There is more
19 than one type.

20 THE COURT: What is Robinson,
21 do you happen to know?

22 THE WITNESS: Robinson is a
23 special type of head that would be attached to the
24 screw so you couldn't unscrew it with a normal
25 screwdriver. You would need a special screwdriver to

McEntas - re-recross

80.

1 tighten it or loosen it.

2 THE COURT: Is that the one that
3 is cut so a screwdriver would just turn around in
4 it?

5 MR. SPENCER: It is that type
6 of thing.

7 THE COURT: The order you
8 received said nothing about tamper proofing?

9 THE WITNESS: Could I just
10 check that again? It says please use Robinson
11 hardware if possible.

12 THE COURT: Would that be tamper
13 proof?

14 THE WITNESS: That would be
15 tamper proof. It says above that, two lines above
16 that, tamper proof hardware, and Robinson is a
17 specific type of tamper proof hardware.

18
19 BY MR. SPENCER: (Continuing)

20 Q There are other kinds of tamper proof
21 hardware?

22 A Yes, there are.

23
24 THE COURT: Would you mind
25 asking him do they have trade names, too, in case

McEntee - re-recross

81.

1 they come up, like Robinson? Do the other ones
2 have trade names?

3 THE WITNESS: I am not all
4 that familiar with the types of tamper proof
5 hardware.

6 MR. SPENCER: Neither am I,
7 Judge.

8
9 Q You were asked to look at Exhibit 6 and
10 compare it with your 23, and they are not the same?

11 A They are not the same, no.

12 Q They would only be the same if 6 was
13 a carbon of 23?

14 A Is 6 the yellow copy?

15 Q Yes.

16 A That's correct.

17 Q So it is obviously not a carbon copy?

18 A That's correct.

19
20 MR. SPENCER: Thank you.

21 MR. BARRY: I have no more
22 questions of this witness.

23 THE COURT: Mr. McEntee, you
24 are excused from this, but don't leave because
25 you might have to come back.

WITNESS STOOD ASIDE.

1
2 MR. BARRY: Your Honor, the
3 Commonwealth and defense have agreed to stipulate
4 that the writing on Commonwealth's Exhibit 6 is
5 Mr. Mosteller's and the handwriting on Commonwealth's
6 Exhibit 23 is Mr. Mosteller's.

7 THE COURT: Who signed this,
8 Buyer? Do you have evidence as to that?
9 One has got Ray Kyber and one has got --

10 MR. BARRY: What was stipulated
11 is all the writing on the document. That name is
12 not on the signature line. That is on the line
13 for name of buyer. We are not trying to show that
14 Mr. Mosteller forged Kyber's name.

15 THE COURT: No, I just want
16 to know that.

17 MR. SPENCER: Mosteller put
18 that on the line.

19 THE COURT: In other words,
20 gentlemen, the stipulation is that Mr. Mosteller
21 wrote everything on both of those documents,
22 unless it is clearly indicated to the contrary
23 that something was done in the New York office?

24 MR. BARRY: Right.

25 I call Mr. Phillips.

1 CARL L. PHILLIPS, a witness
2 called by the Commonwealth, first being duly sworn, testifies
3 as follows:

4 DIRECT EXAMINATION

5 BY MR. BARRY:

6 Q Sir, tell the Judge your name and your
7 occupation.

8 A Carl Phillips. I am Buildings and Ground
9 Superintendent at the Mental Hospital in Danville.

10 Q Sir, were you working in that position
11 September through May of '76 to '77?

12 A No, I was Hospital Electrician there.

13 Q At that particular time?

14 A Yes, sir.

15 Q Did there come a time when some furniture
16 was brought down to the Danville Mental Health Institution
17 that you are aware of during that time period?

18 A Yes. The furniture was shipped in by
19 the truck load right after we had opened. We was ordered
20 to open right after the open house period, and it all came
21 in on the tractor trailer.

22 Q Do you remember approximately what
23 time it was that it all came in?

24 A No.

25 Q Now this particular furniture that you

Phillips - direct

84.

1 are speaking of, did you have occasion at that particular
2 time to see Mr. Mosteller down there?

3 A Yes. That was the first time I met him,
4 yes. The furniture came in on, I believe it was Roadway
5 trucks, and he came up when the trucks were sitting out
6 there.

7 Q Now can you remember specifically
8 what involvement, if any, Mr. Mosteller or his crew had
9 with the installation of that furniture?

10 A They didn't have a whole lot, no.

11 Q Would you tell us how long he was there,
12 to the best of your recollection?

13 A Well, the trucks came in and the
14 assistant director told us all to go down and unload them.
15 I met Dave at that time. I think he may have stayed there a
16 day at the most. He said he had to go somewhere for another
17 job. And then we proceeded to unload the trucks and uncrate
18 the furniture and take it out.

19 Q So specifically when you say we, who
20 are you speaking of?

21 A The hospital staff. It was about 7 of us
22 at the hospital at that time. There was a maintenance crew
23 and a recreational therapy crew and myself.

24 Q How long did the job take you?

25 A It took us about 3, 3-1/2 days to unload

Phillips - direct

85.

1 everything.

2 Q Now Mr. Phillips, what, if any, conversa-
3 tions have you ever had with David Mostaller concerning
4 the samples of furniture left at Danville?

5 A Dave asked me on one occasion if I
6 would sign a letter verifying that we had sample furniture
7 in the hospital, and I told him I couldn't do it because
8 at that time we didn't have any furniture in the hospital.
9 The reason I knew it, I was hired as the electrician, and
10 I was spending my time at that time laying out the hospital
11 electrically and I knew that no furniture existed prior to
12 those trucks coming in. So I didn't sign any letter.

13 Q And you are unaware of any samples
14 existing?

15 A No, no samples was in that hospital, no.

16 Q Mr. Phillips, in your position at that
17 particular time, were you able to determine whether or not
18 any of the furniture needed tamper proofing?

19 A Well all the furniture came in with
20 tamper proofing except for about 10 beds on the second truck
21 load. It caused us a lot of problems on installation
22 because we didn't have the tools to do it with. On the beds
23 themselves, there was about 10 that didn't have the tamper
24 proofing. All the rest of the chairs and tables and everything
25 did.

Phillips - direct

85A

1 Q Did there come a time, then, that Mr.
2 Mosteller helped you tamper proof those 10 beds?

3 A Yes, he did take care of the tamper
4 proofing on those 10 beds, or that small number of beds.

5 Q How many additional pieces of furniture
6 was in that entire load that came in? Can you give me a sum
7 total, from your recollection?

8 A Well let's see. It's two beds per room.
9 I think we got 96 beds and there was about 10 that didn't
10 have it.

11 Q Did any other items besides beds come
12 in?

13 A Oh yes, tables and chairs, two seaters and
14 three seaters, and kitchen tables, kitchen chairs, the office
15 furniture, filing cabinets, desks, everything. Everything had
16 it but those beds.

17 Q Did there come a time, sir, that you
18 signed any letters concerning this tamper proofing and any
19 tamper proofing of the furniture?

20 A All right, after all the furniture had
21 been delivered and we was open, we had patients, Dave came
22 back and wanted Wesley and myself to sign a letter verifying
23 that he had tamper proofed those beds. And Wesley and I
24 co-signed that letter.

25 Q Let me show you Commonwealth's Exhibit 24

Phillips - direct

86.

1 and tell me if you have ever seen this letter before.

2 A Yes. I didn't remember this when the
3 State Police came down. It took a while to remember it.
4 We were supposed to have had tools and extra hardware also,
5 and like I said, Dave came back after everything was there.
6 I would only cosign it with the purchasing agent so he
7 could verify the fact that we had not gotten anything and
8 that he had got this stuff for these extra beds or extra
9 hardware for the beds.

10 Q You understand that, then, to be
11 concerning the ten beds?

12 A Yes, the way Wes explained it to me.

13 Q Well just tell me your own understanding.

14 A All right, the way I understand it,
15 this letter was supposed to verify the tamper proofing for
16 those ten beds.

17 Q Fine, thank you, sir.

18
19 MR. BARRY: The Commonwealth
20 offers this as Commonwealth's Exhibit 24.

21 NOTE: At this point the above
22 referred to letter is marked and filed as
23 Commonwealth's Exhibit No. 24.

24 MR. BARRY: Thank you, Mr.
25 Phillips.

Phillips - direct

87

CROSS-EXAMINATION

BY MR. SPENCER:

Q Mr. Phillips, you started to say, "the way Wes explained it to me"?

A Well, Wesley was the purchasing agent. See, I wouldn't sign anything for Dave after the question of the demonstrator furniture. I knew that the ten beds --

Q If you will just listen --

A I beg your pardon?

Q If you will just listen and answer my question.

A Okay.

THE COURT: I think he has a right to explain his answer, Mr. Spencer.

You may continue.

MR. SPENCER: Well I'm sure he does, Judge, but I have to ask the question, first.

THE COURT: All right, go right along.

Q David Mosteller never undertook to explain that letter to you, did he?

Phillips - cross

88.

- 1 A No.
- 2 Q And as a matter of fact, didn't the
- 3 letter come from Mr. McIntyre?
- 4 A No. Dave was standing there.
- 5 Q Do you know where it came from?
- 6 A No, I don't know where the letter came
- 7 from. Dave was standing there when we signed the letter,
- 8 though.
- 9 Q But you don't know where Mr. Scarce
- 10 got it?
- 11 A No.
- 12 Q Now you were asked about the tamper
- 13 proofing, and you said that everything was tamper proofed
- 14 except for about 10 beds?
- 15 A Right.
- 16 Q Are you sure of the number?
- 17 A No.
- 18 Q Could it have been as few as 5?
- 19 A Sure.
- 20 Q And you say it was about 10?
- 21 A Yes, as best I remember.
- 22 Q It could have been 15?
- 23 A No, it was the nose of the truck of the
- 24 last load. The beds was right in the nose of the truck.
- 25 Q But all the rest of it was tamper proofed?

Phillips - cross

89.

1 A Yes.

2 Q All the other beds?

3 A Yes, the beds and the other furniture.

4 Q Now if there were only about 10 that
5 weren't tamper proofed, let's, for purposes of discussion,
6 assume that all of the beds were ordered with the tamper
7 proof hardware. Then 10 of them didn't have it, is that
8 what you are saying?

9 A Right.

10 Q And no one knew how many beds would or
11 would not have the tamper proof hardware until they got
12 there and you were installing them?

13 A I don't understand you.

14

15 MR. BARRY: The reason he
16 doesn't understand is because that calls for a
17 conclusion that he can't make.

18 THE COURT: Well I think, from
19 the evidence, no one would know what was in the
20 truck until they opened the boxes.

21

22 Q But you are aware that the requirement
23 was that all the beds be tamper proofed?

24 A Right.

25 Q Was this your only experience with receiving

Phillips - crss

90.

1 a large delivery of furniture as an employee of the State?

2 A Uh huh.

3 Q The entire facility was furnished, was
4 it not?

5 A Right.

6 Q And you spoke of everything having
7 tamper proof hardware?

8 A Right.

9 Q Actually, a substantial amount of the
10 furniture that went into the building didn't even come
11 from InterRoyal, did it?

12 A About half of it, I think, came from
13 InterRoyal.

14 Q So you are telling us, then, that even
15 the half that didn't come from InterRoyal, all that had
16 Robinson tamper proof hardware on it?

17 A All right, the other half of the furniture
18 was assembled by the manufacturer. That came in assembled,
19 so I didn't have any dealings with the other furniture.
20 I only had dealings with the InterRoyal furniture.

21 Q Did you personally have dealings with
22 each of the pieces that came in?

23 A I counted the boxes and signed the
24 receiving slips, yes.

25 Q Who actually assembled it and took it up

Phillips - cross

91.

1 and put it in the rooms?

2 A Myself, I was in on some of the assembling
3 and I helped haul a lot of it to the rooms.

4 Q But you can't tell us who else was doing
5 it, because you were doing your work and other people were
6 working?

7 A I don't know what you're asking.

8 Q You can't tell us who took the furniture
9 to a particular room?

10 A Oh, we gave them a list of every room
11 and where the furniture was supposed to go ourselves.

12 Q All right, you were asked about Mr.
13 Mcstaller and you say that he was there when the Roadway
14 truck came and was sitting there?

15 A I don't know whether he was there when
16 the Roadway truck came or not. I was somewhere else in the
17 hospital when the truck came in, and the Assistant Director
18 called us to come up and do the work.

19

20 THE COURT: Who is we?

21

22 Q And you say you think he may have stayed
23 there a day --

24

25

THE COURT: Excuse me. Who is we?

Phillips - cross

92.

1 You said, "the Assistant Director called us to come
2 up there".

3 THE WITNESS: Well the
4 maintenance crew had already been hired at that time.

5 THE COURT: Who?

6 THE WITNESS: The maintenance
7 crew. None of the administrative staff had hired.
8 The maintenance crew and the R.T. staff were in the
9 hospital setting up the various jobs.

10 THE COURT: So when you are
11 referring to we, we are state employees?

12 THE WITNESS: Right. We were
13 all State employees.

14
15 Q You were not paid by InterRoyal to install
16 them?

17 A No, no. I had never heard of them until
18 that time.

19 Q And specifically, you all were called
20 by the Assistant Director?

21 A Right.

22 Q And he told you to do something?

23 A Well he told us to unload the furniture,
24 take it out of the cardboard, check it in and put it in the
25 room.

Phillips - cross

93.

1 Q But Mr. Mosteller never told you all what
2 to do?

3 A No.

4 Q And the question that I asked just a
5 moment ago, you said you met Mr. Mosteller at that time.
6 You think he may have stayed there a day?

7 A Yes. It was quite a lot of confusion.
8 We had trucks sitting there waiting. He introduced himself
9 as the InterRoyal representative, as best I remember.
10 We got started and he told us he had to go on to another
11 job and he would be back later, which he did.

12 Q And at this time you were the electrician?

13 A Right.

14 Q Were there various things that had to be
15 done by an electrician during the time that this furniture
16 was being put in the rooms? Were you engaged from time to
17 time doing the work of an electrician?

18 A No. The Assistant Director, he made it
19 pretty plain to get up there and unload those trucks.

20 Q The Assistant Director did?

21 A Yes. We had no choice.

22

23 MR. SPENCER: I have no other
24 humorous questions.
25

Phillips -redirect

94.

REDIRECT EXAMINATION

BY MR. BARRY:

Q Mr. Phillips, would it be fair to say that even the five to ten beds that needed tamper proofing, you did that work also?

A I can't hear you.

Q The 5 to 10 additional beds that needed tamper proofing, who did the work on that?

A Dave brought the hardware and we put it on the beds. The beds came in partially installed. It folds up. It's a couch in the daytime and a bed at night. The tamper proof hardware, the piano type edges that held it on, we put those in.

THE COURT: In other words State employees did all of the installation of the InterRoyal --

THE WITNESS: Yes, sir, I'd say we did 90, 95% of it, yes.

THE COURT: Who did the other 5%?

THE WITNESS: Well there was a little man up there on and off 2 or 3 times. I can't remember his name. But he had his son with him

Phillips - redirect

95.

1 and they helped to start with. They left and they
2 came back. They was in and out several times
3 during the whole process. Everything was in huge
4 pasteboard boxes. It was really a pain. And we
5 had to take it out of the pasteboard and put it
6 back together.

7 THE COURT: To your knowledge,
8 there were no sample items on the project?

9 THE WITNESS: No, there was
10 no other furniture in the hospital at all.

11 THE COURT: Did you get any of
12 the furniture that was already set up?

13 THE WITNESS: I beg your pardon?

14 THE COURT: Was any of the furni-
15 ture from InterRoyal already set up like a sample
16 would be, I assume, or did you have to assemble it
17 all?

18 THE WITNESS: We had to put --
19 It came in partially assembled and partially
20 disassembled, and we had to put it together to
21 put it in the rooms.

22 THE COURT: All of it was in
23 cardboard boxes?

24 THE WITNESS: Right. It came
25 in in huge cardboard boxes.

Phillips - redirect

96.

1

THE COURT: Thank you.

2

MR. BARRY: Thank you, sir.

3

4

5

RECROSS-EXAMINATION

6

BY MR. SPENCER:

7

Q If we could go back just for one minute,

8

I want to see if you can identify the little man.

9

10

MR. SPENCER: I am going to

11

ask the bailiff to bring a man in, and I want

12

you to look at him. Don't speak, just look at the

13

man if you will.

14

NOTE: At this point a man

15

is brought into the courtroom.

16

17

Q Do you see that man?

18

A Yes, sir.

19

20

MR. SPENCER: Go outside, sir.

21

NOTE: At this point the gentle-

22

man leaves the courtroom.

23

24

Q Is that the little man who was up there

25

2 or 3 times with his son?

Phillips - recross

97.

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A Yes.

THE COURT: All right, you
may step down.

MR. SPENCER: Your Honor,
please, I would like the record to show that that
is Mr. McIntyre from Royal Installations.

MR. BARRY: Objection. That
is Mr. McIntyre, period.

THE COURT: All right, he will
be a witness. We will find out.

Can this gentleman, Mr. Phillips,
go back to Danville?

MR. BARRY: Yes, sir, he may.

THE COURT: Sir, you may be
excused and go back if you so desire, or stay in the
courtroom, either one.

WITNESS STOOD ASIDE.

MR. BARRY: Mr. Scarce.

1
2 J. WESLEY SCARCE, a witness
3 called by the Commonwealth, first being duly sworn, testifies
4 as follows:

5 DIRECT EXAMINATION

6 BY MR. BARRY:

7 Q Mr. Scarce, how are you today?

8 A Fine, thank you.

9 Q Would you tell the Court your full name
10 and occupation?

11 A John Wesley Scarce, Jr. I am the
12 Purchasing Agent for Southern Virginia Mental Health Institute
13 in Danville, a State agency.

14 Q Now Mr. Scarce, did you have occasion
15 to be employed in the same capacity from September of 1976
16 to May 1977?

17 A Yes.

18 Q Did you have occasion on that particular
19 time to receive some furniture from InterRoyal Company?

20 A Yes.

21 Q Now directing your attention to that
22 particular time period when the trucks came rolling in, can
23 you tell the Judge what, if any, furniture you received on
24 that particular occasion? What was the order all about?

25 A Can you be more specific?

Scarce - direct

99.

1 Q Certainly. Did there come a time that
2 some furniture arrived that had been ordered by your
3 institution through Ginns Southern and InterRoyal?

4 A Yes.

5 Q Would you specifically tell the Court
6 what, if anything, was in that order? Can you remember?

7 A Well at that time we were equipping a
8 new facility and all of the furniture that came in came in
9 under my supervision and was checked and placed as to its
10 designated area of use. And what you are speaking of, I
11 suppose, is part of that furniture?

12 Q That's right. You then have no personal
13 knowledge of the exact items that you ordered through this
14 particular company?

15 A No. Without seeing the order that you
16 are referring to, I wouldn't say that.

17 Q All right, let's continue, then. Did
18 you have occasion to speak with a David Mosteller concerning
19 the furniture that came in on this load?

20 A You are talking about a load of furniture,
21 and I am not oriented as to what load of furniture you are
22 talking about.

23 Q I understand. Let's start from the back
24 and work forward, then.

25 Did you have occasion, while working at

Scarce - direct

100

1 the Southern Mental Health Institute, to sign certain docu-
2 ments acknowledging that InterRoyal furniture that had
3 arrived had been tamper proofed and installed per the order
4 with the Ginns Southern? And I am referring to Commonwealth's
5 Exhibit 25 for identification.

6 A Yes, there is a statement certifying that
7 the equipment was as specified.

8 Q Now how do you know that?

9
10 MR. SPENCER: Excuse me. Is
11 this 25 or 26?

12 MR. BARRY: It should be 25.

13
14 Q How were you able to fill out such a
15 document?

16 A Because it was checked to see that it had
17 the tamper proof hardware mentioned in it.

18 Q Who did the checking?

19 A Carl Phillips and I both checked it.

20 Q So to the best of your satisfaction, then,
21 all the furniture had been completely tamper proofed, is
22 that correct?

23 A Yes.

24 Q Now in this particular job, were there
25 any samples left at the institution?

Scarce - direct

101.

- 1 A There were no samples.
- 2 Q How are you aware of that?
- 3 A Because every item was checked, item
- 4 per item per shipping ticket and per order copy.
- 5 Q Did you have occasion --
- 6 A And there were no mismatches.
- 7 Q No mismatches? The building was empty
- 8 prior to the furniture arriving?
- 9 A That is right.
- 10 Q And did you ever have occasion to speak
- 11 to Mr. Mosteller about the samples?
- 12 A There were no samples mentioned to me.
- 13 Q Did there come a time, sir, that you
- 14 signed another letter concerning completion that you sent to
- 15 the Commonwealth?
- 16 A Yes.
- 17 Q Now specifically, why did you again fill
- 18 out this letter?
- 19 A Mr. Kyber, who was with Ginn Southern,
- 20 called and asked me would I give him a certificate stating
- 21 that the order was complete so that he could make claim for
- 22 payment of the bill, the invoice.
- 23 Q Now that is Commonwealth's Exhibit 6
- 24 you are speaking of?
- 25 Who gave you Commonwealth's Exhibit No. 25?

Scarce - direct

102.

1 A The 25 you are speaking of was not put
2 on a piece of letterhead stationery. That's the only difference
3 in the two orders.

4 Q Who prepared Commonwealth's Exhibit No. 25?

5 A You are asking me to remember something
6 way back.

7 Q I understand. Just as long as you
8 remember.

9 A I'm not certain.

10 Q But that is your signature?

11 A Yes.

12
13 MR. BARRY: Thank you, sir.

14 I have no further questions.

15 THE COURT: Do you want to
16 introduce that?

17 MR. BARRY: Yes, sir, Common-
18 wealth's Exhibits 25 and 26.

19 NOTE: At this point the above
20 referred to letters are marked and filed as
21 Commonwealth's Exhibits 25 and 26.

22 MR. SPENCER: We have no
23 questions.

24 THE COURT: All right, sir.
25 You may step down. Thank you.

WITNESS STOOD ASIDE

1
2 MR. BARRY: Your Honor, the
3 next logical witness in this sequence of events
4 for the Commonwealth is Mr. Art Zimmerly. The
5 Commonwealth and defense have reached stipulation
6 of fact, because he is snowbound in Virginia Beach,
7 that if he were present here in court, he would
8 tell you that his name is Art Zimmerly, that he
9 runs the company of Dadson Enterprises, Incorporated,
10 and that he is a general building contractor.
11 He would state that he received \$5,000 from Ginns,
12 in Richmond for tamper proofing furniture on a
13 State job in Danville. He would testify that he
14 has never been to Danville and he doesn't know
15 specifically what was done. He was told by David
16 Mosteller that Bob McIntyre could do the work and
17 that he, Dave Mosteller, would handle everything.
18 He received \$1,000 from the job, or excuse me,
19 he received \$5,000 for the job. From that, \$1,000
20 was retained by him, \$2,000 was transferred to
21 Artisan Incorporated for Mosteller's accounts re-
22 ceivable, and a title to a trailer was transferred
23 to IFA in the amount of \$2,000 at Mosteller's
24 request for Mosteller.

25 Simply to finish the stipulation of fact,

1 we would say that the billings and the payments
2 which are Commonwealth's Exhibits were made at the
3 direction of David Mosteller.

4 The Commonwealth would call Charles
5 Bryant.

6
7
8
9
10 CHARLES D. BRYANT, a witness
11 called by the Commonwealth, first being duly sworn,
12 testifies as follows:

13 DIRECT EXAMINATION

14 BY MR. BARRY:

15 Q Sir, your name and occupation, for the
16 record?

17 A My name is Charles D. Bryant, B-R-Y-A-N-T.
18 I am a special agent with the Bureau of Criminal Investiga-
19 tion, Department of State Police.

20 Q Sir, have you been previously qualified
21 in the courts in this Commonwealth as an accounting expert?

22 A Yes, sir.

23 Q Specifically this court?

24 A No, sir. I don't recall the court, but
25 one in the old City Hall some years ago.

Bryant-direct

105.

1 Q All right, thank you, sir.

2 Now sir, specifically relating to a
3 recent time period, have you had occasion to come in contact
4 with one David Mostaller?

5 A Yes, sir.

6 Q Was that at his request?

7 A Yes, sir. Mr. Mostaller called me on
8 one occasion during my investigation of the furniture issue
9 and pretty much invited himself to see me, and I was
10 receptive to that.

11 Q Did there come a time, then, that you and
12 he met?

13 A Yes, sir.

14 Q Do you specifically remember the date
15 and time?

16 A I commenced the purchases and supply
17 investigation on or about August 17, 1978, and on or about
18 August 31, 1978 Mr. Mostaller and I met at my office at
19 Division I on Route 1 north of Richmond.

20 Q Now sir, did you have occasion at that
21 time to advise him of certain constitutional rights?

22 A Yes, sir, I did.

23 Q Specifically what format did you use?

24 A Well I have my badge case and identifica-
25 tion, and within that I have a little --

Bryant - direct

106.

1
2 MR. SPENCER: We will stipulate
3 proper warnings, Your Honor.

4 THE COURT: All right, he was
5 properly advised of his rights under Miranda vs.
6 Arizona, and he voluntarily waived those rights?

7 THE WITNESS: Yes, sir.

8
9 Q Did he make a statement?

10 A Yes, sir. We talked that day and he made
11 a number of statements.

12 Q Perhaps we had just -- in all fairness,
13 would you please tell the Court what, if anything, at all
14 he said that day?

15 A Well that would be based on my recollection,
16 and I believe at the moment you are concerned with the
17 Danville job?

18 Q That's right, just his remarks concerning
19 Danville.

20 A Relating to the Danville job, he indicated
21 that that portion of the job relating to tamper proofing,
22 was, to use his terms, unusually fat. That job didn't normally
23 come down that way. And he specifically, he indicated that
24 he had had other jobs with other manufacturers such as
25 National and Lincoln that would have contained such an item

Bryant - direct

107.

1 such as the \$5,000 payment for tamper proofing.

2 With regard to samples, he indicated
3 that he had informed vendors that his charges or his prices
4 might contain items for samples.

5 And with regard to installation, he
6 indicated that for the most part, Mr. Bob McIntyre had
7 rendered the duties relating to installation charges.

8 Q Now Investigator Bryant what, if any,
9 explanation did he give you for the tamper proofing done
10 down in Danville?

11 A I asked him specifically about that.
12 I had just commenced this investigation a couple of weeks
13 earlier, and in my travels, I had developed through Ginns
14 and -- well perhaps not through Ginns, but as a result of
15 reviewing paperwork, it was reasonably clear to me that --

16
17 MR. SPENCER: Now I object
18 to what was reasonably clear to him because that
19 is a conclusion he reached from the paperwork
20 he reviewed.

21 MR. BARRY: I concur. I will
22 direct my question more specifically, then, to the
23 issue of tamper proofing.

24
25 Q What did Mr. Mosteller say his involvement

Bryant - direct

108.

1 with the tamper proofing was?

2 A I asked Mr. Mosteller specifically about
3 the tamper proofing charge in Danville, and he indicated
4 that that involved both he and Bob McIntyre taking aluminum
5 putty and spreading it, and he held up a finger, spreading
6 it through the slot on a screw so that the material would
7 eliminate the slot in the screw.

8 Q Now at this particular time, was that
9 pretty much the end of the conversation concerning Danville?

10 A Based on my best recollection, I believe
11 it was.

12 Q Well let me ask you, Mr. Bryant, in your
13 investigations as they continued, did you ever have occasion
14 to go to Danville?

15 A Yes, sir, I did.

16 Q Did you ever have occasion to see any
17 screws with aluminum putty in them?

18 A No, sir. I looked in Danville at many,
19 many items manufactured by the InterRoyal Corporation. Most
20 of that institution, I believe, the furnishings were provided
21 by InterRoyal. And I purposely looked at dozens and hundreds
22 of screws, and I found, personally found no evidence of any
23 putty in the slots of the screws or any indication that
24 something had been there and someone had taken some type
25 device and scraped it out, that type thing.

Bryant - direct

109.

1 Q Does your knowledge dictate that you
2 know what a tamper proof screw is?

3 A Yes, sir. I don't have one with me,
4 but I believe I can identify a tamper proof screw. There are
5 several designs, but essentially it is one that a conventional
6 screwdriver will not reverse the screw out of the product it
7 is put into.

8 Q Did you have occasion to see any of
9 these on the furniture in Danville?

10 A Yes, sir, dozens and hundreds, perhaps
11 thousands.

12 Q Mr. Bryant, I would like to show you a
13 chart, if I could.

14
15 MR. BARRY: Your Honor, the
16 Commonwealth at this particular time would ask
17 Investigator Bryant to identify a chart that he
18 had prepared under his direction as an accounting
19 expert, showing exactly what the breakdown of the
20 bid was to the parties, in chart form.

21 THE COURT: I have no objection,
22 if nobody else does.

23 MR. SPENCER: I do, Your Honor.
24 It is nothing more than a statement of the total
25 of the bid, the total of the amount that went to

Bryant - direct

110.

1 InterRoyal.

2 THE COURT: It is rather
3 difficult for me to rule on something I can't see.

4 MR. SPENCER: I don't mind the
5 Court seeing it, but it is not admissible. It is
6 nothing in the world but taking the figures
7 already in evidence and arriving at a conclusion.

8 THE COURT: It is like ruling
9 on testimony you don't hear.

10 MR. SPENCER: Sir?

11 THE COURT: It is like ruling
12 on testimony I haven't heard.

13 MR. BARRY: This is the chart.
14 (Holding up chart)

15 THE COURT: What is it supposed
16 to mean?

17 MR. BARRY: Well the significance
18 of this particular chart is that this would show
19 more graphically, to understand that this is how
20 much InterRoyal got, this is how much the vendors
21 got and this is what the defendant got.

22 THE COURT: I think he can
23 testify to that. I mean I go to other places
24 besides Shoney's. I don't need to have a picture
25 of a hamburger.

Bryant - direct

111.

1 MR. BARRY: All right, if I
2 can't use my chart, I don't have any other
3 questions.
4

5
6 CROSS-EXAMINATION

7 BY MR. SPENCER:

8 Q When was it that you went to Danville?

9 A I don't have that date, sir. I could
10 make reference to my records, which is at Mr. Barry's table,
11 and establish that.

12 Q Well would you do that, then?
13 I presume it was way after August 31? You might start with
14 that.

15 A I believe so, sir.

16 (Referring to report) Sir, I believe
17 my first trip to Danville to that institution was on or
18 about October 17, 1978.

19 Q And is that the time that you went
20 around and looked at the dozens, maybe hundreds, perhaps
21 thousands of screws, or was that some other time?

22 A I believe I was there more than once,
23 but I went and examined the furniture at that time, also,
24 and would have automatically -- I would have been concerned
25 about how it was manufactured and I would have been concerned

Bryant - cross

112.

1 about --

2 Q That's all I have asked you.

3 A Yes, sir.

4
5 MR. SPENCER: Thank you, Mr.
6 Bryant.

7 THE COURT: All right, Mr.
8 Bryant, you may step down, sir.

9
10 WITNESS STOOD ASIDE.

11
12 MR. BARRY: Your Honor, the
13 final Commonwealth's evidence will be a stipulation
14 of fact reached by the Commonwealth and the
15 defense in that a bill was received by the
16 Comptroller's Office in the amount of \$60,532.59
17 from Ginns Southern, and that this bill was marked
18 for process, and that the Burser's Office here in
19 the City of Richmond, North of the James River,
20 paid this bill in a check form, \$60,532.59, to Ginns
21 Southern organization.

22 MR. SPENCER: We stipulate
23 that, Your Honor.

24 THE COURT: The Commonwealth
25 rests?

1 MR. BARRY: Yes, sir.

2 MR. SPENCER: Judge, we have
3 a motion. Do you want to start on it or do you
4 want to go to lunch? I don't know what the
5 Court's practice is.

6 THE COURT: I have got a 2:00
7 o'clock case, so if you want to go on with your
8 motion, it will be all right with me because I have
9 got that sentencing at 2:00 o'clock.

10 MR. SPENCER: If Your Honor
11 please, at this time, on behalf of the defendant,
12 I would move to strike the Commonwealth's evidence
13 on the grounds that there has been no sufficient
14 showing of any conduct that amounted to a crime,
15 more especially a crime as charged in the indictment
16 on which the defendant stands on trial today.

17 The evidence is that the State of
18 Virginia put out, and first of all the evidence is
19 that someone at the hospital generated a request
20 for a requisition, and if you will examine that,
21 you will see, Your Honor, that it is very strongly
22 slanted to InterRoyal. Everything on there refers
23 to InterRoyal. The State received that, generated
24 an internal document, which is 27, and had it
25 made up. If you recall the testimony from Mr. Irving

1 Brooks, they had this internal document made up,
2 which showed a large number of people to be
3 solicited for bids. And they are all checked off.
4 I don't know, for purposes of the document, I
5 suppose we can assume that they were solicited.
6 That would be 2.

7 THE COURT: I am totally
8 familiar with that. I want to see the accompanying
9 exhibits with the checks.

10 MR. SPENCER: The State then
11 had prepared a proposal to receive bids, and this
12 was distributed to all or some of these furniture
13 suppliers. You then come to the recapitulation
14 sheet, which indicates that bids were received
15 from 8 sources, and that Ginns Southern was the
16 low bidder. The State then awarded the contract,
17 again, and the evidence is that the award was
18 for \$60,500 and some odd dollars. Ginns then took
19 a portion of the bid form on which it had previously
20 entered its bid, the same form on which it had
21 previously entered its bid to the State, x'd out
22 the things that were not included in its bid,
23 and attached a paper, and that ultimately wound
24 up at InterRoyal. Whether it was sent directly
25 there or through Mosteller, I'm not sure.

1 InterRoyal then had the furniture shipped to
2 Danville. The furniture was received. It was
3 checked off. Ginns was billed for things that it
4 was expected to be billed for.

5 THE COURT: How about the
6 installation?

7 MR. SPENCER: Installation,
8 tamper proofing.

9 THE COURT: But did he do the
10 installation at the time he sent a bill to the
11 State for \$5,000?

12 MR. SPENCER: No, sir, that was
13 not the installation. That was the tamper proofing,
14 the \$5,000.

15 THE COURT: My recollection of
16 the testimony, Mr. Spencer, is that was for the
17 installation. When the furniture arrived there,
18 that the State employees did the installation.
19 Then he sent an invoice to the State, or to his
20 supplier, Ginns Southern for \$5,000 for installation,
21 and he was there only one day.

22 MR. SPENCER: Now that, Your
23 Honor, is not quite the testimony. The testimony
24 is that he thinks he was there one day. But the
25 testimony further was that he came back several times

1 and that other people were there, the gray haired
2 man, for example.

3 THE COURT: Do you think he was
4 entitled to the \$5,000 when he didn't do anything?

5 MR. SPENCER: Well Judge, the
6 \$5,000 --

7 THE COURT: I overrule the
8 motion on that. I guess that is the first one,
9 I don't know. I don't think there is any question
10 at this point that the evidence showed clearly
11 that there was a misrepresentation of fact to
12 obtain \$5,000, which I haven't heard your side
13 of the case.

14 MR. SPENCER: To whom, Your Honor?

15 THE COURT: To whom? He used
16 an agent to deprive the State, at this point in the
17 evidence, which was Southern Ginns.

18 MR. SPENCER: The State got
19 exactly what it bid for, Your Honor. They got
20 furniture and they paid \$60,500 for it.

21 THE COURT: There was no evidence
22 that there were any samples, which they were
23 charged for.

24 MR. SPENCER: There is no
25 evidence that anyone ever claimed any samples were

1 left at Danville. Those were the questions that
2 were asked.

3 THE COURT: I am either hearing
4 evidence or you are not hearing because there are
5 invoices there for samples. That is the bill that
6 the first witness corrected. He said, "wait a
7 minute, you have overbilled me \$1100", which goes
8 with the check. So I can overrule your second
9 count.

10 Now the third count, I haven't
11 been able to pick up.

12 MR. SPENCER: If Your Honor
13 please, if you will just go for a minute to the
14 samples, there was no bill for samples. It was
15 a bill for samples used in soliciting this job.
16 It says balance on abandoned samples used in
17 selling Southern Virginia Mental Health Institute.
18 It didn't say where it was used or where it was
19 abandoned. He says that the course of business
20 is that a representative will take samples to
21 numbers of places to show them to the people who
22 will be taking these bids in order to show them
23 what they have that will meet their needs and
24 purposes.

25 THE COURT: Well I think the

1 Commonwealth's Attorney is entitled to a reasonable
2 inference, all reasonable inferences from the
3 evidence.

4 Now the third count I believe
5 I am having a little difficulty with. But those
6 two, I don't have any difficulty with at this point.

7 Now what is the third one?
8 The samples, the installation, or whatever you
9 want to call it, tamper proofing hardware, and
10 what is the third one? It is a three count
11 indictment.

12 MR. BARRY: We are covering
13 samples as one count, installation as one count,
14 and tamper proofing as one count.

15 THE COURT: It was my under-
16 standing from the evidence that tamper proofing
17 was all done. There were 10 beds that didn't have
18 the tamper proofing, and that was done.

19 MR. KAESTNER: From the evidence,
20 we are saying in the third count of the indictment,
21 that Mr. Mosteller, through Dadson Enterprises,
22 billed Ginn Southern \$5,000 to install tamper
23 proofing hardware.

24 THE COURT: That's installation.

25 MR. KAESTNER: No, installation

1 is actual uncrating and assembly of the furniture
2 and placing it in the ward. That is what Carl
3 Phillips testified to.

4 THE COURT: That seems to be
5 one act, taking them off of the truck and installing
6 them. It might take three or three and a half
7 days to put them together. But he only billed
8 them, Dadson, which is true. His testimony was
9 that the money he got did not go to InterRoyal,
10 it went to him. A thousand dollars was retained
11 by Dadson, \$2,000 went to the Artisan Corporation
12 to his accounts receivable, and \$2,000 went for
13 a trailer which eventually became his. So he got
14 4 out of the 5. I have got that one.

15 MR. KAESTNER: There were three
16 statements. There was a \$5,012 bill for installation.
17 That was the uncrating of the furniture, removing
18 of the debris, assembling the furniture and placing
19 it. In addition to that, there was a \$6,113 charge
20 for abandoned samples.

21 MR. SPENCER: Let's get it
22 straight. Which one is which?

23 MR. KAESTNER: Let's call the
24 first one installation, \$5,000. The second one,
25 abandoned samples, \$6,113, and the third one is

1 tamper proofing. The tamper proofing was essentially
2 a contract pursuant to which Dadson would go to the
3 Danville facility, take out the old screws, put in
4 the new screws, and get \$5,000 for doing that.
5 So that tamper proofing is in fact separate from
6 the installation. The tamper proofing job, that is
7 the job of installing tamper proof hardware, was
8 a separate job secured by separate contract docu-
9 ments, by separate invoices.

10 MR. SPENCER: Where is that
11 in the evidence?

12 MR. KAESTNER: That is clearly
13 in the letter.

14 THE COURT: The first one is
15 for installation, the second one is for what?

16 MR. KAESTNER: The second one
17 is for abandoned samples.

18 THE COURT: Okay.

19 MR. KAESTNER: And the third
20 in the evidence is in the letter of December 10th
21 from Dadson Enterprises signed by Art Zimmerly
22 to Dave Mosteller saying: "With regard to our meeting
23 of last week, we will be able to change over standard
24 hardware to tamper proof fastenings on list of
25 furnishings for \$5,000.

1 The phrasing of that letter,
2 change over standard hardware to tamper proof
3 hardware, and a charge of \$5,000, supported by an
4 invoice sent by Dadson Enterprises to Ginns
5 Southern for \$5,000, and the invoice contains a
6 representation that the installation of the tamper
7 proof hardware at Southern Virginia Mental Health
8 Institution has been completed. This is the check
9 for \$5,000 issued by Ginns.

10 THE COURT: I see the check.
11 I thought that the unloading and the assembly was
12 all installation.

13 MR. KAESTNER: Actually, Your
14 Honor, if you will examine the invitation to bid,
15 you will note the invitation says all items must
16 be uncrated, assembled, all crating and other debris
17 must be removed from the premises. That is what
18 is understood to mean installation.

19 MR. SPENCER: Again, I don't
20 know that that is in the evidence.

21 MR. KAESTNER: I believe Mr.
22 Brooks--

23 THE COURT: Well the document
24 is in evidence. All items must be uncrated and
25 set in place ready for use. Well now I agree with

1 that. That is installation. You take them off the
2 truck, you take them out of the boxes, you put
3 the screws in them and you put them in place. That
4 is installed. That chair there that is screwed
5 down is not installed until the screws are put in
6 the floor. Then it is installed. And that was a
7 part of the contract.

8 MR. KAESTNER: Exactly, Your
9 Honor, and with respect to the tamper proofing,
10 we are saying that the phrasing, the letter from
11 Dadson Enterprises to David Mosteller and again
12 pursuant to the stipulations between the Common-
13 wealth and the --

14 THE COURT: Where is the other
15 check for \$6100 you were talking about?

16 MR. KAESTNER: Here it is.

17 THE COURT: What is this check?
18 Where is the invoice that goes with it?

19 MR. KAESTNER: That check goes
20 with this invoice, Your Honor, which is the
21 final invoice for samples, as you will note on
22 this invoice.

23 THE COURT: All right, that is
24 samples. The evidence is there were never any
25 samples, so if this goes with this, he got \$6,000,

1 or he billed his intermediate, who billed the
2 State, and it came back to him.

3 MR. KAESTNER: The remaining
4 is, of course, the installation charge supported
5 by this check. That check includes a payment for
6 the installation, and by math, and notations
7 on another document introduced by the Commonwealth,
8 payment for the two items of furniture supplied
9 apparently by --

10 THE COURT: Assuming I accept
11 your theory of the case, that that is two different
12 things, the foolproof or tamper proof hardware,
13 is there evidence before the Court that he brought
14 the screws, the ten beds, that he brought the screws
15 there?

16 MR. KAESTNER: Is there evidence
17 that Mr. Mosteller brought the screws there?
18 There is evidence clearly before the Court, and
19 I think defense counsel will agree that Mr.
20 Mosteller did supply enough screws for the 10 beds.
21 There is also evidence --

22 THE COURT: All right, he
23 charges the State \$5,000. Where is the crime?

24 MR. KAESTNER: The State, of
25 course, did not pay Mr. Mosteller. Ginns Southern

1 paid Mr. Mosteller.

2 THE COURT: I don't care who
3 they paid. Assuming Ginns Southern, he is working
4 his fraud through an agent who is innocent,
5 but nevertheless, if A sells B his automobile for
6 \$10,000 and it is worth a thousand dollars, where
7 is the fraud? He has billed you what he has
8 done.

9 MR. KAESTNER: The problem is
10 Mr. Mosteller, in his own hand, from the factory
11 ordered tamper proof hardware.

12 MR. SPENCER: If possible.

13 MR. KAESTNER: The invoices
14 from the manufacturer to Ginns Southern indicate
15 that the furniture was delivered with tamper proof
16 hardware, Robinson, if possible.

17 THE COURT: Well gentlemen,
18 don't you all argue the facts. I am going to
19 determine those. I am assuming there were 96 beds,
20 86 of them had tamper proofing on them.

21 MR. SPENCER: No, there were
22 much more than 96 beds.

23 THE COURT: Well he says that's
24 the only thing he found, Mr. Phillips said 10 beds
25 that were in the front of the truck in paper crates

1 that didn't have it. They told the defendant
2 about it, Mr. Mosteller, and he brought them back.
3 Then they put it in. So as a result of that, he
4 billed the State \$5,000, \$5,012 for doing it.

5 MR. KAESTNER: No, that is not
6 what the evidence shows, Your Honor, because as
7 Mr. Kyber testified, he received the total quote
8 from Mr. Mosteller for the cost and he defined
9 Commonwealth's Exhibit No. 6 as being a listing
10 of the prices which he received from David
11 Mosteller, and upon which he based his bid. He
12 then indicated that after he had been awarded the
13 contract, he received a breakdown from Mr. Mosteller
14 as to how a disbursement of the moneys was to be
15 made. That disbursement, that breakdown from Mr.
16 Mosteller was first forty thousand some odd dollars
17 to InterRoyal represented by the document, plus
18 \$5,000 for tamper proofing under the separate
19 contract with Ginns Southern, plus \$5,012 for
20 installation, plus 7,000 and some odd dollars
21 for samples. And that there was an adjustment
22 that had to be made and that adjustment knocked
23 off about \$1100, so the total sample bill came to
24 \$6,100. The trucks arrived at Danville, obviously
25 well after Ginns Southern had placed its order, and

1 had won the bid. The evidence indicates at the
2 beginning of the transaction Mosteller built into
3 the prices he quoted Ginns Southern a charge of
4 \$5,000 for tamper proofing to be covered by the
5 separate letters from Dadson Enterprises, which
6 the Court has before it. In other words, Mr.
7 Mosteller built the \$5,000 charge in at the
8 beginning. Mr. Mosteller orders the tamper proof
9 hardware. Ginns Southern was billed for tamper
10 proof hardware. The tamper proof hardware was in
11 the furniture when it was delivered. That is all
12 in the documents and in the testimony. The installa-
13 tion is something quite apart from the tamper proof
14 hardware.

15 THE COURT: I understand that.
16 There is hardware there when you purchase them,
17 and installation is more labor.

18 MR. KAESTNER: In addition,
19 with respect to the tamper proofing, Mr. Mosteller --

20 THE COURT: At this time, in
21 the law of Virginia, could you steal services?

22 MR. KAESTNER: At this time, no.
23 There was a case on point regarding services.

24 THE COURT: How about installa-
25 tion? Is that service?

1 MR. KAESTNER: \$5,012 was
2 stolen, not a man's services.

3 THE COURT: Installation
4 services, isn't that what you are buying?

5 MR. KAESTNER: \$5,012 was
6 the check.

7 THE COURT: Aren't you buying
8 services?

9 MR. KAESTNER: Oh yes, you are
10 clearly buying services.

11 THE COURT: Did they ever amend
12 the statute?

13 MR. KAESTNER: Not the false
14 pretenses.

15 THE COURT: In other words
16 if I retained Mr. Spencer as my lawyer for \$5,000
17 and he doesn't show up, you can't get him for
18 anything, you can't steal services. Services are
19 not under the VPI case.

20 MR. KAESTNER: But the VPI
21 case is different from this case because in the
22 VPI case it was whether or not a person could be
23 charged with grand larceny based on the value of
24 the time of the computer usage. What we are saying
25 here is that because Mr. Mosteller first built the

1 charges into the prices he quoted Ginns, gave them
2 a breakdown, did not do the work, represented to
3 them that in fact the work had been done, that Mr.
4 Mosteller didn't steal services but rather stole
5 \$5,012 and that he intended to do that from the
6 beginning because of the way he structured his
7 prices to Ginns Southern.

8 In addition, with respect to the
9 issue of tamper proofing, it is very important to
10 realize that this was, Commonwealth's 6 was the
11 document that Mr. Mosteller gave to Mr. Kyber. In
12 this document he says --

13 THE COURT: Well I think if
14 you once conclude that they were supposed to be
15 carbon copies, the criminal intent might be there.

16 MR. KAESTNER: Exactly. That
17 is with respect to tamper proofing. That is with
18 respect to the \$5,000 charge that was gotten through
19 Dadson Enterprises, not with respect to the install-
20 ation services contained in the last paragraph on
21 the bid, and not with respect to the samples that
22 Mr. Mosteller billed Ginns Southern for.

23 THE COURT: All right, gentlemen.
24 Do you have anything else to say at this time?

25 MR. SPENCER: Judge, I think you

1 put your finger right on it with respect to the
2 tamper proofing. You are getting there to a question
3 of the value of the services, if he did 10 beds
4 for them or a 1,000 beds.

5 THE COURT: Well I am going to
6 overrule all of your motions, but I am going to
7 take under advisement whether it is two counts
8 or one count, or excuse me, three counts. I don't
9 know if it is not just one continuous act. The
10 factory installation and the tamper proofing
11 material, I see what the State is talking about at
12 this time, but I am not sure that is not one
13 continuous act, although two billings, which makes
14 a difference.

15 MR. SPENCER: The Court, then,
16 I gather, is overruling my motion?

17 THE COURT: On all three, but
18 I have got one, at this point, seriously under
19 advisement. At this point the others I see
20 clearly what the State maintains, and so I am
21 overruling them because they are entitled to all
22 reasonable inferences.

23 MR. SPENCER: Note my exception.

24 THE COURT: All right,
25 gentlemen. Did you all want to take off until 2:30

1 for lunch?

2 NOTE: At this point a luncheon
3 recess is had, after which the hearing is resumed,
4 viz:

5
6 THE COURT: All right, Mr.
7 Spencer.

8 MR. SPENCER: Your Honor please,
9 the defendant rests.

10 THE COURT: All right, gentlemen.
11 Is there anything that you want to argue?

12 MR. KAESTNER: If it please the
13 Court, the defendant is accused in one indictment
14 of three counts of grand larceny by false pretenses.
15 Before reviewing the evidence, it is necessary to
16 keep in mind the course of element of false
17 pretenses. We must demonstrate that the defendant
18 had an intent to defraud, that he committed an
19 actual fraud, that he used false pretenses to
20 perpetrate that fraud and that somebody relied
21 upon that false pretense and gave the defendant
22 value, that is suffered economic loss.

23 Mr. Mosteller stands charged
24 in the indictment with committing a fraud by
25 false pretenses under three counts, the first

1 involving an installation, the second involving
2 samples and the third involving tamper proofing.

3 THE COURT: Now hand me those
4 indictments and check, Mr. Clerk.

5 MR. KAESTNER: Before considering
6 the specifics of each count, it is necessary to
7 step back and view all the evidence that has been
8 presented in the form of testimony and in the form
9 of documents and witnesses as a whole so that we
10 can determine what the intent was with respect to
11 the Danville transaction, and then how he proceeded
12 to commit these acts of false pretenses.

13 Let's look first at the
14 defendant's overall intent. This defendant, Mr.
15 Mosteller, was an InterRoyal sales representative
16 in the Commonwealth of Virginia. It was Mr.
17 Mosteller who was contacted by Ray Kyber of Ginns
18 Southern and who supplied to Ray Kyber of Ginns
19 Southern prices on furniture which they would
20 deliver. Those prices that Mr. Mosteller supplied
21 were introduced by the Commonwealth as Commonwealth's
22 Exhibit No. 6. These prices introduced, or these
23 prices provided by Mr. Mosteller include three
24 items, or four items, excuse me. They include the
25 cost of the furniture, they include the cost of

1 samples, they include the cost of installation,
2 and they include the cost of tamper proofing.

3 Of the entire \$60,000 worth
4 of purchase order which Ginns Southern was awarded
5 by the State, InterRoyal received \$42,000. Mr.
6 Mosteller, through his charges of \$6,113 for
7 samples, through his charges of \$5,000 for tamper
8 proofing, through his charges of \$5,012 for
9 installation services received an entire sum of
10 \$16,000. In short, Mr. Mosteller received 38%
11 of the purchase price of the furniture.

12 Mr. Kyber has testified that
13 his normal profit margin on various jobs dealing
14 with the State would be somewhat less than 4%, yet
15 Mr. Mosteller received 38%. In addition to that,
16 Mr. Mosteller calculatedly and in a designed fashion
17 planned his fraud. He sent to Ray Kyber of Ginns
18 Southern an order form representing that this is
19 what he had ordered from the factory, representing
20 that he had ordered all of the furniture on the
21 invitation to bid and directing the factory to
22 advise Mosteller of the hardware sizes of all
23 external fastenings by 12/15. This was calculated
24 to lead Mr. Kyber to believe that in fact Mosteller
25 would be supplying those external fastenings when

1 indeed Mr. Mosteller was not planning on supplying
2 those external fastenings. Mr. Mosteller sent the
3 order form to the factory, and in this order form
4 that he sent to his factory he clearly indicates
5 that tamper proof hardware was to be put in the
6 furniture at the manufacturing plant, and that the
7 furniture was to arrive in Danville with tamper
8 proof hardware.

9 THE COURT: Let me ask you,
10 Mr. Kaestner, didn't the furniture have tamper proof
11 hardware?

12 MR. KAESTNER: The furniture
13 was manufactured with tamper proof hardware.
14 Tamper proof hardware was put in the furniture
15 when it was manufactured in Plainfield. That is
16 what Mr. McEntee testified to in the courtroom.

17 MR. SPENCER: If Your Honor
18 please, counsel has got to object to this. That
19 is not what Mr. McEntee testified to. Mr. McEntee
20 said he never saw the furniture, he didn't know
21 what was put in the furniture.

22 THE COURT: Well Mr. Phillips
23 testified that he saw the furniture.

24 MR. SPENCER: Mr. Phillips
25 saw it and he said most of it had the tamper proof

1 hardware, the 10 beds, he said, more or less, did
2 not. But Mr. McEntee doesn't know whether it was
3 or wasn't.

4 MR. KAESTNER: You are quite
5 right, Mr. Spencer. Mr. Phillips said when the
6 furniture arrived, and the furniture that arrived
7 had been, of course, manufactured someplace,
8 presumably it was manufactured by InterRoyal since
9 they were the people to whom Mosteller directed
10 the order for the furniture. The fact that the
11 furniture, when it arrived, had tamper proof
12 hardware in it is buttressed, although it not
13 conclusive, by the invoices that were submitted
14 by the InterRoyal Corporation to Ginns Southern
15 which indicate tamper proof hardware and specify
16 a kind, Robinson hardware, if that is possible to
17 locate.

18 Mr. Mosteller also built into
19 the initial quotation that he gave to Ray Kyber of
20 Ginns Southern \$6,000 worth of charges for samples.
21 There has been testimony presented to this Court
22 that those samples never in fact existed at
23 Danville. Mr. Phillips has testified that the
24 entire facility was new and that there was no
25

1 furniture in it when the huge shipment of furniture
2 arrived from the InterRoyal factory to be installed
3 and to be delivered to the site. Mr. Mosteller
4 did not, contrary to the repeated -- if I may,
5 Your Honor, direct your attention to the invoice
6 for the samples in the amount of \$6,100, Mr.
7 Mosteller repeatedly billed Ginns Southern for
8 these samples. The first bill was a memorandum,
9 that is Commonwealth's Exhibit No. 12, that says,
10 "Ginns, you can expect to receive a bill for samples
11 sometime in the future". Commonwealth's 13 was
12 another bill. That is a memorandum and that says,
13 "Ginns, you can expect to receive a bill for samples
14 from me at sometime in the future". Commonwealth's
15 14 is a bill, and I direct the Court's attention to
16 the top of that bill, because at the top of that
17 bill it says, "Furniture delivered to Danville".
18 It does not say utilized in. The furniture was
19 delivered to the Danville Mental Health facility.
20 Clearly Mr. Mosteller intended to get that \$6,100.
21 He billed for it on three separate occasions.
22 In addition to that, Mr. Mosteller's figures that
23 he supplied to Ginns Southern were used by Ginns
24 Southern in its quotation to the State. Clearly
25 if Mr. Kyber was to believe that his normal profit
margin is 4 to 5% on this type of job, clearly if

1 Mr. Mosteller had not built in his \$16,000 worth of
2 charges, clearly Mr. Kyber would have included his
3 normal profit margin of 4 to 5% and clearly the
4 State would have paid less.

5 In addition, we have shown
6 that Mr. Mosteller hid his activities in a variety
7 of ways. He led Ginns Southern, by Exhibit 7, to
8 believe that tamper proof hardware had to be
9 installed separately, while instructing, through
10 Commonwealth's Exhibit No. 22, to install the
11 tamper proofing at the factory. He also hid his
12 actions by going to Art Zimmerly of Dadson
13 Enterprises and asking Mr. Zimmerly for a letter
14 which was identified by Mr. Kyber, to cover the cost
15 of the tamper proofing, and that letter says, "Dear
16 Dave, with regard to our meeting last week we
17 will be able to change over standard hardware to
18 tamper proof fastenings on the list of furniture
19 for \$5,000". This letter is dated December 10th.
20 The order sent by Mr. Mosteller to the factory is
21 dated November 16th, well after the furniture had
22 been ordered from the factory, a month, indeed
23 after the furniture had been ordered by the factory.
24 Mr. Mosteller goes to Dadson Enterprises and says,
25 "I would like to enter into an agreement with you".

1 And the testimony has been that that agreement was
2 false because all Dadson retained was \$1,000.
3 Dadson did not go down to Danville. Dadson did
4 not do this work. In fact this work was never
5 performed, yet --

6 THE COURT: What does Mr.
7 Dadson think he got the thousand dollars for?

8 MR. KAESTNER: For the use of
9 his name. Mr. Mosteller then caused Mr. Zimmerly
10 to submit this invoice, which is Commonwealth's
11 Exhibit No. 20, to Ginns Southern, and to demand
12 payment for \$5,000. That payment was made, and
13 at Mr. Mosteller's direction, \$4,000 of that were
14 paid to two entities. None of that money was
15 paid by Dadson Enterprises to David Mosteller,
16 rather that money was paid to Artisan Interior
17 Design to be credited to Mr. Mosteller's account,
18 and to have a vehicle transfer.

19 And so we have Mr. Mosteller,
20 even in the way in which he brings Mr. Zimmerly
21 his name, obfuscating the fact that it is Mr.
22 Mosteller who is receiving the value of this
23 tamper proofing charge.

24 MR. SPENCER: What did you say?

25 MR. KAESTNER: Obscuring.

1 MR. SPENCER: Oh, I thought he
2 said something else.

3 MR. KAESTNER: All of the facts,
4 including the two copies of the order sent regarding
5 tamper proofing, speak to Mr. Mosteller's intent.
6 But specifically with respect to each of the
7 charges, once Ginns Southern had been awarded the
8 purchase order by the State in the amount of
9 \$60,000, and that \$60,000 included the \$16,000
10 that was ultimately in one way or another to be
11 disbursed by Mr. Mosteller to find its way into
12 his hands.

13 THE COURT: Was InterRoyal
14 a lot cheaper than other companies? All the bids
15 are pretty much in line.

16 MR. KAESTNER: Your Honor,
17 evidence is not presented as to the nature of the
18 other bidders. However, if one examines the bid
19 tab sheet, one will note that there is no identifi-
20 cation on this, with one exception, and that being
21 the bid of Brownson's that was a partial bid, that
22 anyone was bidding anything other than InterRoyal
23 furniture. In other words, there is nothing on
24 this to indicate that another manufacturer's
25 furniture was being bid.

1 THE COURT: Well what I noticed,
2 Mr. Kaestner, is the fact that Litton is \$60,095
3 there was one by Ginns, \$60,005, Artisan Interiors,
4 \$60,800, Interscapes, \$61,000, General Medical
5 \$61,000, and Flowers, \$63,000. Would all those
6 bids have that much in it?

7 MR. KAESTNER: Yes indeed.
8 As a matter of fact, if you would check and do
9 the computations, if a 10% price variance, or a
10 26% price variance, and if one calculates against
11 the purchase price, the price variance, that is
12 the \$16,000 that Mr. Mosteller benefited is 38%
13 of the cost of the furniture. That is the furniture
14 costs \$42,000. \$16,000 is 38% of that. Had
15 that 38% not been included in each of those bids,
16 some of those bids would have been substantially
17 lower, we contend.

18 THE COURT: Well if they are
19 sealed bids --

20 MR. KAESTNER: But don't forget
21 Mr. Kyber's testimony, Your Honor. Mr. Kyber said
22 that he dealt with the InterRoyal representative
23 in the Commonwealth of Virginia. And that Inter-
24 Royal representative was David Mosteller, and none
25 other.

1 THE COURT: Did all of them
2 deal with InterRoyal?

3 MR. KAESTNER: We have not had
4 testimony to that effect, but there was no --
5 and we should not go beyond that.

6 THE COURT: No, we can't go
7 beyond that. We can't go beyond the evidence,
8 but I don't know where they made their bids from.
9 There must be other manufacturers that have
10 representatives in Virginia.

11 MR. KAESTNER: Oh, there
12 clearly are, Your Honor, but lest the Court forget,
13 the invitation to bid specified InterRoyal products
14 throughout.

15 MR. SPENCER: Now that is a
16 direct effort to mislead the Court, Mr. Kaestner.
17 You know that these specifications always refer
18 to a particular manufacturer, but it clearly says
19 in here what the purpose of that is. Now they
20 are cited as an example of what they want. But you
21 know as well as I know that the Department of
22 Purchasing and Supply puts that down as a standard
23 and accepts bids on equivalent merchandise.

24 MR. KAESTNER: But I direct the
25 Court's attention to the first paragraph in the

1 invitation to bid which says description of the
2 products here are InterRoyal products.

3 THE COURT: Well isn't that a
4 silly way to put out a bid?

5 MR. KAESTNER: Excuse me?

6 THE COURT: Isn't that a silly
7 way to put out a bid?

8 MR. SPENCER: Yes, sir.

9 THE COURT: I want a hundred
10 automobiles of the Chevrolet type. I mean what
11 are you putting out bids for? Why not hand the
12 order directly to InterRoyal? Why put out the
13 bids if they are going to be bidding InterRoyal
14 products?

15 MR. KAESTNER: I will pass
16 the recommendation over to Don Moore.

17 THE COURT: Please do, because
18 if you are going to buy it all from InterRoyal,
19 you have got apparently one representative in this
20 neighborhood, around here. Then that just leaves
21 him in a position of doing what he wants to.

22 MR. KAESTNER: Precisely, Your
23 Honor, and in this case Mr. Mosteller did do precisely
24 what he wanted.

25 THE COURT: They can say, "I don't

1 want Flowers to have this job, so I'll run the
2 cost up.

3 MR. KAESTNER: Yes, sir.

4 In this case he clearly decided, he clearly mani-
5 pulated Ginns, he included in the prices that he
6 quoted, as testified by Mr. Kyber, \$16,000 for
7 samples which were never used, tamper proofing
8 which was never done, and installation which was
9 never performed by Mr. Mosteller or anybody working
10 under his direction.

11 THE COURT: It looks like if
12 you are going to buy it from the same manufacturer,
13 the only difference is how much markup he wants.
14 I believe he called it the representative of this
15 company. But if InterRoyal is going to fix all
16 the manufacturing prices, the only difference in the
17 bid, say Flowers wants 10% --

18 MR. KAESTNER: Precisely. And
19 if InterRoyal had fixed all of the manufacturing
20 prices as they did, as represented in the invoice
21 that Mr. McEntee indicated --

22 MR. SPENCER: Judge, I have to
23 object again. There is no evidence as to how anybody
24 arrived at a price. There is no evidence of what
25 kind of furniture is involved with the other seven

1 bidders. There is no evidence of how they
2 arrived at a price.

3 THE COURT: Well there is no
4 evidence that they all bid from this.

5 MR. KAESTNER: Your Honor,
6 even with respect to the InterRoyal situation,
7 had Mr. Mosteller not included the \$16,000 worth
8 of charges, Mr. Kyber testified that his normal
9 profit margin was less than 4%. You would add
10 a profit margin of less than 4% to the \$42,000
11 rather than to the \$58,000 quoted by Mr. Mosteller
12 to Mr. Kyber in his prices. Clearly 4% of the
13 \$42,000 would have given the State a lower purchase
14 price. That is a question of simple mathematics.

15 In this case, too, there were
16 no samples that ever existed in Danville, yet Mr.
17 Mosteller represented in his invoice, that is in
18 his demand for payment to Ginns Southern, that he
19 had delivered samples to the Danville facility
20 and that \$6111 was to be paid for those samples.
21 These samples didn't exist. Carl Phillips couldn't
22 find them. No one could find them. They simply
23 weren't there. The prior two invoices or the
24 prior two notations that Mr. Mosteller sent show
25 clearly that he utilized or represented that he

1 utilized them in selling the job. But in the
2 final invoice, he represents that he delivered
3 them. Mr. Phillips testified that neither Mr.
4 Mosteller nor anyone else from InterRoyal was
5 substantially involved in the installation of
6 the furniture. Mr. Phillips has testified that he
7 and the building and grounds crew of the Danville
8 facility assembled, uncrated and carted away the
9 debris of the furniture that was delivered. And
10 yet Mr. Mosteller sends a bill on another occasion
11 to Ray Kyber of Ginns Southern saying that, "we
12 have installed the furniture" and demanding \$5,012
13 in payment for that. I believe the Court has the
14 copy of that invoice in front of him. That invoice
15 is not ambiguous. It says it is the demand for
16 payment for installation services of the furniture
17 at the Danville facility.

18 With respect to the tamper
19 proofing, it is clear that the tamper proofing was
20 never done by anyone working for Mr. Mosteller.
21 Mr. Phillips testified that the hardware arrived
22 and he unloaded and assembled most of it, and he
23 saw hundreds. Everything had the tamper proofing
24 hardware. And yet Mr. Mosteller causes Art Summerly
25 of Dadson Enterprises to send a bill for \$5,000 to

1 Ginns Southern for the tamper proofing of the
2 furniture.

3 I also direct the Court's
4 attention to the phrasing of the letter that Art
5 Zimmerly sent to David Mosteller, and in that
6 letter David Mosteller said, or Art Zimmerly
7 says, "we will be able to change over standard
8 hardware to tamper proof hardware". He does not
9 say that they will be installing the tamper proof
10 hardware. He rather says that "we will change
11 over the standard hardware to tamper proof hardware,
12 that is that will change the screws from flathead
13 screws to tamper proof screws.

14 These repeated acts by Mr.
15 Mosteller were clearly calculated. They were
16 clearly planned and they were clearly intentional.
17 The false pretenses, the misrepresentation as to
18 a past or existing fact which must form the basis
19 of any of the counts in the indictment are in His
20 Honor's hands. There is an invoice for samples
21 delivered and none existed. There is an invoice
22 for installation performed and none was. There is
23 an invoice for tamper proofing, for changing over
24 screws, and none was done. These statements are
25 misrepresentation of facts or existing facts within

1 any meaning of that word. And we go beyond that.
2 Mr. Mosteller, in his interview with Investigator
3 Bryant, as Investigator Bryant has testified,
4 indicated that tamper proofing didn't involve
5 changing screws, that what tamper proofing involved
6 was taking a little bit of putty and going down
7 and filling in the holes. And yet Investigator
8 Bryant went down and checked those holes, not all
9 of them, and there was no evidence of putty in
10 them. And there was no evidence of anyone having
11 scraped putty out of them.

12 Mr. Phillips testified that
13 the furniture arrived with tamper proof hardware
14 at the site. Mr. Mosteller also indicated to Mr.
15 Bryant that it was he and Mr. McIntyre who went
16 down and did that. Of course it was unnecessary.
17 Mr. Mosteller also told Investigator Bryant that
18 in fact he did build in sample charges in the prices
19 he gave vendors.

20 What we have here, Your Honor,
21 is quite clearly a situation that falls within the
22 law of larceny by false pretenses. Mr. Mosteller
23 intended to defraud the Commonwealth. He did so
24 first by establishing the fraud. He establishes
25 the fraud with the two documents His Honor is

1 examining now. One document to InterRoyal saying
2 put it in, the other saying leave it out. He
3 establishes a fraud by giving prices which they
4 will rely on in giving to the Commonwealth which
5 includes \$16,000 to be divided up, \$5,000 for
6 samples, \$5,012 for installation, or excuse me,
7 \$5,000 was for tamper proofing, the invoice for
8 \$5,012, but they only wrote the check for \$5,000.
9 No, wait a minute. They wrote the check for more
10 than that. The \$5,000 check, Dadson Enterprises,
11 this is the check for tamper proofing. The check
12 for the installation services should be in an amount
13 in excess of \$5,012, and indeed it is and is made
14 up of this invoice which is an invoice for the
15 installation, and also the invoice for the barber
16 and beauty chair which is right there. You will see
17 there are notations on that particular document,
18 on both of those documents which refer to that
19 check.

20 THE COURT: Well there is no
21 evidence about the beauty and barber chair.

22 MR. KAESTNER: No. The bill
23 includes installation and Mr. Kybar identified
24 this as a bill for the two items of furniture not
25 supplied by the InterRoyal Corporation, but supplied

1 by Royal Installation. Royal Installation submitting --

2 THE COURT: Did they get the
3 chair?

4 MR. KAESTNER: Yes, they did.

5 THE COURT: I didn't hear
6 any evidence of that.

7 MR. KAESTNER: For that \$5,000
8 some odd dollar invoice, or 6,000 some odd dollar
9 invoice --

10 THE COURT: Which one is the
11 5,000?

12 MR. KAESTNER: The \$5,000
13 is the tamper proofing charge, and that is supported
14 by these documents.

15 This is not a case involving theft
16 services. This is a case involving a theft of money.
17 This is a case involving \$16,000 worth of the
18 Commonwealth's money because but for these offenses
19 if Mr. Kyber is to be believed, his 4% profit margin,
20 would have been added to the \$42,000 price rather
21 than to the inflated price which Mr. Mosteller handed
22 to them. The Commonwealth paid that money and it
23 is clear from start to finish that Mr. Mosteller
24 intended for the Commonwealth to pay that. It is
25 equally clear that Mr. Mosteller made misrepresentations

1 to Ginns Southern, and that those misrepresentations
2 related to a past or existing fact. It is equally
3 clear that Ginns Southern relied on those. They
4 disbursed \$16,000 of their money in reliance upon
5 those. And it is equally clear that the Commonwealth
6 relied upon those because they accepted Ginns bid.
7 This is not a situation where the Commonwealth
8 got what it paid for. The Commonwealth did not
9 get those samples that it was charged \$6,111 for.
10 The Commonwealth did not get that installation.
11 And the Commonwealth did not have Mr. Mosteller
12 or Dadson Enterprises or anyone else come on down
13 and change standard screws for tamper proof screws.
14 The Commonwealth did not get what it paid for.

15 Your Honor, there has been no
16 evidence presented rebutting any of the representa-
17 tions made by any of the witnesses. All the
18 witnesses clearly indicated that they accepted
19 Mr. Mosteller's representations regarding installa-
20 tion, regarding tamper proofing and regarding
21 samples and they disbursed their money in reliance
22 upon them. Our witnesses have testified that they
23 relied upon the prices submitted by Mr. Mosteller,
24 and that they based their price quotations upon
25 the quotations supplied by Mr. Mosteller.

1 If the Court examines the
2 date of the various documents that have been
3 presented, the Court will note that the date of
4 each of the invoices for installation, for tamper
5 proofing and for samples are after the events in
6 question.

7 And again, we ask the Court
8 to remember that Mr. Mosteller set this up. He
9 set it up in two different order forms, one to
10 Ginns, one to InterRoyal.

11 THE COURT: All right, assuming
12 everything you say is true, and the Court believes
13 everything, isn't there somewhere in the law of
14 false pretenses that I cannot plainly stand by
15 and let them take my money and then say I have
16 been defrauded? In other words, I can't give you
17 a check for a thousand dollars that is not signed
18 and you take it and you come back and say, "well
19 that's a false pretense. How about the duty of
20 these vendors in the State?

21 MR. KAESTNER: The Supreme
22 Court of Virginia has clearly addressed that issue.
23 The case cited in the Memorandum of Law that I
24 gave to Your Honor, a copy of which was given to
25 defense counsel, was Warren v. Commonwealth. And

1 in that case the Supreme Court said that there is
2 no duty to inquire that the focus must be reliance,
3 was the representation made --

4 THE COURT: I think you have
5 got a little broad interpretation on that case,
6 that there is no duty to inquire. There is some
7 duty to inquire. If I had taken the check for
8 the \$1,000 and didn't sign it and they gave me a
9 thousand dollars, false pretenses, it is obviously
10 void on its face. Now the banks will do that in
11 Richmond, but they don't do it for my checks.
12 They might do it for somebody else, but you have
13 got to look at the instrument and see what it is
14 before you can rely. I mean we are not dealing
15 now with the expert towards the layman. We are
16 dealing with experts. I assume everybody in the
17 Purchasing and Supply Department is an expert in
18 the sense that they take in what comes in.

19 MR. KAESTNER: But the Court
20 must remember that people in the Department of
21 Purchase and Supply never saw Mr. Mosteller's
22 invoices for samples, never saw Mr. Mosteller's
23 invoices for installation, and never saw any
24 invoices for tamper proofing.

25 THE COURT: You keep talking

1 about the Commonwealth's money. Isn't it a duty
2 for them to see themselves?

3 MR. KAESTNER: No, it is the
4 duty for the Commonwealth to pay the invoices
5 presented to them by Ginns Southern.

6 THE COURT: That is the reason
7 they want to raise the gas tax.

8 MR. KAESTNER: Probably it is.

9 THE COURT: It doesn't make
10 sense to me.

11 MR. KAESTNER: In this case
12 Mr. Kyber indicated that first of all he was not
13 an expert in the furniture line. Mr. Kyber also
14 indicated that it was normal for salesman --

15 THE COURT: Well to me he is
16 holding himself out as an expert. Mr. Kyber
17 also indicated that -- we are not talking about
18 furniture now. Apparently the State got the
19 furniture. They were charged too much, as you say,
20 \$16,000 too much, which the State claims went to
21 Mr. Mosteller. But it seems to me it is some duty
22 somewhere for somebody that is spending public
23 money to do it. My money is not public, but if
24 the bank is spending my money, that is the reason
25 I get a bank statement, to see where they are spending

1 it. It looks like to me it is some duty on the
2 State to see that these things were done.
3 Are they so negligent in the thing that they have
4 permitted defraud? I am assuming what you said
5 is true.

6 MR. KAESTNER: The inquiry,
7 of course, must start with Ginns Southern. Ginns
8 Southern indicated that it was normal for salesman
9 to use samples in jobs, and on occasion those
10 samples would be paid for by a particular vendor.
11 Why should Ginns Southern inquire?

12 THE COURT: What did Ginns
13 Southern get the \$2400 for? For placing the order?

14 MR. KAESTNER: For placing the
15 order, submitting a successful bid to the Common-
16 wealth, submitting the low bid to the Commonwealth.

17 THE COURT: It seems to me
18 to be an awful lot of money just to place an order,
19 \$2400.

20 MR. KAESTNER: You know where
21 my sympathies on that regard lie. But nevertheless,
22 Mr. Kyber has testified that InterRoyal did not
23 deal directly with the Commonwealth, but rather
24 allowed vendors in the Commonwealth to deal with
25 the Commonwealth.

1 If InterRoyal would not deal directly with the
2 Commonwealth, clearly InterRoyal is going to
3 deal through a vendor such as Ginns. Ginns then
4 places --

5 MR. SPENCER: Again, Your
6 Honor, I cannot sit and let a misstatement be
7 made. Mr. Kyber testified, and there was certainly
8 testimony from one witness, and I think it was
9 Kyber, that he did not know what the situation was
10 there. You asked, Your Honor, and I pointed out,
11 he didn't know whether this was a regulation of
12 DPS or from some other source. And there is no
13 evidence other than that.

14 MR. KAESTNER: And that
15 evidence amounts to nothing more, and I think it
16 is fair that InterRoyal --

17 THE COURT: I am just trying
18 to find out what he got the \$2400 for.

19 MR. KAESTNER: Mr. Kyber
20 apparently got the \$2400.

21 THE COURT: For submitting the
22 bid?

23 MR. KAESTNER: For submitting
24 the bid.

25 THE COURT: That's right good

1 money.

2 MR. KAESTNER: Yes, but it
3 doesn't involve the representation that samples
4 had been delivered when they had not. It doesn't
5 involve the representation that installation had been
6 performed.

7 THE COURT: In fact they don't
8 pay judges that well. I mean the thing that is
9 bothering me, it seems there is some responsibility
10 that somewhere along the way, during the normal
11 course of business, that they would have checked
12 this and said, "this is a fraudulent invoice".
13 Assuming you are correct, I mean you have got
14 \$5,000, you are going to pay for somebody that has
15 never been on the job?

16 MR. KAESTNER: But then, Your
17 Honor, don't forget that they did receive a
18 certificate of completion so that they did take
19 some steps to check. They received a certificate
20 of completion from Wesley Scarce. So they did in
21 fact take steps to insure that the job contracted
22 for had been performed.

23 THE COURT: Did they realize
24 that the purchase order called for all furniture
25 to have tamper proofing?

1 Did he realize that the furniture came in with the--

2 MR. KAESTNER: Yes, but again,
3 Wesley Scarce didn't know, or those documents
4 from Dadson Enterprises were not addressed to Mr.
5 Scarce. Those documents from Dadson were addressed
6 to Mostellar and to Ray Kyber. Those documents
7 were not addressed to Mr. Scarce. The bill for
8 the samples was addressed to Ray Kyber, not Mr.
9 Scarce. And the bill for installation was addressed
10 to Mr. Kyber, not to Mr. Scarce. So that Mr.
11 Scarce, based upon not receiving copies of the letter
12 from Dadson, not receiving copies of Mostellar's
13 invoices for installation and tamper proofing, could
14 only know what was on the purchase order, and that
15 was that they wanted furniture, that it was to
16 have tamper proof hardware in it, and that that
17 furniture was to be installed. What he represented
18 to Mr. Kyber in his certificate of completion that
19 I just presented to Your Honor was in fact that
20 the furniture arrived as specified and had been
21 installed. Mr. Scarce in fact was functioning
22 truthfully.

23 THE COURT: No, I don't think
24 there is any question about that. I was very much
25 impressed by Mr. Scarce.

1 MR. KAESTNER: The misrepresenta-
2 tions were all hidden from Mr. Scarce. Those
3 misrepresentations were made from Mr. Mosteller
4 to Ginns. Those misrepresentations began when
5 Mr. Mosteller first provided prices to Ginns
6 Southern, because those included the extra \$16,000.
7 And they continue when Mr. Mosteller arranges with
8 Dadson Enterprises to get this \$5,000 submitted
9 for installation never performed, not to the
10 Commonwealth of Virginia, not to Scarce, but to
11 the vendor. And the vendor takes steps. It
12 asks for a certificate of completion from the
13 institution. Was the work done as required? And
14 it was. Was the furniture delivered with tamper
15 proof hardware? Of course it was delivered with
16 tamper proof hardware. Mr. Mosteller has asked
17 that it be manufactured with tamper proof hardware.

18 The furniture was installed.
19 There is no representation on that certificate of
20 completion regarding samples. Mr. Scarce simply
21 was in no position to inquire behind Ginns' bid
22 on this particular job.

23 We submit, Your Honor, that
24 the evidence clearly indicates that Mr. Mosteller
25 intended to make that \$16,000; that Mr. Mosteller

1 committed, engaged in fraud to receive that
2 \$16,000; that he made misrepresentations of fact,
3 that he committed false pretenses, that he
4 misrepresented past or existing facts; that he
5 secured payment, and that all of the goods and
6 services invoiced for which Mr. Mostaller paid
7 never existed or never were needed because they
8 had been done before.

9 We ask the Court to find the
10 defendant guilty as charged.

11 MR. SPENCER: If Your Honor
12 please, counsel for the Commonwealth has expressed
13 himself very vigorously and very forcefully, but
14 he seems to skirt what is the basic situation
15 in this case. It amazed me that he could argue
16 for some 40 minutes and never once touch on the
17 real issue in the case.

18 Now to take the things that
19 he said, there was so much of it, and I objected.
20 I dislike interrupting counsel, but I felt that
21 it was necessary to object from time to time to
22 things that appeared to me to be statements either
23 outside the evidence or in contradiction to the
24 evidence.

25 The first thing that I want to do-

1 and the Court said that you ate at other places
2 other than Shoney's -- the first thing I want to do
3 is to see whose pencil is right and whose pencil
4 is wrong and just what justification Mr. Kaestner
5 had for repeatedly speaking of 38%. It seems to
6 me that the bid was \$60,500 and some dollars,
7 and the amount that Ginns paid to InterRoyal was
8 42,000 and some odd dollars, and according to my
9 pencil that means InterRoyal got pretty close to
10 an even 70%, if you rounded both numbers off at
11 60 and 42. I get 70% on that. And we know that
12 Mr. Ray Kyber said that they got something less
13 than 4%. And it seems to me that that would leave
14 something in the neighborhood of 26%. It makes
15 me wish I had let him put his exhibit in. But I
16 don't think we need that, because as Your Honor
17 said, you do eat at places other than Shoney's.
18 So I was struck that what we were really doing was
19 being subjected to a considerable amount of smoke.
20 And then Mr. Kaestner said something, and he used
21 the word, and I didn't, or wasn't certain I quite
22 heard it, and he turned and said, "obscure". So
23 using obscure, I am just wondering who at one point
24 is trying to obscure what, and from whom.

25 Now he started out with the

1 recitation, I thought he was going to be on the
2 right foot. He started out with the recitation of
3 the nature of the offense. And his first statement
4 was that there were four elements to larceny by
5 false pretenses. I have no doubt that the Court is
6 familiar with the four elements. They were first
7 stated in Virginia in *Paye v. Commonwealth*, which
8 is all the way back in 28 Gratton, an 1877 case,
9 which dealt with the same statutes and the
10 predecessor of the present statute. It is not
11 materially changed. In that case it was held that
12 there were four elements that the Commonwealth had
13 to prove, and that those four elements were that
14 the larceny was, and I want to get the case and
15 read right from it, that the Commonwealth must prove
16 number one, an intent to defraud. Number two, an
17 actual fraud. Number 3, the use of false pretense
18 for the purpose of perpetrating the fraud, and four,
19 accomplishment of the fraud by means of the
20 false pretenses used for that purpose, that is that
21 false pretenses to some degree must have induced
22 the owner to part with his property. False pretense
23 must be a misrepresentation as to an existing fact
24 or past event.

25 Now the first thing that Mr.

1 Kaestner is trying to do is he is trying to go
2 all the way through the situation and take matters
3 as they develop and relate them back to the point
4 at which Mr. Mosteller, and I will use his word,
5 presumably gave these figures. Now there is
6 the first error. There has been no testimony whatso-
7 ever that Mr. Mosteller gave these figures.

8 Do you have a question, Mr.

9 Kaestner?

10 MR. KAESTNER: Yes: I object
11 to that because at the top of Exhibit 6, in Ray
12 Kyber's handwriting, there is a notation as to the
13 source of these quotations, and I would direct
14 both you and the Court's attention to that.

15 THE COURT: He said he didn't
16 talk to him.

17 MR. SPENCER: My recollection
18 is that he said someone in his office got them,
19 and he presumed that they came from Mr. Mosteller.

20 THE COURT: He said the quotes
21 were not in his handwriting. That was his testimony.

22 MR. SPENCER: That's correct.
23 So there is the first flaw. There is no evidence
24 that these figures came from Mr. Mosteller.

25 Now if you proceed on, there is

1 no evidence that there was any false fact. The
2 evidence came at a much later time when the
3 furniture was actually delivered at Danville, and
4 it proved to a greater or lesser extent with reference
5 to two of the items, installation and tamper
6 proofing, that the amount of work done, in the
7 case of the tamper proofing, the amount required
8 to be done, according to the Commonwealth on
9 witness, was rather slight. But as the Court said,
10 how does that make larceny? If I have a \$1,000
11 automobile and I sell it to you for 5, and you agree
12 to pay it, how is that larceny?

13 Now step over to the installa-
14 tion. You will recall, and it is the very same
15 sort of thing that the Commonwealth's witness
16 Mr. Phillips testified about the installation of
17 the furniture, but he did not say that Mosteller
18 did nothing. To the contrary he said Mosteller was
19 there and he did help. He was there for one day,
20 he thinks. He then agreed that Mr. Mosteller had
21 come back at a later time, and he then agreed that
22 the man whom I brought in, who was identified as
23 Mr. McIntyre, came there with his son, and that they
24 worked on it. Now once again, we are back to the
25 \$1,000 automobile. In order to carry the thing a

1 step further, let me go back just for a moment
2 and remind the Court that Mr. Kyber said that in
3 the ordinary course of business samples were used.
4 This is how the dealers made their sales, that
5 either the dealer or the manufacturer's representa-
6 tive would bring samples and show them, and that
7 sometimes these samples were left. Sometimes they
8 were not. I think he said sometimes they were
9 destroyed.

10 Now he also said that Ginns
11 Southern did not do installation, and that in this
12 case they looked to Mosteller to do them. And he
13 said also that they did not tamper proof furniture,
14 that he didn't even know what it was. And he said
15 that but for the fact that he knew on the front
16 end that Mosteller would take care of these things,
17 that Ginns Southern could not have bid and would
18 not have bid because they weren't prepared to
19 do them. They didn't make any installations outside
20 of the City of Richmond.

21 Now what you are being asked
22 to do, Your Honor, is to make a post fact judgment
23 on whether the charge was reasonable. And I
24 don't think the Commonwealth would deny that.
25 As I say, the Court has put in the proposition of the

1 \$1,000 car. But let me ask you this: Clearly
2 Ginns Southern anticipated getting from the Common-
3 wealth of Virginia \$60,500 plus. Clearly Ginns
4 Southern anticipated paying InterRoyal 42,000 and
5 some odd dollars. By the testimony, Ginns
6 Southern anticipated making something less than
7 4%. The Court has picked \$2600.

8 THE COURT: 24.

9 MR. SPENCER: \$2400 for
10 purposes of discussion, and I concede it could have
11 been 2,000. I don't know what it was.
12 Suppose when the furniture had come there had been
13 no Robinson tamper proof screws in it? Suppose
14 when the furniture had come in the gentleman who
15 testified for the Commonwealth, Carl Phillips, had
16 not been instructed by the Assistant Superintendent
17 to go do this. Who would have done it?

18 THE COURT: Let me ask you a
19 question, Mr. Spencer: Talking about the contract,
20 I am going beyond that, I don't worry about that.
21 How about the \$5,000?

22 MR. SPENCER: Which \$5,000,
23 Judge?

24 THE COURT: The \$5,000 for
25 Dadson Enterprises.

1 MR. SPENCER: Tamper proofing,
2 yes, sir.

3 THE COURT: How about that
4 \$5,000? The evidence is uncontradicted that
5 a thousand dollars went to Dadson.

6 MR. SPENCER: Yes, sir.

7 THE COURT: \$2,000 went to a
8 corporation to Mr. Mosteller's accounts receivable,
9 and \$2,000 to buy a trailer. Is there any
10 explanation before the Court of why he would get
11 that \$5,000 to keep for his own? Isn't that
12 uncontradicted evidence?

13 MR. SPENCER: Where he would get --
14 who, Mr. Mosteller would get the \$5,000?

15 THE COURT: By the stipulation
16 I understand the man from Dadson, if he were here,
17 would say he had never been to Danville.

18 MR. SPENCER: That's right.

19 THE COURT: And in essence,
20 he said -- he didn't say it in this language, but
21 he loaned his name for a thousand dollars, or sold
22 his name for a thousand dollars?

23 MR. SPENCER: All right, now
24 if Your Honor please --

25 THE COURT: Along with his character

1 MR. SPENCER: If Your Honor
2 please, what you are doing is presupposing that he
3 never would have had to have gone to Danville.
4 Let's go back to my supposition. Suppose all the
5 furniture had come in and there had not been a
6 single piece of tamper proof hardware on it?

7 THE COURT: I can't go on
8 speculation.

9 MR. SPENCER: Well you were
10 going on speculation the other way.

11 THE COURT: No I am not,
12 either. Nowhere in his testimony did he ever
13 say he went there. Dadson said he never went there.

14 MR. SPENCER: That is what I
15 am saying, Your Honor, and there is no exhibit
16 saying that he ever went there. Dadson undertook,
17 for \$5,000, to see that the furniture was tamper
18 proofed. Now where is there anything in the evidence
19 that required Dadson to go there?

20 THE COURT: Well he never sent
21 anybody up there.

22 MR. SPENCER: Well Judge, there
23 is no evidence that he did or didn't.

24 THE COURT: Well I don't believe
25 I can stretch my imagination that far.

1 MR. SPENCER: Let's go back.

2 THE COURT: Let's go to the
3 furniture that is not there, furniture samples,
4 at Danville Southern Virginia Mental Health
5 Institute. They finally correct that and they get
6 it down to \$6100, \$6113.27. Where is the furniture?

7 MR. SPENCER: Sir?

8 THE COURT: Where is the
9 furniture?

10 MR. SPENCER: Where is the
11 money?

12 THE COURT: The money went to
13 David Mosteller.

14 MR. SPENCER: Where is the
15 evidence of that?

16 THE COURT: The check.

17 MR. SPENCER: You don't know
18 if that is Mosteller's signature. I thought the
19 Court had hit upon that a few minutes ago when
20 you asked what evidence was there that he ever
21 got these checks. The only evidence that Mosteller
22 ever got anything is the situation involving the
23 tamper proofing.

24 Now Your Honor, I think the
25 Court must concede that in order for you to conclude

1 that Mosteller got either the \$6100 or the \$5,012,
2 I think it is because his name appears on the
3 check as the payee.

4 THE COURT: His name is only
5 on one check. The other is to Royal Installation
6 and the other one is to Dadson Enterprises.

7 MR. SPENCER: Yes, sir. And
8 the only one that there is any testimony whatsoever,
9 and that is by stipulation, was the one to Dadson
10 Enterprises.

11 THE COURT: To Royal Installation,
12 he submitted it doesn't show who got that.

13 MR. SPENCER: There is no
14 evidence before the Court of whatever happened
15 to that check or the other check, and surely there
16 is no evidence that David Mosteller got either one
17 of them.

18 Now I think we were addressing
19 tamper proofing. Mr. Kaestner argued, "Phillips
20 said the furniture had tamperproof hardware when
21 it arrived". And then he said what I think is the
22 magic word in this case, "presumably from InterRoyal."
23 Your Honor, there is no evidence, not one iota of
24 testimony that InterRoyal ever tamper proofed a
25 piece of this furniture. There is no evidence that

1 Mosteller ever tamper proofed more than 10 pieces.
2 But the fact remains that the Commonwealth has not
3 established this necessary basic fact in the case,
4 just as they never established the two required
5 showings that Mosteller got the money. Mosteller
6 is indicted here on the three count indictment,
7 and they have absolutely neglected to put one
8 scintilla of evidence before the Court that Mosteller,
9 on those two items, got a penny of it.

10 Now let's go on if we could. I
11 was struck by Mr. Kaestner's willingness to
12 characterize the facts as being that Dave Mosteller
13 built in the cost of the samples, and repeatedly
14 billed Ginns. That is not a fact, Your Honor.
15 The Commonwealth's own witness, and their own
16 exhibit came in, that Ginns received a memo. This
17 is what portion of it was going to be for tamper
18 proofing. Now if you will look at the date, Your
19 Honor, I think you will see that this is December
20 the 10th, I believe, or it is earlier on. That is
21 the letter from Zimmerly. And if you will look
22 at the other documents, at least by the documents,
23 and that is all the testimony we have, the furniture
24 came to Danville on March the 18th, or thereabouts.
25 Here are the shipping documents. They are dated

1 March the 18th. It says F.O.B. 3/18/77. I can
2 only conclude that that means what it says, that
3 it was loaded in the truck to go to its destination
4 on March the 18th and was delivered sometime after
5 that. Now then, where then is the misrepresentation
6 of the present fact? At that point who knew?
7 What evidence is there as to what the situation
8 was with reference to tamper proofing?

9 Now let me carry it just a
10 step further. Suppose, Your Honor, as I said a
11 moment ago, that Carl Phillips's supervisor had
12 not called him and said, "do this"? Suppose that
13 superior had not called the recreation crew and
14 said, "do this"? Suppose that man had not called
15 the other employees and said, "do this"? And
16 suppose the cost of installation had involved
17 bringing in 20 people at \$50.00 a day, and it had
18 taken them the same number of days that Mr.
19 Phillips said he worked on it? And the cost then
20 for the installation, instead of being \$5,012,
21 had actually been \$7,012? Who would have paid
22 for it? Would Ginns? No. Ginns, in advance,
23 had been advised that they had a certain amount of
24 money that would go to installation. Suppose, as
25 I said, not one stick of furniture had had a tamper

1 proof screw in it and it had taken a week for all
2 of the flathead screws, as some have speculated,
3 to be removed and tamper proof screws put in.
4 Who would have paid for that? Would Ginns? Would
5 the Commonwealth? Would InterRoyal? The testimony
6 from the Commonwealth's own witnesses was that the
7 person to whom they looked to take care of problems
8 was Mosteller.

9 Now what you are being asked
10 to do is to convict David Mosteller on three counts
11 of larceny because on this particular job, as he
12 said to the investigator from the Commonwealth,
13 "there was some fat in this one. I have never seen
14 one like that since, with somebody Metal, I can't
15 think of the name of the two other, Lincoln, the
16 two that he stated.

17 What you really have, Your
18 Honor, and you came pretty close to putting your
19 hand on it, you have a situation that is unbelievable
20 that the Commonwealth of Virginia purchasing millions
21 and millions and millions of dollars worth of
22 equipment, could have such an asinine, undependable,
23 weak system as the Commonwealth of Virginia had.
24 And whose fault is that? It certainly is not
25 Mosteller's. The Court knows what has been going on

1 for two years, almost, or more than two years,
2 with this in depth investigation. The Commonwealth
3 of Virginia is not a party to any of these things
4 that dealt with installation or tamper proofing
5 or samples at all. The Commonwealth of Virginia
6 said to Ginn, and 7 other dealers whose names are
7 on the exhibit, and I think it is -- well I tell
8 the Court what it is, it is the capitulation, the
9 recap. Well I said I'd say what it is, but Judge,
10 the Commonwealth said to these people, and their
11 names appear on Exhibit 2 as well, "here's what
12 we want. You tell us what it will cost us if you
13 furnish it. The conditions are that it be this
14 sort of InterRoyal or equivalent, that it be
15 delivered and set up in the rooms, and that it have
16 tamper proof hardware".

17 THE COURT: Do you reckon that
18 is why our taxes are so high, Mr. Spencer?

19 MR. SPENCER: Your Honor, it
20 could well be why taxes are so high. But I tell
21 you another reason why taxes are so high, that is
22 the prosecution will not look for the source of
23 the problem, but will spend thousands and thousands
24 of dollars to prosecute this man on this type of
25 evidence.

1 Your Honor please, the indict-
2 ment recites theft from the Commonwealth of money.
3 In response to a demand for a statement in writing,
4 Mr. Barry said that the Commonwealth, as to each
5 count, every indictment, in every account, will
6 rely on 18.2-178. I have recited to the Court
7 what the four essential elements are for a convic-
8 tion under 18.2-178.

9 Now let's go right to the
10 crux of it, if the Court will. Go back to the very
11 first statement Mr. Kaestner made in his argument.
12 He said, "somebody relied on that false pretense".
13 Now there it is in a nutshell, Your Honor. In
14 order to convict Mosteller, they must not prove
15 that somebody relied upon that false pretense,
16 they must prove that the Commonwealth relied on
17 that false pretense. And the evidence is clear,
18 he repeatedly argued it himself, that the Commonwealth
19 knew nothing about the cost of installation, or the
20 cost of tamper proofing, or the cost of samples.
21 But now let me point this out to you, Your Honor.
22 Neither did the Commonwealth know what Ginns
23 Southern got for putting numbers down on a stack
24 of paper that they had gotten from someone else,
25 for writing two letters, and for signing I think four

1 checks. The Commonwealth didn't know that. The
2 Commonwealth didn't know Ginns Southern was going
3 to get \$2400 for doing that. The Commonwealth
4 doesn't know what the trucker got, Roadway, I
5 think one witness said. The Commonwealth doesn't
6 know what it cost InterRoyal to fabricate the
7 materials, the items. Why should the Commonwealth
8 know any of that? The Commonwealth asked for a
9 competitive bid. They got a competitive bid. They
10 had 8 bids. They took the smaller of the bids.
11 Now Mr. Kaestner can argue until he's blue in the
12 face of what is behind the other 7 bids, but Your
13 Honor, the Commonwealth has not shown you one
14 scintilla of evidence of what is behind those other
15 bids. We don't know if it is InterRoyal or Lincoln
16 or Teddy Roosevelt or whoever the manufacturers
17 may be. But you will note, Your Honor, that they
18 are all pretty darn close together. Now if one
19 of them is Lincoln, and Lincoln had been at 62,
20 I mean at \$65,000 instead of being one of the other
21 people at 61, and the Commonwealth had said, "okay,
22 Lincoln, you get it through Litton Industries",
23 or through whichever, whoever the others were.
24 Judge, I think we would have to look at this long
25 exhibit.

1 THE COURT: I know what one
2 you are talking about.

3 MR. SPENCER: Now if anyone
4 of the other 7 had been low, who would have
5 installed the furniture? Who would have tamper
6 proofed it? And let me ask you another, what I
7 think, is a very cogent question: If 8 people bid
8 on it and there is no evidence as to the manufacturer's
9 representative, then Judge, I pose this query:
10 Who ate the loss for the time and effort and
11 samples of the representative of the unsuccessful
12 bidder expended in trying to sell the State of
13 Virginia?

14 THE COURT: I guess he did.
15 That's part of his business.

16 MR. SPENCER: Yes, sir, and
17 this is part of Mr. Mosteller's business, to make
18 a profit on his business. And he was the only one
19 who was going to do these things that put Ginns in
20 a position to make the bid. Now if the Common-
21 wealth of Virginia wants to know, "all right, Ginns
22 Southern, how much of this is transportation, how
23 much of this is going to InterRoyal, how much of
24 this is for overhead, how much of this is to pay
25 Mr. Kyber to sign his name five times, and how much of

1 this is for this, that or the other thing?", then
2 they have a system called a negotiated single
3 source contract, and they could put it out and
4 they can say, "we want X number of hospital
5 beds and we want to negotiate with anybody who is
6 willing to sell them to us". And then the people
7 could come in and say, "okay, here's the hospital
8 bed like we are going to sell to you and we are
9 going to charge you this much money". And the
10 Commonwealth could say, "well now why are you going
11 to charge us that figure?" And then the man would
12 be in a position where he would have to say, "it
13 costs this much to get it from the manufacturer, it
14 costs me this much to truck it up here, it is going
15 to cost me, my experience is that it is going to
16 cost me some \$15 a bed to have them uncrated, taken
17 upstairs, put together and put in the rooms. It's
18 going to cost me this much to be sure that the
19 tamper proof hardware is on them". Because there is
20 no evidence that tamper proof hardware was put on
21 this by any particular person except Mosteller put
22 it on approximately 10 beds. And then the Commonwealth
23 of Virginia would be entitled to know. And then if
24 the Commonwealth said, "all right, Ginns, we are
25 going to buy these beds from you, there are going

1 to be a hundred of them and the contract is \$60,500",
2 and then if Ginns got the bid for 100 of them for
3 \$60,5000 and got them installed and had them all
4 to conform with the Commonwealth's requirements and
5 they made \$100 a bed on them because it turned out
6 it didn't take them \$15 a bed to have them installed,
7 it only cost them \$5 a bed because they had some
8 good strong people who were fast, then Ginns
9 Southern is going to make X number of dollars. But
10 if you take the same thing and the beds arrive and
11 the men who loaded the truck were clumsy and they
12 are all scratched and scraped and Ginns Southern
13 has to get them back in mint condition as the
14 requirement, then maybe it costs Ginns more than
15 they had estimated, and who is going to have the
16 loss? Ginns is. But what has the Commonwealth
17 got? Once again, the Commonwealth has gotten
18 what it negotiated for. They negotiated to buy the
19 beds from Ginns on this system, and they arrived
20 at a price and they got them, and this is the
21 price they paid.

22 THE COURT: That is all true,
23 Mr. Spencer, but suppose you pay for something
24 you don't get?

25 MR. SPENCER: Judge, you cannot

1 see in this evidence where the Commonwealth paid
2 for anything it didn't get.

3 THE COURT: Well it didn't get
4 the tamper proof hardware.

5 MR. SPENCER: Judge, they did
6 get tamper proof hardware.

7 THE COURT: Well it came in
8 a different way.

9 MR. SPENCER: Well it doesn't
10 matter because they did get this many pieces of
11 furniture for \$60,500 with tamper proof hardware,
12 and that's exactly what they got.

13 THE COURT: Well that is not
14 exactly the evidence. Dadson got \$5,000. It
15 kept a thousand and gave \$4,000 to Mr. Mosteller
16 for something that was never done.

17 MR. SPENCER: Judge, how many
18 lawyers take personal injury cases on a percentage
19 fee, contingent fee, one-third, and they have a
20 case that has got a gold lock on it and they write
21 one letter and they get a hundred thousand dollars
22 and they get a third of it?

23 THE COURT: That's the contract.

24 MR. SPENCER: That's the contract.
25 That's exactly the point, Your Honor. And the same

1 lawyer with the same case without a lock on it
2 would fight for weeks and months and years, and
3 When it is over, if he got the hundred thousand
4 dollars, he had done \$60,000 worth of work and
5 he only got 30 of it, 33. And when it is over,
6 if he only got \$10,000 and he has done \$60,000
7 worth of work, he would still get only \$3300.
8 And if he got no dollars, then he had only done
9 \$60,000 worth of the work.

10 THE COURT: Well he goes under
11 contract then. But the way I understand legal
12 ethics, I thought I understood them, but what I
13 read in the paper, I'm not sure I understand them
14 anymore. But I think you are not supposed to
15 advance costs in your personal injury case, but
16 suppose I sent my client a bill for \$5,000 for
17 going to New York to interview a witness and take
18 depositions, and I never went to New York, I never
19 took the depositions? What am I?

20 MR. SPENCER: Judge, you are
21 a very bad lawyer and you are a thief.

22 THE COURT: I am not talking
23 about ethically, but I am talking about what I am
24 under the law.

25 MR. SPENCER: But there is nothing

1 in this contract that says you have to reveal
2 what makes up the \$60,500. Judge, you hit it right
3 on the head when you say that's the contract. There
4 is the contract.

5 THE COURT: Suppose he had made
6 a mistake of \$100,000 and gets the bid. Should he
7 say, "I'll just keep the \$100,000", or shall I say,
8 "you get the \$100,000, I made a mistake"?

9 MR. SPENCER: Well now Judge,
10 you are getting into another area of the law. If
11 you could prove mutual mistake, then there is a
12 remedy. But the remedy is civil.

13 THE COURT: Suppose you go in the
14 store and you give the girl a \$10.00 bill for a
15 piece of penny candy. She gives you change for
16 a \$20. You know you have given her a ten. You
17 look at the change for the 20, \$19.99, and you put
18 it in your pocket. What are you?

19 MR. SPENCER: You have stolen
20 it, \$10.

21 THE COURT: But where is your
22 contract with the girl? I have contracted with
23 the store. If I buy a penny piece of candy, I
24 pay a penny, and that is the contract. And I am
25 only using her for the agent. And when she gives me

1 back the extra change and I say, "well I've really
2 made it good and I put it in my pocket, what am I?
3 Lucky? Some people would say it is good business.

4 MR. SPENCER: I'm not going to
5 argue with you on that.

6 THE COURT: You are a thief.

7 MR. SPENCER: That's exactly
8 right. But if you take a sealed bid, if you
9 say, "everybody who wants to sell me a piece of
10 candy, give me a sealed bid and I'm going to buy
11 it from the one who is lowest", and if the lowest
12 bid is 2 cents and I found out later that it's
13 only a penny piece of candy, is the man a thief
14 then?

15 THE COURT: Oh no, I think that
16 is good business, they call it.

17 MR. SPENCER: Isn't that what
18 the situation is here? The Commonwealth says,
19 "we want this quantity of furniture and we'll pay
20 this amount". They got that quantity of furniture
21 under those terms, and they paid that amount.
22 Now you are going, if Your Honor please, you are
23 going over to another relationship entirely, and
24 I am not arguing at this point what Mr. Mosteller's
25 position may or may not be with Ginns Southern.

1 I am not arguing what his position may or may not
2 be with InterRoyal. But as to the Commonwealth
3 of Virginia, he has not gotten one nickel from the
4 Commonwealth of Virginia. The only thing that the
5 evidence shows that he got was \$4,000 of the tamper
6 proofing, and as the Court commented earlier, that's
7 an issue of where you agree to pay \$5,000 for a
8 \$1,000 car.

9 Now Judge, the law is plain.
10 The law is clear. And the law is that the burden
11 is on the Commonwealth. It is not up to me. It
12 is not up to Mr. Mosteller to make up all the
13 deficits in the Commonwealth's evidence. They have
14 had months and months and years to prepare their
15 case, and if they don't make a case, then the case
16 falls, the charge falls.

17 THE COURT: They must prove it
18 beyond a reasonable doubt.

19 MR. SPENCER: We submit, Your
20 Honor, please, that they have not.

21 THE COURT: Any rebuttal, Mr.
22 Kaestner?

23 MR. KAESTNER: Briefly, Your
24 Honor.

25 Mr. Spencer has indicated that

1 there is no proof before the Court that the figures
2 supplied to Raymond Kyber were provided through
3 David Mosteller, and that is simply not the case.
4 There is a lot of circumstantial evidence before
5 the Court indicating that those figures were
6 supplied by David Mosteller, or that David Mosteller
7 adopted those figures as his own. It was David
8 Mosteller who provided the bill for installation.
9 It was David Mosteller who provided the bill for
10 samples and negotiated down because the total they
11 had given and the total cost didn't jive, and he
12 negotiated down. And it was Mosteller who caused
13 the certificate of completion to be sent by Dadson
14 Enterprises. So Mosteller, if there is any question
15 but that Mosteller gave those figures, clearly
16 Mr. Mosteller adopted those figures by his subse-
17 quent actions, and there is circumstantial evidence
18 to that effect.

19 Mr. Spencer went on at great
20 length regarding suppose the Commonwealth had not
21 received the tamper proofing and suppose the
22 Commonwealth had not received the installation
23 services. In fact the Commonwealth did receive the
24 tamper proofing. One of the reasons the Commonwealth
25 did receive the tamper proofing was because Dave

1 Mosteller ordered the tamper proofing from the
2 factory. That is Commonwealth's Exhibit No. 23.
3 The invoices introduced by Mr. Kyber, which are
4 Commonwealth's Exhibits 7 through 11 indicate
5 that Mr. Mosteller called for the tamper proofing.

6 Mr. Phillips, who was present
7 when this furniture for which Ginns was invoiced
8 arrived, said that the furniture, when it arrived,
9 had the tamper proof hardware in it. Clearly those
10 tamper proof hardware had been supplied to the
11 institution, and yet Mr. Mosteller arranges that
12 elaborate system pursuant to which Dadson Enter-
13 prises will send a bill to Ginns Southern for \$5,000.
14 Mr. Spencer also indicated there is nothing in the
15 evidence to show that Mosteller benefited from this
16 \$4,000 disbursed by Dadson Enterprises as a result
17 of the payment from Ginns, and yet the stipulation
18 of fact clearly was that \$2,000 was sent over to
19 Artisan Interior Design to be charged against Mr.
20 Mosteller's account receivable. The Court noted
21 that in its statement, or in its questioning of
22 Mr. Spencer.

23 The tamper proofing argument
24 that Mr. Spencer makes, he says, "suppose it wasn't
25 there?" The fact is that it was there. The fact

1 is that it was intended to be there because Mr.
2 Mosteller ordered it from the factory to start with.

3 Mr. Spencer says the State has
4 a weak purchasing system. I'll agree that in 1976
5 the State had a weak purchasing system and the
6 defendant took full advantage of it.

7 Mr. Spencer says that we have
8 to show some reliance. We have shown reliance.
9 We have shown reliance by the statement submitted
10 by Ginns Southern and we have shown the reliance
11 of Ginns Southern upon the invoices and prices
12 which circumstantially and we think conclusively
13 were provided to them by David Mosteller.

14 There is no requirement under
15 the law of false pretenses, and it is cited in the
16 Memoranda of Law which I gave the Court, and it is
17 also in Corpus Juris Secundum that there is no
18 requirement that the person to whom the property
19 was given be the person to whom false pretenses
20 had been made. In this case, Mr. Mosteller was able
21 to extract the public money through the vehicle
22 of Ginns Southern, and he used that to full advantage.

23 Mr. Spencer goes on elaborately
24 saying the Commonwealth got what it paid for.
25 Let anyone show me in any of the Commonwealth's

1 documents anyplace where the Commonwealth requested
2 samples. There is none in the requisition. There is
3 none in the invitation to bid. There is none in the
4 purchase order. There is none anyplace. And yet
5 we paid for these and we never asked for that.

6 Mr. Spencer says that with
7 respect to installation, suppose the Assistant
8 Director of the hospital hadn't called Carl Phillips
9 and hadn't directed him to come on up and to install
10 that furniture? That suppose simply doesn't
11 comport with the evidence because it was Carl
12 Phillips and the building and grounds crew who
13 did that installation job at Danville.

14 In short, the Commonwealth
15 did not get samples. Mosteller never intended
16 for it to get tamper proofing any other way than
17 from the factory. And Mosteller did not perform
18 installation services.

19 Those misrepresentations started
20 when Mr. Mosteller provided prices to Ginns
21 Southern and the false pretense was committed
22 when Mr. Mosteller either himself or through
23 Dadsen Enterprises, caused bills to be submitted.
24 Mr. Mosteller or Mr. Spencer also indicated that
25 there was no testimony with respect to Royal

1 Installation and Mr. Mosteller. That isn't true
2 because Mr. Kyber said that he knew Royal Installa-
3 tion to be Mr. Mosteller's company.

4 Again, Your Honor, the
5 Commonwealth would ask that the defendant be found
6 guilty as charged.

7 THE COURT: In view of this
8 whole testimony, it is rather difficult, because
9 all of the attorneys have read these documents
10 and I have not. But apparently the invitation to
11 bid says: The number and descriptions listed are
12 those of InterRoyal and are provided to indicate
13 design quality and function of equipment required".

14 I can't find this for a fact,
15 because I don't think it is in evidence, it is
16 only an inference, that apparently the State
17 wanted InterRoyal property, which appears to me
18 would not be very useful to get bids if you are
19 going to buy all the same property. But that is the
20 way the invitation to bid went out. It was accepted
21 by Ginns Southern. They got the bid for \$60,500
22 and some odd dollars. Up to that point everything
23 seemed to be in good shape. However, there is some
24 indication, perhaps the bids were more or less --
25 is rigged right -- rigged somewhat, but there is no

1 evidence of that, and the Court can't find that.
2 However, I think the thing that sets up the
3 defendant's actions, his orders, one he sends to
4 Ginns and the other he sends to his company, which
5 are entirely different orders that were to be
6 given. In fact if they are carbon copies, they
7 are so different it was difficult for the Court
8 to determine that was supposed to be a carbon
9 copy. Well it couldn't be a carbon because one
10 says Ray Kyber and the other says R. Kyber. But
11 the evidence is such to show that they are the
12 same order. So the furniture was ordered. When
13 it arrived at the place, the evidence is totally
14 void that Dadson Enterprises ever was in Danville,
15 ever checked it, ever sent anyone up there. But
16 yet there were received by -- I assume this is the
17 invoice or purchase order they got a copy of,
18 purchase order 1123 for \$5,000, which was made out
19 to Dadson Enterprises. It is obvious to the Court
20 that the defendant got \$4,000 of that money, and
21 this is uncontradicted evidence, or unexplained
22 evidence, other than what he told Investigator
23 Bryant to the effect that it was a fat contract,
24 or words to that effect. I don't know if they
25 were exactly. But it was a good contract. So.

1 certainly since it was there, that was a misrepresent-
2 tation to a material fact.

3 Then we come to the other
4 where it was checked by Mr. Kyber. He said he
5 found an \$1143.79 mistake, but they went on that
6 for sample furniture. There is no evidence before
7 the Court that any sample furniture was ever sent
8 to the Danville Southern Virginia Mental Health
9 Institute. In fact the evidence is certainly
10 to the contrary. Certainly the invoice, the
11 furniture not being there is a misrepresentation
12 of a material fact.

13 And lastly we come to the
14 Royal Installation. There is no evidence that I
15 recall before the Court as to where this money went,
16 besides to Royal Installation Company at 2112
17 East Admiral Drive, Virginia Beach, which I believe
18 matches the defendant's address. But in any event,
19 it was based on his invoice to the State which would
20 come to that.

21 NO INVOICE TO STATE
BY ROYAL INSTALLATIONS!

22 Now the only question before
23 the Court that I have some real bother with, and
24 the Commonwealth takes the opposite view to Mr.
25 Spencer's view very strongly, of how this could
come about. And of course it is no question in my

1 mind that it came through the negligence of the
2 State. We talked about high taxes. It appears
3 to me that this investigation, if the public money
4 was used wisely, we could cut 20% locally, statewide
5 and federally, which would give all of us some
6 relief. But they certainly opened the gate for
7 this to come in, which I hope has been closed.
8 However, I think that it is the custom of the business
9 to rely on the manufacturers and the sellers, the
10 vendors, and that is exactly what they did in this
11 case. I have no question beyond any doubt in my
12 mind that the defendant worked a fraud upon the
13 State and received \$16,000 that he wasn't entitled
14 to.

15 Stand up.

16 NOTE: At this point the
17 defendant is standing.

18 MR. SPENCER: As I understood
19 the Court, you stated in your recitation that there
20 was no evidence as to where the \$5,012 went.

21 THE COURT: I don't have any
22 problem with that. It was his fraud that got
23 the \$5,012. It would still be stealing by false
24 pretenses. I don't have any problem with that,
25 Mr. Spencer. The Supreme Court might, but I don't.

1 All right, on the evidence
2 heard by the Court, the Court now finds you
3 guilty as charged in each count in the indictment.

4 I assume that you want a
5 presentence report, Mr. Spencer?

6 MR. SPENCER: Yes, Your Honor.
7 I would ask that the Court delay sentencing --

8 THE COURT: Are there some
9 other cases we are going to try?

10 MR. SPENCER: Yes, sir, we
11 have another one pending tomorrow.

12 MR. KAESTNER: Seventeen of
13 them.

14 THE COURT: Is this 3 of the 17?

15 MR. KAESTNER: No, this is
16 one of the 17.

17 THE COURT: What I will do
18 is just continue it over until tomorrow morning.
19 I am sure that everybody has had a very tiring
20 day, although it is still early in the afternoon.
21 I do have tomorrow set for the balance of the cases.
22 Maybe tomorrow I won't have interruptions and we
23 could try 2 or 3 of them.

24 MR. SPENCER: I think the
25 Commonwealth's plan was to try one more tomorrow.

1 and another one Thursday, and then make up its
2 mind as to what it was going to do with the
3 remaining 15.

4 THE COURT: Well I will ask
5 the Commonwealth to think over this very thoroughly
6 and advise the Court tomorrow morning what they
7 anticipate in presenting the cases. I'm quite sure
8 that you all will come up with an answer tomorrow
9 morning. If we are going to try all 17 of them,
10 gentlemen, I think perhaps we had better set
11 Saturday aside. I can do it the rest of this week
12 and Saturday, too. But I have the balance of this
13 week for the Mosteller cases. So at this time I
14 will not set a pre-sentence date, or would you
15 rather set a pre-sentence date, and if the defendant
16 is convicted on the others, we will use the same
17 date? Would that be easier? It might be easier,
18 because, Mr. Spencer, you might get several trial
19 dates in between.

20 Now you told me you were going
21 in the hospital in 10 days? How long do you think
22 it will be, about 30 days?

23 MR. SPENCER: Six weeks, Your
24 Honor.

25 THE COURT: Well it takes 6 weeks

1 to get a pre-sentence report, so we are talking
2 about April or May. Do you think you would be
3 recovered by April 30th?

4 MR. SPENCER: Judge, I couldn't
5 be certain. I think it would be better off if we
6 could pick a mid-May date.

7 THE COURT: Well that's two
8 months, 8 weeks.

9 MR. SPENCER: Yes, sir.

10 THE COURT: But you have got
11 a week before you go in the hospital.

12 MR. SPENCER: The 18th, Judge,
13 two weeks.

14 THE COURT: How about May the
15 6th?

16 MR. SPENCER: I can't think of
17 anything.

18 THE COURT: That is the day
19 after our docket call. You can call your office
20 and check on that date. Of course if you find
21 yourself in the hospital longer or more slowly
22 in your recovery, Mr. Spencer, you notify the
23 Court. We will certainly take that into consideration.

24 All right, gentlemen, I will
25 see you at 9:30 in the morning.

* * * * *

COURT REPORTERS.

CERTIFICATE OF COURT REPORTER

I, Nancy D. Cook, hereby certify that I, having been duly sworn, was the court reporter in the Circuit Court of the City of Richmond, Division I, on March 4, 1980, at the time of the hearing herein.

I further certify that the foregoing is a true and accurate transcription of the testimony and other incidents of the hearing herein, and that this transcript is prepared and filed pursuant to the Rules of Court 5.9(a) effective March 1, 1972.

Given under my hand this ____ day of April, 1980.

Original signed
Nancy D. Cook, CSR-RPR

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

3 DIVISION I

4
5 -----
6 COMMONWEALTH OF VIRGINIA

7
8 -vs-

9
10 DAVID MOSTELLER
11 -----

12
13 Complete transcript of the testimony
14 and other incidents in the above when heard on March 5, 1980,
15 before The Honorable James B. Wilkinson, Judge.
16

17
18 APPEARANCES:

19 Learned D. Barry, Esquire, Assistant Commonwealth's Attorney
20 for the City of Richmond, John Marshall Courts Building,
21 8th & Main Streets, Richmond, Virginia;

22 Joseph W. Kaestner, Esquire, Assistant Attorney General,
23 Fidelity Building, Richmond, Virginia;

24 Reid M. Spencer, Esquire, 607 Plaza One, Norfolk, Virginia,
25 Counsel for the defendant;

The defendant, David Mosteller, in person.

CRANE - SNEAD & ASSOCIATES, INC.

COURT REPORTERS

908 N. THOMPSON STREET

RICHMOND, VIRGINIA

PHONE 355-4335

2

Hearing held on

March 5, 1980

I N D E X

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Irving J. Brooks, Jr.	7	19		
Thomas Schmidt	27	37	48 59	57
Francis X. McEntee	61	63		
David K. Peckman	69	72		
John Alexick	75	79	89	
Lewis Lankford	90	92		
James C. Manley	96	99		
Lewis Lankford (Recalled)	101	102		

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Commonwealth's Exhibit #3 - Invitation to bid	15
Commonwealth's Exhibit #4 - Tabulation of bids.	17
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Commonwealth's Exhibit #12 - documents from Comptroller's office	110

Defendant's Exhibit #1 - letter of 6-18-75

21

Reported by Nancy D. Cook

1
2 THE CLERK: The case of Commonwealth
3 vs. David Mosteller.

4 The defendant is present in court, and
5 represented by Mr. Spencer.

6 Mr. Spencer, are you prepared for trial?

7 MR. SPENCER: Yes, we are.

8 THE CLERK: David Mosteller, the Grand
9 Jury charges that during or about January, 1976
10 and continuing thereafter until December of 1976,
11 in the City of Richmond, within the jurisdiction
12 of this court, you did feloniously and unlawfully
13 take, steal and carry away property whose value was
14 in excess of \$100.00, belonging to the Commonwealth
15 of Virginia and its agency, Lynchburg Training
16 Center and Hospital.

17 How do you plead to this count, guilty
18 or not guilty?

19 DEFENDANT MOSTELLER: Not guilty.

20 THE CLERK: And the Grand Jury further
21 presents that during or about January, 1976,
22 and continuing thereafter until December of
23 1977 (sic) within the City of Richmond, David
24 Mosteller did feloniously and unlawfully take, steal
25 and carry away property whose value was in excess

1 of \$100.00 belonging to the Commonwealth of Virginia
2 and its agency, Lynchburg Training School and
3 Hospital.

4 How do you plead to this charge?

5 MR. SPENCER: If Your Honor please, Mr.
6 Clerk, I believe you may have misread the second
7 date. I think you said January of '76 and continuing
8 thereafter until December of '77.

9 THE CLERK: My apologies, sir. It was
10 '76. I'll read it again.

11 THE COURT: That's all right, we have
12 got it correct. He understands.

13 DEFENDANT MOSTELLER: Not guilty.

14 THE CLERK: On your pleas of not guilty,
15 do you wish to be tried by His Honor, the Judge
16 or by a jury?

17 DEFENDANT MOSTELLER: By the Judge, sir.

18 THE COURT: The Court will waive the jury.

19 MR. BARRY: The Commonwealth waives jury
20 trial.

21 THE COURT: Mr. Mosteller, you know that
22 you have a right to have a jury try you on each of
23 these cases?

24 DEFENDANT MOSTELLER: Yes, sir.

25 THE COURT: And you discussed it with

1 your attorney?

2 DEFENDANT MOSTELLER: Yes, sir.

3 THE COURT: And after discussing it with
4 your attorney, you decided to be tried by the Court?

5 DEFENDANT MOSTELLER: Yes, sir.

6 THE COURT: Are you ready for trial?

7 DEFENDANT MOSTELLER: Yes, sir.

8 THE COURT: You may have your seat.

9
10 NOTE: At this point the defendant is
11 seated at counsel table next to Mr. Spencer.

12
13 MR. BARRY: Judge, this fraud today before
14 the Court involves two counts of grand larceny.
15 It involves the Lynchburg Training School and
16 Hospital, specifically a job bid out on the
17 psychiatric building. The Commonwealth intends to
18 show that the job was bid out, that it was
19 accepted by General Medical, a vendor here in the
20 City of Richmond. David Mosteller, acting as a
21 representative of InterRoyal Corporation, told
22 General Medical that they would take care of the
23 job for them, that a certain price would be paid,
24 an exact amount, exactly the price to be paid.
25 We find that \$5,800.00 in abandoned samples were

1 billed through the vendor and on to the Commonwealth
2 that were never delivered nor were they intended to
3 be delivered; and that \$3,788.00 in installation
4 costs were billed to the vendor, passed on to the
5 Commonwealth, and no installation was ever
6 performed; that during the initial sessions down at
7 the Lynchburg Training School, that representatives
8 of the Commonwealth, Mr. Peckman and Mr. Alexick
9 will testify that they specifically told Mr.
10 Mosteller that the State would do all the installa-
11 tion, and that there would be no need for him to
12 do anything, and that no samples were ever used
13 or seen by any representatives of the Commonwealth
14 at the Lynchburg Training School.

15 And again, the amount of the job was
16 \$89,507.00, which Mr. Mosteller received \$5,800.00
17 in samples, \$3,788.00 in installation costs.

18 THE COURT: Mr. Spencer?

19 MR. SPENCER: If Your Honor please, the
20 position of the defendant is, as to both counts,
21 that the Commonwealth solicited bids, that bids
22 were made, that the successful bidder had agreed
23 to furnish certain materials at a certain cost to
24 the State, and that the State received the materials
25 and paid the agreed amount, and that no crime was

1 involved insofar as any theft by false pretense or
2 by any other method from the Commonwealth.

3 MR. BARRY: The Commonwealth would call
4 Mr. Brooks.

5 MR. SPENCER: Judge, as before, we would
6 like to exclude the witnesses.

7
8 NOTE: At this point all witnesses are
9 excluded from the courtroom with the exception of
10 Mr. Brooks.

11
12
13
14 IRVING J. BROOKS, JR., a witness called
15 by the Commonwealth, first being duly sworn, testifies as
16 follows:

17 DIRECT EXAMINATION

18 BY MR. BARRY:

19 Q Mr. Brooks, how are you this morning?

20 A Fine, thank you.

21 Q Would you tell the Court your name and
22 occupation for the record, please?

23 A Irving, I-r-v-i-n-g, Brooks, Jr.,
24 occupation, Assistant Director, Division of Purchases &
25 Supply, Commonwealth of Virginia.

Brooks - Direct

8

1 Q Specifically, would you detail for the
2 Judge what your duties actually consist of?

3 A My duties consist of the general
4 administrative function of the Division, which includes
5 handling all of the files, storing of the files and the
6 archives of the files.

7 Q So, you are the custodian of all the
8 documents maintained by the Department of Purchases & Supply?

9 A Right.

10 Q Would you specifically relate to the
11 Court, if you know, the procedure involved in Purchases &
12 Supply for purchasing items for the Commonwealth?

13 A I feel that I am relatively abreast of
14 it.

15 Q What procedure would normally, or what
16 documents would normally start off any purchase for the
17 Commonwealth of Virginia?

18
19 MR. SPENCER: If Your Honor please, I
20 think that the witness ought to be limited in his
21 response to questions of whether he was familiar
22 with it during the period from January of '76
23 through December of '76, and what was the system at
24 that time.

25 THE COURT: All right, it would be

Brooks - Direct

9

1 before '76 because I assume '76 is the date the
2 bid was accepted, January. He gave the invitation
3 to bid before that.

4
5 Q Mr. Brooks, how long have you actually
6 been employed in that position for the Commonwealth of
7 Virginia?

8 A I have been the Assistant Director since
9 October of last year. Prior to that I was the Assistant
10 Director of Administration from the period approximately
11 1962 until that period.

12 Q Then you are familiar with any procedures
13 used by the Commonwealth of Virginia in purchasing items
14 from January, 1976 to December, 1976?

15 A I feel I am, yes.

16 Q Now, at that particular time, could you
17 tell the Court if you know the specific procedure for pur-
18 chasing items for the Commonwealth of Virginia?

19 A Well, the procedure would generally be
20 that a requisition would be received from an institution.
21 That requisition would go to a purchase officer or buyer
22 within the department. From there he would evaluate it,
23 would solicit bids, and the bids would be returned. They
24 would be evaluated and the award would be made and the
25 purchase order subsequently cut.

Brooks - Direct

10

1 Q Let me show you Commonwealth's Exhibit
2 1 for identification.

3 Would you tell the Court what this item
4 is?

5 A This is a requisition from Lynchburg
6 Training School & Hospital indicating the items and
7 description and specs, quantities as per attached sheets,
8 with numerous sheets attached behind it.

9 Q The numerous sheets attached --

10 A The numerous sheets attached behind it
11 is a list of requirements which they sent to the Department
12 for the purpose of bids.

13 Q Who is they, sir?

14 A Being the Lynchburg Training School.

15 Q And the approximate date that arrived?

16 A The date it arrived in our office was
17 February 3rd, 4:20 p.m., 1976.

18 Q And this is a typical official record
19 maintained by your office?

20 A It is, yes.

21

22 MR. BARRY: The Commonwealth offers this
23 as Commonwealth's Exhibit 1.

24

25

NOTE: At this point the above-referred-

Brooks - Direct

11

1 to requisition is marked and filed as Commonwealth's
2 Exhibit Number 1.

3
4 Q After the requisition has been sent in
5 by the institution, what is the next logical document in the
6 flow of events?

7 A The next logical document, and I have to
8 put this in two ways because some buyers do prepare what they
9 call a sheet to apprise the secretary as to how to type the
10 bid or write that information on the requisition. And the
11 main process would be to prepare the bids.

12 Q Let me show you Commonwealth's Exhibit
13 2 for identification, and tell me if you recognize the docu-
14 ment of this nature?

15 A This is the one that I am saying some
16 do prepare and some do not prepare. This is the authority
17 for preparing proposals.

18 Q What is the purpose of this document?

19 A The purpose of the document is to inform
20 the clerical assistants as to what information they want put
21 on the bid and to whom the bids are to be sent.

22 Q In this particular case, this institution,
23 that this authority for proposing the bid --

24 A Lynchburg Training School and Hospital.

25 Q And the date?

Brooks - Direct

12

1 A This document is dated 3-2-76.

2 Q This is a document form maintained in the
3 normal official capacity of your office?

4 A Yes, it is.

5

6 MR. BARRY: The Commonwealth offers this
7 as Commonwealth's Exhibit Number 2.

8

9 NOTE: At this point the above-referred-
10 to authority for bid proposal is marked and filed
11 as Commonwealth's Exhibit Number 2.

12

13 Q After these items, or after certain items
14 have been sent out, pursuant to Commonwealth's Exhibit Number
15 2, what, if anything, is the next --

16 A The next item would be the actual bid
17 covering the items being mailed out to the prospective
18 bidder.

19 Q Let me show you Commonwealth's Exhibit
20 Number 3 for identification and tell me if you can identify
21 this document.

22 A This is a formal proposal for bid sent
23 out by our office. It indicates here it is to be shipped to
24 the warehouse at East End, Route 210, and it is to be invoiced
25 to Lynchburg Training School and Hospital.

Brooks - Direct

13

1 Q And the date of the document?

2 A The date of the document is March 4,
3 1976 for bid opening on March 23, 1976.

4 Q What is the name of the organization
5 submitting the bid in this case?

6 A It would be Contract Interiors, Incorporated,
7 8741 Landmark Road, Richmond, Virginia.

8 Q Now, the accompanying document to the
9 Invitation to bid, what is the purpose of those sheets?

10 A They would be the sheets attached to
11 the yellow copy. The second sheet gives certain general
12 information such as: All items must be uncrated, assembled
13 and set in place; all crating and other debris must be removed,
14 and other general information as that. And the other attach-
15 ment is the actual items themselves, to which bids were
16 requested to be received.

17 Q Fine, and those are the prices of the
18 bids?

19 A This shows the prices that the vendor
20 actually quoted.

21 Q Is this document maintained in the offi-
22 cial capacity of your office?

23 A Yes, sir.

24

25 MR. BARRY: I would like to offer that

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14

1 as Commonwealth's Exhibit 3.

2 MR. SPENCER: If Your Honor please, I
3 would interpose an objection to Exhibit 3. In
4 this case the defense requested a Bill of Parti-
5 culars, and such a bill was furnished. A supple-
6 mental answer was furnished, and on the supplemental
7 answer, as to this case, the Commonwealth said
8 that during January, 1976, through December, 1976,
9 the Commonwealth of Virginia, through General
10 Medical, paid \$5,800.00 for abandoned samples and
11 \$3,788.00 for installation to David Mosteller.
12 The indictment is in a form that comports to the
13 statement of particulars. And this document
14 which they are offering is a bid of Contract
15 Interiors, Inc.

16 MR. BARRY: In response to that, Your
17 Honor, the Commonwealth would just state that
18 General Medical is a generic term and Contract
19 Interiors is nothing more than a small subsidiary
20 branch of General Medical, therefore we do not feel
21 that we have misled the defendant in any way, shape
22 or form. We still are dealing with the same
23 people.

24 THE COURT: I will overrule counsel's
25 objection.

Brooks - Direct

15

1 MR. SPENCER: I gather from counsel that
2 he will show some evidence of what he just stated?

3
4 NOTE: At this point the above-referred-
5 to Invitation to Bid is marked and filed as
6 Commonwealth's Exhibit Number 3.

7
8 BY MR. BARRY: (Continuing)

9 Q The next logical process for the Common-
10 wealth back in 1976, after the Invitation to Bid has been
11 sent out, would be what?

12 A They would be received, publicly opened
13 and then tabulated.

14 Q Let me show you Commonwealth's Exhibit
15 4 for identification, and tell me if you have ever seen docu-
16 ments of this nature before.

17 A This is a tabulation.

18 Q Considering what job?

19 A Lynchburg Training School and Hospital.

20 Q And the significance of the tabulation
21 of bids in the normal purchasing process would be what, sir?

22 A The listing of them is for the
23 evaluation of prices by the various vendors for various
24 items.

25 Q Can you decide from the tabulation of

Brooks - Direct

16

1 bids, who, if anyone, is the winner of the purchase order
2 or the bid?

3
4 NOTE: At this point the witness is
5 referring to Commonwealth's Exhibit Number 4 for
6 identification.

7
8 A On this page right here, Contract is out
9 there, so I assume that Contract Sales received those.
10 Contract received these items also. Contract received all
11 the items on that page. Contract received all the items on
12 that page. Contract received all the items on that page.
13 All of those, Contract received them. Contract received all
14 the bids on this page. Contract received the bids on that
15 page. Contract was successful on that page. Contract was
16 successful on that page. Contract was successful on that
17 page. All items on that page went to Contract. The items
18 on that page went to Contract, and the items on that page went
19 to Contract.

20 Q So it would be fair to say that Contract
21 won the bid?

22 A Yes, sir.

23 Q Thank you, sir. I'm sorry to put you to
24 that trouble.

25 Now, Mr. Brooks, when someone had won

Brooks - Direct

17

1 all the prices in the proposal to bid, what, if anything,
2 would that signify?

3 A That they were the low bidder on those
4 particular items.

5
6 MR. BARRY: The Commonwealth would also
7 offer this as Commonwealth's Exhibit Number 4.

8
9 NOTE: At this point the above-referred-
10 to Tabulation of Bids is marked and filed as
11 Commonwealth's Exhibit Number 4.

12
13 Q What would be the normal sequence of
14 events after that?

15 A An award would be made and a purchase
16 order would be written.

17 Q Let me show you Commonwealth's Exhibit
18 5 for identification.

19
20 MR. SPENCER: Your Honor please, my
21 objection to Exhibit 3 would carry over to Exhibit
22 4 as well, subject to Mr. Barry establishing the
23 relationship of the corporation.

24 THE COURT: I understand that.

25 MR. SPENCER: Note my exception, please.

Brooks - Direct

18

1
2 Q Let me show you Commonwealth's Exhibit
3 5 for identification. Can you tell me what that document
4 is?

5 A This is a copy of a purchase order
6 generated in our office. It is written to Contract Interiors,
7 Incorporated, 7641 Landmark Road, Richmond, Virginia, items
8 to be delivered to the warehouses, end of Route 210, to be
9 invoiced to Lynchburg Training Center and Hospital,
10 Lynchburg, Virginia.

11 Q What, if any, significance, would the
12 purchase order create in the purchasing process for the
13 Commonwealth of Virginia?

14 A It creates a contract with us from the
15 Commonwealth to the vendor, to make shipment and the related
16 services that would come with it. ✓

17
18 MR. BARRY: The Commonwealth would offer
19 this as Commonwealth's Exhibit Number 5.

20
21 NOTE: At this point the above-referred-
22 to purchase order is marked and filed as
23 Commonwealth's Exhibit Number 5.

24
25 MR. BARRY: I have no further questions

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19

1 of Mr. Brooks.

2
3
4 CROSS-EXAMINATION

5 BY MR. SPENCER:

6 Q Mr. Brooks, I presume that you and the
7 other members of the Department of Purchases & Supply are
8 familiar with the pamphlet on centralized purchasing?

9 A Yes, sir.

10 Q And was this the pamphlet that was in
11 effect at this time?

12 A This would be the pamphlet that would
13 have been in effect at that time, subject to any changes in
14 the Code after this was printed, because this is really taken
15 right out of the Code of Virginia.

16 Q And you are familiar with the Code
17 requirements on centralized purchasing and submitting for
18 sealed bids and taking the low bid?

19 A Reasonably so, yes.

20 Q The Department of Purchasing & Supply
21 also has internal rules and regulations under which it
22 functions, does it not?

23 A It did at that time, I believe, yes.

24 Q Are you familiar with the signature of
25 Mr. Philip R. Brooks, the Director of the Department of

1 Purchases & Supply?

2 A I feel I would be, yes.

3 Q I show you a letter dated July 18, 1975,
4 signed by Philip R. Brooks and directed to Mr. Allen E.
5 Wolf, the Assistant Commissioner of Administration of the
6 Department of Mental Health and Retardation, and ask that you
7 examine that with particular reference to Paragraph Number 5.

8
9 MR. BARRY: Before Mr. Brooks launches
10 into that, we know what the letter was all about.
11 I think reading Paragraph 5 out of the letter, it
12 might be somewhat misleading to the Court.

13 THE COURT: I guess he is going to intro-
14 duce the letter.

15
16 A Do you want me to read the paragraph?

17 Q No, sir, I want to ask you if you attended
18 the meeting mentioned in the letter?

19 A No, I did not.

20 Q You did not?

21 A No.

22 Q Are you familiar with the fact that such
23 a meeting was held?

24 A No.

25 Q Did this letter ever come to your attention?

1 A I have seen the letter.

2 Q You have seen the letter? I know that
3 a copy of the letter went to Mr. Roy Scott. What was his
4 position with DPS?

5 A Mr. Roy Scott was Purchase Manager.

6 Q Did the letter come to you in connection
7 with your appointment as you had testified earlier?

8 A It came across my desk because all
9 copies of all correspondence relating to anything actually
10 comes across my desk as information for future judgment and
11 so forth.

12 Q And I asked you whether you can identify
13 this as the signature of Mr. Brooks?

14 A That is, I'm sure, the signature of Mr.
15 Brooks.

16

17 MR. SPENCER: All right, I would offer
18 that, then, Your Honor.

19 THE COURT: Defendant's Exhibit Number
20 1.

21

22 NOTE: At this point the above-referred-
23 to letter dated July 18, 1975 is marked and
24 filed as Defendant's Exhibit Number 1.

25

1 Q Now Paragraph 5 of the letter deals with
2 a discussion had over the method of obtaining bids, does
3 it not?

4 A Yes, sir.

5 Q And it is obvious that the question has
6 been raised about obtaining bids only from the dealers
7 handling the furniture of one manufacturer?

8 A I would have to say that is fairly
9 accurate.

10 Q And the conclusion is that perhaps
11 consideration ought to be given to changing the procedure
12 in the rules so as to encourage bids from representatives
13 of other manufacturers?

14 A Well, I don't think that I'm really in
15 a position to really give a conclusion.

16
17 THE COURT: I didn't hear that.

18 THE WITNESS: I said I don't think I am
19 really in a position to really give a conclusion.
20 I was not at the meeting or anything.

21 THE COURT: That's all right, Mr. Spencer.
22 I can come to that conclusion, he wants to change
23 the system. I am in full accord of Mr. Brooks in
24 changing the methods of bidding.

25 MR. SPENCER: When the Court said Mr.

1 Brooks, I am sure you were referring to Philip
2 Brooks?

3 THE COURT: Yes.

4
5 Q As a matter of fact, Mr. Irving Brooks,
6 that recommendation was not implemented, was it?

7 A I do not know.

8 Q You don't know from the bid tabulation,
9 Exhibit 4, who the particular vendors represented?

10 A No, sir, I do not.

11 Q Whose line they carried?

12 A No, sir, I do not.

13 Q You don't know whose line they bid?

14 A No, sir.

15 Q All right, sir. Now, I cannot say that
16 you were asked about this, but I want to call your attention
17 to Commonwealth's Exhibits 2 and 3. On the second page of
18 Exhibit 2, in the explanatory notes, it is clear, is it not,
19 that the use of the phrase InterRoyal is as a matter of
20 practical fact InterRoyal or equivalent?

21 A In the place of. It says: The number
22 and descriptions listed are those of InterRoyal and are
23 provided to indicate design quality and function of equip-
24 ment required. Consideration may be given to alternate
25 proposals providing differences in specifications are

1 explained by catalogues, drawings and/or other descriptive
2 literature and so forth and so on.

3 Q All right, sir, now look on the first
4 page of that, if you will, and more especially in the lower
5 middle, special terms and conditions, what does it say
6 there?

7 A You are speaking of all the approved
8 equal?

9 Q It is or isn't it?

10 A Or approved equal.

11 Q Now, what is the next part?

12 A Deliver and install.

13 Q Looking at 3, if you will, that is the
14 actual bid proposal --

15 A That's correct.

16 Q Would you look at the second page of
17 that and would you look in particular at the second one-
18 sentence paragraph on that page? What does that say, please?

19 A All items must be uncrated, assembled
20 and set in place ready for use.

21 Q I ask with reference to the tabulation
22 Exhibit 4, if you knew what lines, what manufacturer's line
23 each of the bidderstabulated handled, and you responded you
24 did not. Let me refer you again to Exhibit 2, and as I
25 understand your explanation, this is an internal document

1 which directs the vendors to whom the solicitation of bids
2 is to be sent?

3 A Yes.

4 Q There are some twenty listed. Some of
5 those are struck so that there is also a note of 18, and
6 there is a note on there of 18 vendors. Do you know what
7 manufacturers those vendors handled?

8 A Well, I see InterRoyal on here. Having
9 been here yesterday, I am going to say Ginns did handle
10 InterRoyal, but from that standpoint I don't know.

11 Q You don't know?

12 A I am not familiar with who handled what
13 lines, sir.

14 Q I would particularly call your attention
15 to what is alternately numbered in front 17, and behind
16 the word 18, Thonet?

17
18 MR. BARRY: I'm sorry, he has testified
19 that he didn't know.

20 THE COURT: Well, he is asking him does
21 he know specifically that one. I overrule the
22 objection.

23
24 A Thonet, I know nothing about that.

25 Q And 20 in front and 18 behind, Hill-Rom --

1 A I know nothing about that, either.

2 Q Those are not names with which you are
3 familiar?

4 A No.

5 Q How about 13 behind it and it is
6 Wortham, and behind it in parenthesis is Simmons.

7 A Simmons manufacturers a bed. I do
8 know that. Wortham, I have heard the name, but I have no
9 relationship of one to the other.

10 Q Let me very quickly direct your attention
11 to three others, 7, Brownson, 8, Morton Marks, and 12,
12 Delta Graphic.

13 A I do not know what lines they carry.

14 Q You do not?

15 A No, sir.

16
17 MR. SPENCER: I have no further questions.

18 MR. BARRY: I have no redirect.

19 THE COURT: Let me ask you this: Is
20 InterRoyal the only manufacturer that manufactures
21 this kind of furniture?

22 THE WITNESS: Sir?

23 THE COURT: Is InterRoyal the only
24 company that handles this type of equipment,
25 manufactures it?

1 THE WITNESS: Sir, my main thrust in here
2 is not in purchasing, so I don't feel like I am
3 really knowledgeable enough to answer that, Judge.

4 THE COURT: All right, that's all.

5
6 - - - - -
7 WITNESS STOOD ASIDE.

8
9 MR. BARRY: I call Mr. Schmidt.

10
11
12
13
14 THOMAS SCHMIDT, a witness called by the
15 Commonwealth, first being duly sworn, testifies as follows:

16 DIRECT EXAMINATION

17 BY MR.BARRY:

18 Q Mr. Schmidt, how are you today?

19 A I'm fine, thank you.

20 Q Would you tell the Court your full name
21 and your occupation?

22 A My name is Thomas Schmidt. I handle
23 Contract Services, which is a company of General Medical
24 Corporation.

25 Q That solves one problem. Were you working

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1 for them in January of 1976?

2 A Yes, I was.

3 Q In that particular time period, what was
4 your job?

5 A My responsibility at that time was
6 directing Contract Services, which was engaged in the planning
7 for and furnishing of medical needs for new medical
8 facilities.

9 Q At that particular time they were part of
10 General Medical?

11 A That's correct.

12 Q All right, sir, I would like to show you
13 what has already been introduced as Commonwealth Exhibit 3.
14 Tell me if you can identify or recognize this particular
15 document.

16 A Yes, I do.

17 Q Could you specifically tell the Court what,
18 if anything, that document is?

19 A It is a bid submittal that was forwarded
20 from our organization to the State for the represented
21 materials.

22 Q Now, is that your signature on the document?

23 A Yes, it is.

24 Q In what particular installation or job
25 location was that bid in connection with?

1 A The Lynchburg Training School and Hospital
2 at Lynchburg, Virginia.

3 Q Now, in comparing that particular bid,
4 sir, who, if anyone, did you contact, or were you contacted
5 by, to receive the figures that you placed on it?

6 A We contacted, as is the customary, the
7 manufacturer in order that we be given the prices as a cost
8 to us before, of course, we can prepare our bid to the
9 customer. In this case, we would contact the representative,
10 who in turn would solicit these prices from the manufacturer.

11 Q For this particular bid, what, if any,
12 representative did you contact?

13 A I would have at that time gone to Mr.
14 Mosteller to obtain the prices that we were to be eventually
15 charged were we to get the bid.

16 Q Let me show you Commonwealth's Exhibit
17 6 for identification; tell me if you recognize that document.

18 A Yes.

19 Q Sir, could you tell us what, if anything,
20 these documents mean to you?

21 A The figures that are shown here in typed
22 form are those that we would have submitted to the
23 Commonwealth as our quotation for this related merchandise.
24 We have here, it appears, the figures of our cost from the
25 manufacturer as well.

1 Q All right, now, specifically, sir, is
2 this the type of document that you would maintain in the nor-
3 mal course of business in your files?

4 A Yes, we would maintain the cost of
5 merchandise to us, together with our bid to the customer in
6 the event, of course, that we got the order, that we would
7 know what our cost is.

8 Q Then what, if any, value would you place
9 on a document like this when you prepare a bid?

10 A Substantial, because it again relates
11 our cost for merchandise, and that would be that cost that we
12 would insist upon obtaining were we successful.

13 Q Do you know who you received these docu-
14 ments from?

15 A I believe that these -- this would natur-
16 ally have come from the manufacturer, from InterRoyal as the
17 party whose property we were bidding, whose merchandise we
18 were bidding.

19 Q Do you know which representative you were
20 dealing with at the time you received these documents?

21 A Our representative at the time was Mr.
22 Mosteller.

23 Q Is that whose name appears on the first
24 small document that you have in your hand?

25 A Yes, sir.

Schmidt - Direct

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1 Q Did you have specific dealings with Mr.
2 Mosteller concerning this job?

3 A I don't recall being specifically in-
4 volved, although certainly it was my department that was in-
5 volved, and my personnel obviously had to be, and I relied
6 upon them in judgment, in signing the quotation.

7
8 MR. BARRY: The Commonwealth offers this
9 as Commonwealth Exhibit 6.

10 MR. SPENCER: Your Honor, please, I would
11 have to object to that. He just stated that he
12 was not involved. He would have to believe that
13 his people were involved. So I don't think that
14 that document has been properly identified.

15 THE COURT: I haven't seen it yet.

16 MR. BARRY: The Commonwealth's response
17 would be that he said in this particular job he
18 dealt with the InterRoyal representative. David
19 Mosteller appears on the first page of the document
20 with the breakdown of costs. Further, he stated
21 that this is a normal business record that had been
22 maintained in his file at that time, and he used
23 to make the bid, which is Commonwealth Exhibit 3.

24 THE COURT: Okay, let me ask you, this
25 note from the desk of David Mosteller was not on it,

Schmidt - Direct

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1 or did you all attach it, or was that in his record?

2 MR. BARRY: No, I submitted the document
3 to him en masse.

4 THE COURT: That was in his records?

5 MR. BARRY: That's correct. That is how
6 we received the document.

7 MR. SPENCER: But if I may inquire, Mr.
8 Barry, you received the document from Mr. Bryant,
9 did you not?

10 MR. BARRY: That's correct.

11 THE COURT: I will overrule the objection.

12 MR. SPENCER: Note my objection.

13
14 NOTE: At this point a group of documents
15 containing price quotations is marked and filed as
16 Commonwealth's Exhibit Number 6.

17
18 BY MR. BARRY: (Continuing)

19 Q Sir, after you had been awarded the bid
20 in this particular job, I would like to show you the next
21 particular document in a sequence, Commonwealth's Exhibit
22 7 for identification, and tell me if you recognize this
23 particular document.

24 A I recognize the matter that it deals with,
25 but I'm not familiar --

Schmidt - Direct

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1 Q Specifically what, if anything, does that
2 document deal with?

3 A It appears that this was an order, a work
4 order of some type that would have been developed by
5 InterRoyal related to this particular order. It didn't ori-
6 ginate with us, but it relates to what we are talking about
7 here.

8 Q Is that your signature on the bottom?

9 A No, it's not.

10 Q Specifically, you say it relates to what
11 you are talking about. What were you talking about?

12 A In order that it would have been
13 generated by General Medical to InterRoyal for the Lynchburg
14 Training School.

15 Q Do you know who, if anyone, prepared this
16 document?

17 A I don't know.

18 Q Do you know who, if anyone, signed your
19 name to it?

20 A No, I don't.

21 Q Is that the type of document that is
22 maintained in the normal course of business in transactions
23 such as this in your file?

24 A No, it doesn't have origin with us.

25 Q All right, thank you.

Schmidt - Direct

34

1 MR. SPENCER: Your Honor --

2 THE COURT: Sustained.

3
4 Q All right, sir. Now, let me show you
5 Commonwealth's Exhibits 7 and 8 for identification, and tell
6 me if you have received documents of that nature before.

7 A Yes, I recognize these.

8 Q What specifically are those documents?

9 A It was a bill to General Medical and it
10 indicates the check to be made payable to Mr. McIntyre for
11 the installation of furniture.

12 Q All right, and what wording appears in
13 the left-hand corner of that document?

14 A Make check payable to Robert McIntyre.

15 Q I'm sorry, left-hand lower corner.

16 A Job completed, customer okays all
17 invoices, payment from General Medical, David Mosteller.
18 It appears to be the name.

19 Q All right, now is this record and check
20 maintained in the normal course of business by your company?

21 A Yes, we would.

22 MR. BARRY: The Commonwealth offers that
23 as Commonwealth's Exhibits 7 and 8.

24 THE COURT: We will just make it 7 and
25 keep them together.

Schmidt - Direct

35

NOTE: At this point the above-referred-to bill and check are marked and filed collectively as Commonwealth's Exhibit Number 7.

Q Sir, let me show you Commonwealth's Exhibit 8 for identification and tell me if you recognize these documents.

A Yes, I do.

Q Would you tell the Court what, if anything, they are?

A It is indicated that this is a billing for abandoned samples used to sell psychiatric building furniture, Lynchburg Training Center & Hospital.

Q Is this a job that your company handled on that particular occasion?

A Yes.

Q Do you know any knowledge of any samples?

A Not specifically.

Q Did you ever see any samples?

A No, I did not.

Q And this is a form normally maintained in the course of business by your company?

A Yes.

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1 MR. BARRY: The Commonwealth would offer
2 that as Commonwealth's Exhibit Number 8.

3
4 NOTE: At this point the above-referred-
5 to bill is marked and filed as Commonwealth's
6 Exhibit Number 8.

7
8 Q Sir, on a job of \$79,000.00, what would
9 be the normal profit margin for General Medical?

10
11 MR. SPENCER: I'm sorry, I couldn't hear
12 you.

13 MR. BARRY: I was asking him the normal
14 profit margin on a job of this size.

15 MR. SPENCER: Judge, I think that would
16 not be relevant.

17 THE COURT: What did you make in this
18 particular job?

19 THE WITNESS: Your Honor, I am not sure.
20 I have not calculated that. I don't know.

21
22 Q Whenever you handle government jobs of
23 this size, you say a specific margin that you use in trying
24 to determine your profit?

25 A There is never a specific margin, of

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1 course, because you don't obviously want to establish any
2 pattern of margin for your competition of course, would know
3 that trend and you would certainly not be awarded very many
4 of them. We have done a considerable amount of business with
5 the State and maintained a margin of --

6
7 MR. SPENCER: I object, if Your Honor
8 please. It is not material to this case.

9 MR. BARRY: I think it is very material
10 to this case what his normal margin is. This is
11 a government job. He certainly has experience in
12 dealing with quotations of this nature. He can
13 testify basically what the upper end of the
14 spectrum and the lower end of the spectrum would be
15 on a job of this size.

16 THE COURT: I think he ought to know what
17 it was on this one.

18 MR. BARRY: I will withdraw my question.
19 Thank you, that's all.

20
21
22 CROSS-EXAMINATION

23 BY MR. SPENCER:

24 Q Mr. Schmidt, you were asked with
25 reference to Exhibit 8, which you identified as an invoice

Schmidt - Cross

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1 for abandoned samples, whether you had any knowledge of the
2 samples, and you replied you did not. And you were asked
3 whether you saw any samples, and you replied you did not.
4 Did you ever go out to the Lynchburg Training School?

5 A I did not.

6 Q All right, sir. Do you know of the use
7 of samples far in advance of the bidding process in order
8 to persuade the purchasing authorities to use this particular
9 merchandise?

10 A There are occasions when a sample or
11 some exhibits of furniture or equipment or whatever is used
12 to relate to the customer the quality, the features and
13 things of this nature of what is being considered.

14 Q All right, sir, and specifically have you
15 not, yourself, your company, to your knowledge, received
16 samples from Mr. Mosteller and requested samples to go to
17 specific locations for examination by potential purchasers?

18 A I am not aware of any instances where
19 we would have asked Mr. Mosteller for samples.

20 Q What about the State hospital in
21 Charlottesville?

22 A Charlottesville?

23 Q A private hospital in Charlottesville,
24 rather?

25 A We were under contract to furnish

1 furniture in a hospital in Charlottesville, and there we
2 arranged for InterRoyal as well as other manufacturers to
3 bring in their furniture for a one-day evaluation. I don't
4 recall that this was Mr. Mosteller at the time. It was
5 InterRoyal that we'd --

6 Q You don't specifically recall that that
7 was Mr. Mosteller you contacted for samples?

8 A I don't recall, but it could well have
9 been. There were two men representing InterRoyal to General
10 Medical.

11 THE COURT: Who was the other man?

12 THE WITNESS: He has since or at some-
13 time earlier, Your Honor, or early in my time at
14 General Medical, been transferred.

15 THE COURT: But who was he at that time?
16 Do you know his name?

17 THE WITNESS: I don't remember his name,
18 I don't.

19 THE COURT: Well, that could be very
20 material. But it was two that you were dealing
21 with?

22 THE WITNESS: Well, one was related to
23 the medical application and another was related to
24 the furniture for the most part, Your Honor.
25 And this probably was prior to these dates that we

1 are talking about here.

2

3 BY MR. SPENCER: (Continuing)

4 Q Then let me test your recollection as
5 to this specific incident. You were asked a question and I
6 posed an objection and the Court overruled my objection. Let
7 me go back just for a minute. You testified, "We contacted
8 the manufacturer to get prices for us to make our bids to
9 purchasing". Did you contact anyone?

10 A I don't know that I personally had
11 contacted anyone. I related what I had because I saw that
12 there were names of other people at that time entered on that
13 sheet. I had also said that naturally I would be involved
14 in that. I had signed the bid.

15 Q But did you have any specific recol-
16 lection of you having contacted Dave Mosteller with reference
17 to this bid?

18 A I do not.

19 Q Do you have any specific knowledge of
20 anyone else having contacted David Mosteller with reference
21 to this bid?

22 A I'm sure that we would have had to, sir,
23 in that we had to have received the information from him or
24 his company on which to base --

25 Q Him or his company? All right, sir.

Schmidt - Cross

41

1 Now, you have previously identified Exhibit 6 in toto as being
2 from the records of your company kept in the normal course of
3 business, is that correct?

4 A Yes.

5 Q All right, sir. Look at the printed
6 page. It is obvious that that is a State form. It says so
7 right on there, doesn't it?

8 A Uh-huh.

9 Q And it is signed by John Alexick as a
10 representative of the Lynchburg Training School?

11 A That's correct, from what I can see of the
12 name, yes.

13 Q All right, then, that document, based
14 on what you just examined, appears to have originated some-
15 where within the Commonwealth of Virginia, the apparatus of
16 the Commonwealth of Virginia?

17 A That's correct. It is a requesting of
18 this merchandise.

19 Q All right, now that actually is a part of
20 the Invitation to Bid, is it not, a copy of part of the
21 Invitation to Bid?

22 A Yes.

23 Q Now the figures noted in red, do I under-
24 stand that those are the figures for cost to you and bid to
25 the Commonwealth?

Schmidt - Cross

42

1 A No, it appears the figures in black, which
2 are those that represent our bid to the Commonwealth.

3 Q All right, you are saying that the
4 figures typed in are the bids you made to the Commonwealth?

5 A Well, let me examine this more carefully.

6 Q Let me attempt to refresh your memory
7 and suggest to you, are the typed figures not the estimates
8 provided by the user institution in requesting issuance of
9 their requisition?

10 A They could well be, sir. The only thing
11 that you asked specifically about the red figures, and that
12 is explained here in that side note, that is also attached,
13 that there is a pre-bid cost and a Royal cost.

14 Q All right, sir, the red figures, are they
15 not costs to you and costs to the State of Virginia as bid?

16 A I don't know what our bid is because I
17 don't have that to compare with it.

18 Q Look at the top of the column. The left-
19 hand column, in red, is Royal cost, and the right-hand column
20 is pre-bid cost written in red. Do you see that?

21 A Yes.

22 Q Then it would appear from the document,
23 having examined it more closely, that the red column is your
24 pre-bid cost? Let me ask you to look at Exhibit 3 and compare
25 the first item, 1 each, ash stand. When you compare the two

Schmidt - Cross

43

1 documents, you have your pre-bid cost on that ash stand in
2 the amount of \$30.32, and your bid in the amount of \$33.94?

3 A That's correct.

4 Q Now, just look at it very quickly. Does
5 that appear to hold true for all the other items? Take as
6 many as you like.

7 A It appears there is a consistency or
8 pattern.

9 Q Now, let's go for a minute to the document
10 that you said was attached to the front of this Exhibit 6.
11 That shows a built-in pre-bid cost for \$9,588.00 total, does
12 it not?

13 A That's what it says.

14 Q And that, on its face, appears to be
15 from Dave Mosteller, and it shows the breakdown as between
16 samples and installation?

17 A That's correct.

18 Q Now, refer again to Exhibit 3. This is
19 your bid, is it not?

20 A Yes, it is.

21 Q All right, sir. Look at the fifth
22 paragraph, a little one-line paragraph. What does that say?

23 A Please state best possible delivery date.

24 Q You and I aren't counting the same. This
25 one right here.

1 A The successful bidder may be required to
2 furnish samples.

3 Q Is this the reason why you would include
4 a pre-bid built in allocation for samples?

5 A We would have included this indication
6 on the basis that there was samples being furnished, or having
7 been furnished, and an indication of that, of our pre-bid
8 cost, as it is termed there, being included, as well as the
9 installation for that.

10 Q But if you will look at that, that is an
11 executory phrase that projects into the future that the
12 successful bidder may be required to furnish samples?

13 A That's correct.

14 Q Had you been required to furnish samples,
15 to whom would you have turned to furnish the samples?

16 A To InterRoyal.

17 Q And specifically in this case, would you
18 not have turned to David Mosteller?

19 A Yes, we would have requested it through
20 him.

21 Q Now, on the second page, the second two
22 paragraphs, if you will read those for us, please, second and
23 third paragraphs.

24 A (Reading) All items must be uncrated,
25 assembled and set in place ready for use.

1 All crating, other debris must be removed
2 from the premises.

3 Q Now, when you made your bid, did your
4 company propose to go to Lynchburg to uncrate, assemble and
5 set up for use the furniture on which you bid?

6 A No, that option is always open to us,
7 but it was our intention, since it was bid to us installed,
8 that we in turn intended to use the installer.

9 Q You say it was bid to you installed?
10 When it came to you, it had a built-in factor for the
11 expense of installation?

12 A As it was indicated on that sheet.

13 Q As indicated on the top piece or item
14 of Exhibit 6?

15 A It says there that a portion of the pre-
16 bid cost was for the installation, McIntyre's installation.

17 Q All right, as a matter of fact, Mr.
18 Schmidt, did you not customarily, with reference to InterRoyal,
19 have InterRoyal's representative make installation? I
20 understand that your company sometimes made its own
21 installation, but as a matter of practice, that was not the
22 case when the sale involved InterRoyal's furniture, was it?

23 A In the couple of instances that I am
24 aware of since I took over, that they were, that InterRoyal
25 did arrange, or we agreed to the installation by InterRoyal.

Schmidt - Cross

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1 Q By InterRoyal? All right. And in this
2 case it is obvious from Exhibit 6 that that was through
3 Mosteller?

4 A Yes.

5 Q Will you look at Exhibit 2, in the middle
6 portion, mail inquiry as to classified vendor coded above and
7 include following, and then two have been struck, so the
8 number has been reduced to eighteen. Would you examine that
9 list of eighteen persons to whom that internal DPS document
10 directed the bid material be mailed?

11 Have you examined that, Mr. Schmidt?

12 A Yes.

13 Q Are you familiar with those dealers?

14 A Some of these I am.

15 Q Are they not all persons known to you or
16 companies known to you to deal in merchandise similar to that
17 which was the subject of this particular bid?

18 A I know that some of these are. I'm not
19 familiar with all of them.

20 Q All right, sir, let me specifically direct
21 your attention to Hill-Rom. Does Hill-Rom handle InterRoyal
22 furniture or do they handle Hill-Rom?

23 A They are a manufacturer that sells their
24 own product.

25 Q And that is Hill-Rom?

Schmidt - Cross

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1 A That's correct.

2 Q And Thonet --

3 A Thonet sells the Simmons furniture.

4 Q Thonet sells Simmons?

5 A At this point, yes, they do.

6 Q And did Thonet also sell Thonet?

7 A Yes.

8 Q Look at Delta Graphic, Number 12, and

9 tell us, if you will, what they handle?

10 A I really don't know.

11 Q Worthan, Number 13, that indicates on

12 there Simmons. Do you know that company?

13 A I'm not familiar with them.

14 Q EdwardsMedical which is numbered alter-

15 nately 19 and 17, are you familiar with them?

16 A No, I'm not.

17 Q You are not aware of what they handle?

18 A I'm not.

19 Q Morton Marks Company, Number 8?

20 A I know of them as selling office

21 furniture.

22 Q And they handle multiple lines, do they

23 not? They sell furniture manufactured by numerous manu-

24 facturers?

25 A Yes.

Schmidt - Cross

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1 Q The same is true of Brownson, is it not?

2 A I'm not familiar with Brownson.

3 Q Thalhimer's?

4 A Thalhimer's represents a number of
5 manufacturers.

6 Q Numbers of manufacturers?

7 A That's correct.

8
9 MR. SPENCER: I think that's all, Your
10 Honor.

11
12 REDIRECT EXAMINATION

13 BY MR. BARRY:

14 Q Mr. Schmidt, in dealing with the Lynchburg
15 Psychiatric building, is Mr. Mosteller the only InterRoyal
16 dealer or representative that you worked with?

17
18 MR. SPENCER: If Your Honor please, the
19 gentleman has testified earlier that he had no
20 dealings in this particular job, that he was not
21 specifically involved.

22 THE COURT: He did testify to that,
23 Mr. Barry.

24 MR. BARRY: Well, I must be confused,
25 because he was talking about working with two

Schmidt - Redirect

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1 different dealers or two different representatives
2 on a job.

3
4 THE COURT: But he said the other repre-
5 sentative handled medical.

6 MR.SPENCER: That was with relation to
7 the hospital in Charlottesville.

8
9 Q So there was no one else that you dealt
10 with with the Lynchburg job at that time?

11
12 MR. SPENCER: Judge, my objection con-
13 tinues. He is trying to ask him who he dealt with
14 in that time, and the man hasn't dealt with anybody.

15 MR. BARRY: I think it is obvious he has
16 dealt with someone.

17 THE COURT: Well, he doesn't know.

18 MR. BARRY: I will withdraw the question.

19
20 Q Tell me, Mr. Schmidt, why did you pay
21 David Mosteller for samples?

22
23 MR. SPENCER: Judge, I don't want to slow
24 this down, but Mr. Schmidt has never said he paid
25 Mr. Mosteller. He has identified some records and

Schmidt - Redirect

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1 that is all he has done, and he has testified that
2 he did not have any specific connection with this
3 transaction.

4 MR. BARRY: His company, on documents that
5 he identified, on a bid that he signed, paid David
6 Mosteller a sum of money. My question to him,
7 since he was the one that signed the bid, was why
8 did they pay David Mosteller for samples. And my
9 next question would be installation.

10 THE COURT: Well, I think he paid because
11 he got an invoice, but I don't have a canceled
12 check. I have a check stub for \$3,000.00. Doesn't
13 say who it was paid to.

14 MR. SPENCER: There is a notation on the
15 stub.

16 THE COURT: Well, if you can read it,
17 Lynchburg samples on job. It looks like CM.
18 It looks like they would have a copy of the check.

19 That is the extent of the Commonwealth's
20 documentation.

21 I am interested in why they paid for the
22 installation if you want to ask that question.

23 MR. BARRY: That one is permissible?

24 THE COURT: Yes, sir.

25 MR. SPENCER: My objection would continue, (1)

Schmidt - Redirect

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1 Note my exception, please.

2

3

4

Q Why was the bill paid to do the installation?

5

6

THE WITNESS: Am I to answer that now?

7

THE COURT: Yes, sir.

8

9

A Because it was indicated that this merchandise was in fact installed. We supplied the merchandise and paid for the merchandise. We were paid for the merchandise so it was our understanding that it was satisfactory to the customer. We were submitted a bill and we had paid it.

14

15

16

17

18

19

20

THE COURT: The bid says all items must be uncrated and assembled, ready for use. I want to know why they paid the money. His very bid said it would be uncrated, set in place and assembled and the crates moved, which is included in the bid. So what is the \$3,700.00 for?

21

22

23

24

MR. SPENCER: Judge, you have just recited it must be uncrated and assembled, set in place and ready for use, crating and debris removed from the premises.

25

THE COURT: Yes, sir, that is all

1 included in the price of the bid.

2 MR. SPENCER: Yes, sir, and the \$3,800.00
3 is all included in the price of the bid, and he is
4 sitting there nodding. That is what I directed
5 his attention to in my examination, that those
6 items were included in his bid.

7 THE COURT: Was that in the price of the
8 furniture, in other words the \$33.00 for that piece
9 of furniture that was uncrated, assembled and put
10 in place?

11 THE WITNESS: We were instructed by those
12 instructions to furnish it, assemble it and install
13 it.

14 THE COURT: Well, that is the price you
15 gave?

16 THE WITNESS: Yes, and our price to the
17 Commonwealth would have had to include it because
18 it was our responsibility to do that.

19 THE COURT: In other words, they have an
20 ash stand, \$33.94, total cost?

21 THE WITNESS: All right.

22 THE COURT: The total cost, to me, means
23 that it is uncrated, assembled and put in place.

24 THE WITNESS: That's correct.

25 THE COURT: So that \$33.94 included that?

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Schmidt - Redirect

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1 THE WITNESS: That's correct.

2 THE COURT: Why did you go on and pay an
3 additional \$3,700.00?

4 THE WITNESS: Because that service was
5 performed for us to the customer, I mean.

6 THE COURT: Well, is that getting paid
7 twice?

8 THE WITNESS: No. We quoted the \$33.00
9 figure here. Our responsibility was therefore to
10 install it and so forth. In this case we elected
11 to use McIntyre to install it for us as opposed to
12 our doing it ourselves.

13 THE COURT: Wait a minute now. You are
14 not telling me the same thing. You have got a
15 side chair, InterRoyal 4836WS, Unit cost \$36.23.
16 Total cost is \$869.52. That price to me, indicates
17 that that is what those chairs cost shipped,
18 uncrated, assembled, put in place, debris removed.
19 It is no more cost to me?

20 THE WITNESS: That is correct.

21 THE COURT: Why then did you pay the
22 extra \$3,700.00?

23 THE WITNESS: Well, that was a cost to
24 us for performing that service to the Commonwealth.

25 THE COURT: Where in the bid did you put

Schmidt - Redirect

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1 installation charge, so much?

2 THE WITNESS: It was inclusive in the
3 overall cost.

4 THE COURT: You are just saying the same
5 thing. You paid him twice. Why did you pay him
6 twice? When your company got the bill for
7 \$3,788.00 installation, why didn't you say, "We
8 don't owe that"?

9 MR. SPENCER: Judge, could I please
10 assist the Court, having gone into it a little
11 more deeply?

12 THE COURT: I want the witness to explain.
13 You are not the witness, Mr. Spencer, and I want
14 to know why he paid the bill twice. It is obvious
15 to me, anybody who gets a bill for \$3,788.00,
16 knowing full well the installation is included in
17 the cost of the chair, why would they just auto-
18 matically pay that money out?

19 THE WITNESS: In the figures that I have
20 sent here, it was a matter of the cost that was
21 given to us, included that installation, and we,
22 in turn, used that cost on which to base our bid
23 to the Commonwealth.

24 THE COURT: Why did you pay the \$3,800.00?
25 That is my question. All the furniture was --

Schmidt - Redirect

55

1 THE WITNESS: We were responsible, Your
2 Honor, to install the furniture, and we had to
3 either pay that to an installer, in this case, or
4 do it ourselves, which would also have been a cost.

5 THE COURT: No, the cost for installing
6 with the furniture, by your bid, is \$88,044.00,
7 which included the installation. That included it?

8 THE WITNESS: Yes.

9 THE COURT: That is a total cost to the
10 State for all of the furniture to be put in the
11 building, assembled, uncrated and the crates taken
12 away?

13 THE WITNESS: That is correct.

14 THE COURT: Now, why did you pay him when
15 you were paying for it in the chairs?

16 THE WITNESS: Well, we were paying for
17 in the chair, and what you are saying here is
18 because there was a part of it, and that little slip
19 there said that a part of the bid cost to General
20 Medical is including the installation of \$3,700.00.

21 THE COURT: Well, didn't that put you on
22 notice that something is wrong?

23 THE WITNESS: No, because it is going to
24 be a real cost to us somehow to perform the service
25 of installation, and you are buying, first of all,

Schmidt - Redirect

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1 a chair at a given price, then to which there was
2 an added installation, and then upon which we would
3 place a mark-up.

4 THE COURT: What was your mark-up?

5 THE WITNESS: I don't recall, Your Honor.

6 THE COURT: Well, let's take a recess
7 and let's figure it out. I would like to know.

8 MR. SPENCER: Before you take a recess,
9 could I examine him?

10 THE COURT: You can examine him after the
11 recess. What he is trying to say is he just paid
12 out \$3700.00 and didn't check it.

13 MR. SPENCER: For the record, Your Honor,
14 I must say that I don't agree with the Court, and
15 I think we can clarify it.

16
17 NOTE: At this point there is a recess,
18 after which the hearing is resumed, viz:

19 *Discussing it in chambers with Counsel!*

20 THE COURT: Gentlemen, the Court now,
21 after thinking about it, understands the \$3700.00
22 perfectly for the charge of the installation. But
23 you all have had an advantage. You all have been
24 over this case three or four times, and I haven't.
25 But I do understand it now.

Schmidt - Redirect

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1 What was your mark-up, Mr. Schmidt, did
2 you find out?

3 THE WITNESS: Your Honor, we don't have
4 the records sufficient. There is one unknown here,
5 and that is, of course, the merchandise cost. I
6 don't have an invoice with me that relates what that
7 is. I have called my office to try to get that
8 information, if you would, of course, want that.
9 We do know, of course, the installation cost, the
10 sample cost, to which we have added the merchandise
11 cost and then compared that with our bid figure,
12 and that will give us, of course, the mark-up.

13 THE COURT: Thank you.

14
15
16 RECROSS-EXAMINATION

17 BY MR. SPENCER:

18 Q Mr. Schmidt, so we will have it perhaps
19 more clearly stated in the record, let me take your bid,
20 Exhibit 3, and let me take the Exhibit 6, which was your
21 internal document. Now, we have previously established the
22 figures that are the column in red, and I am taking the first
23 item, the ash stand, \$30.32 was your pre-bid cost?

24 A That's correct.

25 Q And I believe we also previously

1 established that to this you added your mark-up and when you
2 made your bid, sticking again to that first item, the bid to
3 the State was \$33.94?

4 A That's correct.

5 Q All right, sir. So the difference between
6 the pre-bid cost, \$30.32, and the \$33.94, with reference to
7 that one item, would indicate that your profit on that item
8 was \$3.62?

9 A That's correct.

10 Q Let's take, then, Exhibit 6 and stick
11 with this first item, the ash stand. Your pre-bid cost,
12 \$30.32, included in that, is there some small portion of the
13 price that you ultimately paid for installation in the total
14 amount of \$3,788.00?

15 A That's correct.

16 Q Perhaps 40 cents of that \$30.32 is to
17 go to make up the cost of installation, \$3,788.00?

18 A That's correct.

19 Q And when you carry that over to the bid,
20 then the same 40 cents is in the bid?

21 A Yes.

22 Q All right, now the installation, I mean
23 the sample cost of \$5,800.00, a small portion of that, that
24 was broken down and a smaller portion of that was allocated
25 to each item?

Schmidt - Recross

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1 A That's correct.

2 Q So as to the ash stand, perhaps 60 cents
3 of your pre-bid cost is the cost that you put in for samples
4 because the bid package said that you may be responsible for
5 samples?

6 A That's correct.

7 Q And the bid to the State, just as with
8 the installation costs, when you carried it over and told the
9 State they could have it for \$33.94, that same 60 cents that
10 you had included in your \$30.32 was a part of the \$33.94?

11 A That's correct.

12 Q And the same would hold true as to each
13 and every item on your bid, so that when you got to the end,
14 the total of \$89,507.84 included items for installation
15 and samples that totaled \$9,588.00?

16 A They were included.

17 Q So when the State paid the bill, they
18 paid the \$89,507.84, and that's all they paid?

19 A That's correct.

20

21

22

RE-REDIRECT EXAMINATION

23

BY MR. BARRY:

24

25 Q Then what you are saying is that the
\$9,588.00 for samples and the figure for installation was

Schmidt - Re-Redirect

60

1 all figured in your bill?

2 A That's correct.

3 Q In your final bid?

4 A That's correct, into the bid to the
5 State.

6
7 MR. BARRY: Thank you very much, sir.

8 THE COURT: All right, gentlemen, any
9 further questions?

10 MR. BARRY: No, sir.

11 THE COURT: Would you get me that figure?
12 Can you get that, Mr. Schmidt?

13 THE WITNESS: Yes, Your Honor.

14 THE COURT: I would appreciate it if you
15 could.

16 Thank you.

17
18 -----

19 WITNESS STOOD ASIDE.

20
21 MR. BARRY: Mr. McEntee.

22

23

24

25

1 FRANCIS X. MCENTEE, JR., a witness called
2 by the Commonwealth, first being duly sworn, testifies as
3 follows:

4 DIRECT EXAMINATION

5 BY MR. BARRY:

6 Q Sir, your name and occupation for the
7 record?

8 A Francis X. McEntee, Jr. I am employed
9 in the Quotations Department of InterRoyal Corporation.

10 Q Sir, how long have you been employed in
11 that capacity?

12 A Since 1974.

13 Q And what specifically does your job
14 entail?

15 A I am responsible for the preparation of
16 bids, and if we are successful in receiving bids, processing
17 documents through the various plants.

18 Q I would like to show you Commonwealth's
19 Exhibit Number 9. Tell me if you recognize this document.

20 A Yes, this is a note that was sent from
21 Dave Mosteller to my attention requesting that I enter an
22 order for Lynchburg Training School.

23 Q Now, specifically, going through that
24 page by page, if you would, what, if any significance to you,
25 a man in your position, would the front page have?

McEntee - Direct

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1 A The front page is just a cover letter from
2 Dave to me requesting how the shipment would be made and
3 approximately when.

4 Q What, if any, significance does the
5 second page have?

6 A The second page is part of the InterRoyal
7 Corporation salesman order form.

8 Q All right, and then the accompanying
9 documents?

10 A This is just a listing of what is to be
11 supplied.

12 Q All right, now, specifically, then, when
13 you received the documents like this, what, if any, steps
14 would you take pursuant to your position?

15 A First I would make sure that the prices
16 were quoted by the Department. If they were quoted by the
17 Department, then I would break out the various items that are
18 shown on the third and continuing pages, and send them to
19 the various plants.

20 Q What, if any, significance does "deliver
21 blanket wrapped to Lynchburg" have?

22 A That means that it is delivered just to
23 the end of the truck, without any cartoning.

24 Q And this would be the extent of the order
25 to that particular location?

McEntee - Direct

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1 A Yes.

2
3 MR. BARRY: The Commonwealth offers that
4 as Commonwealth's Exhibit Number 9.

5
6 NOTE: At this point the above-referred-
7 to group of documents is marked and filed collective-
8 ly as Commonwealth's Exhibit Number 9.

9
10 MR. BARRY: Thank you, sir.

11
12
13 CROSS-EXAMINATION

14 BY MR. SPENCER:

15 Q Tell me again, Mr. McEntee, the last
16 thing you said. You refer to the language on the first page,
17 blanket wrapped?

18 A Yes, that means there was no cartoning
19 around the goods.

20 Q And that is the first page of this
21 Exhibit 9?

22 A That's correct.

23 Q Now, look at the third page if you will.
24 This, you say is what you actually ordered from the factory?

25 A May I see the document, please?

McEntee - Cross

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1 On Page 3, which item, sir?

2 Q Just Page 3 and all the subsequent pages.
3 This is what you ordered from the factory?

4 A This is what would be ordered from the
5 factory.

6 Q And read, if you will, beginning with
7 about six lines down, please mark.

8 A What page is this, sir?

9 Q Page 3.

10 A Page 3?

11 Q Page 3 of the exhibit, Mr. McEntee.

12 A Oh, I'm sorry.

13 Q The third piece of paper in Exhibit 9.

14 A Okay. "Please mark all cartons Psychiatric
15 Building with individual cartons identified as noted. Tag
16 all furniture for room numbers".

17 Q Now if that says that on the order that
18 you gave to the factory, then how does that comport with your
19 explanation of what is on the first page, the words "blanket
20 wrap"?

21 A They would be interpreting, because if
22 you look at the top of Page 3, you will see the word "Deliver
23 blanket wrapped to Lynchburg Training School & Hospital",
24 handwritten.

25 Q And you are saying that the typed

1 in portion about marking the cartons was not a part of it,
2 and was not done?

3 A That was not done.

4 Q How do you know? Did you ever go to the
5 factory to see how the furniture was marked?

6 A No, sir, but if I could look at the invoice
7 for shipment, I could determine it from that and the packing
8 slips.

9 Q Now, the unit costs that are shown,
10 beginning with the third sheet of paper in Exhibit 9, those
11 are the confirmed unit cost charges by InterRoyal?

12 A Those would be the charges charged to the
13 dealer.

14 Q So that is what InterRoyal got for the
15 transaction?

16 A That's correct.

17 Q Would you look again, starting with the
18 third sheet of paper in Exhibit 9, and look at Exhibit 6,
19 which is a document already offered into evidence, and tell
20 me how the Royal cost shown in the left-hand column of red
21 figures compares with the cost you have on your InterRoyal
22 document from InterRoyal?

23 A So far on this exhibit here, on Page

24 3--

25 Q On the third sheet of paper.

1 order comes to you?

2 THE WITNESS: No, the prices would be
3 already on that document. It would come to us
4 with the prices on it.

5 THE COURT: Well, do you check the
6 prices?

7 THE WITNESS: We would check the prices.

8 THE COURT: And then divert it to the
9 factory?

10 THE WITNESS: That is correct.

11 THE COURT: I think that is admissible.
12 I overrule your objection, Mr. Barry.

13
14 BY MR. SPENCER: (Continuing)

15 Q And you have already testified that in some
16 instances you have checked them and they are absolutely
17 identical, and it appears to you that they are all identical?

18 A Yes, sir.

19 Q So whoever did 6, also had access to the
20 information on 9?

21 A Yes.

22 MR. SPENCER: Thank you.

23 MR. BARRY: No further questions.

24 MR. SPENCER: Well, let me ask just a
25 couple more questions.

1
2 BY MR. SPENCER: (Continuing)

3 Q Did InterRoyal Corporation ever undertake
4 to make the installation?

5 A On what project, sir?

6 Q On this project.

7 A I have to look at some documents to see
8 if there was any attempt. I don't have any documents to see
9 that.

10 Q Well, you have what came to you and what
11 you priced on?

12 A Right. It was not quoted with instal-
13 lation by InterRoyal.

14
15 THE COURT: Excuse me. I didn't under-
16 stand you.

17 THE WITNESS: It was not quoted to the
18 dealers including installation by InterRoyal.

19 THE COURT: It was not included on the
20 price?

21
22 Q For example, if the \$32.32 as Royal cost
23 for the Ash Stand --

24 A That did not include installation.

25 Q And likewise it did not include the cost

1 of any samples that may have been used or may have been asked
2 for?

3 A That's correct.

5 MR. SPENCER: That's all I have.

6 MR. BARRY: Thank you, Mr. McEntee.

8 - - - - -
9 WITNESS STOOD ASIDE.

11 MR. BARRY: I call David Peckman.

14 DAVID K. PECKMAN, a witness called by the
15 Commonwealth, first being duly sworn, testifies as follows:

16 DIRECT EXAMINATION

17 BY MR. BARRY:

18 Q Mr. Peckman, how are you today?

19 A Fine, thank you.

20 Q Give the Court your full name and
21 occupation presently.

22 A David K. Peckman, Assistant Director,
23 Administrative, Lynchburg Training School & Hospital.

24 Q Were you employed in that position back
25 in January of 1976?

Peckman - Direct

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1 A Yes, I was.

2 Q Mr. Peckman, at that particular time,
3 what were your duties at the Lynchburg Training School?

4 A As they are today, responsible for all
5 administrative activities of the facility.

6 Q Would you ever get involved in purchasing
7 furniture?

8 A To a degree, yes.

9 Q Now, specifically directing your attention
10 to the time in which the Lynchburg Psychiatric Hospital was
11 being furnished, do you remember any involvement you had
12 in that particular installation?

13 A Normally the Procurement Section, and
14 Mr. Alexick, Administrative Services Supervisor, him more so
15 than anyone else, would be involved in the formulation of the
16 plans for procurement. I would have to sign off or approve
17 the purchases for purchasing of supplies and equipment in
18 the final analysis.

19 Q Would you have been involved in any
20 planning meetings concerning that function?

21 A Involved in some, yes.

22 Q Now, specifically directing your attention
23 to what meetings you can remember, what, if any, conversations
24 did you have with David Mosteller concerning the purchase of
25 furniture for the psychiatric buildings?

Peckman - Direct

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1 A I can't remember in detail. We did
2 meet, I know, on occasions with Mr. Mosteller and Mr.
3 Alexick and myself.

4 Q And at that particular time, can you
5 remember what, if any, conversation you had concerning any
6 installation of any furniture purchased?

7 A The installation --

8
9 MR. SPENCER: If Your Honor please, he
10 already said he couldn't remember any details.

11 MR. BARRY: I'm simply trying to refresh
12 his recollection the best I can as to any possible
13 thing that he might remember. My other question
14 was obviously too general.

15 THE COURT: I will allow the question.

16 MR. SPENCER: Note my exception.

17 Q Go ahead, sir.

18 A I do remember that on the installation
19 it was supposed to be, due to a dollar limitation, a tailgate
20 job. We would do the installation, Lynchburg Training Center
21 & Hospital.

22 Q Was Mr. Mosteller present during any
23 of these conversations?

24 A I believe he was.

25 Q Then the general individual responsible

Peckman - Direct

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1 for the final decision would be Mr. Alexick?

2 A Not for the final decision. No, I would
3 have the final decision. Mr. Alexick, as I mentioned earlier,
4 was involved more in the details, working up the final decision
5 to be made.

6 Q For the psychiatric building?

7 A Yes.

8
9 MR. BARRY: Thank you, Mr. Peckman.

10 THE COURT: Mr. Spencer.

11

12

13

CROSS-EXAMINATION

14 BY MR. SPENCER:

15 Q I gather from your testimony, Mr.
16 Peckman that you were involved in the matter generally by way
17 of you approving the application for requisition, and after
18 having been advised by your underlings, you, I suppose, would
19 approve it for payment?

20 A Yes, sir.

21 Q But you had no other direct involvement
22 except you do have some recollection of a conversation about
23 it being a tailgate job?

24 A Yes, sir.

25 Q But you do not know whether Mr. Mosteller

1 was present or not?

2 A I'm not positive on that, no, sir.

3
4 MR. SPENCER: That's all I have.

5 Thank you, Mr. Peckman.

6 THE COURT: I have a question, sir.
7 Why would that get changed in the process, when
8 the bid was for it to be installed, or do you have
9 any knowledge of this?

10 THE WITNESS: Your question is why was
11 the -- in other words you are saying the installa-
12 tion was supposed to have been included in the
13 project and was it changed and not to be included?

14 THE COURT: Yes. I understood you to
15 say that the installation was to be done by your
16 people?

17 THE WITNESS: Right, because of the
18 dollar limitations of the project.

19 THE COURT: Well, let me ask you this:
20 Did you have any knowledge of the bid that was
21 accepted?

22 THE WITNESS: No, sir.

23 THE COURT: Okay, thank you, sir.

24
25 BY MR. SPENCER: (Continuing)

1 Q Mr. Peckman, your statement to the Court,
2 that because of the dollar limitation, that is your best
3 recollection of it?

4 A Yes, sir.

5 Q Might I suggest to you and have you con-
6 sider, see if this perhaps refreshes your recollection, if
7 you ever heard of it, that what happened was the patient --
8 this building was for the most severely disturbed patients
9 at your hospital, was it not?

10 A Yes, sir.

11 Q And was it not a fact that by the time
12 the delivery came, the patients had already been moved in with
13 the temporary furniture and you did not want outsiders going
14 into the building with these, some violent patients, and
15 very ill people?

16 A No, I don't recall anything of that sort,
17 sir.

18 Q You don't remember?

19 A No, sir.

20 Q Did any other manufacturers solicit
21 your business on this?

22 A To the best of my knowledge, no.

23 Q Did Mr. Mosteller examine your plans
24 and do layouts and suggest specifications for what you needed
25 in developing your requisition?

1 A I believe he was involved, but I don't
2 know to what extent.

3
4 MR. SPENCER: That's all.

5 MR. BARRY: Thank you, Mr. Peckman.

6
7 -----

8 WITNESS STOOD ASIDE.

9
10 MR. BARRY: Mr. Alexick.

11
12
13 JOHN S. ALEXICK, a witness called by the
14 Commonwealth, first being duly sworn, testifies as follows:

15 DIRECT EXAMINATION

16 BY MR. BARRY:

17 Q Sir, how are you today?

18 A Fine, thank you.

19 Q Would you tell the Court your name and
20 present occupation?

21 A John S. Alexick. A-l-e-x-i-c-k.

22 I was employed at the Lynchburg Training School & Hospital
23 as Administrative Services Supervisor. I have since retired.

24 Q Now, specifically, were you working in
25 that position in January of 1976 until December of 1976?

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Alexick - Direct

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1 A Yes, sir.

2 Q What would a Purchasing Agent primarily
3 be involved with at Lynchburg?

4 A I was not basically the Purchasing Agent.
5 Among my respective duties, I was in charge of physical and
6 supply, and as we moved into identification, to Capital Outlay,
7 to Construction, furnishing buildings. I had this as an
8 added responsibility, to work with the staff who would be
9 occupying the various buildings and identifying with them as
10 to their needs and work with them in respect to what would
11 be planned in the respective functioning areas, and then
12 identify with catalogues, sales representatives, in respect to
13 the items that we might be wishing to purchase. We would have
14 to go back in to measure up the available funds to the amount
15 of goods and furnishings which we might have to use. In
16 many cases funds were not sufficient. And then you would have
17 to do your cutting and meeting with sales representatives.
18 They were pretty much aware of what your dollar figures were,
19 and you would, in many instances, have to relate what your
20 needs were and then actually do your cutting when you
21 determined that maybe your quality was too high as you started,
22 and you would have to go back to a different kind of
23 substitute.

24 Q All right, sir, directing your attention
25 to the psychiatric building, were you involved in that

Alexick - Direct

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1 project?

2 A Yes, sir.

3 Q Specifically, which sales representative
4 did you work with on that project?

5 A Well, with the InterRoyal furnishings,
6 we worked with Mr. Mosteller.

7 Q In developing specifications for the
8 Lynchburg Psychiatric Building, what, if any contact did you
9 have with Mr. Mosteller?

10 A We had him come in, we met with our
11 Purchasing Supervisor, the nursing staff, the Food Service
12 Director, the Buildings and Grounds maintenance men, and
13 discussed what items of furnishings, furniture, equipment
14 would be best suited for our particular needs. That building
15 would be housing our most severely retarded, most destructive
16 residents.

17 Q Now, Mr. Alexick, did Mr. Mosteller ever
18 exhibit to you any sample furniture to sell you this job?

19 A Not for this job, no, sir.

20 Q What, if any, conversation did you have
21 with Mr. Mosteller concerning installation on this job?

22 A As had been common practice in prior
23 purchases of furniture, we never had sufficient funds to be
24 able to have somebody else do installation for us. We always
25 accepted tailgate delivery. And in this instance it was

Alexick - Direct

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1 agreed that we would provide labor for the unloading, moving
2 into the building, distributing, uncartoning and setting
3 into place.

4 Q It was agreed with who, Mr. Alexick?

5 A Mr. Mosteller.

6 Q Explain the conversation.

7 A Internally we factored, with my superior,
8 Mr. Peckman, our Director of Buildings and Grounds, and our
9 warehouse personnel, because it would rest upon the warehouse
10 and the buildings and grounds to give assistance to the set-up.

11 Q How do you know that Mr. Mosteller was
12 aware of this?

13 A We discussed it.

14 Q How many times did you discuss it?

15 A I don't remember specifically how many
16 times, but it was mentioned that we would take it off the
17 truck, we would do the total work ourselves on it because
18 we did not have funds enough to be able to identify with
19 outside help as it were.

20 Q So were any samples ever left after the
21 items did arrive?

22 A Not specifically related to that
23 building, no, sir. Later on we did receive --

24 Q Later on, what do you mean? How much
25 time?

Alexick - Direct

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1 A No, this was not a sample from Inter-
2 Royal.

3 Q All right, fine. I would like to show
4 you Commonwealth's Exhibit 1, and tell me if you ever con-
5 tacted anyone at Purchases & Supply and asked for installation
6 of furniture?

7 A Yes, sir, we had contacted Mr. Bob
8 Maitland, Mr. Roy Scott in respect to this as a contract.

9 Q Did you ask for installation?

10 A No, sir. In fact, we indicated, I'm sure,
11 in that instance, that we did not have money to be able to
12 let other people do the installation.

13
14 MR. BARRY: Thank you, Mr. Alexick.

15 This gentleman may have some questions.

16
17 CROSS-EXAMINATION

18 BY MR. SPENCER:

19 Q Mr. Alexick, as I understand your testi-
20 mony, you participated in a conference with Mr. Maitland and
21 Mr. Scott and others in DPS with reference to the requisition
22 of this furniture?

23 A Not a conference. We had telephone
24 conversations back and forth. I don't think we ever had a
25 specific meeting in respect to this as such. This was all in

Alexick - Cross

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1 a conversational inquiry.

2 Q Well now, you, as I understood your
3 testimony, and apparently I misunderstood the part we just
4 covered, you testified that in this conversation that you did
5 not ask for installation?

6 A Yes, sir.

7 Q Okay, is that the basis on which you
8 say that no requirement was made for installation in soliciting
9 bids for your job?

10 A Yes, sir.

11 Q A telephone conversation that you remem-
12 ber having with either Mr. Maitland or Mr. Scott?

13 A We did not have money in our allotted
14 funds, and as a consequence, we could not afford to have
15 private parties come in and do the installation.

16 Q All right, sir, may I direct your
17 attention to Exhibit 3. This is not the solicitation for
18 bid that went out on this job?

19
20 THE COURT: Would he be in a position
21 to know? I know that is the bid.

22 THE WITNESS: This was evidently
23 issued through the Department of Purchases &
24 Supply. This document was not.
25

1 Q I don't mean to cut you off --

2 MR. BARRY: I'm sorry, I would like to
3 have him finish answering his question. I am
4 getting kind of tired of having defendant's counsel
5 summarize the evidence, put words in the witness'
6 mouth.

7 THE COURT: He has got him on cross-
8 examination.

9 MR. BARRY: I think we are at the point
10 that obviously if the man would be left to
11 answer the question, we could move on rapidly to
12 the next question.

13 MR. SPENCER: Or perhaps, if we let him
14 answer, we would get another five-minute answer
15 that he answered when you asked him if he were
16 the Purchasing Agent.

17 THE COURT: I will let him answer the
18 question. He has answered the question, I don't
19 think he is familiar with that document.

20 You don't see those documents at all,
21 do you?

22 THE WITNESS: Sir, after these are
23 received back by the Department of Purchases &
24 Supply, some of these would be sent back to
25 agencies, sometimes they were not sent back to

Alexick - Cross

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1 agencies, and purchase orders were cut accordingly.

2

3 BY MR. SPENCER: (Continuing)

4 Q Well, my question to you, Mr. Alexick,
5 if you will look at that, please, the yellow pages, which is
6 the top two pages of Exhibit 3, and tell me, do you not
7 recognize that as the solicitation for bid, and the other
8 pages are the actual bid that was sent out by DPS on your
9 job at Lynchburg? Look at it, please, sir.

10 A Yes, sir, this is a document that would
11 have been issued by P. & S.

12 Q And it came to your attention in con-
13 nection with this job? You have seen that document before?

14 A If I had seen this and this was at
15 Lynchburg Training School & Hospital, customarily I always
16 put my initial A. and a line underneath.

17 Q Mr. Alexick, I am not suggesting for a
18 moment that this specific piece of paper was ever at
19 Lynchburg. For the purposes of clarification, this is the
20 record from the State, Department of Purchases & Supply.
21 But there are multiple copies of that. Copies of that go
22 to all the persons for whom bids are solicited?

23 A Right.

24 Q And a copy went to you at Lynchburg?
25 So you have seen that particular document, though it is not

Alexick - Cross

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1 that particular paper? You have seen a copy of the same
2 document and you recognize it?

3 A Specifically, not this one.

4 Q Well, look at it.

5 A Others I have seen similar to that, yes,
6 sir.

7 Q Look at it, sir, and tell me whether or
8 not it is the document for your job about which you are
9 testifying?

10 A This relates to the particular psychiatric
11 building, yes, sir.

12 Q And by whom is that signed?

13 A This was signed by the party who
14 submitted the quotation.

15 Q All right, sir, and up on this line
16 up here, does that indicate the name of the individual who
17 prepared the document?

18 A Yes, sir.

19 Q And whose name is indicated?

20 A Robert Maitland.

21 Q Now in the document on the first page,
22 I call your attention to the line, "The successful bidder
23 may be required to furnish samples".

24 A No samples were ever furnished, sir.

25 Q But that was on the bid, it may be

Alexick - Cross

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required?

1 A Right.

2 Q And on the second page, on the bid, "All
3 items must be uncrated, assembled and set in place ready for
4 use. All crating and other debris must be removed from the
5 premises". Is that what it says?

6 A Yes, sir. If I had seen this, I would
7 have questioned it having been placed.

8 Q All right, sir. Now, let me ask you this,
9 if you will: The particular building about which we are
10 talking was your psychiatric building?

11 A Yes, sir.

12 Q And is this the building in which your
13 most seriously mental ill patients are housed?

14 A Mentally retarded, yes, sir.

15 Q And is it not a fact, I want you to
16 really dig into your recollection, is it not a fact that by
17 the time this furniture was delivered, the building was
18 already occupied by the patients and that temporarily you had
19 equipped the building with old furniture from elsewhere in
20 your facility? Think hard, please.

21 A I don't recall, sir, whether the
22 building was or wasn't occupied.

23 Q You don't remember? Do you remember at
24 any time an incident like I am describing to you?

25 A I believe earlier, a number of years

Alexick - Cross

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1 earlier, we did move into our hospital building, but I don't
2 think we occupied the psychiatric building --

3 Q Then I gather --

4 A -- until after the furniture was
5 delivered.

6 Q From your answer that you don't think,
7 I gather that you are uncertain?

8 A Yes, I can't place the time level.

9 Q Let me suggest this to you: Is it not
10 a fact that this particular furniture, upon its arrival, was
11 unloaded and placed in a large area that was a recreation
12 hall or gymnasium or treatment center?

13 A A multiple use hall, yes, sir.

14 Q And was the furniture not then uncrated,
15 assembled and set up in that building by other persons other
16 than you and your staff? Think hard.

17 A When the furniture trucks arrived, there
18 were two men who did basically the total unloading, Mr.
19 Lew Lankford, Mr. Mann, Billy Mann, two men out of our
20 warehouse. Now they did tailgate pick-ups.

21 Q But they -- excuse me, sir.

22 A And they unloaded all of the items that
23 came from InterRoyal in that complex area.

24 Q And they unloaded them into this large
25 vacant area?

1 A Yes, and Mr. Lankford, who was our
2 Warehouse Foreman, and also Property Plant Supervisor, keeping
3 records of all the various distributions and plant assets.
4 He and Mr. Mann, they advised me that they had placed every-
5 thing.

6 Q Now, I really don't want you to recite
7 what someone else told you. I want to know what you know
8 yourself.

9 A Well, I know this was done.

10 Q Did you see it done, sir?

11 A Partially. I wasn't there all the time,
12 but I visited the site on occasions and saw, and they did
13 the basic uncrating and setting up in the various rooms.

14 Q Moving into the rooms?

15 A Or corridors, office.

16 Q Did you ever go over and watch in that
17 room who was doing the uncrating and the assembling of the
18 furniture?

19 A I visited the building on several
20 occasions, yes, sir.

21 Q And did you watch that process?

22 A Passing through. I could see what was
23 going on, yes, sir.

24 Q All right, you did not watch the entire
25 process, I gather?

Q You occasionally passed through and observed it?

A No, sir, I had other duties that necessitated my being at a desk in my office.

MR. SPENCER: I have no other questions.

REDIRECT EXAMINATION

BY MR. BARRY:

Q Mr. Alexick, when the defense was showing you the bid, I didn't understand. If you would have seen that bid, what would you have done?

A There is a notation on the second page which indicates that the installation and the clean-up would have been done by the successful bidder. I would have challenged that back with Mr. Maitland immediately.

MR. BARRY: Thank you, sir.

THE COURT: All right, sir. You may
step down. Thank you.

— — — — —

WITNESS STOOD ASIDE.