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SUPREME COURT OF VIRGINIA



RICHMOND, VIRGINIA

IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 801223

DAVID MOSTELLER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

JOINT APPENDIX

Vol. II

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JOINT APPENDIX

Table of Contents

VOLUME II

Section C. (Cont'd.)

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Lewis Lankford	90	92		
James C. Manley	96	99		
Lewis Lankford (recalled)	101	102		

Section D. Transcript of March 6, 1980

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Irving J. Brooks, Jr.	11 30	29 33	40	
John Alexick	41	51	60	60
Robert Maitland	61	73	87	
Sidney Horestead	87	93		
Robert Creasey	98	107		
Raymond Chalkley	109	116		
Wayne Butler	122	124		
Barbara Bromley	126	146	155	156
Francis S. McEntee, Jr.	159	166		
John Alexick (recalled)	170			
Lewis Lankford	174			
Nancy Stoll	179	182		
Frank H. Williams	184			
Charles D. Bryant	188	190		

Section E. Transcript of May 6, 1980:

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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Michael R. Walker	5			
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Section F. Assignments of Error

1 MR. BARRY: Mr. Lankford.

2
3 LEWIS J. LANKFORD, a witness called by
4 the Commonwealth, first being duly sworn, testifies as
5 follows:

6 DIRECT EXAMINATION

7 BY MR. BARRY:

8 Q Mr. Lankford, how are you today?

9 A Fine, thank you.

10 Q Sir, would you give the young lady your
11 name and your current address?

12 A Lewis J. Lankford, L-e-w-i-s, J.,
13 L-a-n-k-f-o-r-d, 5720 Edgewood Avenue, Lynchburg, Virginia,
14 24502.

15 Q Mr. Lankford, did you ever work at the
16 Lynchburg Training School?

17 A Yes.

18 Q Did you work there back in January of
19 1976?

20 A Yes, sir. I was Warehouse Foreman with
21 Plant and Property Control.

22 Q Did you ever have occasion to unload
23 any furniture into the psychiatric hospital?

24 A All of it.

25 Q Could you tell us what you remember of

Lankford - Direct

91

1 the entire incident?

2 A Well, it came in two or three trucks, and
3 at the time I was getting ready to retire, and I had my
4 assistant helping me. We unloaded this truck with the help
5 of Buildings & Grounds, two men from Buildings & Grounds.
6 We put it in the gymnasium.

7 Q All right, Mr. Lankford, did you get
8 any samples along with this furniture?

9 A No, sir.

10 Q Are you sure of that?

11 A Absolutely.

12 Q Did you see Mr. Mosteller around when the
13 furniture was being installed?

14 A Not in this particular building, no.

15 Q You have seen him there before, though?

16 A Yes.

17 Q How long did the job actually take you,
18 Mr. Lankford, do you remember?

19 A Well, it took about one day unloading
20 it, and I had two men from Buildings & Grounds to put the
21 tables together. And after this was done, Mr. Mann, the
22 man who was helping me, and I put all of it on the wards.
23 The building was occupied at the time. We had one vacant ward,
24 so we put all the furniture on that one ward until we could
25 put it in the proper locations, with the exception of what I

Lankford - Direct

92

1 could put in the office. And the furniture, the office
2 furniture went in place. Most all of it went into the
3 reception room and into the special arts room.

4 Q Mr. Lankford, I would like to show you
5 a document or a copy of a document, and I would like you to
6 tell me if you have ever seen anything like that before.

7 A Yes, I have seen it before. I made
8 this.

9 Q Is that your signature on the bottom?

10 A It is.

11 Q Could you tell us what this is in regard
12 to? Does this have anything to do with the job on the
13 psychiatric building?

14 A No, this was the hospital.

15 Q The hospital? I see.

16
17 MR. BARRY: I think we will have to
18 withdraw that. The Commonwealth will withdraw that
19 exhibit.

20 Thank you, Mr. Lankford. This gentle-
21 man may have some questions.

22
23
24 CROSS-EXAMINATION

25 BY MR. SPENCER:

Lankford - Cross

93

1 Q Mr. Lankford, you have testified that the
2 psychiatric building was already occupied?

3 A All except one ward.

4 Q All except one ward? And I gather that
5 that was occupied by utilizing old furniture that had been
6 brought in from elsewhere in the facility?

7 A That's right, in 3 Ward.

8 Q Now, the nature of the patients in these
9 wards, do you permit outsiders to go in where those patients
10 are?

11 A They can go in the hallway. The doors
12 are locked. This is the security ward.

13 Q The doors are locked so they can't go
14 in the rooms?

15 A That's right.

16 Q Now, what sort of furniture did you and
17 your assistant and the two men from Buildings & Grounds
18 unload, do you recall?

19 A There were bedside tables and beds,
20 clothes cabinets and chairs and tables, and some clothes
21 lockers were in the kitchen.

22 Q Clothes lockers what?

23 A Went in the kitchen.

24 Q Went in the kitchen?

25 A That's right.

1 Q Do you also recall unloading and uncrat-
2 ing and installing some desks and office furniture?

3 A Yes, I had some desks, but they didn't
4 come crated. They was covered.

5 Q Did this material come crated?

6 A No, none of it was crated.

7 Q The material that you say you all
8 unloaded and put in the large storage area, the beds, bedside
9 tables, clothes cabinets --

10 A The only thing that was crated was
11 table tops.

12 Q Table tops? Now was it assembled or did
13 you have to assemble it?

14 A All of it was assembled except a few
15 chairs and tables.

16 Q The beds were all assembled?

17 A No, the beds come knocked down. The
18 beds were not assembled.

19 Q Who assembled them?

20 A They were assembled by Buildings &
21 Grounds, after they got to where they could get them on the
22 ward, the proper place.

23 Q After they got them in the room, in the
24 proper place?

25 A That's right.

Lankford - Cross

95

1 Q Mr. Lankford, did you see the invoice
2 that would come with the furniture?

3 A That's right, I had a copy of the
4 invoice.

5 Q And would you sign off on that indicating
6 that everything was received and it was in proper order?

7 A I received it according to the purchase
8 order. I checked the items, what we ordered. I had it
9 listed on my receiving. If it wasn't, I wouldn't receive
10 it.

11 Q And you received this according to the
12 purchase order?

13 A That's right, if it come in, I did.

14 Q Let me show you Exhibit 3. Is this the
15 document that you would receive a copy of, the purchase
16 order?

17 A No, my purchase order would look like
18 this. I wouldn't get a copy of this.

19 Q You wouldn't get a copy of the top part?

20 A No.

21

22 MR. BARRY: He is talking about
23 Commonwealth's Exhibit Number 5. That is the
24 purchase order.

25 MR. SPENCER: I have no further questions.

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Lankford -

96

1 MR. BARRY: Thank you, Mr. Lankford.

2
3 - - - - -
4 WITNESS STOOD ASIDE.

5
6
7 JAMES C. MANLEY, a witness called by the
8 Commonwealth, first being duly sworn, testifies as follows:

9 DIRECT EXAMINATION

10 BY MR. BARRY:

11 Q Mr. Manley, would you tell the Court
12 your name and occupation, please?

13 A My name is James C. Manley. I am the
14 Operations Manager of Contract Services.

15 Q Is that a subsidiary of General Medical?

16 A It is.

17 Q Sir, in your daily business, could you
18 tell the Court just exactly what you do?

19 A I'm responsible for the internal operation
20 of the company, accounts payable, accounts receivable,
21 inventory, that type of operation.

22 Q I see. Let me show you Commonwealth's
23 Exhibit 10. Tell me if you have ever seen any exhibit like
24 that before.

25 A Yes, I have.

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Manley - Direct

97

1 Q What specifically is that document, sir?

2 A This is the authorization for the company
3 to make payment.

4 Q And by looking at that, can you determine
5 whether or not it has been paid?

6 A From this document I cannot determine
7 that it has been paid, but it is possible to determine if it
8 has been paid.

9 Q How can you determine whether or not that
10 has been paid?

11 A Go through the check log.

12 Q Let me show you Commonwealth's Exhibit
13 Number 11, then, and tell me if you have ever seen that
14 document?

15 A Yes, I have.

16 Q What is that?

17 A This is a copy of a check issued by our
18 company.

19 Q Is it pursuant or can you notice if there
20 is any connection between Commonwealth's Exhibit 10 that I
21 showed you earlier?

22 A Yes.

23 Q Specifically, then, sir, what is the
24 significance then, of the last exhibit I gave you, which would
25 be marked as Commonwealth's Exhibit 11?

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Manley - Direct

98

1 A This represents the prior document sub-
2 mitted.

3
4 MR. BARRY: The Commonwealth would offer
5 that as Commonwealth's Exhibits 10 and 11.

6
7 NOTE: At this point the above-referred-to
8 authorization for payment is marked and filed as
9 Commonwealth's Exhibit Number 10.

10 The above-referred-to copy of a check
11 is marked and filed as Commonwealth's Exhibit
12 Number 11.

13
14 MR. BARRY: I have no further questions
15 of Mr. Manley.

16 Judge, I might add, this is the gentle-
17 man that has the percentage that you were interested
18 in.

19 THE COURT: What is it?

20 Q What is the percentage that General
21 Medical would have made on a job of this nature, specifically
22 speaking of the psychiatric building at Lynchburg Training
23 School?

24 A It worked out to 4.76 percent of the
25 gross figure.

Manley - Direct

99

1 MR. BARRY: Thank you.

2
3
4 CROSS-EXAMINATION

5 BY MR. SPENCER:

6 Q That was an overall figure?

7 A That is correct. That is on the gross.

8 Q And as to individual items, for example,
9 an ash stand, it may have been 10 percent?

10 A That is correct.

11
12 THE COURT: Any further questions?

13 MR. SPENCER: I have no further questions.

14 THE COURT: You may be excused.

15
16 - - - - -

17 WITNESS STOOD ASIDE.

18
19 MR. BARRY: At this time, Your Honor, I
20 would request a recess. We have to have one
21 witness come over from the Comptroller's office.

22 THE COURT: The Comptroller of Virginia?

23 MR. BARRY: Comptroller, yes, sir.

24 THE COURT: We will recess for lunch
25 until 2:00 o'clock.

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100

1
2 NOTE: At this point a luncheon recess
3 is had, after which the hearing is resumed, viz:
4

5 MR. BARRY: Judge, a matter has come to
6 the attention of the Commonwealth that will need
7 a few more minutes to explore concerning something
8 that has occurred with one of our witnesses very
9 innocently, and I would like to have time to
10 explore that.

11 THE COURT: What do you mean something
12 has happened?

13 MR. SPENCER: No ill event has occurred
14 to the witness.

15 MR. BARRY: I just need a few more
16 minutes.

17 THE COURT: How long do you mean?

18 MR. BARRY: We are also waiting for some
19 documents from the Treasurer's office. I anticipate
20 at least another five or ten minutes.
21

22 NOTE: At this point a brief recess is
23 had, after which the hearing is resumed, viz:
24

25 MR. BARRY: Your Honor, the defense and

1 the prosecution has determined that Mr. Lankford
2 should be recalled, in the interest of justice,
3 to clarify some items.
4

5
6 LEWIS LANKFORD, having been previously
7 sworn, resumes his testimony as follows:

8 DIRECT EXAMINATION

9 BY MR. BARRY:

10 Q Mr. Lankford, can you go back to when
11 you were unloading the trucks at Lynchburg Psychiatric
12 Building? Do you remember anyone else helping you with that
13 job?

14 A Not helping me, no.

15 Q Do you remember anyone else being there
16 with the furniture besides your own crew?

17 A Yes, the truck driver and somebody with
18 him.

19 Q Do you remember what that man's name
20 was?

21 A I know now but I didn't know then, Mr.
22 McIntyre. I had met him.

23 Q I understand. Can you tell the Judge
24 what, if anything, the truck driver and Mr. McIntyre did
25 concerning the installation of that furniture?

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Lankford - Direct

102

1 A Nothing with the installation. All any
2 of us did the day the truck was there was set it on the
3 game floor. That's all we did.

4 Q So did Mr. McIntyre unload the items from
5 the truck?

6 A That's right, he helped us unload them
7 from the truck.

8 Q And put them in the gymnasium?

9 A That's right. I thought he was part of
10 the truck crew. He didn't introduce himself and I didn't
11 know him.

12
13 MR. BARRY: Thank you.

14
15 CROSS-EXAMINATION

16 BY MR. SPENCER:

17 Q Mr. Lankford, I understand that this has
18 been a long time ago and it is sometimes difficult to
19 remember exactly. May I ask you, Mr. Lankford, how old
20 you are?

21 A 67.

22 Q And when did you retire?

23 A Two years ago. It will be three years
24 in June.

25 Q And your original testimony was that you,

Lankford - Cross

103

1 your assistant and two men in the Buildings & Grounds unloaded
2 the truck and put the stuff in the gymnasium?

3 A We didn't actually unload the truck.
4 Mr. McIntyre brought it to the tailgate or to the dock.

5 Q And they took some into the gymnasium?

6 A Maybe when I wasn't looking they placed
7 some inside the door, but I was putting items at different
8 locales so it would be easy to get to.

9 Q But you said just a minute ago that they
10 unloaded it from the truck and set it out on the floor in
11 the gymnasium?

12 A That is where we eventually put it. It
13 had to go across the dock.

14 Q And McIntyre and at least one other man
15 participated in that?

16 A I don't know whether they carried
17 anything into the building or not. I don't know for sure.

18 Q Well, I think it is pretty well agreed
19 that they could not go into the psychiatric building because
20 of the nature of the patients?

21 A That's correct, right.

22
23 MR. BARRY: I'm sorry. I request that
24 be stricken. No one has agreed to anything along
25 those lines. We are just asking Mr. Lankford about

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Lankford - Cross

104

1 what happened, so I would request that that question
2 be stricken from the record.

3 MR. SPENCER: Either Mr. Lankford or
4 John Alexick had previously agreed to that, that
5 no one else could go in that building because of
6 the nature of the patients.

7 THE COURT: Well, go on. That's all
8 right. I will overrule the objection.

9
10 Q Now, could it have been, Mr. Lankford,
11 as many as four other men?

12 A No, sir.

13 Q You say it couldn't?

14 A No, sir.

15 Q But you do say now that McIntyre and one
16 other man helped?

17 A That's right and I thought they were
18 on the truck, right.

19
20 MR. SPENCER: That's all.

21 MR. BARRY: Thank you, Mr. Lankford.

22 THE COURT: You may step down.

23
24 - - - - -

25 WITNESS STOOD ASIDE.

1
2 MR. BARRY: Your Honor, the only final
3 exhibit the Commonwealth would offer at this time,
4 I have the document but I do not have the repre-
5 sentative from the Comptroller's office here to
6 remit it. I have asked him to pull the originals.
7 I didn't anticipate originally that I was going
8 to have trouble, but I do.

9 THE COURT: All right, you rest subject
10 to that?

11 MR. BARRY: Yes, sir.

12 THE COURT: Are they on the way?

13 MR. BARRY: Yes, sir, there are people
14 trying to get them right now.

15 THE COURT: All right, he is going to rest
16 subject to that, Mr. Spencer. I don't know what
17 the documents are.

18 MR. SPENCER: Well, Your Honor, there is
19 some confusion about the documents and this is the
20 reason we are not stipulating. The Court may
21 recall that yesterday, in the Danville case, based
22 on Mr. Barry's statement to me as to what the
23 documents would show, we stipulated. But today, in
24 attempting to work out stipulations, it is apparent
25 there is some variant that he doesn't know, and

1 so we have got to get the document before we go
2 any further.

3 THE COURT: Well, I will let him rest.

4 Do you have any witnesses?

5 MR. SPENCER: Judge, I would not at this
6 time be in a position to make that decision,
7 until we know what these documents are going to
8 show. I don't think I can.

9 THE COURT: What are the documents?

10 MR. BARRY: What the problem is, the
11 job was bid for \$89,000.00. We have Comptroller
12 documents stating that the institution, the vendor
13 had only delivered and received \$87,000.00,
14 seventy-six thousand and some odd dollars in
15 products. So we are missing \$2,000.00 worth of
16 items that the institution did not receive that
17 were originally bid. We are \$2,000.00 off. The
18 vendor was paid, but the Comptroller documents
19 do not ascertain where the extra \$2,000.00 went.

20 MR. SPENCER: In order not to delay the
21 Court and hold up the matter, we have been trying
22 to work it out and we cannot reconcile the amount.
23 To me it appears that there is a conflicting
24 statement here and Mr. Barry and I agree that when
25 we total, we don't get the same total they get.

1 THE COURT: They have probably got an
2 adding machine.

3 MR. SPENCER: Well, they are pretty simple
4 totals, and we also eat other than at Shoney's and
5 we think we are right on the totals and they just
6 don't come out the same way. But in order not to
7 delay the matter, if we introduce the things and
8 agree that one document shows certain payments and
9 another document shows certain payments. What
10 we come out to is a difference of a few hundred
11 dollars.

12 MR. BARRY: This is the final payment.
13 This is what we paid.

14 MR. SPENCER: But we have a copy of the
15 document and it is for a different amount.

16 MR. BARRY: The problem is that the job
17 was bid for 89, and there seems to be a discrepancy
18 of just exactly what was paid, anywhere between
19 approximately eighty-six thousand all the way up
20 to eighty-seven thousand.

21 MR. SPENCER: It looks to us, Judge, it
22 looks to me that though taking this figure as
23 correct, because that is what this shows, and
24 that is after these deductions, taking that as
25 correct, and then taking this, which we know is

1 not correct and adding, instead of making it
2 twenty-nine fifty-five, which is what the copy of
3 the voucher shows, \$2,917.10. We conclude they
4 must have paid \$87,258.21. They say they paid
5 \$85,947.12.

6 THE COURT: Eighty-five what?

7 MR. SPENCER: \$947.12.

8 MR. BARRY: The payment went to the
9 vendors.

10 THE COURT: What does the State say
11 they paid?

12 MR. SPENCER: In another place they
13 say \$87,258.21, instead of \$85,947.12. So we have
14 a variance of about \$1,300.00.

15 Could we show you, Judge? Here is one
16 document, which is an invoice, and after taking
17 off for some items that were not delivered, they
18 paid this amount. And if you total these two
19 figures, you got that figure, and we both agree
20 that is what they paid. Now, they then produce
21 this document, shows an additional invoice for
22 \$2,955.08, and a copy of a Voucher No. 3398 for
23 \$2,917.10. So if you add the \$2,917.10 to this,
24 you get \$87,258.21. But then they give Mr. Barry
25 another document which they had written afterwards,

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109

1 and they said that they paid a total of \$85,947.12,
2 and they showed the payments by two invoices, two
3 vouchers. And one of them is this very voucher,
4 3393, which they say was in this amount. But
5 there is a copy of it, and it obviously was in that
6 amount.

7 MR. BARRY: So the end result being
8 General Medical got paid, but we don't know if
9 they paid them the right amount.

10 MR. SPENCER: We don't know what they
11 were paid.

12 MR. BARRY: We think the State paid that
13 amount.

14 THE COURT: Well, subject to that, you
15 all can clarify that. We know the State paid at
16 least this much?

17 MR. SPENCER: And perhaps --

18 THE COURT: More? \$87,258.21?

19 MR. SPENCER: In order to save time,
20 we are willing to stipulate these records would
21 be produced by the Treasurer's office or Comptroller.

22 MR. BARRY: Comptroller.

23 MR. SPENCER: By the Comptroller's
24 office.

25 THE COURT: Make this Number 12.

1
2
3 NOTE: The above-referred-to documents
4 from the Comptroller's office are marked and filed
5 as Commonwealth's Exhibit Number 12.

6 MR. SPENCER: If Your Honor please, for
7 the record, in order to save time and shorten this
8 matter, since there is some question in my mind
9 as to how quickly a witness can get here, and as
10 to what explanation the witness can give, the
11 Commonwealth and the defense are prepared to
12 stipulate the following: That the State
13 Comptroller, or a representative of that office,
14 if called to testify, would produce, among other
15 things, three documents. The first is an invoice
16 sold to Lynchburg Training School by Contract
17 Services, Purchase Order #69608, Requisition
18 Number 5-451, dated November 10, 1976, and showing
19 near the bottom an amount certified for payment,
20 \$84,341.11, to Contract Services Interiors at the
21 address shown.

22 The second document would be a similar
23 invoice, that is the top half of it is the same
24 down to the line that says vendor should not write
25 below this line, and that invoice to the same

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111

1 people and by the same people, Contract Services
2 Interiors is an invoice for \$2,955.08. And that
3 invoice, on the same copy of the paper, there is
4 a copy of the State draft, check receipt or draft
5 for Voucher Number 3398 on Purchase Order
6 Number 69608 showing a payment of \$2,917.10.
7 And we assume, and by agreement will agree that
8 this is a copy of a voucher to Contract Services
9 Interiors and that those two items, the \$84,341.11
10 and the \$2,917.10 total \$87,258.21. And it would
11 appear from those two documents that the State
12 paid this amount to Contract Services Interiors.
13 However, the same office then produced, or I'm
14 sorry, not the same office, but Mr. Alexick,
15 Administrative Services Supervises, prepared a
16 letter to Mr. Manley, the Office Manager of
17 Contract Services, with reference to the same
18 Purchase Order No. 69608. And in that letter he
19 states that the net paid to Contract Services,
20 instead of \$87,258.21, he states it is \$85,947.12.
21 So the stipulation is that Contract Services was
22 paid an amount, but that the records are in
23 a state of confusion so that we do not know whether
24 it was the lesser amount of \$85,947.12 or the
25 greater amount of \$87,258.21, or something in

1 between.

2 THE COURT: Okay.

3 MR. BARRY: The Commonwealth now will
4 rest.

5 MR. SPENCER: Your Honor please, then at
6 this point we would move to strike the
7 Commonwealth's evidence as to both counts of indict-
8 ment on a number of grounds. First of all, and I
9 don't want to bore the Court by total recitation of
10 yesterday's argument, but first of all on the
11 grounds that no crime has been established.

12 THE COURT: I think, Mr. Spencer, that
13 they have made a prima facie case.

14 MR. SPENCER: Sir?

15 THE COURT: I think they have made a
16 prima facie case at this time.

17 MR. SPENCER: All right, sir. And secondly,
18 and I am sure the Court's comment will perhaps
19 be the same, but secondly, on the grounds that in
20 neither instant, neither as samples or as to
21 installation, is there any evidence that Mr.
22 Mosteller got any portion of the total of the
23 \$9,588.00, as shown on the exhibit entered by
24 Mr. Schmidt as having been the amount that they
25 anticipated paying for installation and samples.

1 THE COURT: I will overrule your
2 motion.

3 MR. SPENCER: Let me confer with my
4 client.

5
6 NOTE: At this point counsel is conferring
7 with the defendant.

8
9 MR. SPENCER: The defense rests, also,
10 Your Honor.

11 THE COURT: Now, I have got some
12 questions to decide, whether the Commonwealth
13 proved beyond a reasonable doubt, and I will be
14 perfectly honest with your gentlemen, this is
15 much more serious than on a motion to strike.

16 I have studied the documents carefully,
17 and this case is distinguished from the one
18 yesterday. The defendant consistently in his
19 purchase orders to his home office has said,
20 "Advise Mr. Robert McIntyre, installer", and
21 his phone number, "one week prior to the first
22 shipment. Shipments start to finish do not exceed
23 one week". That is notice to everybody that Mr.
24 Robert McIntyre, who apparently, there was a
25 charge for him installing. And I have some

1 difficulty on this point. I see that the installing
2 price might be entirely different, the furniture
3 be given, but the installing price be included
4 in there, and was a separate item.

5 Now, the invoice from the defendant
6 says, "Make check to Mr. Robert McIntyre, Install-
7 er, Virginia Beach, Virginia, 23455," which is
8 consistent with that. And that is for the
9 installation of furniture.

10 Now, you go all the way back to the bid
11 part, and the bid came in but the price was to
12 include the installation. Somewhere along the
13 way, the State changed its mind and said, "No, it
14 is not in the contract. We are going to install
15 it". But to me, the State had entered into a
16 contract which included the installation, and I
17 think the State is just as bound as an individual.
18 The Supreme Court has consistently said you must
19 stand behind the word of the State, and here I
20 think the State committed itself. It changed its
21 position. I can very well see, and I don't know
22 where the money went, it went to Mr. McIntyre by
23 everything I have, that Mr. McIntyre could have
24 brought the furniture up there. When he brought
25 the furniture up there, came back and told the

1 defendant, "well, I have installed the furniture",
2 and after he tells him that, the defendant then
3 writes to the State and says, "I want the money for
4 the installation, which is \$3,890.00. But don't
5 make the check payable to me, make the check pay-
6 able to Mr. McIntyre". He never planned that the
7 check was to be made payable to him. And I think
8 quite frankly, and I don't want to cut you off,
9 Mr. Barry, I just want to give you the facts
10 before the Court. He is entitled to every reason-
11 able hypothesis of innocence. It is the duty of
12 the Commonwealth to prove the case beyond a rea-
13 sonable doubt. And quite frankly, I have a doubt
14 as to that. It has been consistent from the start
15 to finish that McIntyre was the installer.
16 Now this is on the installation, his position has
17 been consistent.

18 Another thing that worries me so about
19 these cases, gentlemen, being a Judge, I am not
20 involved in the everyday business world, and I
21 don't see this, excuse the expression, how loosely
22 business is handled. I wish some of my creditors
23 would possibly be that loose, but they aren't.
24 There is so much done by the telephone in the fast
25 world that we live in, nothing is documented.

1 But on the installation charge, now as far as the
2 State having a breach of contract against him, I am
3 not in a position to decide that because he did
4 have a contract for the installation. Now I don't
5 think the State can change its position without
6 some negotiations. They can't say, "I'm going to
7 install the furniture and I am going to take that
8 out".

9 On the installation charge, I see no
10 other way but that the defendant is entitled to
11 the reasonable doubt, and the Commonwealth has
12 failed to carry its burden beyond a reasonable
13 doubt. I don't guess you want to argue, Mr.
14 Spencer? Unless you have something to add, Mr.
15 Barry, I can see no reason --

16 MR. SPENCER: I have a question, Your
17 Honor.

18 THE COURT: I am going to get to that.
19 You have another one coming.

20 MR. SPENCER: No, about this, Judge,
21 There is no identification as yet. Despite my re-
22 quest for a bill and a supplemental bill as to
23 which count of the indictment deals with the
24 installation --

25 THE COURT: Well, it is two counts of
the indictment and I think that you were very

1 familiarized with the case.

2 MR. SPENCER: Yes, sir, but I do not
3 know and have never known which count of this
4 indictment deals with installation and which count
5 deals with samples. There is nothing in either the
6 indictment or the Bill of Particulars or the
7 supplemental answers to designate that.

8 THE COURT: Well, I can handle that.

9 Mr. Barry, what did you have?

10 MR. BARRY: The only real comment we have
11 concerning installation, Your Honor, is on the back
12 of the check written to Robert McIntyre, Dave
13 Mosteller, or a signature that would appear to be
14 his name, appears on the back of the check. So the
15 only inference that we have before the Court at
16 this time, and you are absolutely correct, is that
17 the check did eventually end up in Mr. Mosteller's
18 hands.

19 THE COURT: I know, but Mr. McIntyre
20 could very well have owed him the money. Just the
21 very naked signature on the check does not make
22 him criminally liable. I mean as long as it is
23 his signature and the check is good. But I don't
24 see any other theory than the defendant, the burden
25 hasn't been carried beyond a reasonable doubt in

1 the installation. We will mark that count as
2 Number 1.

3 Now, Mr. Spencer, I will give you an
4 exception, if you want, about Count Number 2, and
5 I will allow you, because Count Number 2 has
6 given me a different thought at this time, so I
7 will let you gentlemen argue Count Number 2,
8 which would be as to the abandoned furniture.

9 MR. SPENCER: If Your Honor please, I
10 would note an exception, and specifically so there
11 is --

12 THE COURT: You are excepting to me
13 dismissing it?

14 MR. SPENCER: No, sir, I am excepting
15 to the Court designating Count 1 as being applicable
16 to the installation. This, of necessity, means
17 that Count 2 is the samples, and the Commonwealth's
18 Attorney today has made no designation. It appears
19 to me, and I would be very interested in hearing
20 the Commonwealth's response to this, that as a
21 matter of fact, whatever occurred, occurred as
22 one event, and that if a fraud was practiced, it
23 was a single fraud. If the Court will note, the
24 only evidence that deals with the amount either
25 for installation or for samples --

1 THE COURT: Well, suppose he was defraud-
2 ing his company? Is that defrauding the
3 Commonwealth?

4 MR. SPENCER: No, sir. That was what
5 I argued yesterday.

6 THE COURT: I know you did. That is
7 why I asked. I wanted to see if you would be
8 consistent today.

9 MR. SPENCER: Yes, sir. That has nothing
10 to do with this indictment because the Bill of
11 Particulars, the indictments both make plain that
12 the theft was from the Commonwealth of Virginia.

13 THE COURT: See, yesterday, they had
14 totally, what the Commonwealth paid, or what money
15 went from the vendor back to InterRoyal was
16 forty-two thousand some-odd dollars. The contract,
17 as I recall, was something like sixty-eight
18 thousand.

19 MR. SPENCER: The contract, Your Honor,
20 was \$60,500.00.

21 THE COURT: Well, it was an \$18,000.00
22 difference, I recall.

23 MR. SPENCER: Well, actually it was
24 \$16,000.00 difference because you remember you have
25 the \$2,400.00.

1 THE COURT: Oh, yes, the \$2,400.00. I
2 remember that.

3 MR. SPENCER: But it is the same
4 situation as I argued yesterday. I am not at this
5 point defending any claim or charge for action as
6 between the company, in this instance, General
7 Medical, through its subsidiary, the service
8 company, Contract Service Company. The charge is
9 a theft from the Commonwealth, and there has been
10 no showing that this defendant received anything
11 from anybody for any purpose. There is no evidence
12 whatsoever that the defendant got payment from
13 anybody for any part of the money that changed
14 hands in connection with this case.

15 THE COURT: There hasn't been any show-
16 ing, Mr. Barry, has there, that the Commonwealth
17 has lost anything?

18 MR. BARRY: Well, what you have pre-
19 sently before the Court is a situation where the
20 Commonwealth put out a bid. The bid is approxi-
21 mately \$39,000.00. Now when they put out the bid,
22 in all fairness to everyone, various people bid
23 on it. And then when the vendors come to the
24 representative of InterRoyal, Mr. Mosteller, he
25 gives them a figure. And in that figure is

1 computed approximately \$9,000.00 worth of goodies,
2 installation and samples. So then, based on that,
3 the vendor then bids, wins the bid, and in the
4 long run, after the services are all done, this
5 vendor is paid by the Commonwealth. And what the
6 vendor is paid is not only his bid price, but
7 figured into that is \$5,800.00 worth of samples.
8 So yes, the Commonwealth again loses money.

9 THE COURT: In this case it is only
10 \$3,000.00?

11 MR. BARRY: That is all the Commonwealth
12 has. The Commonwealth has two pieces of evidence,
13 one that an item that the vendors relied on from
14 the desk of Dave Mosteller, signed by an individual
15 named Dave, says that he is going to charge them
16 \$5,800.00, and that is figured into the price.
17 And then of course you have a showing that at
18 least \$3,000.00 of that \$5,800.00 was indeed paid
19 for samples.

20 The Commonwealth's position, for argument
21 is the \$5,800.00, but we have an actual showing
22 of \$3,800.00 paid for samples that did not exist.

23 MR. SPENCER: I think Mr. Barry perhaps
24 will agree with me that he made an error in his
25 statement, and I think attempted to correct it

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122

1 when he said what the vendor was paid is not only
2 the bid price, and then he added, but included in
3 that was the cost for the samples and the instal-
4 lation. What the vendor was paid was the bid
5 price into which had been factored a little bit at
6 a time, the charge for the installation and the
7 samples.

8 Now, if you examine the bid, Your Honor,
9 you have a contract with the Commonwealth, the
10 Commonwealth was the maker of the contract, and
11 right on the face of it, it says the vendor may
12 be required to furnish samples. And there is no
13 evidence whether they were or weren't required to
14 furnish samples. There is some testimony from
15 some of the people at the hospital that they saw
16 no samples there, but that particular hole has
17 never been closed. Plus the fact, Your Honor,
18 that the Commonwealth creates a contract and put
19 something in which is uncertain in nature. Then
20 anyone who was trying to respond to the
21 Commonwealth's contract had to speculate as to what
22 their ultimate liability might be, and in this
23 case Dave told them, "factor in -- " and Judge,
24 I have to look at it to get the amount.

25 THE COURT: Which one?

1 MR. SPENCER: 6, I believe. Dave told
2 them, "factor in the amount for samples, \$5,800.00;
3 McIntyre installation, \$3,788.00, a total of
4 \$9,588.00".

5 Now, there is no evidence, as the Court
6 has already ruled, on the question of the
7 installation, and that takes out \$3,788.00 of this.
8 And there is no evidence at all that Mr. Mosteller
9 got anything, any part of the \$5,800.00 that was
10 identified there as being factored in for samples.

11 THE COURT: Well, now, where is the
12 \$5,800.00 for samples?

13 MR. SPENCER: Right on that top sheet,
14 Your Honor.

15 THE COURT: You mean his little note?

16 MR. SPENCER: Yes, sir. That is the
17 only place in the case where the figures appear.

18 MR. BARRY: That is the only figure that
19 appears as \$5,800.00. There are figures later
20 dealing with samples.

21 THE COURT: Yes, the samples for
22 \$3,000.00, they sent an invoice for that.

23 MR. SPENCER: The invoice? The Court
24 is speaking of Exhibit --

25 THE COURT: Exhibit 8.

1 MR. SPENCER: 8?

2 THE COURT: Abandoned samples used to
3 sell Lynchburg Training School and Hospital.
4 It says, "make check payable to Dave Mosteller,
5 sample account".

6 MR. SPENCER: Yes, sir, that is the
7 total exhibit. There's no check here. There is
8 no showing that it was ever paid.

9 MR. BARRY: That is the next exhibit,
10 from Mr. Manley.

11 THE COURT: 10 and 11.

12 MR. SPENCER: If Your Honor please, what
13 this is is a copy of something, but there is no
14 showing of what this is.

15 THE COURT: Mr. Spencer, I don't think
16 there is any question that I have got enough
17 before me that the check was paid.

18 MR. SPENCER: Where is the evidence that
19 the check is paid?

20 THE COURT: I listened to the witnesses
21 and I listened to what this man said.

22 MR. SPENCER: No one, Your Honor, has
23 said that a check went to Mosteller.

24 THE COURT: Well, I think the last
25 witness did or the next-to-the-last witness.

1 MR. BARRY: Mr. Manley, Your Honor.

2 THE COURT: He said he couldn't do it by
3 this, but he could do it by this. So Mr. Barry
4 introduced the other exhibit.

5 Well, I have a question, Mr. Barry.
6 You said the Commonwealth has lost, we'll say
7 \$3,000.00. Where has it lost? Where has it shown
8 to me that it has been lost under this bill?

9 MR. BARRY: The evidence that you have
10 before the Court is that when the original price
11 was given to the vendor, samples were figured
12 into it, \$5,800.00 worth, as a matter of fact,
13 were figured into it. That is Commonwealth's
14 Exhibit 6.

15 THE COURT: That is the little notation?

16 MR. BARRY: That's right. That is the
17 notation. I mean that is giving us a forewarning.
18 Take that alone and no, that is not enough, I
19 agree. But from the desk of David Mosteller, it
20 says, "I am going to charge you \$5,800.00 for
21 samples". And then we found out that samples
22 not only never showed up in Lynchburg, but they
23 weren't even used to sell the job. And then the
24 vendor gets an invoice saying, "Pay \$3,000.00 for
25 samples that were used to sell the job". And

1 of course the whole thing is passed on to the
2 Commonwealth because it was sent on in the bid.

3 THE COURT: What is a sample? There
4 was some evidence that that is what is delivered
5 first, to look at?

6 MR. BARRY: That's right.

7 THE COURT: Suppose he includes -- he
8 calls it samples. You have one definition of
9 samples, or the Commonwealth has one definition of
10 samples and he has something else. Didn't the
11 Commonwealth verify that it got all the furniture
12 that it paid for?

13 MR. BARRY: Yes, they did, all the
14 furniture that they paid for, that they requested
15 on the bid.

16 THE COURT: They got all that furniture?

17 MR. BARRY: That's correct.

18 THE COURT: Well, what is bothering me,
19 Mr. Barry, where is the \$3,000.00? Where do you
20 get the \$3,000.00 out of the contract?

21 MR. BARRY: All right, again, when the
22 job was originally bid to General Medical, he
23 tells us in his little letter that "yes, in
24 addition to what you are going to pay for the
25 furniture, you are going to pay such and such

1 amount for installation and such and such amount
2 for samples".

3 THE COURT: Where is that, the General
4 Medical --

5 MR. BARRY: No, Commonwealth's Exhibit
6 6, I guess, the memo.

7 THE COURT: Oh, we go back to the memo?
8 Well, I can't read that. What is that numbers
9 in red, ANC? It looks like a prescription. What
10 is that?

11 MR. BARRY: I think that's are, Judge.
12 The numbers in red are Royal cost. When you read
13 the document, you see Royal cost, and you see pre-
14 bid cost, so you can figure that the Royal cost is
15 this, and then including my little amount for
16 installation and samples, then we have the pre-bid
17 cost, then the bid cost is the extra 4.6 percent
18 that Mr. Manley testified to you about. So that
19 is how we break it down. And in the pre-bid cost,
20 he has figured on each stick of furniture approxi-
21 mately maybe \$8.00, something along those lines.

22 THE COURT: Well, let me ask you a
23 question. You are talking about Commonwealth's
24 Exhibit Number 6. My understanding of Commonwealth's
25 Number 3, the figures agree with these red figures?

1 MR. SPENCER: That is correct.

2 MR. BARRY: That was his testimony.

3 I don't know what the witness said.

4 MR. SPENCER: I didn't testify. I'm
5 not a witness.

6 THE COURT: Both of you all have been
7 doing quite a bit of that.

8 MR. BARRY: These figures don't corres-
9 pond. These aren't the same figures. These are
10 the bid costs.

11 MR. SPENCER: These don't correspond,
12 Judge. These are the bid figures which he takes
13 this and adds his profit to that, and gets this.

14 THE COURT: Gentlemen, that is for the
15 installation?

16 MR. SPENCER: He didn't say that they
17 are the same figures. He said that this would be
18 what he bid it to the State. This would be what
19 he was going to have to pay for it. And the
20 difference, which was \$3,62, would have been his
21 profit. And he compared every one of them down
22 here and he said that held true on everything on
23 the first page, and then he went through and
24 scanned the others, and he said it appeared to him
25 that that would hold true throughout.

1 THE COURT: This is what the defendant
2 said his own --

3 MR. SPENCER: Yes, and that is the one
4 that shows the same figure that is down here, the
5 \$22.32.

6 THE COURT: The State paid for it, plus
7 the mark-up?

8 MR. BARRY: That is what the factory
9 got.

10 THE COURT: Yes, I know the factory got
11 that.

12 MR. BARRY: The factory didn't get this,
13 the only evidence is that the factory got that.

14 MR. SPENCER: There is no evidence the
15 factory got anything.

16 THE COURT: No, they got that.

17 MR. BARRY: Mr. McEntee said, and I
18 think it would be fair to say that the factory
19 never saw the pre-bid cost that Mr. Mosteller has
20 on that. As a matter of fact, the factory had no
21 idea, obviously, because that is the only piece
22 of evidence that they got.

23 MR. SPENCER: If Your Honor please, I
24 think Mr. Barry has gone beyond the evidence here.

25 MR. BARRY: Mr. McEntee was very candid,

1 very straightforward. He said, "Yes, in my busi-
2 ness that is what I get".

3 MR. SPENCER: Mr. McEntee never testified
4 that he got anything. He did not testify as to
5 what InterRoyal got. He said this was the price,
6 but he never said they got anything.

7 Now, if I may interpose one question to
8 sort of follow up on the Court's line of questions,
9 you have asked Mr. Barry about the \$3,000.00 and
10 where is there any showing that the Commonwealth
11 lost \$3,000.00. If he came up with an answer
12 that would show that the Commonwealth lost
13 \$3,000.00, then of course, my question would be
14 what happened to the \$2,880.00 left?

15 THE COURT: Well, I am not worried about
16 what is left. I'm worried about how he can get
17 \$3,000.00 out of it. I think it is the duty of
18 the Commonwealth to be able to show that to me.
19 It is not my duty to search it out. And I have
20 looked at these documents and looked at them. I
21 think I understand them. I could be wrong, but
22 I think I do. But this is not a breach of contract
23 suit. This is a criminal prosecution where the
24 liberty of the individual is at stake. And until
25 I am convinced beyond all doubt, then I know

1 firmly what my duty is. And if I am convinced
2 beyond all doubt, I know what my duty is then.

3 MR. BARRY: Perhaps I am not explaining
4 it.

5 THE COURT: Now, when I look at the bid
6 price, I assume that these totals come out right.
7 This was the bid that was submitted, which the
8 Commonwealth accepted?

9 MR. BARRY: Absolutely.

10 THE COURT: Less 1 percent if you pay
11 within 21 days?

12 MR. LARRY: That's right.

13 THE COURT: Then somebody has taken 10
14 percent of the figure. I don't know what that is.

15 MR. BARRY: Put Judge, what you have
16 got to understand is that the whole thing was
17 figured in in the very beginning, and that is the
18 reason the Commonwealth lost money, because when
19 the bid went out, the money was already figured
20 into it.

21 THE COURT; Well now, that is hypothetical.

22 MR. BARRY: No, it is not hypothetical,
23 because you can tell by looking at Commonwealth's
24 Exhibit 6, the item that was relied upon by
25 General Medical to determine what it was going to

1 cost them. The Royal cost is obvious what it is
2 going to cost InterRoyal. The pre-bid cost figure
3 in the additional cost, which is installation and
4 samples. And then the bid cost will be the Royal
5 cost, Mosteller's cost. And then finally the
6 mark-up by General Medical. That's the reason
7 the Commonwealth loses all the money.

8 THE COURT: Well, now I have before me
9 the fact that, on your Commonwealth's Number 6,
10 and that is a general request and what they want.
11 In red they have a total cost of \$32.32. Now the
12 bid cost is \$33.94, right?

13 MR. BARRY: That's right.

14 THE COURT: All right. So out of that
15 you are saying that \$3,000.00 is built in on these
16 items?

17 MR. BARRY: Built into every single one
18 of them. And the reason it is built into every
19 single one of them is because they have to bid.
20 And Commonwealth's Exhibit 3 shows that each speci-
21 fic item is bid on. That is the reason we had
22 so many winners. That is the reason Mr. Brooks
23 had to go through so many sheets to determine who
24 won on each item.

25 Judge, without belaboring it, when you

1 look at Commonwealth's Exhibit 6, you will see
2 that \$8.00 is the exact amount on every single
3 item that has been marked up between the Royal cost
4 and the pre-bid cost. And without becoming too
5 mathematically involved, I would suggest to the
6 Court that if they took that \$8.00 by the number
7 of items it was marked up, they would probably come
8 up with ninety-five hundred and some-odd dollars.

9 THE COURT: It is \$8.00 on each one of
10 them?

11 Mr. Barry, quite frankly it is beginning
12 to make more sense now, because I have not
13 thoroughly studied all of them, I have been up
14 here trying to figure the thing out. This is the
15 first time it has been brought to my attention that
16 each item was raised \$8.00, unless I was asleep,
17 and I don't think I was.

18 MR. BARRY: Judge, I come up with
19 approximately 1206 items. If you multiply that
20 by 8, you get real close to \$9,600.00, the amount
21 on the statement there.

22 MR. SPENCER: \$8,600.00, the amount on
23 the statement is.

24 MR. BARRY: On Commonwealth's Exhibit
25 Number 6.

1 THE COURT: \$9,588.00. I see some of
2 these things are multiple purchases.

3 MR. BARRY: That's right. Some are 1,
4 some are 13, some are 192. You just multiply it
5 out and that is the load. That is what the pre-
6 bid cost is. That is why he bid it different
7 from the Royal cost. And that is the reason why
8 the pre-bid cost is what it is.

9 THE COURT: Well, that still would not
10 change my opinion on the installation.

11 MR. BARRY: I understand. The Common-
12 wealth has failed to meet its burden. Whoever put
13 "installation per Mr. Alexick" on the contract
14 changed whatever the original intention had been,
15 obviously, of the institution. I don't have any
16 problem with that. But this is built into it and
17 they said they didn't see samples. None were
18 delivered. They didn't even see any when they were
19 trying to decide to buy the furniture.

20 THE COURT: I am beginning to see what
21 you are talking about. That is why I wanted to
22 give you a chance to point it out.

23 Mr. Spencer will have equal time.

24 MR. SPENCER: Sir?

25 THE COURT: You will have equal time.

1 I see the situation now.

2 MR. SPENCER: Judge, I'm afraid that the
3 Court is now going back to what I think is an
4 erroneous view of it. You have previously put
5 the question, "Where did the Commonwealth lose
6 \$3,000.00?" And Mr. Barry has succeeded in avoiding
7 any effort to respond to that by showing this
8 fact which he has brought to the Court's attention.
9 Now I would like to point out to the Court that
10 what Mr. Barry has said is not uniformly correct.
11 I am beginning to wonder if my copy of this is
12 the same. If the Court will look at the second
13 page, just for example, the second item, I
14 don't get an \$8.00 difference.

15 THE COURT: You get a \$9.00 difference.

16 MR. SPENCER: All right, sir. And if
17 you go over, and I have just gone through very
18 quickly, 32 take away 23 is 9.

19 THE COURT: That is a \$9.00 difference.
20 Then you go back specifically to 8. There might
21 be another one that is not exactly 8.

22 MR. SPENCER: Go over to Page 13, and
23 there is a difference of \$3.12, it looks like to
24 me.

25 THE COURT: What item is that?

1 MR. SPENCER: It is the first item on
2 that page.

3 THE COURT: Here is another \$9.00 one,
4 76 to 85. That would be another \$9.00. That
5 might be where your dollars are off.

6 MR. SPENCER: But look at the first
7 item on Page 13. I don't know, I can read the
8 description, Judge. There are no item numbers
9 on this thing.

10 THE COURT: But it has got it in the
11 margin, 48, 46.

12 MR. SPENCER: Judge, I don't know where
13 you are reading from. I don't have any of that
14 on mine.

15 THE COURT: Are you looking at this,
16 Commonwealth's Exhibit 6?

17 MR. SPENCER: Commonwealth's Exhibit C,
18 Page 13 of 14 pages. That ought to be the next
19 to the last page.

20 THE COURT: For some reason Page 12 is
21 not here.

22 MR. SPENCER: On that one, yes. See,
23 Judge, we don't have Page 14.

24 THE COURT: Now that apparently is on
25 a number of items. Let's see.

1 MR. SPENCER: But the difference is
2 \$3.12.

3 THE COURT: Yes, but you have got a lot
4 of different items in there. I don't know what
5 they amount to. But then you go back to 8.

6 MR. SPENCER: Well, the point I am making,
7 Your Honor, is that that is no sufficient base
8 on which to hang a complete change in the Court's
9 decision in the matter, and abandonment of what
10 I thought was the Court's very cogent question,
11 "Where did the Commonwealth lose \$3,000.00?"

12 THE COURT: I really see where they lost
13 it now, Mr. Spencer.

14 MR. SPENCER: Judge, how did they lose
15 it when they, as the Court has pointed out, the
16 Commonwealth said, "We will pay you this much for
17 this". And the Commonwealth has said, "We got
18 this".

19 THE COURT: Well, I know, but I don't
20 think bid rigging is the right word, but he put
21 the mark-up there. He knew how much he would
22 charge up. And he sent a different thing to his
23 home office.

24 MR. SPENCER: Judge, his home office
25 didn't send anything out.

1 THE COURT: No, he would send it to the
2 home office, and they would send him the furniture.
3 So as a result, he was converting the Commonwealth's
4 money to his own use by a false representation.

5 MR. SPENCER: Judge, you have just
6 said, you just mentioned bid rigging.

7 THE COURT: I said I didn't want to
8 call it that.

9 MR. SPENCER: Well, I wish you would
10 go ahead and call it that, because if you call it
11 that, there is no offense, because there is no
12 crime for bid rigging in Virginia.

13 THE COURT: Well larceny is called a
14 lot of things.

15 MR. SPENCER: Sir?

16 THE COURT: Larceny is called a lot of
17 different things. You can call it stealing.

18 MR. SPENCER: But Judge, there is no
19 statute that says that bid-rigging is called
20 larceny.

21 THE COURT: No, I don't think there is.
22 But I think this, frankly. If it were not con-
23 verted to money, it might be a different question.
24 If he used good salesmanship, that is not
25 larceny.

1 MR. SPENCER: Well now, Judge, you have
2 just said the very thing that I have been saying
3 all along. The Commonwealth is prosecuting a man
4 for being a good salesman. And that is exactly
5 what the situation is.

6 THE COURT: I don't think yesterday
7 they prosecuted him for being a good salesman.

8 MR. SPENCER: Sir?

9 THE COURT: Yesterday they didn't prose-
10 cute him for being a good salesman.

11 MR. SPENCER: Well, yesterday is behind
12 us, and you know that I don't agree with your
13 decision, so I don't know that we are going to
14 get anywhere rearguing yesterday, although if the
15 Court opens the door a bit, I may try to get
16 somewhere with yesterday.

17 THE COURT: You have been trying all
18 day.

19 MR. SPENCER: But I thought we had
20 made more progress today than we apparently have
21 because now you are going back. You have abandoned
22 your thinking as stated on the bench today, and
23 now you are going back and picking up on something
24 from yesterday. You are saying that there was
25 something in there.

1 THE COURT: I think yesterday's case
2 was more thorough. I had more evidence.

3 MR. SPENCER: All right, Judge, if you
4 take this little peculiarity which Mr. Barry
5 wants you to utilize as a basis for convicting this
6 defendant, \$8.00, what part of it was installation?
7 What part of it was samples?

8 And let me go to what I think is a
9 final and even more telling question: How much
10 did the Commonwealth pay? We don't know what
11 the Commonwealth paid. The Commonwealth either
12 paid -- and the Commonwealth has got a bid, as
13 the Court has repeatedly said, for \$89,507.84.
14 And the Commonwealth paid either \$87,258.21, or
15 the Commonwealth paid \$85,947.12, or the
16 Commonwealth paid some unknown amount in between
17 those two figures. Now, that is the evidence.
18 And let's say, for purposes of discussion, that
19 the Commonwealth paid \$85,947.12, as one of their
20 letters said. If you subtract that from the bid
21 amount \$89,507.84, you have a difference of some
22 \$3,440.00. Now the Commonwealth then didn't pay
23 out this \$3,440.00. If you take that figure that
24 the Commonwealth didn't pay out, and you take the
25 figure that the Court used a moment ago in its

reasoning on the installation, then you come to approximately the same total that you come to when you put together what the Commonwealth tried to show was for installation, and what the Commonwealth is trying to claim was for samples. So do we have a situation where the Commonwealth never paid for it? We don't know, because we don't know what the Commonwealth paid. For the Court to go beyond that would require that the Court engage in pure speculation. The evidence is clear. We don't know what the Commonwealth paid. That is by stipulation, by agreement between the Commonwealth and defense.

Now how can you say, Your Honor, if we don't know what they paid, that the differences between the bid and what they claim they paid in one instance, or what they claim they paid in another instance, does not represent this \$3,000.00 that the Court is looking for? It's the same amount. It is a little bit more. It is \$3,440.00. So I submit, Your Honor, that the Commonwealth has shown many, many things. The Commonwealth has not shown beyond a reasonable doubt that Dave Mosteller got anything from the Commonwealth.

Now if I may just pursue this matter one

1 step further, I would ask the Court to look at
2 Exhibit 1, Exhibit 3, and Exhibit 6. Looking at
3 Exhibit 3, which is the document the Commonwealth
4 sent out, we can see that the Commonwealth was
5 going to pay for an ash stand. Just taking the
6 first item on the third sheet, \$33.94. If you
7 look back at Exhibit 6, you see that Mr. Schmidt
8 figured that his cost in that would be \$30.32.
9 But if you look back in Commonwealth's Exhibit
10 1, at the same figure, the Commonwealth had it
11 figured at \$15.00. So they paid something more
12 than double what the Commonwealth had estimated.

13 But if the Court goes on through this
14 document, and compares the various pages, you will
15 find that in some instances the Commonwealth paid
16 much much less. And by the way, Your Honor, I am
17 glad I brought this to your attention, because
18 suddenly I think I have come on Page 14 of 14.
19 We do find that page included as a part of Exhibit
20 1. And there's a good example, because there
21 the Commonwealth has estimated on a table that
22 it would pay \$240.00, and as a matter of fact, the
23 bid was \$84.46. And as a further matter of fact,
24 Mr. Schmidt's estimate on that of his cost, we
25 don't know, because again we don't have Page 14

1 of 14.

2 THE COURT: I have it, Mr. Spencer.

3 MR. SPENCER: Exhibit 6 doesn't have
4 Page 14, but Exhibits 1 and 3 do have Page 14.
5 So the point that I make, Your Honor, is when you
6 start trying to deduce something from this
7 peculiarity that Mr. Barry has pointed out, I
8 would sincerely urge the Court that you are being
9 asked to speculate, and that the Court ought not
10 to, but ought to return to its earlier question,
11 "How did the Commonwealth -- show me where the
12 evidence is that the Commonwealth lost \$3,000.00?"

13 THE COURT: All right, Mr. Barry. Do
14 you have anything further that you want to say?

15 MR. BARRY: Just two real quick things
16 on rebuttal, Judge. The amount that the Common-
17 wealth paid, if there is any confusion, if you
18 look at the exhibits you can tell that things were
19 obviously being substituted because they weren't
20 being delivered. That is a state of confusion as
21 to what was delivered and what wasn't delivered.
22 But the point the Commonwealth made, the vendors,
23 and if it is any problem, it is between the vendors
24 and the Commonwealth. The original price was
25 set, and what even caused us to have samples

1 equated in the original cost. And as far as any
2 discrepancies conceivably in the Commonwealth's
3 exhibit as to \$15.00 ash stands and \$22.00 ash
4 stands, if you will simply go back to Mr. Alexick's
5 conversation, he sat down and he talked with Mr.
6 Mosteller. These are InterRoyal products. I
7 submit to the Court if there is any confusion,
8 where do you think he got these prices from?
9 He didn't make them up. He is not the InterRoyal
10 dealer.

11 MR. SPENCER: Mr. Barry --

12 MR. BARRY: I'm sorry. This is rebuttal.
13 I have got to be able to talk, and we can debate
14 later.

15 The whole amount, the whole specification,
16 the entire procedure was established down there
17 in Lynchburg. And Mr. Alexick said Mosteller was
18 there. "Did he help you with the layout? Did
19 he help you with the specifications"? Sure, he
20 did a great deal. He sold the job. There is no
21 confusion they all came from Mosteller. And then
22 perhaps when we get back and we have to put our
23 figures down, they might change, but that has no
24 effect on the ultimate outcome. The outcome is
25 there were no samples ever used. There were no

1 samples ever purchased. There were no samples
2 ever left. And we paid for them.

3 THE COURT: Well, gentlemen, the Court
4 has it very clear in its mind now. I have not
5 changed from the installation. But on the other
6 matter, the Court views that rather differently,
7 and sees where it is. The difficult part about
8 this case, and cases just like it, it is people
9 with such ability can use it in the right way.
10 It's just a shame.

11 All right, stand up.

12
13 NOTE: At this point the defendant is
14 standing.

15
16 THE COURT: On Count Number 1, the Court
17 is going to give you the benefit of the doubt
18 and find you not guilty.

19 On Count Number 2, the Court is going
20 to find you guilty as charged in the indictment.
21 And Mr. Spencer, I will note your exception to the
22 Court's ruling and I will continue the matter
23 until May 6th, the presentence date.

24 All right, gentlemen. I don't suppose
25 you all want to go on further today?

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146

1 MR. BARRY: No, sir. Let me just say that
2 we have one more case that will be pending
3 tomorrow, and that at the conclusion of that case,
4 the Commonwealth does not intend on prosecuting
5 any further because of the convictions on the
6 previous days, and today, and in anticipation of
7 a conviction tomorrow.

8 THE COURT: Well, don't let's
9 anticipate.

10
11 * * * * *

12 HEARING CONCLUDED.
13
14
15
16
17
18
19
20
21
22
23
24
25

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 5, 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 Rules of Court 5:9(a), effective March 1, 1972.

Given under my hand this _____ day of April, 1980.

Nancy D. Cook, CRS-RPR.

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148

1
2
3
4
5 I, _____, Deputy
6 Clerk of the Circuit Court of the City of Richmond, Division
7 I, certify that the within transcript of the trial of the
8 case Commonwealth vs. David Mosteller, was this day
9 received and filed with the record in this case.
10
11
12

13 Deputy Clerk
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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 6,
15 1980, before The Honorable James E. 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,
8th & Main Streets, Richmond, Virginia;

21 Joseph W. Kaestner, Esquire, Assistant Attorney General,
22 Fidelity Building, Richmond, Virginia;

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

25 The defendant, David Mosteller, in person.

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2

Hearing held on
March 6, 1980

I N D E X

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Irving J. Brooks, Jr.	11 30	29 33	40	
John Alexick	41	51	60	60
Robert Maitland	61	73	87	
Sidney Horestead	87	93		
Robert Creasey	98	107		
Raymond Chalkley	109	116		
Wayne Butler	122	124		
Barbara Bromley	126	146	155	156
Francix S. McEntee	159	166		
John Alexick: (recalled)	170			
Lewis Lankford	174			
Nancy Stoll	179	182		
Frank H. Williams	184			
Charles D. Bryant	188	190		
Commonwealth's Exhibit #1 - Requisition				Page 14
#2 - Authority to prepare bid				14
#3 - group of bids				18
#4 - tabulation of bids				20

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2(a)

		<u>Page</u>
1	Commonwealth's Exhibit #5 - Addendum	21
2	#6 - Addendum	22
3	#7 - Ginn Southern Purchase order	24
4	#7A- Ginn Southern Purchase order	32
5	#8 - Trend Contract Furn. P.O.	26
6	#9 - Contract Services/Interiors	
7	P. Order	28
8	#10 - Litton Products P.O.	29
9	#11 - Piece of Fiber-X	67
10	#12 - Order blank	103
11	#13 - group of invoices	106
12	#14 - statement and check stub	114
13	• #15 - Check	124
14	#16 - work sheet	130
15	#17 - Invoice	133
16	#18 - Invoice	134
17	#19 - Invoice	135
18	• #20 - Check and invoice	159
19	• #21 - Check and invoice	159
20	#22-Price quotation	163
21	#23 - Salesman's order form	165
22	#24 - Group of invoices	182
23	• #25 - Checks	187

Reported by Nancy D. Cook

1
2 THE COURT: I want the Commonwealth to
3 tell me, I see it as four indictments --

4 MR. BARRY: I am going to tell you.
5 F10-967 through 10-970.

6 THE COURT: Each indictment has two
7 counts?

8 MR. BARRY: Yes, sir.

9 THE COURT: The same dates? Does the
10 Bill of Particulars have a particular date or
11 something? There are four indictments, two counts,
12 and they are all the same dates?

13 MR. BARRY: The dates are similar because
14 they involve a transaction from when the job was
15 bid for the Lynchburg Training Center, buildings
16 14 through 20, until the job was paid by the State
17 of Virginia, completed.

18 THE COURT: Let's start with 967, the
19 first count. What will that involve?

20 MR. BARRY: That will involve the
21 vendor, Everett Waddey, and the first count will
22 be installation. The second count will be
23 samples.

24 10-968 will involve the vendor Trend,
25 Incorporated, and again, in the first count,

1 installation, second count samples.

2 10-969 will involve the vendor again,
3 Southern.

4 THE COURT: Installation and samples?

5 MR. BARRY: Yes, sir.

6 10-970 will involve General Medical/
7 Contract Interiors, installation and samples.

8 MR. SPENCER: If Your Honor please, may
9 I may one statement before arraignment? I would
10 move the Court to consolidate all of these counts
11 into a single count on the ground that on the
12 face, and supported by the Bill of Particulars,
13 that these involve a single transaction, and that
14 it is a series of events in a single transaction
15 that ought to be considered as one offense, if it
16 be an offense.

17 THE COURT: Well, I will reserve that,
18 Mr. Spencer, until after I hear the evidence.
19 The Commonwealth has an election. They can
20 combine it or they can make each one, if that is
21 the evidence. I never understood that rule of
22 law, but that is what it is, except the difference
23 between petty and grand larceny. A lot of times
24 they combine them, each one petty larceny and
25 combine them and make them grand. That is the

1 law.

2
3 NOTE: At this point the defendant is
4 standing.

5
6 THE CLERK: The case of Commonwealth
7 versus David Mosteller. The defendant is present
8 in court and represented by Mr. Spencer.

9 Mr. Spencer, are you prepared for
10 trial?

11 MR. SPENCER: Yes.

12 THE CLERK: David Mosteller, you are
13 charged in this indictment that during or about
14 August 1976 and continuing thereafter until March,
15 1977 in the City of Richmond, within the juris-
16 diction of this court, did feloniously and unlaw-
17 fully take, steal and carry away property whose
18 value was in excess of \$100.00 belonging to the
19 Commonwealth of Virginia and its agency,
20 Lynchburg Training School and Hospital.

21 How do you plead to this count?

22 DEFENDANT MOSTELLER: Not guilty.

23 THE CLERK: The Grand Jury further
24 presents that during or about August, 1976 and
25 continuing thereafter until March, 1977, within

1 the City of Richmond, David Mosteller did
2 feloniously and unlawfully take, steal and carry
3 away property whose value was in excess of
4 \$100.00, belonging to the Commonwealth of Virginia,
5 and its agency, Lynchburg Training Center and
6 Hospital.

7 How do you plead to this count?

8 DEFENDANT MOSTELLER: Not guilty.

9 THE CLERK: David Mosteller, you stand
10 charged in this indictment that you did, during
11 or about August 1976, and continuing thereafter
12 until March, 1977, in the City of Richmond, within
13 the jurisdiction of this Court, did feloniously
14 and unlawfully take, steal and carry away property
15 whose value was in excess of \$100.00 belonging to
16 the Commonwealth of Virginia and its agency,
17 Lynchburg Training Center and Hospital.

18 How do you plead to this count?

19 DEFENDANT MOSTELLER: Not guilty.

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

1 the Commonwealth of Virginia and its agency,
2 Lynchburg Training Center and Hospital.

3 How do you plead to this count?

4 DEFENDANT MOSTELLER: Not guilty.

5 THE CLERK: David Mosteller, you stand
6 charged in this indictment that you did during or
7 about August 1976, and continuing thereafter until
8 March, 1977, in the City of Richmond, within the
9 jurisdiction of this Court, did feloniously and
10 unlawfully take, steal and carry away property
11 whose value was in excess of \$100.00, belonging
12 to the Commonwealth of Virginia and its agency,
13 Lynchburg Training School and Hospital.

14 How do you plead to this count?

15 DEFENDANT MOSTELLER: Not guilty.

16 MR. SPENCER: Mr. Clerk, what count
17 did you just read?

18 THE CLERK: I just read 968, sir.
19 This is 969.

20 MR. SPENCER: I'm sorry, I just wanted
21 to be sure I was looking at the right one.

22 THE CLERK: And the Grand Jury further
23 presents that during or about August, 1976 and
24 continuing thereafter until March of 1977, within
25 the City of Richmond, David Mosteller did

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8

1 feloniously and unlawfully take, steal and carry
2 away property whose value was in excess of
3 \$100.00, belonging to the Commonwealth of Virginia,
4 and its agency, Lynchburg Training Center and
5 Hospital.

6 How do you plead to this count?

7 DEFENDANT MOSTELLER: Not guilty.

8 THE CLERK: David Mosteller, you stand
9 charged in this indictment that you did during
10 or about August, 1976, and continuing thereafter
11 until March, 1977, in the City of Richmond, within
12 the jurisdiction of this Court, did feloniously
13 and unlawfully take, steal and carry away property
14 whose value was in excess of \$100.00 belonging to
15 the Commonwealth of Virginia and its agency,
16 Lynchburg Training School and Hospital.

17 How do you plead to this count?

18 DEFENDANT MOSTELLER: Not guilty.

19 THE CLERK: And the Grand Jury further
20 presents that during or about August, 1976 and
21 continuing thereafter until March, 1977, within
22 the City of Richmond, David Mosteller did felon-
23 iously and unlawfully take, steal and carry away
24 property whose value was in excess of \$100.00,
25 belonging to the Commonwealth of Virginia and its

1 agency, Lynchburg Training School and Hospital.

2 How do you plead to this charge?

3 DEFENDANT MOSTELLER: Not guilty.

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

7 DEFENDANT MOSTELLER: By the Judge.

8 THE COURT: The Court will waive jury.

9 MR. KAESTNER: The Commonwealth will
10 waive.

11 THE COURT: Do you still understand you
12 have a Constitutional right to have a jury trial
13 on either or all of these counts?

14 DEFENDANT MOSTELLER: I do.

15 THE COURT: You have discussed this with
16 your attorney?

17 DEFENDANT MOSTELLER: Yes.

18 THE COURT: After discussing it with
19 him, you have decided to plead ^{NOT} ~~guilty~~ and be tried
20 by the Court?

21 DEFENDANT MOSTELLER: Yes, sir.

22 THE COURT: Are you ready for trial?

23 DEFENDANT MOSTELLER: Yes, I am.

24 THE COURT: All right, you may have your
25 seat.

1
2 NOTE: At this point the defendant is
3 seated at counsel table by his attorney.
4

5 MR. KAESTNER: If it please the Court,
6 I would like to move that all witnesses be
7 excluded.
8

9 THE COURT: All right, all witnesses.
10 will retire to the hall. Do not discuss your
11 testimony. Mr. Brooks, I guess you can wait.
12

13 NOTE: At this point all witnesses are
14 excluded from the courtroom with the exception
15 of Mr. Brooks.
16

17 THE COURT: I don't need an opening
18 statement.
19

20 MR. SPENCER: Judge, can I have just
21 one minute. I still am missing a document.
22

23 THE COURT: Yes, sir.
24 I didn't mean to cut you off, Mr.
25 Kaestner, but I assume this is a like pattern?

MR. KAESTNER: Yes, sir.

MR. SPENCER: Thank you, Your Honor.

MR. KAESTNER: The Commonwealth calls

1 Mr. Brooks.

2
3
4 IRVING J. BROOKS, JR., a witness called
5 by the Commonwealth, first being duly sworn, testifies as
6 follows:

7 DIRECT EXAMINATION

8 BY MR. KAESTNER:

9 Q Good morning, Mr. Brooks. How are you?

10 A Fine.

11 Q Would you give the reporter and the
12 Court your full name, please?

13 A Irving J. Brooks, Jr.

14 Q And what is your present position, sir?

15 A I am Assistant Director with the
16 Division of Purchases & Supply, Commonwealth of Virginia.

17 Q How long have you been employed by the
18 Department of Purchases & Supply?

19 A I have been employed by the Department
20 of Purchases & Supply since 1958.

21 Q In your position as Assistant Director,
22 what are your responsibilities?

23 A I am Assistant Director of the
24 administrative aspects of the Division, and therefore I
25 handle the financial affairs, plus the records and so

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Brooks - Direct

12

1 forth.

2 Q In that position, are you custodian of
3 the official records of the Department of Purchases and
4 Supply?

5 A Yes, I am.

6 Q Mr. Brooks, I am going to show you a
7 series of documents and I would like for you to tell me
8 whether these documents are part of the official record of
9 the Department of Purchases & Supply.

10 I would like to exhibit to you a docu-
11 ment premarked as Document Number 1 for the Commonwealth,
12 and ask you if you can describe this document.

13 A This is a formal requisition from
14 Lynchburg Training School sent to the Department of Purchases
15 and Supply for the purchase of various pieces of equipment.

16 Q And what kind of equipment is being
17 purchased by that requisition?

18 A This requisition is covering -- they
19 are indicating InterRoyal 4564-LGP Mental Health beds, 640
20 of those; InterRoyal L2356SX sliding door wardrobes, 196
21 of those; InterRoyal L2206-CHX wardrobes, 336.

22 Thsi indicates also that all interior
23 panels are to be Fiber-X high pressure laminate.

24 Q If you would, Mr. Brooks, just restrict
25 yourself to the type of furniture.

Brooks - Direct

13

1 A All right. The type of furniture?
2 InterRoyal L2306-SX sliding door wardrobes, 108; InterRoyal
3 L4305-FX chest of drawers, 336.

4 Q In addition to the furniture, does the
5 requisition call for the purchase of any other items or
6 services?

7 A Let me look back over it. On the ward-
8 robes there shall be two keys for each unit, plus four
9 Master keys for these buildings.

10 Q What is the purpose of that document?

11 A It is Lynchburg Training School's request
12 upon the Department of Purchases and Supply to proceed with
13 issuing invitations to bid to vendors to purchase merchandise
14 and have it delivered.

15 Q Invitations to bid, then, are issued
16 pursuant to this document?

17 A Pursuant to this document.

18 MR. KAESTNER: I would offer this as
19 Commonwealth's Exhibit Number 1.

20
21 NOTE: At this point the above-referred-
22 requisition is marked and filed as Commonwealth's
23 Exhibit Number 1.
24

25 Q What is the next step in the procurement

Brooks - Direct

14

1 process, Mr. Brooks?

2 A It would be developing the vendor list
3 and then the bidding to go out to the vendors.

4 Q I show you Document Number 2, and ask
5 you if you can identify that.

6 A This is the authority to prepare the
7 proposal that was written up by the purchase officer for
8 use by his clerical assistant. This was on the Lynchburg
9 Training School job.

10 Q What is the function of that document?

11 A It gives special instructions to the
12 party typing the bid, and also indicates the vendors to
13 whom it will go.

14 Q What happens with that document?

15 A It goes from the buyer to his clerical
16 assistant in order for her to type the invitation to bid,
17 and also have envelopes and so forth mailed to the various
18 vendors.

19 MR. KAESTNER: I would like to offer this
20 as Commonwealth's Exhibit Number 2.

21

22 NOTE: At this point the above-referred-
23 to authority to prepare bid proposal is marked and
24 filed as Commonwealth's Exhibit Number 2.

25

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Brooks - Direct

15

1 MR. KAESTNER: If it please the Court,
2 the next series of documents that I would like to
3 show Mr. Brooks are all the same kind of documents.
4 I would like to show him all of those documents
5 together. Mr. Spencer has asked for one moment
6 after I do that to look at each of these. I
7 believe it will save time.

8 THE COURT: All right.

9
10 Q Mr. Brooks, I would like to show you
11 copies of documents marked for identification as Commonwealth's
12 Number 3, Commonwealth's Number 4, --

13
14 MR. SPENCER: Mr. Kaestner, if you could
15 just identify them by bidder as you do it.

16 MR. KAESTNER: Certainly. Commonwealth's
17 Number 3 being for General Medical/Contract
18 Services; Commonwealth Number 4 being for Ginns
19 Southern; Commonwealth No. 5 being for Artisan
20 Design; Commonwealth Number 6 being for Trend
21 Contract Furnishings; Commonwealth Number 7 being
22 for Litton Office Products; Commonwealth Number 8
23 being for the Simmons Company; Commonwealth 8A
24 being for Edwards Medical Company; Commonwealth's
25 Number 9 being for Thalhimer's non-fire retardant;

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Brooks - Direct

16

1 Commonwealth Number 9A being for Thalhimer's fire-
2 retardant.

3 Can you identify those documents, Mr.
4 Brooks?

5
6 A Yes. All of them are bids received
7 by our office from various vendors you have just mentioned.

8 Q So these would be bids received
9 pursuant to Invitation to Bid?

10 A Correct.

11 Q Sent out pursuant to the requisition
12 you previously identified?

13 A Yes.

14 Q Are these official records of the
15 Department of Purchases & Supply?

16 A These are the various vendors and signed
17 for by -- do you want me to indicate those individuals?

18 Q If you would, just indicate the vendor
19 who submitted the bid.

20 A All right, the vendor submitting the
21 first one I have in hand is General Medical Corporation/
22 Contract Service Interiors. The next one is Ginn Southern.
23 The next one is Artisan Interior Design, Incorporated,
24 Trend Contract Furnishings, Litton Office Products Center,
25 Simmons Company, Edwards Medical Equipment Company,

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17

1 Thalhimer's Industrial Sales Corporation, and another one
2 from Thalhimer's Industrial Sales Corporation.

3
4 THE COURT: Were they bids sent in on
5 this one requisition for furniture?

6
7 Q Were all of these bids sent in for this
8 one requisition of furniture?

9 A Yes.

10
11 MR. KAESTNER: I would like to offer
12 all of these as Commonwealth's Exhibit Number 3.

13 MR. SPENCER: Judge, I'm sorry. I
14 was trying to look at the document. Your question
15 was: Were all of these bids received as a result
16 of the one requisition?

17 THE COURT: Yes.

18 MR. SPENCER: Your Honor, please, I
19 would interpose an objection to 5, 8 and 8A.

20 MR. KAESTNER: Would you identify those
21 by vendor?

22 MR. SPENCER: 5 is Artisan, 8 is
23 Simmons, and 8A is Edwards Medical.

24 THE COURT: What are your grounds for
25 your objection?

1 MR. SPENCER: That these are not involved
2 in any of the four indictments, the eight counts
3 of the four indictments, and they are not material
4 to these cases.

5 MR. KAESTNER: What we are attempting
6 to show, Your Honor, by these, is a complete set
7 of bids with respect to this transaction, that is
8 the requisition offered previously and accepted
9 in evidence, and the invitation to bid on the
10 job for the procurement of furniture for Lynchburg.

11 THE COURT: The Court will overrule the
12 objection.

13 MR. SPENCER: Note my exception.
14

15 NOTE: At this point the above-referred-
16 to group of bids is marked and filed collectively
17 as Commonwealth's Exhibit Number 3.
18

19 BY MR. KAESTNER: (Continuing)

20 Q Mr. Brooks, I would like to show you a
21 copy of this document which has been previously marked for
22 identification as Commonwealth's Number 10, and ask you if
23 you can identify it.

24 A This is a bid tabulation which the
25 various vendors are recorded and the prices recorded in order

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19

1 to evaluate their bid.

2 Q Is that tab sheet maintained in the
3 Department of Purchases and Supply?

4 A Yes.

5 Q And that is prepared in the normal
6 course of business?

7 A Yes.

8 Q Do you know how that tabulation sheet
9 is normally prepared?

10 A It is prepared by the buyer or his
11 clerical personnel.

12
13 MR. KAESTNER: I would like to offer
14 this into evidence as Commonwealth's Exhibit
15 Number 4.

16 MR. SPENCER: I'm sorry, Your Honor.
17 I was going through those documents, and when we
18 had reviewed these last night, we had numbered
19 all of those bids successively beginning with
20 3 and going through 9, and so I would like for the
21 record to show that when I said I objected to
22 5, 8 and 8A, that I was referring to the bidders
23 that I subsequently named and the exhibits as
24 a part of 3. Did the Court take those all as
25 3 or are they 3 and 3A?

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20

1 THE COURT: All are Exhibit Number 3.

2 MR. SPENCER: All right, sir.

3 THE COURT: I understand. You listed
4 the ones that you objected to.

5 MR. SPENCER: Sir?

6 THE COURT: You listed the ones that
7 you objected to?

8 MR. SPENCER: Yes, sir, but I gave the
9 number, and I didn't want the record to be
10 confusing on that point.

11 THE COURT: I thoroughly understand what
12 you mean.

13
14 NOTE: At this point the above-referred-
15 to tabulation of bids is marked and filed as
16 Commonwealth's Exhibit Number 4.

17
18 Q Mr. Brooks, I would like to show you a
19 copy of a document previously marked for identification as
20 Commonwealth's Number 11, and I ask you if that is an
21 official record of the Department of Purchases and Supply?

22 A Yes, it is an addendum sent out by Mr.
23 Robert S. Maitland, Jr., or sent out under his name.

24 Q What is the purpose of the addendum?

25 A The purpose of that is to, in reading

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21

1 this one, please refer to Invitation to Bid, September 24.
2 The Invitation to Bid opening date has been extended to
3 October 28, 1976, 2:30 p.m., EDST. There will be another
4 addendum explaining all changes shortly in the mail to
5 you. All other terms and conditions remain the same.

6 This one apparently was to extend the
7 date of the opening of the Invitation to Bid and to allow
8 for another one to be sent forward.

9 Q Is that an official record of the
10 Department of Purchases & Supply?

11 A Yes, it is.

12 Q And is it prepared in the normal course
13 of business?

14 A Yes, it is.

15
16 MR. KAESTNER: I would like to offer
17 this as Commonwealth's Number 5.

18
19 NOTE: At this point the above-referred-
20 to addendum is marked and filed as Commonwealth's
21 Exhibit Number 5.

22
23 Q Mr. Brooks, I would like to show you
24 another document previously marked for identification as
25 Commonwealth's Number 12, and ask if you can identify it?

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22

1 A This is Addendum Number 2 on the
2 Lynchburg Training School and Hospital, indicating opening
3 day October 28, 1976, 2:30 p.m., EDST. There are ten
4 changes on the addendum or the addendum was putout by
5 Mr. Robert S. Maitland.

6 Q How many pages are there to the addendum?

7 A The addendum itself is two pages, with
8 three pages of attachments.

9 Q And are those documents a part of the
10 official record of the Department of Purchases and Supply?

11 A Correct.

12 Q And are they prepared in the normal
13 course of business?

14 A Yes.

15
16 MR. KAESTNER: I offer these as
17 Commonwealth's Exhibit Number 6.

18
19 NOTE: At this point the above-referred-
20 to addendum is marked and filed as Commonwealth's
21 Exhibit Number 6.

22
23 Q Mr. Brooks, I would like to show you
24 a copy of a document previously marked for identification
25 as Commonwealth's Number 13, and ask if you can identify

Brooks - Direct

23

1 it.

2 A This is a Purchase Order issued to
3 Ginn Southern covering InterRoyal L4305-FX chest of
4 drawers, 336 of them, for a total price of \$47,712.00.
5 This is the purchase order which would have been mailed to
6 Ginn Southern as a result of their bid.

7 Q And is this purchase order a part of the
8 official record of the Department of Purchases and Supply?

9 A Yes, sir.

10 Q And is it prepared in the normal course
11 of business?

12 A Right.

13 Q Was this purchase order issued pursuant
14 to the bid that you previously identified?

15 A If you would let me see the copy of
16 Ginn Southern.

17
18 MR. KAESTNER: May I have Exhibit 3
19 for a moment, Your Honor?

20 Let the record show that I am exhibiting
21 to the witness a copy of the Ginn Southern bid
22 previously exhibited as Commonwealth's Exhibit
23 Number 3, and a copy of the purchase order.

24
25 A This is the purchase order covering

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24

1 Ginn Southern's bid in this case.

2 Q Would you give the total amount of that
3 purchase order?

4 A \$47,712.00.

5
6 MR. KAESTNER: I move that this be
7 introduced into evidence as Commonwealth's Exhibit
8 Number 7.

9
10 NOTE: At this point the above-referred
11 to purchase order for Ginn Southern is marked and
12 filed as Commonwealth's Exhibit Number 7.

13
14 Q Mr. Brooks, I would like to show you a
15 copy of a document previously marked for identification as
16 Commonwealth Number 14 and ask if you can identify it.

17 A This is a purchase order issued to
18 Trend Contract Furnishings covering two items, having an
19 original total of \$157,143.00, and attached to it are
20 three change orders affecting the original order.

21 Q Would you identify the pages which are
22 the original purchase order, that is the first purchase
23 order that was issued?

24 A The first purchase order is Pages 1
25 and 2.

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25

1 Q And what are the remaining pages?

2 A The remaining pages, Page 3 is Change
3 Order Number 1, Page 4 is Change Order Number 2, Page 5 and
4 6 are Change Order Number 3.

5 Q And what is a change order?

6 A It is issued to, in this case, apparently
7 it appears that it is issued to change the quantity on the
8 original purchase order, and also the final total price.

9 Q Now, on the price of the original
10 purchase order, you will see certain notations in hand?

11 A On the first item, on Page 1, which was
12 originally typed 196 InterRoyal L2356 SX wardrobes, that
13 has now been changed to 256, and the total amount originally
14 typed at \$86,943.00 has been hand-changed to \$90,048.00.
15 On the second item, first page, InterRoyal L2206CHX --

16 Q Excuse me, Mr. Brooks. Would you read
17 the original figure for the first item on the first page
18 of the change order again?

19 A The typed figure of the quantity of
20 196.

21 Q And what is the amount?

22 A The amount typed for that item is
23 \$68,943.00.

24 Q And would you read the typed figure of
25 the second item?

Brooks - Direct

26

1 A The typed figure of the second item,
2 quantity is 336.

3 Q And the typed figure?

4 A Typed figure for the second item in the
5 amount column is \$88,200.00.

6 Q And what is the purpose of those hand
7 notations?

8 A That is the indication of the effect
9 of the change orders that are attached.

10
11 MR. KAESTNER: I would like to introduce
12 this as Commonwealth's Exhibit Number 8.

13 THE COURT: Who was that purchase order
14 to?

15 MR. KAESTNER: That was issued to Trend
16 Contract Furnishings.

17
18 NOTE: At this point the above-referred-
19 to purchase order issued to Trend Contract
20 Furnishings is marked and filed as Commonwealth
21 Exhibit Number 8.

22
23 Q Mr. Brooks, I would like to show you a
24 copy of this document previously marked for identification
25 as Commonwealth's Exhibit Number 15, and ask if you can

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27

1 identify it.

2 A This is a purchase order issued to
3 Contract Services/Interiors in an original amount of
4 \$57,120.00 covering InterRoyal 4564-LGP mental health beds.
5 Attached to that is change order Number 1 indicating the
6 total of the order to be \$69,972.00.

7 Q And on the face of the change order, the
8 first page, there are certain hand notations. What are
9 those?

10 A In the quantity column, the typed figure
11 is 640 and in the amount column it is \$57,120.00. And the
12 penciled in figures or written in pen figure, quantity,
13 784, and the amount has been changed to \$69,972.00.

14 Q And is this part of the official records
15 of the Department of Purchases and Supply?

16 A It is, sir.

17 Q And is it prepared in the normal course
18 of business?

19 A Yes, sir.

20
21 MR. KAESTNER: I would like to introduce
22 this as Commonwealth's Exhibit Number 9.

23
24 NOTE: At this point the above-referred-
25 to purchase order issued to Contract Services/

Brooks - Direct

28

1 Interiors is marked and filed as Commonwealth's
2 Exhibit Number 9.

3
4 Q Mr. Brooks, I would like to show you
5 another document previously marked for identification as
6 Commonwealth's Exhibit Number 16, and ask if you can identify
7 it.

8 A This is a purchase order issued to
9 Litton Office Products Center in an original amount of
10 \$35,715.60, covering InterRoyal L2306/SX, sliding door
11 wardrobes. Also there is a Change Order Number 1 attached
12 to it indicating a change in total to \$62,171.60.

13 Q And there are certain notations on the
14 face of the document made in hand. What do those notations
15 refer to?

16 A In the quantity column, typed, 108,
17 in the amount column, typed \$35,715.60. Handwritten in the
18 quantity column, 188, and in the amount column \$62,171.60.
19 And they have written the amounts that were transferred to
20 the change order.

21 Q And is this part of the official records
22 of the Department of Purchases and Supply?

23 A Yes.

24 Q And were they prepared in the normal
25 course of business?

Brooks - Direct

29

1 A Correct.

2
3 MR. KAESTNER: I will offer this as
4 Commonwealth's Exhibit Number 10.

5
6 NOTE: At this point the above-referred-to
7 purchase order issued to Litton Office Products
8 with attached change order is marked and filed
9 as Commonwealth's Exhibit Number 10.

10
11 MR. KAESTNER: Mr. Brooks, thank you very
12 much. I have no further questions.

13
14
15 CROSS-EXAMINATION

16 BY MR. SPENCER:

17 Q Mr. Brooks, on your direct examination,
18 you were shown Exhibit 1, you were asked to read the items
19 of furniture and you read them off by InterRoyal code. I
20 call your attention to the third sheet of paper which was
21 a part of this Exhibit 1, and ask specifically, if you will,
22 to read the third paragraph. This is a letter from Mr.
23 Peckman at Lynchburg to Mr. Wolf here in Richmond. If you
24 would read the third paragraph of that letter.

25 A Items requested are not proprietary to

Brooks - Cross

30

1 InterRoyal, but sizes must be provided because of existing
2 floor space requirements.

3 Q And that was a part of --

4 A That would have been a part.

5 Q Of the request for bids?

6 A Yes.

7 Q Three of these purchase orders which you
8 identified had change orders attached to them?

9
10 MR. SPENCER: Judge, in order to keep the
11 record clear, I am going to stop my cross-exami-
12 nation and Mr. Kaestner has another document which
13 he will introduce, if the Court will allow.

14 THE COURT: If you have no objection,
15 I don't.

16
17 DIRECT EXAMINATION (Continuing)

18 BY MR. KAESTNER:

19 Q Mr. Brooks, you recall I showed you a
20 purchase order issued to Ginn Southern. I show you another
21 purchase order issued to Ginn Southern. Can you identify it?

22 A This is a purchase order issued to
23 Ginn Southern by the Department of Purchases and Supply
24 covering InterRoyal L4305FX Chest of drawers in an original
25 amount quantity of 336, with an original dollar amount of

Brooks - Direct

31

1 \$47,712.00. That is Sheet 1. Sheet 2 represents a change
2 order to that order. Sheet 3 represents Change Order Number
3 2, and Sheet 4 represents Change Order Number 3.

4 Q Mr. Brooks, I would like to show you
5 Commonwealth's Exhibit Number 7 and ask you what the re-
6 lationship between Commonwealth Exhibit Number 7 and the
7 document I have just shown you is.

8 A Sheet Number 1 of both are one and the
9 same. Exhibit Number 1 does not have the change orders
10 attached.

11
12 MR. SPENCER: That is Exhibit Number 7.

13
14 A Excuse me, Exhibit Number 7 does not
15 have the change orders attached.

16 Q Is the document you are examining now,
17 then, without the change order, a copy of Exhibit Number 7?

18 A It is a copy of Exhibit 7, correct.

19 Q To whom would Exhibit 7 have been sent?

20 A Exhibit 7 would have been mailed to the
21 vendor, which would have been Ginn Southern in this case.

22 Q And whose copy would the document you are
23 examining now be?

24 A These are our official file copies.

25 Q And would you take a look, please, at the

Brooks - Direct

32

1 handwritten notation on the face of that, and what do those
2 handwritten notations refer to?

3 A Quantity type, 336, hand-changed to
4 436 and again hand-changed to 544. Dollar amount, original
5 typed \$47,712.00, hand-changed to \$61,912.00 and again hand-
6 changed to \$77,248.00.

7 Q And is this document an official record
8 of the Department of Purchases and Supply?

9 A Yes, sir, it is.

10 Q And is it prepared in the normal course
11 of business?

12 A Yes, sir, it is.

13 MR. KAESTNER: I would like to introduce
14 this as Commonwealth's Exhibit Number 11.

15 THE COURT: Why don't you just attach it
16 to 7.

17 MR. SPENCER: Why don't we make that
18 Exhibit 7A?

19 THE COURT: All right, make it 7A because
20 that all does go together.

21
22 NOTE: At this point the above-referred-to
23 purchase order issued to Ginn Southern with attached
24 change order is marked and filed as Commonwealth's
25 Exhibit Number 7A.

CROSS-EXAMINATION (Continuing)

BY MR. SPENCER:

Q All right, now, again, in your direct testimony, you were asked when you began introducing these purchase orders, or I am sorry, initially in your testimony you were asked if you were the custodian of the records of the Department of Purchases and Supply, and you testified that you were?

A Correct.

Q And then you identified all of these documents, but as a matter of fact the one that went in as Exhibit 7 is not from your records, is it?

A That is not from our record, but a copy of our records.

Q Well, that is the original?

A That is the original.

Q Of what you have retained as a copy in your records?

A Correct.

Q Now then, I am going to ask you if you will, to look at each of these four documents, 7A, 8, 9 and 10 separately, and tell me if you will originally how many units were ordered of whatever it is, and what was the original unit price.

MR. KAESTNER: Your Honor, I object. Mr.

Brooks - Cross

34

1 Brooks has already given that information.
2 Mr. Spencer has clarified it on a number of
3 occasions. Besides that, they are on the documents
4 and the documents do speak for themselves.

5 MR. SPENCER: Your Honor, this is the
6 first time I have mentioned it. I have not under-
7 taken to clarify it and we have not heretofore
8 interposed any objection to the witness reading
9 a portion of the document. This is exactly what
10 Mr. Kaestner was doing.

11 THE COURT: That is all right. Go on and
12 answer it.

13 Go on, Mr. Brooks.

14
15 A If I understand you correctly --

16 Q Well, let me make it clear. I don't
17 want you not to understand. The document shows a certain
18 item of furniture, a quantity of items, and the unit price?

19 A Uh-huh.

20 Q And you have already read, in answer
21 to Mr. Kaestner, what the total cost was. What I want you to
22 do is tell us what kind of item it was, for example, a
23 wardrobe, a chest or a dresser, the quantity, that is the
24 number of units, and the price per unit.

25 A As originally typed?

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35

1 Q As originally typed.

2 A Okay, on Exhibit 7A, InterRoyal L4305FX
3 chest of drawers, original quantity, 336 each, at a unit
4 price of \$142.00.

5 Q All right, sir, and on the first change
6 order?

7 A On the first change order?

8 Q I'm sorry. What was the date of the
9 original document?

10 A The date of the original document was
11 November 9, 1976.

12 Q All right, sir. Now, look at the first
13 change order. What is the date of that?

14 A The date on the first change order is
15 January 11, 1977.

16 Q All right, sir. Now, give us the number
17 of items.

18 A All right, on the original reading on the
19 order, 336 is the quantity, unit price of \$142.00. It is
20 indicating to change, showing a quantity of 436 at a unit
21 price of \$142.00.

22 Q So the number of units increased, but
23 the unit price remained the same?

24 A Remained the same.

25 Q Change Order Number 2.

Brooks - Cross

36

1 A The date on Change Order Number 2 was
2 March 1, 1977. The original quantity, 436 at \$142.00.
3 The change, the quantity went to 544 at a unit price of
4 \$142.00.

5 Q So again, the number of units increased,
6 but the price remained the same per unit.

7 A Yes, sir.

8 Q Now, would you look at Number 8, please.
9 Give us the date, and don't bother to read all the identify-
10 ing numbers, just tell us what kind of a piece of furniture
11 it was, like a bed or something.

12 A All right, the date on this one is
13 11-9-76. This covers sliding door wardrobes, originally
14 typed 196 quantity, unit price \$351.75.

15 Q Look at the first change order. Give
16 us the date and tell us if it is the same piece of furniture
17 then the quantity and the unit price.

18 A The date, January 10, 1977. On that
19 particular item, original reading, 196, quantity at \$351.75
20 unit price, the change is 256 and the unit price of \$351.75.

21 Q So again, the number of units increases
22 but the unit price remains the same?

23 A Correct.

24 Q Now this is Trend, isn't it?

25 A This is Trend Contract Furniture.

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37

1 Q All right, sir. Give your change
2 Order Number 2. Is it the same piece of furniture?

3 A On the same piece of furniture.

4 Q The date?

5 A The date is March 31, 1977 on that parti-
6 cular furniture, showing the new total of quantity 256
7 and a unit price of \$351.75 was changed to 396 at a unit
8 price of \$351.75.

9 Q All right, sir. So again, the same
10 piece of furniture, the number of units increased, but the
11 unit price remained the same?

12 A That is correct.

13 Q All right, sir. Now, will you look at
14 Change Order Number 3 on that. What is the date of that?

15 A Change Order Number 3 dated April 6,
16 1977.

17 Q Is it the same piece of furniture?

18 A Yes, it says through Change Order
19 Number 2, indicates a total and number 3.

20 Q May I see, Mr. Brooks, where you are
21 reading from?

22 A I am trying to identify the number as
23 to whether it is the same piece of furniture, sir.
24 The change in the Change Order Number 3 is a wardrobe, but
25 it is not numerically identified as the same piece of

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38

1 furniture.

2 Q Let me see it again, if you will.

3 Now, let me see if I understood you. You say it is not the
4 same piece of furniture?

5 A No, I say it is a wardrobe but it is not
6 numerically identified as the same piece of furniture.

7 Q Is this where you are looking?

8 A Yes.

9 Q That number is L2356HX?

10 A Yes, sir.

11 Q And this is L2356SX?

12 A Yes.

13 Q That is where the difference is?

14 A Yes, sir.

15 Q Now, tell us, if you will, how many
16 units were added there.

17 A The units shown on here are twelve.

18 Q And what is the unit price?

19 A At a unit price of \$351.75.

20 Q Now that is the same unit price as
21 appeared in the original purchase order for the unit that is
22 marked SX?

23 A Correct.

24 Q And it is the same purchase price as
25 appeared in Change Orders 1 and 2 for the unit marked SX?

Brooks - Cross

39

1 A Right.

2 Q But it is an additional number of units?

3 A It is a quantity for a wardrobe.

4 Q Yes, sir, with that one letter change?

5 A Yes, sir.

6 Q Now, I show you Exhibit 9.

7 THE COURT: Can't we stipulate that the

8 unit price didn't change?

9 MR. SPENCER: Yes, sir, I'll be glad to.

10 MR. KAESTNER: We will be very happy to

11 stipulate that.

12 THE COURT: Why don't you stipulate that

13 on the change orders, the unit price stayed the

14 same?

15 MR. SPENCER: The units increased but the

16 unit price stayed the same, and the dates became

17 later.

18 MR. KAESTNER: We will be happy to

19 stipulate that.

20 MR. SPENCER: And Exhibit 10, the same

21 would be so?

22 MR. KAESTNER: The same stipulation.

23 MR. SPENCER: I have no further

24 questions.

25

Brooks

40

REDIRECT EXAMINATION

BY MR. KAESTNER:

Q Mr. Brooks, tell me, the change orders,
are they separate transactions or part of the original
purchase order?

A A change order is a separate transaction.

MR. KAESTNER: I have no further
questions.

THE COURT: You may step down.

WITNESS STOOD ASIDE.

THE COURT: We will take a ten or
fifteen minute recess.

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

MR. KAESTNER: The Commonwealth calls
Mr. John Alexick.

1.
2 JOHN ALEXICK, a witness called by the
3 Commonwealth, first being duly sworn, testifies as follows:

4 DIRECT EXAMINATION

5 BY MR. KAESTNER:

6 Q Good morning, Mr. Alexick. How are
7 you?

8 A Fine, thank you.

9 Q Mr. Alexick, can you give us your full
10 name, please?

11 A John S. Alexick, A-l-e-x-i-c-k,
12 Alexick. My position was that of Administrative Services
13 Supervisor at the time of this hearing involvement and I
14 am now retired.

15 Q Mr. Alexick, in your position as
16 Administrative Services Supervisor, did you participate
17 in the development of a requisition to purchase furniture
18 for Buildings 14 through 20 at the Lynchburg Training
19 School and Hospital?

20 A I did.

21 Q Mr. Alexick, I would like to show you
22 Commonwealth's Exhibit Number 1 and ask you if you have
23 ever seen that document before?

24 A Yes, sir.

25 Q Now, did you participate in preparing

Alexick - Direct

42

1 this document?

2 A I did.

3 Q Can you tell me how this document was
4 prepared? That is, how did you decide upon these kinds of
5 furniture in this document?

6 A Those furnishings were part of certifi-
7 cation requirements and funds had been budgeted in our
8 regular maintenance and operation funds to provide for those.
9 In the build-up of these items, as I indicated, these were
10 required to meet certification standards. Each resident
11 had to have a wardrobe, a dresser, and in order to identify
12 with the harmony of the groupings, we felt that we should
13 upgrade beds in the area where these were to be placed, too,
14 which then included the beds for replacement. In the
15 instance here we contacted the Unit Manager and the Director
16 of Residential Services in respect to the type of furniture
17 that would be identified. We had relatively no choice so
18 far as the wardrobe would be concerned because of its size
19 and shape. This would have to be identified through a
20 manufacturer. We were advised --

21
22 THE COURT: What relevancy does that
23 have?

24 MR. KRAESTNER: I am trying to demonstrate,
25 Your Honor -- If I may ask another question of

Alexick - Direct

43

1 this witness.

2
3 Q Mr. Alexick, in addition to discussions
4 with people who were State employees at Lynchburg, did you
5 have any discussions with anyone else concerning the
6 furniture?

7 A Yes, sir, Mr. Mosteller. We later
8 identified with the Purchases and Supply Department, identi-
9 fying with questions. We also moved into our central office,
10 the Department of Mental Health and Mental Retardation.

11 Q Now, let me stop you if I might, sir.
12 Prior to submitting this requisition to the Department of
13 Purchases and Supply, do you recall having discussions with
14 Mr. Mosteller?

15 A Yes, I do.

16 Q During the course of that discussion,
17 do you recall discussing with Mr. Mosteller the subject of
18 installation?

19 A Yes.

20 Q What was the subject of those discussions?

21 A Again, in the dollar value that we had
22 budgeted, we had to identify with the cost. We had to
23 identify with quality and quantity.

24 Q And what was the substance of your
25 discussion with Mr. Mosteller regarding installation?

Alexick - Direct

44

1 A Any of the beds we would automatically,
2 as we had done in the past, accept them as headsteads,
3 footsteads, and springs, and we would take care of putting
4 them together. The dressers would be shipped in, in entirety,
5 ready for placement.

6 Q And who would do that placement?

7 A The institution.

8 Q The institution personnel?

9 A Our hospital personnel.

10 Q And with respect to wardrobes?

11 A With respect to wardrobes, there were
12 three sizes. I believe size 1 was referred to as the 24-
13 inch. This was totally assembled and shipped from the
14 factory ready for placement. We agreed that we would accept
15 those off the truck and do the placement ourselves.

16 Q So that institution personnel would do
17 the placement of those wardrobes you just described?

18 A Yes, sir. Now there was another, I may
19 not be exact in size, but I think it was referred to as
20 a 36-inch and a 42-inch. These, because of size and shipping
21 involvement, it was agreed that these would come as a
22 breakdown, and then these would be assembled and the agreement
23 on the assembly was that we could not afford the cost of
24 assembly by outside parties, but in the instance here, we
25 agreed that if InterRoyal received the contracts, and I

Alexick - Direct

45

1 think it was specified on the purchase order, that super-
2 vision by InterRoyal, and it was agreed that there would be
3 a minimum of two factory personnel who would give assistance
4 with our maintenance people and work with them throughout
5 the entire assembly of the 36 and 42 inch wardrobes.

6 Q So that the actual assembly of the
7 wardrobes was to be done by whom, sir?

8 A In conjunction with hospital personnel
9 and the supervisory personnel from InterRoyal.

10 Q Did Mr. Mosteller also participate
11 with you in developing the descriptions of the various types
12 of furniture that are listed in the requisition?

13 A Yes, sir. There were, to my knowledge,
14 no brochures or catalogues identifying this equipment.
15 And if my memory serves me correctly, Mr. Mosteller said
16 that this was a new product that they were entering into.
17 I may be mistaken on that, but I think that was the identity
18 that this certification was something new, and that was a
19 product that they, too, had to do some developing.

20 Q Do you recall if Mr. Mosteller exhibited
21 any samples of the furniture that you would be purchasing
22 to you so that you could adequately describe it?

23 A There were no samples available, to my
24 knowledge.

25 Q And do you know whether the furniture

Alexick - Direct

46

1 described in the requisition ever arrived at the Lynchburg
2 Training Center?

3
4 MR. SPENCER: I'm sorry, Mr. Kaestner,
5 I can't hear you.

6
7 Q Do you know if the furniture requested
8 in the requisition ever arrived at the Lynchburg Training
9 Center?

10 A It did.

11 Q Who took that furniture off the truck,
12 placed it in the wards and put it together?

13 A Our Plant Assets person, Mr. Lankford,
14 was notified of the truck or trucks arriving, and he,
15 along with our maintenance personnel and storehouse
16 personnel, did all of the unloading and moving into the
17 respective buildings.

18 Q Did Mr. Lankford, do you know whether
19 Mr. Lankford and your maintenance personnel, did they do
20 for instance the assembly of the beds and the placement of
21 those on the wards?

22 A Yes, sir.

23 Q Do you know if Mr. Lankford and the
24 state personnel took the small chest of drawers that you
25 said came assembled and took those and placed them on the

Alexick - Direct

47

1 wards?

2 A They did.

3 Q Do you know if Mr. Lankford and State
4 personnel assembled the wardrobes?

5 A In respect to the 24 inch wardrobes,
6 they, of course, were placed in the same manner as the
7 dressers and beds. In respect to the 36 and 42 wardrobes,
8 these came in crated units, similar pieces banded together,
9 and then these were moved into the various buildings.
10 These buildings were all occupied. It was necessary that,
11 from the standpoint of fire safety and living areas, that
12 these were a real encroachment upon the living areas in
13 which they were placed. Because of the volume, we could
14 not store them outside of the building areas. So when they
15 arrived, Mr. Mosteller had been asked, or was also advised
16 by his company when shipment would be arriving. So the
17 units were placed in the various buildings and Mr. Mosteller
18 advised that he would arrange with a Mr. McIntyre to come
19 and give us assistance when they came with installation.
20 On a noon day, I don't remember, I presume it was around
21 mid-January, Mr. McIntyre, along with two young men,
22 arrived in my office, introduced themselves and he said that
23 he was here to proceed with the assembling of the units.

24 Q Do you know what Mr. McIntyre did?

25 A I called our storekeeper supervisor,

Alexick - Direct

48

1 who sent Mr. Lankford over, because Mr. Lankford would in
2 essence be the boss man of the institution to identify
3 with the assembling. Mr. Lankford also notified, or maybe
4 I did, the maintenance people so that we had a crew of
5 possibly eight people. I don't know the exact number.

6 Q Now that group of six or eight people
7 were State employees?

8 A Yes, sir. These were institutional
9 employees. Mr. Lankford joined Mr. McIntyre and they
10 started assembling. They worked an afternoon and the
11 following day, they went on working again. About noon time
12 I received a call from Mr. Mosteller, could Mr. McIntyre
13 contact him. Shortly after that Mr. McIntyre came to my
14 office, said, "I have been called to an emergency job down--
15 I believe at ODC or ODU -- and I have got to take my two
16 men along and we will be back as soon as we can."

17 Q So this was from noon of the preceding
18 day to noon of the following day?

19 A Yes.

20 Q And at that point did Mr. McIntyre
21 leave?

22 A Yes, sir, at least he so advised me.

23 Q And after that, who continued in the
24 assembly of the wardrobes?

25 A We continued with the assembly of the

Alexick - Direct

49

1 wardrobes. I don't know how long an interval of days
2 passed, but maybe within five or six work days Mr. McIntyre
3 came back again. I don't know at that time how many he had
4 with him. But the same situation arose again where he said
5 that -- I don't know the exact amount of time, but it
6 certainly didn't involve more than a day or a day and a
7 half of work time again. And again he said that he had
8 to go somewhere else to do some further assembling.
9 To my knowledge, that was all of the work that Mr. McIntyre
10 accomplished on the assembling of the detail for Buildings
11 14 through 20.

12 Q So apart from the first time which
13 went from noon of one day to noon of the second day, and
14 the second occasion when Mr. McIntyre came back again,
15 those were the only occasions where you recall Mr. McIntyre
16 or Mr. Mosteller being at the facility to supervise the
17 construction and assembly of the wardrobes?

18 A Yes, sir.

19 Q Do you know whether the majority, or
20 substantially all of the assembly of the wardrobes was
21 done by State employees?

22
23 MR. SPENCER: I would object to that,
24 Your Honor. That requires a speculative response.

25 THE COURT: I will sustain your

Alexick - Direct

50

1 objection.

2
3 Q Now, one further thing, Mr. Alexick.
4 The requisition which I exhibited to you before has in it,
5 and if you would like to see it, I can of course show it
6 to you, a product called Fiber-X?

7 A Yes, sir.

8 Q Are you familiar with Fiber-X?

9 A Fiber-X, when it was first called to
10 my attention, this was preceding Mr. Mosteller's time, I
11 was advised that Fiber-X was a plastic laminate that was
12 welded to a 10-ply solid core. I later learned that Fiber-
13 X, this was after we had received our material --

14 Q No, at the time that you included the
15 term Fiber-X in the requisition, by the term Fiber-X in
16 that requisition which you prepared, what did you understand
17 that you were asking for?

18 A Plastic laminate, with a solid 10-ply
19 core.

20 Q Do you know if there is a difference
21 between Fiber-X and particle board?

22 A After this detail came to light, I had
23 learned that we had received particle board instead of a
24 solid core.

25 Q Now, tell me who suggested that Fiber-X

Alexick.- Direct

51

1 be included in those specifications?

2 A Mr. Mosteller.

3
4 MR. KAESTNER: Thank you very much. I
5 have no further questions, Your Honor.

6
7
8 CROSS-EXAMINATION

9 BY MR. SPENCER:

10 Q Taking the substance of your testimony
11 in reverse order, Mr. Alexick, you say you were familiar
12 with Fiber-X, that it had first been called to your attention
13 before Mr. Mosteller's time? I gather you mean before Mr.
14 Mosteller became associated with InterRoyal and began con-
15 tacting people in your position as a representative of that
16 company?

17 A Yes, sir.

18 Q So you knew what it was?

19 A I knew what it was in the prior repre-
20 sentation, yes, sir.

21 Q And is that what you wanted, the sort
22 of material you wanted in your furniture?

23 A We needed something that was quite
24 substantial. These units were going into areas throughout
25 the institution which would receive very high impact. In

Alexick - Cross

52

1 fact, many of us doubted the advisability of placing these
2 into areas that are demanded for certification, which would
3 have necessitated even, we thought, maybe even stronger
4 material, if it was available. But because of the nature of
5 the institution, you cannot find many manufacturers who will
6 identify with this retardation and mental institutions.
7 They just don't want to have the responsibility to build
8 and provide that kind of material. I will say this for
9 InterRoyal, they were, as a company, interested in the
10 mentally retarded and were trying to identify with proper
11 types of furnishings.

12 Q Mr. Alexick, if I could caution you, it
13 might be a little late, but if you would just listen to the
14 question, if you would, please, sir, and respond to the
15 question, I would appreciate it. If you have something else
16 that you want to bring out, I am sure Mr. Kaestner will bring
17 it out.

18 When you spoke, Mr. Alexick, of the doubt
19 that existed about placing these in areas needing certifi-
20 cation, what do you mean by that?

21 A The Federal Government established
22 requirements, and if the institution was to receive Medicaid
23 support that would be sharing of Federal funds to matching
24 State funds, you would have to have provided the items as
25 we were providing. Each individual resident or patient had

Alexick - Cross

53

1 to have a bed, had to have a dresser, had to have a wardrobe.

2
3 THE COURT: That is in the bid under
4 Title 19?

5 THE WITNESS: Yes, sir.

6 THE COURT: It says must comply with
7 specifications under Title 19, USC, and I think
8 all Americans are familiar with the Federal
9 Regulations.

10 MR. SPENCER: I don't think there is any
11 American, Your Honor, who is familiar with all of
12 the Federal Regulations.

13 THE COURT: Well not all of them, but
14 some of them. I don't think any Federal government
15 individual is familiar with all of them.

16 MR. SPENCER: Well, I was assuming that
17 most of them were Americans.

18 THE COURT: There is still some doubt.

19
20 Q Is fireproofing or fire retardancy one
21 of the items incident to the certification?

22 A I don't know, sir.

23 Q You don't know? Doesn't the document
24 mention also fire retardant?
25

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Alexick - Cross

54

1 MR. KAESTNER: Objection, Your Honor.

2 I would like for Mr. Spencer to refer, if he is
3 going to refer to a document, to show Mr. Alexick
4 the particular document. I would also indicate
5 that Mr. Alexick may not be competent to testify
6 regarding Federal requirements or specifications.

7 THE COURT: I believe that Mr. Spencer
8 is referring to Addendum Number 2.

9 MR. KAESTNER: I believe it is Exhibit
10 Number 6, Your Honor.

11 THE COURT: That is right, all furnish-
12 ings, that his bid would have to conform to mental
13 health standards, like Safety Code Title 19,
14 HEW.

15
16 Q All right, sir, I am referring, Mr.
17 Alexick, to Exhibit 6, which is an addendum to the bidders.
18 I ask if that ever came to your attention?

19 A I can't recall, but I don't believe this
20 ever did come to my attention, sir.

21 Q Never did?

22 A No, sir.

23 Q Let me have you look at 5, then, which
24 is Addendum 1. 6 is Addendum 2.

25 A This did not come to my attention either,

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55

1 six.

2 Q All right, sir. Now, these are addendums
3 to your requests for furniture as it went out on the State
4 solicitation for bids, are they not?

5 A Yes, sir.

6
7 MR. KAESTNER: Objection, Your Honor.
8 Those are addenda to the Invitation to Bid. Those
9 aren't addenda to the request, which Mr. Alexick
10 forwarded to the Department of Purchases and
11 Supply.

12 MR. SPENCER: That is what he said.

13 MR. KAESTNER: Excuse me, Mr. Spencer.

14 THE COURT: What you are saying is
15 exactly what the witness said. These were added to
16 his request and went out on the State's invitation
17 to bid.

18 MR. KAESTNER: No question, Your Honor,
19 but the witness has also testified that he was
20 unaware of those.

21 MR. SPENCER: Yes, and that is my next
22 question.

23
24 A If I may add, this was not generated at
25 the institution.

1 Q I understand that, and that also deals
2 with my next question. Then Mr. Maitland, who signed those
3 two addenda, was making changes and clarifications that
4 affected your request as it had been incorporated in the
5 invitation to bid?

6
7 THE COURT: Well, isn't that exclusion?

8 MR. SPENCER: Well, sir, you can look at
9 the face of it.

10 THE COURT: Well, isn't that a conclusion
11 that the Court draws from the evidence?

12 MR. SPENCER: All right, sir. Let me
13 substitute, then, this question.

14
15 Q If you will examine that, I believe you
16 have already responded that that deals with your furniture,
17 the material you had requested the State to solicit and get
18 bids on.

19 A Yes.

20 Q Look at it, sir.

21 A Yes, it did.

22
23 THE COURT: It just says, Mr. Kaestner,
24 that the institution wants a hard-resin board,
25 using the tradename as Fiber-X, and an indication

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57

1 that hard-resin furniture will be accepted. That
2 was the addendum.

3 Is Fiber-X involved in this in any way?

4 MR. KAESTNER: Yes, it is.

5 MR. SPENCER: It is involved from the
6 standpoint that it was a part of the specs but was
7 never furnished.

8 MR. KAESTNER: It is part of the specs,
9 yes.

10 MR. SPENCER: Part of the original specs.

11
12 Q All right, now, Mr. Alexick, you were
13 busy about your duties at the institution as the Assistant
14 Director of Services, Administrative Services Superintendent?

15 A Supervisor.

16 Q And I then gather that you would not
17 have been, on a constant basis, observing such a mundane
18 thing as the assembly of wardrobes?

19 A No, sir.

20 Q So what you have told us about who was
21 present and who assembled them is based on your periodic
22 observation as you perhaps walked by?

23 A Our buildings and grounds office built
24 up a daily log of work assignments to respective men in
25 the maintenance service who gave assistance. To my knowledge

Alexick - Cross

58

1 there were --

2 Q If you will let me interrupt you a
3 minute, Mr. Alexick, I think you are testifying to something
4 that would be categorized as hearsay.

5 A No, sir, this is not hearsay. This is
6 documented, sir, and I believe that a copy of this was
7 forwarded.

8 Q Excuse me, Mr. Alexick.

9
10 MR. SPENCER: I have no doubt, if Your
11 Honor please, that the man is testifying as to what
12 he saw, but that merely establishes the existence
13 of what he saw and not the factual content of what
14 he saw.

15
16 A Mr. Spencer --

17
18 MR. SPENCER: Mr. Alexick, if you will
19 wait and let the Court decide.

20 MR. KAESTNER: If these records that Mr.
21 Alexick is referring to are business records pre-
22 pared in the normal course of business, and if the
23 person preparing them had a duty to do them, Mr.
24 Alexick is perfectly justified in relying on them
25 in reaching his conclusion.

Alexick -Cross

59

1 MR. SPENCER: That may be, Your Honor,
2 but still, in all, it only establishes as to this
3 procedure.

4 THE COURT: The objection goes to the
5 weight of the evidence and not the admissibility.

6 MR. SPENCER: Note my exception. 0

7

8 A May I interject something here, Mr.
9 Spencer?

10 Q I would rather you didn't, but I am
11 sure Mr. Kaestner would like to hear it.

12 A Mr. Lankford and Mr. Mann of the
13 Warehouse Department worked in conjunction with the maintenance
14 service men and Mr. Lankford is here and will --

15 Q We are well aware of that, Mr. Alexick.
16 Now, let me ask you again, if you will,
17 think very seriously about this. You were asked about Mr.
18 Mosteller being up there and you replied no. Isn't it a
19 fact that Mr. Mosteller was up there on several occasions
20 after the material came?

21 A Mr. Mosteller made periodic visits. I
22 can't remember specifically, I never documented them. But
23 every time he came, we interrelated with the respective
24 problems of the business at hand.

25

Alexick - Cross

60

1 MR. SPENCER: Thank you.

2 MR. KAESTNER: One more question, if I
3 might, Your Honor.
4

5
6 REDIRECT EXAMINATION

7 BY MR. KAESTNER:

8 Q Do you know, when Mr. Mosteller made his
9 periodic visits, did he stay for a long time?

10 A The time varied.

11 Q How much time?

12 A Well, it depended on whether or not we
13 had discussions for needs within the institution. He at
14 times would visit sites, check on what was the utilization
15 given to the various furnitures that had been supplied.

16 Q Now on these periodic visits that Mr.
17 Mosteller made, were any of these visits for the purpose
18 of installing, assembling wardrobes?

19 A I don't believe so, sir.
20

21 MR. KAESTNER: Thank you.
22

23
24 RECROSS-EXAMINATION

25 BY MR. SPENCER:

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Alexick - Recross

61

1 Q But you don't know?

2 A Mr. Mosteller was not always in my
3 presence.

4
5 THE COURT: He said he didn't know.
6 He said he didn't believe so, he doesn't know.

7
8 A But I don't think he did.

9
10 THE COURT: All right, sir. You may
11 step down. Thank you.

12
13 - - - - -
14 WITNESS STOOD ASIDE.

15
16 MR. KAESTNER: The Commonwealth would
17 like to call Mr. Maitland, Robert Maitland.

18
19
20 ROBERT MAITLAND, a witness called by
21 the Commonwealth, first being duly sworn, testifies as
22 follows:

23 DIRECT EXAMINATION

24 BY MR. KAESTNER:

25 Q Mr. Maitland, how are you today?

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Maitland - Direct

62

1 A Just fine, sir.

2 Q Mr. Maitland, would you give us your
3 full name, please?

4 A Robert Maitland. Do you want Robert
5 F. Maitland?

6 Q That's fine. During the period from
7 July of 1976 through November of 1976, what was your
8 position?

9 A I was a buyer at the State Purchasing
10 Department, sir.

11 Q And were you involved in your position
12 as a buyer at the State Purchasing Department in the procure-
13 ment of furniture for the Lynchburg Training Center,
14 Buildings 15 through 20?

15 A Yes, I helped buy that.

16 Q I would like to show you a copy of
17 Commonwealth's Exhibit 1 and ask you if you ever have seen
18 this document.

19 A Yes, sir.

20 Q Did you handle the procurement of furni-
21 ture requested by that requisition?

22 A Yes, sir, I helped handle it, yes, sir.

23 Q I would like to direct your attention,
24 if I might, to the lower left-hand corner where there are
25 two words written in red, and ask you if you can identify

Maitland - Direct

63

1 the writing?

2 A Yes, sir, that is my writing.

3 Q What do those two words say?

4 A It says installation, question mark, no.

5 Q How did those two words come to be on
6 the requisition?

7 A At the time that I received this
8 requisition, sir, they had no mention whether they wanted
9 installation in it or not. So I called Mr. Alexick, who was
10 the head of the purchasing out there, and asked him. And
11 he said no, that at that particular time they did not want
12 installation.

13 Q So that is what caused you to put that
14 "installation? No" on the requisition?

15 A Yes. The question was installation,
16 the answer was no.

17 Q Now, do you recall if a pre-bid conference
18 was held in connection with this particular purchase of
19 furniture?

20 A Yes, sir.

21 Q And do you recall if Mr. Mosteller was
22 at that pre-bid conference?

23 A Yes, sir.

24 Q And do you recall if, during the pre-bid
25 conference, a discussion took place regarding Fiber-X?

Maitland - Direct

64

1 A Yes, sir.

2 Q Do you recall how that discussion came
3 about and the substance of that discussion?

4 A I think Mr. Horestead of, at that time,
5 representing another manufacturer, a manufacturer by the name
6 of Thonet, wanted to bid a fiber resin board against that,
7 and he brought the subject up and we discussed it at that
8 time.

9 Q Did Mr. Mosteller, do you recall if Mr.
10 Mosteller participated in the discussion of Fiber-X?

11 A Yes.

12 Q Do you recall if Mr. Mosteller in any
13 way described Fiber-X?

14 A Yes, sir, he did.

15 Q And what did he describe it as being?

16 A About, if I remember correctly, and I
17 might be -- some of these statements might be coming back to
18 me from reading specifications, sir. I'm not sure exactly
19 what he said.

20
21 MR. SPENCER: If that is the case, Your
22 Honor, I don't think it ought to be admitted, if
23 he is uncertain as to whether this is actually what
24 was said.

25 MR. KAESTNER: If you will, Your Honor.

Maitland - Direct

65

1 I will refer the witness to one of the addenda
2 and I think that will clarify the objection Mr.
3 Spencer has made, so I will withdraw the question.

4
5 Q Mr. Maitland, let me show you a copy of
6 Commonwealth's Exhibit Number 6, and ask if you have ever
7 seen that before?

8 A Yes, sir.

9 Q And what is that?

10 A This is our Addendum Number 2 which
11 refers to the questions that were asked and the answers that
12 were given at the pre-bid conference. Let's see. I can
13 tell you what day that it was on.. It was actually the
14 question and answer that were discussed at the pre-bid
15 conference -- I don't remember the exact date. It was some-
16 time probably before October 25th.

17 Q I would like to direct your attention,
18 if I could, to the fourth page of Exhibit Number 6, and ask
19 if you can identify that document.

20 A Yes, sir. This is the description of
21 Fiber-X and this is the reason I made the statement as I
22 did a while ago, I didn't know whether I would refer back
23 to this for exactly what was said at that meeting. But this
24 is the document which is the specifications of Fiber-X that
25 was given to us, what Fiber-X was and the material it was.

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Maitland - Direct

66

1 Q Does it describe a particular kind of
2 Fiber-X?

3 A 720, yes, sir.

4 Q What does Fiber-X 720 mean?

5 A It refers to a publication here of
6 Nema, N-e-m-a specifications. And of course it gives you
7 the testing procedure that Fiber-X will go through and what
8 it would stand, and the type of material that Fiber-X
9 actually was.

10 Q Mr. Maitland, I would like to show you
11 this piece of material, and ask you if you have ever seen
12 it before?

13 A This is a material that was given to me
14 at that pre-bid conference.

15 Q And who gave that piece of material to
16 you?

17 A Mr. Mosteller.

18 Q Do you recall if this was the shape of
19 the material?

20 A No, sir, it was not.

21 Q Do you know if this is a part of the
22 particular piece of Fiber-X that Mr. Mosteller exhibited to
23 you?

24 A Yes, sir.

25 Q How do you know that?

Maitland - Direct

67

1 A Because I took it and scratched the end
2 of it off right here, at the very end, with my knife, to
3 find out exactly what kind of material was in that. It was
4 a square piece of material or rectangular, whatever you
5 want to call it.

6 Q You made these scratch marks?

7 A Yes, sir.

8
9 MR. KAESTNER: I would like to enter
10 this into evidence as Commonwealth's Exhibit
11 Number 11.

12
13 NOTE: At this point the above-referred-
14 to piece of Fiber-X is marked and filed as
15 Commonwealth's Exhibit Number 11.

16
17 Q Do you know what Mr. Mosteller's purpose
18 was in exhibiting that piece of material?

19
20 MR. SPENCER: Your Honor please, that is
21 certainly speculative.

22 THE COURT: Well, did he state why?

23 MR. SPENCER: Then the question should
24 be, Your Honor, whether Mr. Mosteller said anything
25 about it.

Maitland - Direct

68

1 THE COURT: Rephrase the question.

2
3 Q Why was that particular piece of material
4 exhibited?

5 A Well, at that time I did not know,
6 really, basically what Fiber-X looked like. I had never seen
7 any Fiber-X or any part of it. And I think he gave it to
8 me strictly so that I would know what Fiber-X was. And I
9 had seen the spec many times within the specifications which
10 we had been receiving, but I didn't really know what it was.

11 Q Now, do you know if there was any
12 difference between Fiber-X and particle board?

13 A Yes, sir.

14 Q Is there a difference?

15 A Yes.

16 Q And is there a difference between Fiber-X
17 and chip core?

18 A Yes, sir.

19 Q There is a difference?

20 A Yes, sir.

21 Q Mr. Maitland, I would like to direct
22 your attention to the last page of Exhibit Number 6, which is
23 a picture, and ask you how you came by that particular
24 picture?

25 A This particular picture, normally we had

Maitland - Direct

69

1 been specifying a bed that had square corners on it, and on
2 this particular bid, these specifications came out with
3 round corners, and I did not really -- I could not tell my
4 vendors what a round cornered bed and how it was to be used
5 and how it was to be shaped. So I asked Mr. Scott and Mr.
6 Scott told me to call the InterRoyal representative and get
7 him to give me a picture of it.

8 Q And did you do it?

9 A Yes, sir.

10 Q And what InterRoyal representative did
11 you call?

12 A Mr. Mosteller, Dave Mosteller.

13 Q And did Mr. Mosteller provide that copy
14 to you?

15 A I would say yes. I will have to say
16 yes on that.

17 Q But you are not certain on that?

18 A No, sir. I mean I don't know whether it
19 came in the mail or he gave it to me, whether it came directly
20 from him, but it came through him.

21 Q Now, Mr. Maitland, did you also receive
22 the invitation to bid that had been returned from the various
23 vendors?

24 A Yes, sir, I opened the bids, yes, sir.

25 Q I would like to show you a copy of

Maitland - Direct

70

1 Commonwealth's Exhibit Number 4 and ask you if you have ever
2 seen it before?

3 A Yes, sir.

4 Q What is Commonwealth's Exhibit Number 4?

5 A It is a bid tabulation that was made
6 by my secretary at the time, after the bids were opened,
7 to tell us exactly -- so that I can look right straight down
8 and see who bid on what and what the prices were.

9 Q Mr. Maitland, I would like to show you
10 these documents which have been introduced. I am going to
11 ask you to refer to it.

12
13 MR. SPENCER: I'm sorry, I can't hear
14 you.

15 MR. KAESTNER: I am going to ask him to
16 examine these.

17
18 Q Have you seen those documents before?

19 A This looks like the bid package that we
20 had on that particular furniture.

21 Q And so do you know if the bid tabulation
22 sheet which I have just exhibited to you, would have been
23 prepared from those bids?

24 A Yes, sir, it was supposed to be. I am
25 pretty sure it was.

Maitland - Direct

71

1 Q Could you, by flipping through Common-
2 wealth's Exhibit Number 3, tell me how many of those bids
3 are from InterRoyal vendors?

4 A Five of them, sir.

5 Q Five of these bids were from Inter-Royal?

6 A Yes, sir.

7 Q And the remaining bids were from vendors
8 representing other lines?

9 A Yes, sir.

10 Q And would you please refer to the bid
11 tabulation sheet which you have laid out there in front of
12 you, and would you tell me who was awarded, would you tell
13 me what product was purchased from Ginn Southern?

14 A It was a three-drawer chest.

15 Q Was Ginn Southern the low bidder on that
16 particular product?

17 A No, sir.

18 Q Who was the low bidder?

19 A Thalhimer's, bidding Thonet.

20 Q Why was Ginn Southern awarded the pur-
21 chase order for that chest?

22 A I would like to look at the bid document,
23 if you don't mind, sir, rather than make a statement. I
24 would rather be sure.
25

Maitland - Direct

72

NOTE: At this point the witness is referring to documents.

A (Continuing) The reason that this was, this one item, InterRoyal was low on the other four items, and if you add the fifth item into it at the low price of \$142.00, it would still have been a savings to the State, if we awarded everything to InterRoyal, because the statement is written on each bid, it says, and I quote, "This bid must be awarded in total or nothing to InterRoyal Company. Split between InterRoyal dealers will be acceptable."

Q Now, was that condition placed on there by the Department of Purchases and Supply?

A No, sir.

Q Who would have placed that condition on there?

A By each and every vendor that bid it.

Q So if I understand you correctly, then GimSouthern, despite the fact that it was not the low bidder, because of that condition, was awarded the purchase order?

A Yes, sir.

Q Mr. Maitland, do you know if the furniture that you secured pursuant to those bids ever arrived at Lynchburg?

A Yes, sir.

Maitland - Direct

73

1 Q Did you have occasion to inspect that
2 furniture?

3 A Yes, sir.

4 Q And do you know if that furniture was
5 made of Fiber-X?

6 A In my opinion it was not, sir.

7
8 MR. KAESTNER: Thank you very much,
9 Mr. Maitland. I have no further questions.

10

11

12

CROSS-EXAMINATION

13 BY MR. SPENCER:

14 Q Mr. Maitland, where are you employed
15 now?

16 A I am working as a consultant right
17 now, sir.

18 Q You are no longer employed by the
19 Commonwealth?

20 A No, sir.

21 Q Consultant in what field?

22 A In the field of furniture, sir, school
23 furniture.

24 Q And I do not want you to answer this
25 until counsel has an opportunity pose an objection, if he

Maitland - Cross

74

1 desires. Are you currently under a charge brought against
2 you as a result of the same Grand Jury investigation that
3 resulted in these charges?

4 THE COURT: He can answer that question.

5 MR. KAESTNER: I have no objection to
6 him answering that question.

7 THE COURT: Well, you can object, but
8 he can answer. I will overrule the objection, but
9 there is no objection, so go ahead.

10 A Yes, sir.

11 Q Are you under charge here in the City
12 of Richmond?

13 A Yes, sir.

14
15 THE COURT: It is in this court. I will
16 take judicial notice of it.

17
18 Q And the same prosecutors are involved in
19 your case, are they not?

20 A Yes, sir.

21
22 THE COURT: He might not know that. It
23 might not be the same prosecutor.

24 MR. SPENCER: Well, he has already
25 responded. Apparently he did know that.

1 THE COURT: Well, he knows more than the
2 Court does.

3
4 A Well, what I mean by that, when I said
5 yes, sir, to the question, I know Mr. Aubrey Davis' office.
6 That's the only thing I know.

7
8 THE COURT: All right, that might be
9 the best answer, Mr. Aubrey Davis' office.
10 I will take judicial notice that he is the
11 Commonwealth's Attorney.

12
13 Q Now, when were the bids that made up the
14 bid package, which is Exhibit 3, submitted, do you know?

15 A Not without having the --

16
17 MR. SPENCER: May I have Exhibit 3, Your
18 Honor?

19
20 NOTE: At this point Exhibit 3 is shown
21 to the witness.

22
23 A On 9-24-76.

24 Q All right, sir. And look at any one of
25 them and tell us what was stated as the bid opening date

1 originally.

2 A The original bid opening date was
3 October 21, 1976.

4 Q All right, sir. Were all the bids
5 September of 1976?

6 A They should have been, yes, sir.

7
8 MR. KAESTNER: Your Honor, I have to
9 object because I don't think that Mr. Maitland
10 understood Mr. Spencer's question. As I under-
11 stood Mr. Spencer's question, he was asking what
12 date each of those bids were submitted, and by
13 that I took him to mean submitted by the vendors
14 to the Commonwealth. I believe that Mr. Maitland
15 is referring to the date that the bids were mailed
16 out by the Commonwealth to the vendors.

17 THE WITNESS: That's right, sir.

18
19 Q Is that right?

20 A Yes, sir, that is correct.

21 Q Well then, your response to my prior
22 question perhaps was in error, because what I asked you was
23 the date of the bid. And I meant, if I didn't convey it, I
24 meant the date these bids were submitted.

25 A You mean back from the vendors to us?

1 Q Yes, sir.

2 A Oh, I'm sorry. Excuse me. I am com-
3 pletely wrong on that because I took the date that we sent
4 them out.

5 Q All of them were sent, then, September
6 9, 1976?

7 A No, 24th.

8 Q September 24th?

9 A '76, yes, sir. And they all had to be
10 back in our office, there was an addendum, and I don't know
11 really basically what the exact date was when they had to be
12 back at our office without that addendum. But I think it
13 probably was the 28th of October. I am not sure. That would
14 be under that addendum, Number 2, I think.

15 Q All right, I show you Exhibit 5 and ask
16 you if this is the addendum you refer to?

17 A No, sir, Addendum Number 2, sir.

18 Q All right, that is Exhibit Number 6.

19 A Okay, right. The bid, it says on the
20 first paragraph here, "Bid opening date has been extended to
21 November 4, 1976".

22 Q All right, sir. And when did they have
23 to be in your office?

24 A By November 4, 1976, by 2:30 p.m.

25 Q So they just had to be there before the

1 time they were to be opened?

2 A Yes.

3 Q Someone could walk in one minute ahead
4 of that?

5 A Yes, sir.

6 Q All right, sir. Now, I believe you
7 prepared and signed both of these addenda, Exhibit 5 and 6,
8 did you not?

9 A Yes, sir, I did.

10 Q And would you look again at Exhibit 6
11 and tell us if that was not a fairly material change in the
12 specifications for the furniture from what had been requested
13 by Mr. Alexick and his people?

14
15 MR. KAESTNER: I would ask Mr. Spencer
16 to specify if he is talking about any particular
17 section of Exhibit Number 6, or the whole of
18 Exhibit Number 6.

19 THE COURT: He is talking about Fiber-X.

20 MR. SPENCER: I am talking about Items
21 2 and 4.

22 THE COURT: Gentlemen, I don't see why
23 the witness has to read that to the Court. I mean
24 I am reading these addendums. I mean if you
25 would point out, I can probably read as well as

Maitland - Cross

79

1 Mr. Maitland.

2 MR. SPENCER: Well, if Your Honor please,
3 I was only trying to have it stated in the record
4 to avoid any future person having to refer back
5 to the exhibit.

6 THE COURT: But it is part of the record.
7 It is all in the record. It saves the court
8 reporter cost of writing it up if I read it and the
9 Supreme Court reads it.

10
11 Q All right, sir, the original request was
12 for Fiber-X as a material?

13 A Yes.

14 Q But this addendum, first of all, it
15 added the requirement that it conformed with mental health
16 standards, life and safety code?

17 A Yes, sir.

18 Q And at that time there was some dispute
19 about whether that required fire retardant material or not,
20 wasn't there?

21 A Yes, sir.

22 Q And some thought it did and some
23 thought it didn't?

24 A Right, sir.

25 Q And it also required, Item 4, it changed

Maitland - Cross

80

1 to a standard particle board?

2 A I'd have to look at that, sir. That
3 was inner panel, sir. I mean that was not the entire unit,
4 just the inner panel.

5 Q I understand. But when you go over to
6 Item 9, you have also particle board?

7 A Yes, sir.

8 Q And that wasn't the inner panel, was it?

9 A That's right, sir. That's what it says.

10 Q All right, sir. And then Item 10 made
11 clear the fact that the use of Fiber-X was just an indicator,
12 that other types of hard resin finishes were perfectly
13 acceptable?

14 A That's right.

15 Q And other types of hard resin finishes
16 might or might not be on solid core? They might be on particle
17 board or just chip core and still have a hard resin finish?

18 A On a hard resin finish?

19 Q Hard resin finish?

20 A Right. I mean on any finish, right.
21 They might be completely penetrated.

22 Q But what it says is other types of board
23 with a hard resin finish, and that would include particle
24 board and chip board? You have seen both of those with hard
25 resin finishes, haven't you?

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Maitland - Cross

81

1 A Yes, sir.

2 Q And as a matter of fact, that is what they
3 got, wasn't it, with a high pressure laminate?

4 A With a high pressure laminate, that would
5 be considered, right.

6 Q And you did that change, as I understand
7 it, without consulting with Mr. Alexick?

8 A That change, sir, was done at the pre-
9 bid conference.

10 Q Yes, sir, and it was done as a result of
11 questions raised by Thonet, was it not, who pointed out to you
12 that there was a difference in these things and that one was
13 fire-retardant and one wasn't, and one was solid core and one
14 wasn't?

15
16 MR. KAESTNER: Objection, Your Honor.

17 That is not what the testimony has been to point.

18 MR. SPENCER: I am on cross-examination.

19 MR. KAESTNER: The testimony has been
20 that Thonet raised the question of Fiber-X. Now
21 that is not what Mr. Spencer has gone into.

22 MR. SPENCER: If Your Honor please, I
23 have him on cross-examination.

24 THE COURT: Go on, Mr. Spencer.

25

Maitland - Cross

82

1 Q Isn't that so, Mr. Maitland?

2 A Would you repeat that?

3 Q Isn't it a fact that those changes, as
4 you said, resulted from the pre-bid conference and the direct
5 cause for the changes was a question raised by Thonet pointing
6 out to you that there was a substantial difference between
7 things that were either Fiber-X or like Fiber-X, and other
8 boards and finishes, that is, a hard resin finish, laminate,
9 discussion of the cores?

10 A I don't think that, if I remember cor-
11 rectly, sir, that that ever came up, really.

12 Q Well, don't you remember that the question
13 came up about whether Fiber-X or any hard resin finish board
14 like Fiber-X was fire-retardant?

15 A Yes, sir, I think that did come up in
16 that particular meeting, yes.

17 Q And it was pointed out to you that you
18 were saying that you wanted things that complied with health
19 and safety, and there was some doubt as to whether that
20 required fire retardancy, but you were specifying something
21 that wasn't fire retardant?

22 A I don't remember that, I mean that com-
23 ing up exactly like that, like you expressed it, but it could
24 have.

25 Q Well, that is the substance of it, isn't

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Maitland - Cross

83

1 it?

2 A Well, I think what actually happened, the
3 way that I remember it, and of course this is just the way
4 that I remember it, is that --

5 Q Well, let me just stop you a minute,
6 sir. Are you telling us that you are uncertain about this?

7 A Uncertain about what, sir?

8 Q About what you are about to say.

9 A No, sir.

10

11 THE COURT: Well, frankly I think all of
12 that is in the evidence now, that the State changed
13 the position.

14

15 Q Did not Thonet, Mr. Maitland, as a
16 matter of fact, submit two bids?

17 A Yes, sir.

18 Q Now, Thonet's two bids, neither one of
19 them complied or attempted to meet the alternative specifi-
20 cations of Fiber-X, did it?

21

22 THE COURT: Gentlemen, is this a trial
23 on the bidding practices or a trial on larceny?

24 MR. SPENCER: Judge, I thought it was
25 a trial on larceny that arose from the State

1 bidding practices.

2 THE COURT: Not necessarily.

3 MR. SPENCER: I'm sorry, Your Honor. We
4 have been in here two days and that is what the
5 prior cases have been.

6 THE COURT: I don't think it has been
7 on bidding practices. It has been false repre-
8 sentation made to get the State's money. Now I
9 don't see where all of this is relevant.

10 MR. SPENCER: Well, I believe it is rele-
11 vant, Your Honor, to show that the State obviously
12 has tried to make a point of Fiber-X and that
13 Fiber-X wasn't supplied. They specifically brought
14 that up, and I am pointing out that Fiber-X was
15 not required, and Fiber-X is not even bid in some
16 instances.

17 THE COURT: Well, I don't really know
18 what the evidence is. It is one theory I can see
19 where Fiber-X might be very important, Fiber-X
20 720, it might be more expensive, and the bid might
21 have gone to the manufacturer with not that, but
22 the bid price includes it, Fiber-X. And these
23 bids are based on Fiber-X. When it goes to the
24 manufacturer, it doesn't include Fiber-X, which
25 makes a cheaper product and more profit, but the

1 State was charged the full amount.

2 MR. SPENCER: Well, I agree that Your
3 Honor doesn't know at this point, and I think
4 you will find that is not the case.

5 THE COURT: All right, I just said this
6 is one theory. That is why I allowed all of this
7 about Fiber-X. But I really understand that the
8 State has changed its position, the State has said
9 that Fiber-X is an example that they could use,
10 but other stuff would suffice. So I think that is
11 enough on that.

12 MR. SPENCER: I am trying to point out
13 that even the parties who bid a different manu-
14 facturer, did not bid a product similar to Fiber-
15 X. They bid an ordinary chip core with a laminate
16 finish, hard resin finish, chip core.

17 THE COURT: And they didn't get the job,
18 did they?

19 MR. SPENCER: No, sir, but it is part of
20 the Commonwealth's exhibit.

21 THE COURT: The only evidence, one of
22 them was Trend, they gave them that job because all
23 of the vendors representing InterRoyal said it had
24 to be a lump sum job or no deal.

25 MR. SPENCER: This goes back to the fact

1 that I objected to it when the Commonwealth even
2 attempted to introduce these other bids, but the
3 Court overruled my objection and let them in. And
4 now that they are in, I think I am entitled to --

5 THE COURT: Not in this case, maybe in -- ①
6 a civil case.

7 MR. KAESTNER: We will be happy to
8 stipulate that the Thonet bids were not Fiber-X
9 and did not conform with a requirement of Exhibit
10 Number 2. We will stipulate that.

11 MR. SPENCER: Would you stipulate that
12 the Simmons bids were not Fiber-X?

13 MR. KAESTNER: I will stipulate that
14 both Simmons bids were not Fiber-X.

15 MR. SPENCER: But were chip core?

16 MR. KAESTNER: I am not going so far as
17 to stipulate that they were chip core, because I
18 believe indeed they were not.

19 MR. SPENCER: Well, I believe indeed they
20 were, but we will discuss that later.

21 THE COURT: You all discuss that at
22 lunch and let's get along with the case.

23 MR. SPENCER: I believe that is all,
24 Your Honor.

25 THE COURT: Any further questions?

1 MR. KAESTNER: One question on redirect.

2
3 REDIRECT EXAMINATION

4 BY MR. KAESTNER:

5 Q Mr. Maitland, has the Commonwealth made
6 you any kind of offer in return for your testimony today?

7 A No, sir.

8
9 MR. KAESTNER: Thank you.

10
11 - - - - -
12 WITNESS STOOD ASIDE.

13
14 THE COURT: Next witness.

15 MR. KAESTNER: The Commonwealth calls
16 Mr. Sid Horestead.

17
18
19 SIDNEY HORESTEAD, a witness called by
20 the Commonwealth, first being duly sworn, testifies as
21 follows:

22 DIRECT EXAMINATION

23 BY MR. KAESTNER:

24 Q Mr. Horestead, could you state your
25 full name, please?

Horestead - Direct

88

1 A Sidney A. Horestead.

2 Q What is your present business or occu-
3 pation?

4 A I am a representative for Thonet
5 Furniture.

6 Q And what does Thonet Furniture do?

7 A We manufacture institutional and office
8 furniture.

9 Q Are you familiar with the bid for the
10 procurement of furniture for the Lynchburg Psychiatric
11 facilities, Buildings 15 through 20?

12 A Yes, sir, I am.

13 Q Tell me, how long have you been involved
14 in selling furniture?

15 A Well, I have been with the company I am
16 with now for nine and a half years, but I have been in the
17 business better than eighteen.

18 Q Is Thonet a manufacturer of furniture?

19 A Yes, they are.

20 Q Are you familiar with the manufacture
21 of furniture?

22 A Yes, sir.

23 Q Are you familiar with a product called
24 Fiber-X?

25 A Yes, sir, I am.

Horestead - Direct

89

1 Q What is Fiber-X?

2 A Well, Fiber-X is a particle board which
3 has been saturated in a resin or plastic, and it is very,
4 very hard and it is very brittle. It is very heavy.

5 Q Do you know if Fiber-X is different
6 than chip core?

7 A Definitely.

8 Q Is Fiber-X different from particle board?

9 A Definitely.

10 Q Which of the three products that I have
11 mentioned to you is more expensive?

12 A Fiber-X.

13 Q Does Thonet manufacture furniture?

14 A Yes, we do.

15 Q In November of 1976, when these bids
16 were taken, if the order had been awarded to Thonet, and if
17 Thonet had to manufacture products with Fiber-X, could you
18 have manufactured those products in your factory?

19 A No.

20 Q Why not?

21 A Because it takes special cutting tools,
22 special knives and saw blades and shapers. They had to be
23 carbonized. And we didn't have that at our facility at that
24 time.

25 Q Tell me, do you know whether furniture

Horestead - Direct

90

1 manufactured out of Fiber-X would be more or less expensive
2 than furniture manufactured out of particle board?

3 A More expensive.

4 Q And how about furniture manufactured out
5 of chip core?

6 A It would be less than Fiber-X.

7 Q The chip core would be less expensive
8 than Fiber-X?

9 A Yes.

10 Q Are you familiar with the two bids
11 submitted by Thalhimer's on this particular procurement?

12 A Yes, I am.

13 Q One of the bids, as the record shows, is
14 for a fire retardant product, and one of those bids for a
15 non-fire retardant product?

16 A That is correct.

17 Q Were any part of those bids on products
18 manufactured of Fiber-X or anything like Fiber-X?

19 A No, they were bid on the standard
20 particle board and on the fire retardant particle board.

21 Q Do you know whether any of the bids sub-
22 mitted by Thalhimer's were in fact low?

23 A I think we were low on one item, Item 5
24 of that bid.

25 Q Was Thalhimer's or Thonet awarded a

Horestead - Direct

91

1 purchase order for Item Number 5?

2 A No, we were not.

3 Q And why weren't you?

4 A I went to the State Purchasing to see if
5 we could pick up this one item we were low on, and I was told
6 by the State Purchasing that there was an additional discount,
7 that if the whole award was awarded to InterRoyal, and for that
8 reason it was for the benefit of the State to award everything
9 to InterRoyal.

10 Q So that by Item 5, you are referring to
11 a chest of drawers?

12 A Yes.

13 Q Mr. Horestead, do you recall attending
14 a pre-bid conference in connection with this particular bid
15 procurement?

16 A Yes, I did.

17 Q Do you recall Fiber-X being discussed?

18 A Yes.

19 Q What was your understanding when you
20 left that meeting regarding whether the furniture would have
21 to be made of Fiber-X?

22 A Well, I was told it had to be made of
23 Fiber-X or a similar product by another company named
24 Fiber-Resin. They would accept either one of them.

25 Q Is there any difference between Fiber-X

Horestead - Direct

92

1 and Fiber-Resin?

2 A Slight. There is a difference in
3 weight of about five pounds.

4 Q Tell me, is Fiber-Resin identical to
5 chip board?

6 A No.

7 Q Well, to particle board?

8 A No.

9 Q Is Fiber-Resin more expensive than those
10 two?

11 A Yes.

12
13 MR. SPENCER: Than which two?

14 MR. KAESTNER: Chip core and fiberboard.

15 MR. SPENCER: You are a little fast, Mr.
16 Kaestner. It is hard to keep up with you.

17
18 Q If the furniture had to be manufactured
19 out of Fiber-Resin or Fiber-X, would that furniture have
20 been more or less expensive than furniture manufactured out
21 of particle board or chip core?

22 A More expensive.

23
24 MR. KAESTNER: I have no further
25 questions.

Horestead - Cross

93

CROSS-EXAMINATION

BY MR. SPENCER:

Q All right, now, you say when you left the meeting, it was your understanding that the requirement was either for Fiber-X or for Fiber-Resin?

A Yes, sir.

Q But you submitted bids, and you did not submit a bid that included Fiber-X?

A That is correct.

Q Did it include Fiber-Resin?

A No.

Q What did it include?

A It included, we submitted two bids, one on the regular 42/44 pound particlar board and one on fire retardant particle board.

Q And on the regular board, what sort of finish did that have?

A You mean the exterior finish?

Q The exterior finish.

A Plastic laminate.

Q And that is the same exterior as is on Fiber-X, substantially, isn't it?

A I believe so. I don't know if they used a high pressure laminate on Fiber-X or not. I can't say.

- 1 Q Well, this was a laminate?
- 2 A It was a high pressure laminate.
- 3 Q A high pressure laminate? All right, sir.
- 4 And on the other bid, what was it?
- 5 A On the fire retardant?
- 6 Q Your other bid.
- 7 A That was a high pressure laminate, except
- 8 that you have to have a special laminate made to be fire
- 9 retardant.
- 10 Q So one of your bids was what is called
- 11 ordinary chip core?
- 12 A Standard, yes.
- 13 Q Standard chip core?
- 14 A Yes.
- 15 Q With a high pressure laminate finish?
- 16 A Right.
- 17 Q And the other was fire retardant?
- 18 A Fire retardant and plastic high pressure
- 19 laminate finish.
- 20 Q Now, if you submitted these bids, then
- 21 you must have thought that these items that you were offering
- 22 conformed with the bid solicitation as changed by the two
- 23 addenda?
- 24 A No, sir.
- 25 Q You did not?

Horestead - Cross

95

1 A No, sir.

2 Q Well, let's look at the Addendum Number
3 2, which is Exhibit Number 6. Did this come to your atten-
4 tion?

5 A Yes, sir.

6 Q Are you testifying that you were fami-
7 liar with Fiber-X and knew what it was?

8 A Yes.

9 Q And you were familiar with it at that
10 time and knew what it was?

11 A Yes.

12 Q You had seen it before in various
13 products?

14 A Yes.

15 Q Now, let me ask you, sir, have you seen
16 it since bid in various products?

17 A I have seen it bid since that product,
18 but I don't know if the product was actually made that way,
19 and if it was awarded on it. But there was a bid that came
20 out in the State of New York after that.

21 Q Was that an InterRoyal bid?

22 A Yes.

23 Q Direct from the manufacturer?

24 A That I can't tell you.

25 Q But it did specify Fiber-X?

Horestead - Cross

96

1 A Yes.

2 Q And it was two years after this bid,
3 was it not?

4 A I couldn't tell you. I don't know the
5 date.

6 Q Was it some period of time after this
7 bid?

8 A It seems to me it was six to twelve
9 months, but I can't swear to that.

10 Q Now, I believe you testified that you
11 attended the pre-bid conference?

12 A Yes, sir.

13 Q Do you know Mr. Joe Schlackman?

14 A Yes, sir.

15 Q Who is he, or who was he at that time?

16 A I think he was a Products Manager for
17 what we call the case goods.

18 Q For what company?

19 A InterRoyal.

20 Q Was he one of the superiors of Mr.
21 David Mosteller?

22 A Yes.

23 Q Was he at that meeting?

24 A I am 80 percent sure he was.

25 Q And in whose company was he during the

1 time of the meeting?

2 A Mr. Roy Scott.

3 Q And the meeting was held in a conference
4 room adjacent to Mr. Scott's office, was it not?

5 A Can I answer this the way I recall it?

6 Q Yes.

7 A The way I recall the pre-bid meeting
8 opened up, and we all signed a form at the pre-bid meeting,
9 and Mr. Roy Scott and Mr. Schlackman, I am almost positive,
10 arrived quite a bit after, after the pre-bid meeting started.

11 Q And where did they go?

12 A They went to the pre-bid meeting.

13 Q And then where did they go?

14 A I believe they went back to Mr. Scott's
15 office.

16 Q All right, sir, and you saw them there
17 together?

18 A No, I didn't see them. The door was
19 closed.

20 Q No, I don't mean you saw them inside
21 the office together. You saw them about the area together?

22 A Yes.

23 Q And then you saw them go into Mr. Scott's
24 office?

25 A I'm sure they did. I couldn't swear to

1 that. This has been three and a half years ago.

2 Q Mr. Scott was Mr. Maitland's immediate
3 superior, was he not?

4 A Yes.

5
6 MR. SPENCER: That is all we have.

7 MR. KAESTNER: No further questions,
8 Your Honor.

9 THE COURT: All right, you may step
10 down. Thank you.

11
12 - - - - -
13 WITNESS STOOD ASIDE.

14
15 MR. KAESTNER: The Commonwealth calls
16 Mr. Robert Creasey.

17
18
19 ROBERT CREASEY, a witness called by the
20 Commonwealth, first being duly sworn, testifies as follows:

21 DIRECT EXAMINATION

22 BY MR. KAESTNER:

23 Q How are you, Mr. Creasey?

24 A Fine, thank you.

25 Q Mr. Creasey, would you give us your full

Creasey - Direct

99

1 name, please.

2 A Robert Carrington Creasey.

3 Q Can you tell me what your position is,
4 what you do for a living?

5 A I'm a salesman for Litton Office Products.

6 Q And do you know if Litton Office Products
7 is the same as Everett-Waddey?

8 A It is.

9 Q Are you familiar with the bid for the
10 furniture supplied to the Lynchburg Psychiatric facility in
11 1976, Buildings 16 through 20?

12 A I am familiar with it briefly.

13 Q I would like to show you, if I could, Mr.
14 Creasey, a portion of Commonwealth's Exhibit Number 3, which
15 is the bid of Litton Office Products, and ask you if you have
16 ever seen this before?

17 A Yes.

18 Q And is that your signature there, Mr.
19 Creasey?

20 A It is.

21 Q Mr. Creasey, did you participate in the
22 preparation of this bid?

23 A No, I had it done.

24 Q Excuse me?

25 A I did not work the figures up. I had the

Creasey - Direct

100

1 figures put out.

2 Q Did you receive the figures upon which
3 that bid is based?

4 A That is correct.

5 Q I would like to show you a copy of this
6 document, Mr. Creasey. This document has been previously
7 marked for identification as Commonwealth's Exhibit Number 17
8 and ask you if you have ever seen it before?

9 A Yes, I have.

10 Q Would you flip to the second part of this
11 document, and would you tell me what those pages are?

12 A It is a copy, a xerox copy of the State
13 bid for the Lynchburg Training School.

14 Q Now I would like for you to refer to the
15 next page, Mr. Creasey, and in the right-hand column you will
16 see two figures. Do you recognize that writing? Is that
17 your writing?

18 A That is my writing.

19 Q What is the \$89.00 figure?

20 A That is the cost figure, unit cost.

21 Q And the \$92.55?

22 A That is the mark-up, suggested mark-up.

23 Q Now the \$89.00 figure is a figure that you--
24 who did you receive the \$89.00 figure from?

25 A Mr. Dave Mosteller.

Creasey - Direct

101

1 Q And what was that figure to be used
2 for?

3 A To work up a bid against this requisition
4 for Lynchburg Training School.

5 Q Now, if you would take a look at the
6 column of figures that goes down, did you receive each of
7 those figures, not the one, of course, that you submitted
8 on your bid, but the rest of them, did you receive each of
9 those figures from Mr. Mosteller?

10 A Yes, I did.

11 Q Do you know what was included in those
12 figures? Do you know whether those figures were to cover the
13 cost of the furniture?

14 A Cost of the furniture and abandoned
15 samples.

16 Q So that figure of \$89.00 was to pay for
17 the cost of furniture and the cost of abandoned samples?

18 A Correct.

19 Q Do you know if the \$89.00 figure was
20 to include a disbursement for installation?

21

22 MR. SPENCER: I object to the leading.

23 MR. KAESTNER: I asked him if he knew.

24 THE COURT: I don't think that is

25 leading. I will overrule the objection.

Creasey - Direct

102

1 MR. SPENCER: Note my exception.

2 THE COURT: Yes, sir.

3
4 A It could have. I don't know that.

5 Q Now you received those figures from Mr.
6 Mosteller, and based on those figures, you worked up your
7 bid?

8 A Yes, sir.

9 Q Now, would you flip, if you would, to
10 the next-to-the-last page of that document. On the next-to-
11 the-last page, on the lower portion, you will see some writing
12 in hand. Do you recognize that handwriting?

13 A At the bottom you are referring to?

14 Q Yes. Whose handwriting is that?

15 A That is my scribbling.

16 Q And what is that scribbling about?

17 A What is that? That is what Dave told
18 me to put out on the bid, and that is what we put on the bid.

19 Q Dave told you? Were those conditions to
20 be added to your bid?

21 A Yes, they were.

22 Q And those came from Mr. Mosteller?

23 A Yes, they did.

24 Q Now, tell me, Mr. Creasey, this entire
25 document, what is this document?

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Creasey - Direct

103

1 A That is our order blank.

2 Q And is this document prepared in the
3 ordinary course of business?

4
5 MR. SPENCER: I'm sorry. That is your
6 what?

7 THE WITNESS: Our sales order blank.

8
9 Q Is this document prepared in the normal
10 course of business?

11 A Yes.

12
13 MR. KAESTNER: I would like to offer
14 this into evidence as Commonwealth's Exhibit
15 Number 12.

16 THE COURT: All right.

17
18 NOTE: At this point the above-referred-
19 to order blank is marked and filed as Commonwealth's
20 Exhibit Number 12.

21
22 Q Mr. Creasey, I would like to show you
23 another group of documents, if I might. These have been pre-
24 marked for identification as Commonwealth's Exhibit 18. I
25 ask you if you have seen this group of documents before. There

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Creasey - Direct

104

1 are four documents there.

2 A Yes.

3 Q What are those documents?

4 A Documents we received from Dave.

5 Q I would like for you to take a look at
6 the first document which is a little note. What is that note
7 about?

8 A It is about a cost figure.

9 Q I would like to direct your attention,
10 if I might, to the little addition of the little number
11 figure of this document that is approximately in the middle,
12 and direct your attention to two lines. It says, "the cost I
13 gave you for bidding was 108 each at \$318. equal \$34,344.00?

14 A Uh-huh.

15 Q Is that what that says?

16 A Yes.

17 Q And the line below that says: Royal
18 purchase order cost is 108 at \$242.45. And then it gives
19 a figure of \$26,184.60?

20 A Yes.

21 Q Now, let me ask you, do you know if
22 this \$318.00 figure was in fact the figure that Mr. Mosteller
23 gave you to bid on to use in preparing your bid?

24 A I assumed that.

25 Q Now, tell me, underneath that --

Creasey - Direct

105

1
2 MR. SPENCER: What was that?

3 MR. KAESTNER: I said does he know
4 whether the \$318.00 figure was the figure that
5 Mr. Mosteller gave him to use in preparing his
6 bid.

7
8 Q Now, tell me, do you know the second,
9 underneath, it says: Applicable portion for wardrobe labor
10 set up on something, \$8,159.40?

11 A That's what it looks like.

12 Q And down at the bottom of this, would
13 you read the last paragraph?

14 A It says, "I have attached an invoice for
15 \$8,159.40 to be payable to us in one to sixteen weeks,
16 Invoice A for \$2,159.40, Invoice B for \$6,000.00."

17 Q Now, I would like to flip, if you
18 could, to the third page of the document and ask if that is
19 the invoice which you received?

20 A Yes, sir.

21 Q And this is an invoice for \$2,159.00,
22 and it says: For selling cost on abandoned samples for the
23 Lynchburg job?

24 A Yes.

25 Q And the notation here indicates that

Creasey - Direct

106

1 they were shipped to Lynchburg Training School, does it
2 not?

3 A Yes.

4 Q I would also like for you to look at
5 the second invoice and ask you if this is the second invoice
6 that you received?

7 A Yes.

8 Q And what is this invoice for?

9 A Setting up labor for the wardrobes.

10 Q What is the amount of that?

11 A \$6,000.00 even.

12 Q And you received these from Mr.
13 Mosteller?

14 A Yes.

15 Q And were these retained in the normal
16 course of your business?

17 A I would pass them on to our Furniture
18 Department, which would keep them.

19
20 MR. KAESTNER: I would like to introduce
21 this as Commonwealth's Exhibit Number 13.

22
23 NOTE: At this point the above-referred-
24 group of invoices is marked and filed as
25 Commonwealth's Exhibit Number 13.

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107

1
2 Q Now, Mr. Creasey, do you know if those
3 invoices were ever paid, the invoices that Mr. Mosteller
4 submitted to you?

5 A No, I would not handle that.

6 Q You did not handle that?

7 A No.

8
9 MR. KAESTNER: I have no further
10 questions of this witness, Your Honor.

11
12 CROSS-EXAMINATION

13 BY MR. SPENCER:

14 Q Mr. Creasey, subsequent to submitting
15 your original bid, you were awarded the item involving the
16 36-1/2 inch wardrobes, were you not?

17 A That is correct.

18 Q And that was for 108 of them at \$330.70?

19 A Yes.

20 Q And then later there was an add-on,
21 was there not, change order?

22 A It came in later, yes.

23 Q And that was for an additional quantity
24 of the same items, but at the same unit price?

25 A Yes, sir.

1
2 MR. KAESTNER: I object to any testimony
3 regarding the change order. Mr. Brooks has testi-
4 fied that that was part of a separate transaction
5 and not part of the transaction in issue in this
6 group of indictments, so I object on the grounds of
7 materiality..

8 MR. SPENCER: Well, if Your Honor please,
9 if that is the case, why were they ever offered?

10 MR. KAESTNER: They were a necessary part
11 of the purchase orders that were submitted as part
12 of the document from the Department of Purchases &
13 Supply.

14 THE COURT: Objection sustained.

15 MR. SPENCER: If Your Honor please, I
16 might point out that one of the items that was
17 originally submitted did not have the change order
18 and was not from the State Purchasing and Supply.
19 And when I pointed that out to Mr. Kaestner, he
20 changed it, amended it.

21 THE COURT: Objection sustained.

22 MR. SPENCER: Note my exception. 0

23 I have no further questions.

24 THE COURT: All right, thank you, Mr.

25 Creasey.

WITNESS STOOD ASIDE.

THE COURT: Next witness.

MR. KAESTNER: I call Mr. Raymond
Chalkley.

RAYMOND CHALKLEY, a witness called by
the Commonwealth, first being duly sworn, testifies as
follows:

DIRECT EXAMINATION

BY MR. KAESTNER:

Q How are you, Mr. Chalkley?

A Fine.

Q Mr. Chalkley, can you tell us what your
position is?

A I am Vice-President of Litton Office
Products, Business Center Southeast.

Q And are you familiar with the transaction
involving the purchase of furniture?

THE COURT: Is that Everett-Waddey?

THE WITNESS: Formerly Everett-Waddey.

THE COURT: But it sells furniture
under Everett-Waddey?

Chalkley - Direct

110

1 THE WITNESS: Not anymore, Judge.

2 THE COURT: I thought all of them were
3 still Everett-Waddey?

4 THE WITNESS: A big corporate decision.

5 THE COURT: Oh, all right.

6
7 Q In your position, are you familiar with
8 the transaction involving Litton Office Products supplying
9 furniture to the Lynchburg Training facility, Buildings 15
10 through 20?

11 A Yes.

12 Q Now, Mr. Chalkley, I would like to show
13 you a copy of Commonwealth Exhibit Number 13 and ask if you
14 have ever seen these documents before?

15 A Yes, I have.

16 Q And do you know what these documents are?

17 A Yes.

18 Q What are they?

19 A Well, they are invoices from Mr.
20 Mosteller for services provided at Lynchburg Training School.

21 Q And what is the total of these invoices?

22 A \$8159.40.

23 Q Now, on the small slip of paper at the
24 back, it indicates that your Royal purchase order cost will
25 be \$242.45 each, or a total of \$26,184.00?

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Chalkley - Direct

111

1 A Right.

2 Q To whom is that bill payable?

3 A To InterRoyal.

4 Q Do you know if Everett Waddey/Litton

5 Industries ever paid that bill?

6 A We did.

7 Q Now, to what does this 108 each at

8 \$316 refer?

9 A I am not sure. A portion of the order,

10 I would assume.

11 Q Now, Mr. Chalkley, do you know if Mr.

12 Mosteller's bill, two bills totaling \$8,159.00 was ever paid?

13 A A check was drawn for that amount, yes.

14 Q A check was drawn in the full amount of

15 \$1,159.00?

16 A Yes.

17 Q And did Mr. Mosteller receive that

18 check?

19 A No, we stopped payment.

20 Q Why did you stop payment on that check?

21 A Because it developed that Mr. Mosteller

22 was no longer working at InterRoyal and I help up payment on

23 the check until the job was completed, and because I had

24 questions in my mind whether any abandoned samples existed.

25 Q And did Mr. Mosteller take any steps

Chalkley - Direct

112

1 after you stopped payment on that check to secure the
2 \$8,159.00?

3 A Mr. Mosteller came to see me and asked
4 me why I had done that, and I told him that for two reasons,
5 one, I had nothing to validate for the auditors what the
6 abandoned samples were, and also the fact that I felt until
7 the job was completed, since he was no longer employed at
8 InterRoyal, that we had better hold up payment on the check
9 until the job was paid for in full by the agency.

10 Q And after that conversation, didn't
11 Mr. Mosteller take any other action to procure payment from
12 you?

13 A I received a letter from Mr. Mosteller
14 basically commenting the same as he had in person, and
15 advising me that he would take legal action. And subsequently
16 we did get a letter from an attorney in Norfolk requesting
17 that we pay it or legal action would be taken.

18 Q And were further steps taken to secure
19 payment?

20 A Yes. Later we got a letter from Mr.
21 Axselle, a Richmond lawyer. Mr. Mosteller apparently had
22 retained him. I called Mr. Axselle and went to his office
23 on the Boulevard and discussed with him the facts surrounding
24 this. In the interim, I had sought information from the
25 Director of Purchasing as to whether or not there were any

Chalkley - Direct

113

1 abandoned samples in evidence. I got a letter from him
2 stating that there were none except some samples that were
3 sent to Lynchburg from Catawba Sanitorium. And Mr. Goldston
4 who was the President of the company, then paid an amount of,
5 I think, \$2700.00 to Mr. Mosteller for those abandoned
6 samples.

7 Q I would like to show you this document,
8 Mr. Chalkley, and ask if you have seen that before?

9 A Yes, I have.

10 Q What is that?

11 A This is a statement from Mr. Mosteller
12 stating that payment on account of \$6,000.00 on one item,
13 and \$8,159.40, is well overdue and will be turned over to
14 collection unless payment is received by March 31st, and it
15 is signed by Beverly A. Babson, it looks like and it says
16 my commission expires 3-26-79.

17 Q What is the total amount demanded?

18 A \$14,159.40.

19 Q And what is the last document in that
20 packet?

21 A The last document is a stub from a
22 check #45210 for furniture installation dated 6-26-78 in the
23 amount of \$\$263.93.

24 Q To whom was the check disbursed?

25 A Mr. Mosteller.

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Chalkley - Direct

114

1 Q Mr. Chalkley, is this document a business
2 record of Litton Industries?

3 A It is.

4 Q And is it kept in the normal course of
5 business?

6 A It is.

7
8 MR. KAESTNER: I would like to introduce
9 this into evidence as Commonwealth's Exhibit
10 Number 14.

11
12 NOTE: At this point the above-referred-
13 to statement with attached check stub is marked
14 and filed as Commonwealth's Exhibit Number 14.

15
16 Q Now tell me, Mr. Chalkley, at the time
17 you determined to pay this \$2,700.00, would you tell me
18 once again exactly why you determined to pay that?

19 A Well, actually I was not involved
20 in that transaction. The President of the company, by that
21 time I had discussed the entire matter with him, and he had
22 talked with Mr. Axelle, and upon receipt of the letter from
23 the Director of Purchases, understanding that abandoned sam-
24 ples in this amount were evident, they paid that amount.

25 THE COURT: Wait a minute. Now you said

Chalkley - Direct

115

1 the State said abandoned samples were there?

2 THE WITNESS: The abandoned samples
3 from Catawba Sanitarium.

4 MR. KAESTNER: Those are abandoned
5 samples at the Lynchburg Training Center.

6 THE COURT: Why would that make the
7 President of your company, because the abandoned
8 samples were left somewhere else, or do you know?

9 THE WITNESS: Well, they pertained to
10 samples at Lynchburg Training School.

11 THE COURT: And they were from InterRoyal?

12 THE WITNESS: Well, they came from
13 Catawba Sanitarium, as samples owned by Mr.
14 Mosteller or by InterRoyal, so there were samples.

15 THE COURT: Where is the sanitarium?

16 MR. SPENCER: North Carolina, Your
17 Honor.

18 THE COURT: In other words, they paid
19 for abandoned samples?

20 THE WITNESS: They came in from Catawba,
21 not from InterRoyal's factory.

22
23 Q In addition to that check, did you pay
24 Mr. Mosteller any other sums for abandoned samples and
25 installation?

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Chalkley - Direct

116

1 A We had paid him previously for some, but
2 we withheld payment on the amount, I think, of about seven
3 thousand and some odd dollars.

4 MR. KAESTNER: I have no further questions
5 of this witness.

6
7
8 CROSS-EXAMINATION.

9 BY MR. SPENCER:

10 Q You say you withheld payment? And by
11 the way, Mr. Chalkley, I too am interested in how you are,
12 and I am glad you are fine, and I am going to be nice to you.

13
14 THE COURT: I thought you were looking
15 for this opportunity to cross-examine him.

16 MR. SPENCER: It is just that the
17 Commonwealth always starts off by inquiring about
18 the witness' health, and I never get a chance.

19
20 Q You say you withheld payment to this job
21 in an amount of about \$7,000.00?

22 A Mr. Spencer, I believe what we withheld
23 was equal to an amount that we had paid for abandoned samples
24 that we had no proof existed.

25 Q Well, that was in a prior job?

1 A Yes.

2 Q But I am talking about this job.

3 A Right.

4 Q You withheld payment of about \$7,000.00?

5 A Right.

6 Q But then you subsequently were sued for
7 it, were you not?

8 A No, I don't think -- we weren't sued.
9 I don't think any action was taken in court.

10 Q Wasn't there a substantial amount of
11 correspondence between your company and Mr. Axselle?

12 A As I said, Mr. Spencer, I did not handle
13 this transaction, Mr. Goldston did. And my recollection, in
14 our records there is only one letter from Mr. Axselle, which
15 we acted promptly on and paid.

16 Q Well, I believe the Commonwealth has in
17 its possession some three, four or five letters which I
18 assumed had come from you.

19

20 MR. SPENCER: Would you stipulate that
21 what I said was correct?

22 MR. KAESTNER: That there were several
23 letters.

24

25 Q And as a matter of fact, didn't Litton

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Chalkley - Cross

118

1 Industries ultimately settle that dispute by paying \$4,000.00
2 to Mr. Mosteller?

3 A I'm not sure. My recollection is that
4 we paid twenty-seven hundred and some dollars, Mr. Spencer.

5 Q But you are not sure?

6 A No.

7 Q Mr. Chalkley, do you keep the records
8 for your company?

9 A They are in my department, Furniture.

10 Q This check stub that you testified
11 about --

12 A That would not be in my department, no,
13 sir.

14 Q Not in your department? Have you ever
15 seen the check?

16 A No.

17 Q Then how do you know it was payable to
18 Mr. Mosteller?

19 A I was told by the President.

20 Q That is something that someone else told
21 you?

22 A Yes, sir.

23
24 MR. SPENCER: I object to that, Your
25 Honor, and ask that it be stricken from the record.

Chalkley - Cross

119

1 his direct testimony.

2 THE COURT: Get the President up here,
3 Mr. Kaestner. It is perfectly all right with me.
4 Where is the President?

5 THE WITNESS: I am not sure that he is
6 in town today, Your Honor.

7 THE COURT: Well, issue a subpoena for
8 him forthwith. Tell him to be up here at 3:00
9 o'clock. If he can't make it, we will send after
10 him.

11 MR. SPENCER: I gather, Your Honor, from
12 this conversation, that my objection is sustained?

13 THE COURT: Well, I think, Mr. Chalkley,
14 if he has never seen the check, we will have to
15 get the President here, whatever his name is.

16 THE WITNESS: Gerald Goldston.

17 MR. SPENCER: I have no further questions
18 of Mr. Chalkley, Your Honor.

19 THE COURT: I might say, Mr. Chalkley is
20 the only one that has found some business principle.
21 When he got an item without any itemization, he
22 said, "I am not paying it". Congratulations.

23 THE WITNESS: Thank you.

24 MR. KAESTNER: No further questions.
25

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Chalkley - Cross

120

WITNESS STOOD ASIDE.

MR. KAESTNER: The Commonwealth would like to call Barbara Bromley.

MR. SPENCER: I have an objection to this witness' testimony.

THE COURT: All right, let's get over the objection.

MR. SPENCER: Barbara Bromley has resumed her maiden name, as I understand it, and she was at and during the entire time of this transaction the wife of David Mosteller. And under the applicable section, I believe 8.01-98, I do not believe that she is competent to testify.

THE COURT: If it is something that she observed, if you have read Jenkins vs. Commonwealth and the subsequent cases, that she can testify that he came to her as a result of the marital relationship, then she would be competent. I am very familiar with that rule. Jenkins vs. Commonwealth, the Supreme Court didn't understand that case, but anyway, I am familiar with it.

MR. KAESTNER: The evidence we intend to introduce comes from her position at Trend

1 Contract Interiors, one of the companies bidding
2 on the Lynchburg Buildings 15 through 20 job. And
3 we believe that none of the information or none
4 of the testimony of Mr. Bromley will be covered
5 by the husband-wife privilege. We also believe
6 that the objection is premature, and perhaps
7 should be dealt with on a question by question
8 basis.

9 THE COURT: They are divorced at this
10 time, finally divorced?

11 MR. SPENCER: They are now, yes. I
12 believe they were divorced in March of '78.

13 THE COURT: The testimony that will
14 come in will come through her position with Trend,
15 Incorporated, not as his wife?

16 MR. KAESTNER: Yes, sir.

17 THE COURT: The Court will overrule the
18 objection.

19 MR. SPENCER: Note my exception, and I
20 will renew my objection at the time of her
21 testimony.

22
23 NOTE: At this point a luncheon recess
24 is had, after which the hearing is resumed, viz:
25

1 MR. KAESTNER: If it please the Court,
2 I would like to call the representative of Everett-
3 Waddey who was subpoenaed to be here at 2:15.
4

5
6 WAYNE BUTLER, a witness called by the
7 Commonwealth, first being duly sworn, testifies as follows:

8 DIRECT EXAMINATION

9 BY MR. KAESTNER:

10 Q Mr. Butler, would you tell the Court
11 your full name, please?

12 A Wayne Samuel Butler.

13 Q And what is your present business or
14 occupation?

15 A I am Accounting Manager of Litton Office
16 Products Center.

17 Q In that capacity, did you have occasion
18 to deal with the Accounts Payable Division?

19 A Yes.

20 Q And did you hold that position in June
21 of 1978?

22 A Yes.

23 Q Mr. Butler, I would like to show you a
24 copy of this document and ask you if you have ever seen that
25 before?

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Butler - Direct

123

1 A Yes, sir.

2 Q What is that document?

3 A It is our copy of a check that we have
4 written.

5 Q When you say it is our copy of a check,
6 specifically what do you mean?

7 A Our checks are four parts, and when you
8 type on the original of the check itself, it goes through.
9 We keep one copy and mail the check.

10 Q To whom is that check written?

11 A Ralph or Bill Axselle, attorney for Dave
12 Mosteller.

13 Q Do you know the purpose for which this
14 check was issued?

15 A Not exactly, no. It says furniture
16 installation. I have a check request that would have said
17 furniture installation.

18 Q At one time had you seen the original of
19 this check?

20 A Yes.

21 Q And is this check and this a document
22 prepared in the normal course of business?

23 A Yes.

24 Q And is it retained in the normal course
25 of business?

Butler - Direct

124

1 A Yes.

2
3 MR. KAESTNER: I would like to offer this
4 into evidence as Commonwealth's Exhibit Number 15.

5
6 NOTE: At this point the above-referred-to
7 check is marked and filed as Commonwealth's
8 Exhibit Number 15.

9
10 MR. KAESTNER: No further questions.

11
12 CROSS-EXAMINATION

13 BY MR. SPENCER:

14 Q Mr. Butler, this is the Litton Office
15 copy of the check and its stub?

16 A Yes.

17 Q And where is the check?

18
19 THE COURT: We can probably get Mr.
20 Axselle. He is right over here at the General
21 Assembly. We will ask him to come over if you want
22 to, Mr. Spencer.

23 MR. SPENCER: I don't want to, Judge.
24 This is the Commonwealth's case. I had just as
25 soon not see him.

Butler - Cross

125

1 MR. SPENCER: Would you read back my
2 last question?

3
4 NOTE: At this point the reporter reads
5 back the previous question, viz:

6 Question: And where is the check?

7
8 A The canceled check is in New York.

9 Q Do you prepare all of the checks?

10 A Yes, sir.

11 Q That go out of Litton here in Richmond?

12 A Yes.

13 Q Have you repaid back to the Commonwealth
14 of Virginia for any portion of the money you all received
15 on the Lynchburg job?

16 A I really don't remember. I don't know.

17 Q You don't know?

18 A No.

19 Q So you don't know, then, if Litton has
20 repaid the Commonwealth any portion of that money?

21 A I assume they have.

22 Q You assume that, but you don't know?

23 A No.

24
25 MR. SPENCER: That's all I have.

Butler - Cross

126

MR. KAESTNER: No further questions, Your

Honor.

THE COURT: You may be excused.

WITNESS STOOD ASIDE.

MR. KAESTNER: The Commonwealth calls
Barbara Bromley.

BARBARA BROMLEY, a witness called by the
Commonwealth, first being duly sworn, testifies as follows:

DIRECT EXAMINATION

BY MR. KAESTNER:

Q Mrs. Bromley, both Mr. Spencer and I
agree that you look fine.

For the record, would you give us your
full name?

A Barbara Anne Bromley.

Q And what is your present position?

A President of Trend Contract Furnishings.

Q Did you hold that position in August
of 1976?

A Yes, I did.

Bromley - Direct

127

1 Q Mrs. Bromley, are you familiar with the
2 sale of furniture by Trend Contract, Trend Furnishings to the
3 Commonwealth of Virginia for the Lynchburg Psychiatric
4 building, Buildings 15 through 20?

5 A Yes, I am.

6 Q Tell me, Mrs. Bromley, were you ever
7 married to the defendant, Mr. Mosteller?

8 A Yes, I was.

9 Q And did you separate from Mr. Mosteller
10 at any time?

11 A Yes, I did.

12 Q And when did you separate from him?

13 A November of '76.

14 Q And from November of 1976 on, have you
15 lived apart from Mr. Mosteller?

16 A Yes, I have.

17 Q During any period since November of 1976,
18 have you been living with Mr. Mosteller?

19 A No, I have not.

20 Q Tell me, was Mr. Mosteller involved in
21 any way with your company, Trend?

22 A No, he is not.

23
24 MR. SPENCER: I can't hear the witness,
25 Your Honor.

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Bromley - Direct

128

1 A No, no, he is not.

2 Q So Trend is entirely your company?

3 A That is correct.

4 Q Now, I would like to show you a copy of
5 documents which have been previously marked as Commonwealth's
6 Exhibit 19 and ask if you have ever seen this document before?

7 A Yes, I have.

8 Q What is this document?

9 A This is a work sheet that I used to come
10 up with my bid for Lynchburg Training School.

11 Q Now, I would like for you to follow with
12 me, if you would, and in the left-hand column there are a
13 number of different products. Do you see those?

14 A Yes.

15 Q And next to those you see quantity?

16 A Yes, sir.

17 Q And next to those, there is a column
18 marked cost?

19 A Correct, uh-huh.

20 Q What does that refer to?

21 A That is the cost that was quoted to
22 Trend by Dave Mosteller.

23 Q So these prices, then, were provided by
24 David Mosteller?

25 A That is correct.

Bromley - Direct

129

1 Q In the next column over is a column
2 marked Bid. What does that column refer to?

3 A That is my price or my mark-up that I
4 quoted on the job.

5 Q Let's refer back to the column marked
6 cost. Do you know what is included within the cost of each
7 item of furniture? In other words, you clearly have the
8 cost of the furniture but are there any other charges included
9 in that cost that Mr. Mosteller quoted to you?

10 A I was aware at that time of no additional
11 cost.

12 Q So at the time that these were given to
13 you, you assumed these to be simply the cost of the furniture?

14 A That is correct.

15 Q Did subsequent events bear out whether
16 or not this was the cost of the furniture?

17 A Oh, yes.

18 Q And what did they indicate?

19 A Okay, I was invoiced for installation
20 and abandoned samples.

21 Q And did you also receive an invoice from
22 the InterRoyal Corporation?

23 A Yes, I did.

24 Q And did the invoice from the InterRoyal
25 Corporation match the cost figures quoted to you by Mr.

Bromley - Direct

130

1 Mosteller?

2 A No, they did not.

3 Q Were they higher or lower?

4 A Lower.

5 Q Were they substantially lower?

6 A Much lower.

7 Q They were lower?

8 A Uh-huh.

9 Q Is that a document which you normally
10 prepare in the course of your business?

11 A Yes.

12 Q And based upon the prices that Mr.
13 Mosteller provided to you, did Trend then compute its bid
14 and submit it to the Commonwealth?

15 A That is correct.

16
17 MR. KAESTNER: I would like this intro-
18 duced as Commonwealth's Exhibit Number 18.

19 THE COURT: That will be 16.

20
21 NOTE: At this point the above-referred-
22 to work sheet is marked and filed as Commonwealth's
23 Exhibit Number 16.

24
25 Q Now, Mrs. Bromley, do you know who was

Bromley - Direct

131

1 the representative, the sales representative in Virginia in
2 1976 for the InterRoyal Corporation?

3 A Yes, David Mosteller.

4 Q Do you know if there was any other
5 sales representative?

6 A Yes, there was.

7 Q Do you know who that was?

8 A Bill Graves.

9 Q And was Mr. Graves' territory the same
10 as Mr. Mosteller?

11 A He had Virginia, but not institutional
12 furniture, no. He had office products.

13 Q So Mr. Mosteller was the only repre-
14 sentative for the InterRoyal Corporation for institutional
15 furniture?

16 A That is correct,

17 Q Do you know if the furniture delivered
18 to the Lynchburg Psychiatric building would be office
19 furniture or institutional furniture?

20 A Definitely institutional furniture.

21 Q Did there come a time when you received
22 invoices from Mr. Mosteller?

23 A Yes.

24 Q I would like to show you a copy of this
25 document marked for identification as Commonwealth's Exhibit

Bromley - Direct

132

1 20 and ask you if you have ever seen this document before?

2 A Yes, I have.

3 Q And what is that document?

4 A This is an invoice from Royal Installa-
5 tion to Trend Contract Furnishings for \$41,000.00.

6 Q And what is that \$41,000.00 to be paid
7 for?

8 A Installation of labor for wardrobe set-
9 up and abandoned sales.

10 Q Do you know who Royal Installations is?

11 A Yes.

12 Q Who is that?

13 A It is a company that David had.

14 Q So this is Mr. Mosteller's company?

15 A Yes.

16 Q And the Mr. Mosteller you are referring
17 to is the defendant, Mr. Mosteller?

18 A That is correct.

19 Q And did you retain this invoice in your
20 records?

21 A Yes.

22 Q And was it kept as a normal part of your
23 business?

24 A It was. Copies of it were turned over,
25 but yes, it remained in my records.

Bromley - Direct

133

1 MR. KAESTNER: I would like this intro-
2 duced as Commonwealth's Exhibit Number 17.

3
4 NOTE: At this point the above-referred-
5 to invoice is marked and filed as Commonwealth's
6 Exhibit Number 17.

7
8 Q And did there come a time when you
9 received a subsequent invoice from Mr. Mosteller?

10 A Yes.

11 Q Let me show you a copy of this document,
12 which is marked for purposes of identification as Commonwealth
13 Document Number 21, and ask if you have ever seen it before?

14 A Yes, I have.

15 Q What is that document?

16 A It is a breakdown of the abandoned
17 samples.

18 Q And why did you receive that document?

19 A I received this because I requested, I
20 wanted to know what part of the \$41,000.00 was abandoned
21 samples and what part was installation.

22 Q And do you know who provided this to you?

23 A Yes, Dave Mosteller.

24 Q And do you recognize Mr. Mosteller's
25 writing?

Bromley - Direct

134

1 A Yes, I do.

2 Q Is this Mr. Mosteller's writing?

3 A Yes, it is.

4 Q And was this received and maintained by
5 you in the normal course of your business?

6 A Yes, it was.

7

8 MR. KAESTNER: I would like this intro-
9 duced as Commonwealth's Exhibit Number 18.

10

11 NOTE: At this point the above-referred-
12 to invoice is marked and filed as Commonwealth's
13 Exhibit Number 18.

14

15 Q Mrs. Bromley, did there come a time when
16 you received subsequent invoices from Mr. Mosteller?

17 A Yes.

18 Q I would like to show you a copy of this
19 document, which for purposes of identification has been
20 marked as Commonwealth's Exhibit Number 22, and ask if you
21 received that?

22 A Yes, I did.

23 Q And what is that an invoice for?

24 A An overdue account.

25 Q And in what amount is that invoice?----

Bromley - Direct

135

1 A \$16,000.00.

2 Q Now, that \$16,000.00, do you know
3 whether that is \$16,000.00 in addition to the \$41,000.00,
4 or is that \$16,000.00 part of the \$41,000.00?

5 A That \$16,000.00 is part of the \$41,000.00.

6 Q Did there come a time when you paid Mr.
7 Mosteller any money under the first invoice which I showed to
8 you for \$41,000.00?

9 A Yes.

10 Q And how much did you pay Mr. Mosteller?

11 A \$25,000.00.

12 Q Let me just stop for a moment. This was
13 maintained in your business records?

14 A Yes, it was.

15 MR. KAESTNER: I would like this marked
16 as Commonwealth's Exhibit Number 19.

17
18 NOTE: At this point the above-referred-
19 to invoice is marked and filed as Commonwealth's
20 Exhibit Number 19.

21
22 Q You paid Mr. Mosteller \$25,000.00?

23 A That is correct.

24 Q And subsequent to that payment to Mr.
25 Mosteller of \$25,000.00, you were billed again by Mr.

Bromley - Direct

136

1 Mosteller for \$16,000.00?

2 A That is correct.

3 Q Now tell me, did Mr. Mosteller take any
4 steps to collect that additional \$16,000.00?

5 A Yes, he did.

6 Q What did he do?

7 A He, in May and June, placed several
8 suits against me personally and against the company for
9 collection of that \$16,000.00.

10 Q And did you have to pay that \$16,000.00?

11 A No, I did not.

12
13 THE COURT: You said you didn't have to
14 pay it?

15 THE WITNESS: No, I did not.

16
17 Q Do you recall whether you paid the
18 InterRoyal Corporation for the furniture which it provided
19 under the purchase order issued to Trend Contracts?

20 A Yes, I did.

21 Q And you are quite certain that the amount
22 you paid the InterRoyal Corporation was lower than the amount
23 that Mr. Mosteller quoted to you?

24 A Oh, yes.

25 Q Now, can you describe to me the

Bromley - Direct

137

1 circumstances surrounding your payment to Mr. Mosteller of
2 the \$25,000.00?

3 A Yes, I paid under duress.

4 Q And what do you mean by that, ma'am?

5 A I received a phone call from David in
6 mid-April telling me that he was aware that I had received
7 partial payment from the State, and that he wanted his entire
8 sum, and, you know, I had refused and he threatened me with--
9 he threatened me. He told me that if I didn't deliver the
10 money by 12:00 o'clock the next day I wouldn't be around to
11 deliver anything.

12 Q And at 12:00 o'clock the next day, did
13 you deliver the money to Mr. Mosteller?

14 A Yes. He came in the office and I wrote
15 him out the check.

16 Q Now, tell me, ma'am, have you ever seen
17 a copy of this document?

18
19 MR. KAESTNER: This document has been
20 previously marked for identification as Common-
21 wealth's Document Number 23.

22
23 A Yes, I have.

24 Q And what is that document?

25 A It is Dave's work sheet and analysis

Bromley - Direct

138

1 on the Lynchburg job.

2 Q And how did you come upon that document?

3 A I took it from his file.

4 Q Could you tell me the circumstances
5 surrounding your taking it from his files?

6 Yes. I had received a phone call from
7 him telling me that he was --

8 MR. SPENCER: I'm sorry. From who?
9

10
11 A (Continuing) From David, telling me
12 he was no longer employed with InterRoyal. I didn't know
13 under what circumstances, but I wanted to get to the bottom
14 of it, and know exactly what had transpired.

15 David, at that time, had a desk, he
16 still maintained a desk in my office and would come in per-
17 haps once a week. He said he was in the process of moving out.
18 And I went in his file and I found his analysis sheets.

19 Q And do you know what this analysis sheet
20 refers to?

21 A Yes, I do.

22 Q What did they refer to?

23 A It refers to the cost that was quoted
24 to him by InterRoyal and the various costs that he was
25 charging the various dealers.

Bromley - Direct

139

1 Q Now I would like you to review the docu-
2 ment with me, if you could. I would like you to look at the
3 first column on the left-hand side where certain products
4 are described. And the first item there is what?

5 A Beds.

6 Q And how many beds?

7 A 640.

8 Q 640 beds?

9 A That is correct.

10 Q And what is the second item?

11 A The 42-inch wardrobes.

12 Q And how many of them?

13 A 196.

14 Q And what is the third?

15 A The 24-inch wardrobes.

16 Q How many of them?

17 A 336.

18 Q And what is the fourth?

19 A 36-inch wardrobes.

20 Q How many of them?

21 A 108.

22 Q And what is the fifth?

23 A Chests.

24 Q How many of them?

25 A 336.

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Bromley - Direct

140

1 Q And next to each of those, on the next
2 column on the left, what do the notations refer to?

3 A The various dealers.

4 Q And the beds were provided through?

5 A General Medical.

6 Q And the wardrobes, the 42-inch ward-
7 robes?

8 A Trend.

9 Q And the 24-inch wardrobes?

10 A Trend.

11 Q And the 36-inch wardrobes?

12 A Waddey.

13 Q And the chests?

14 A Ginns.

15 Q Now the next column, what does that
16 refer to?

17 A Dealer pre-bid.

18 Q And there are two figures in that
19 column?

20 A That is correct.

21 Q On the beds, what is the dealer pre-bid?

22 A \$85.00.

23 Q And on the wardrobes, the dealer
24 pre-bid?

25 A \$335.00.

Bromley - Direct

141

1 Q And on the 24-inch wardrobes, pre-bid?

2 A \$250.00.

3 Q And on the 36-inch?

4 A \$318.00.

5 Q And on the chests?

6 A \$135.00.

7 Q Now, I would like you to refer over to

8 the next column and what does that refer to?

9 A Royal cost.

10 Q And what is the figure for the Royal cost
11 of beds?

12 A \$79.00.

13 Q And the figure for the Royal cost of
14 the 42-inch wardrobes?

15 A \$260.33.

16 Q And the figure for the Royal cost of
17 the 24-inch wardrobes?

18 A \$177.17.

19 Q And the figure of the Royal cost for the
20 36-inch wardrobes?

21 A \$242.45.

22 Q And the figure of the Royal cost for
23 chest of drawers?

24 A \$109.49.

25 Q Which of these costs were quoted to you

Bromley - Direct

142

1 by Mr. Mosteller?

2 A The dealer pre-bid cost.

3 Q If I may refer back to an earlier
4 exhibit, I would like to refer you back to Commonwealth's
5 Exhibit Number 16 and ask you to compare the cost which you
6 received to the cost listed in the dealer pre-bid cost.
7 Are the costs you received the same?

8 A No.

9 Q Are any of the costs that you received
10 the same?

11 A Yes.

12 Q Which costs are the same?

13 A On both the 42-inch wardrobe and the
14 24-inch wardrobes.

15 Q Do you recognize the handwriting on this
16 document?

17 A Yes, I do.

18 Q Whose handwriting is this?

19 A Dave Mosteller's.

20 Q This is Mr. Mosteller's handwriting?

21 A Yes, that is correct.

22 Q After you secured this document from
23 Mr. Mosteller's files, what did you do with it?

24 A I showed it to the InterRoyal people,
25 and then that is where it went, and then to my attorney.

Bromley - Direct

143

1 Q And this is an accurate copy of the docu-
2 ment which you took from his files?

3 A Yes, sir, it is.

4
5 MR. KAESTNER: I move that this be
6 introduced into evidence.

7 MR. SPENCER: I object to that, Your
8 Honor.

9 THE COURT: Why do you object to it, Mr.
10 Spencer?

11 MR. SPENCER: Your Honor, that is a very
12 bad xerox copy of something, and she had the
13 original, and I object on the grounds that that
14 copy ought not to be admitted. We don't know
15 whether that is an accurate copy, and without the
16 original to compare it, I don't think she would
17 know.

18 MR. KAESTNER: Mrs. Bromley has testi-
19 fied that this is in fact an accurate copy, and
20 that she delivered -- may I ask her?

21 Q To whom did you deliver the original of
22 this document?

23 A To this Court.

24 Q And was that document returned?

25 A No, it was not.

Bromley - Direct

144

1 Q And what did the original of this docu-
2 ment look like?

3 A It was white paper with blue lines,
4 and there was blue ink, and there was some red.

5 Q And to the best of your knowledge, is
6 the copy which you have now an accurate reflection of that
7 copy, of the original of the document?

8 A Yes, it is.

9 Q Do you notice any material changes in
10 any of the four columns that I referred you to?

11 A No, I don't.

12
13 MR. KAESTNER: Your Honor, I submit
14 that the original of this document is no longer
15 in my custody or in the custody of the Grand Jury,
16 and in fact was not provided to us. And we have
17 the testimony of the witness to the effect that
18 this is an accurate copy of the original of that
19 document. I move that this be admitted into
20 evidence.

21 MR. SPENCER: If Your Honor please,
22 from the same witness you have the testimony that
23 it was delivered over to the custody of the
24 authorities and I submit that we are entitled to
25 see the original. She was asked to the best of

Bromley - Direct

145

1 her knowledge is this an accurate copy. She said
2 it was. And she was asked so far as she observed
3 was there any difference, and she said no. And
4 that, Your Honor, is not the degree of reliability
5 that is called for in this situation, and I renew
6 my objection.

7 THE COURT: Well, it doesn't make any
8 difference. I will exclude it in the record. D
9 The figures; that's all I wanted off of it.

10 MR. SPENCER: Well, if Your Honor
11 please --

12 THE COURT: I will get the Court Reporter
13 to write that up. When I decide the case, I will
14 get the Court Reporter to write that portion up.

15 MR. SPENCER: And the testimony is
16 excluded?

17 THE COURT: No, sir, it is not. She
18 only used that to refresh her memory.

19 MR. SPENCER: Note my exception. D

20 THE COURT: Yes, sir, you may have your
21 exception.

22
23 BY MR. KAESTNER: (Continuing)

24 Q Why didn't you pay the \$41,000.00?

25 A I didn't feel it was justified.

Bromley - Direct

146

1 Q Why not?

2 A I felt --

3 MR. SPENCER: If Your Honor please, this
4 has got to be speculative. This has got to be
5 the witness' opinion he is calling for.

6 THE COURT: Well, you can cross-examine
7 her as to it. The objection is overruled.

8 MR. SPENCER: Exception. D

9

10 Q Why did you not feel it was justified?

11 A Because installation was not required.

12 Q And you were certain that you paid the
13 InterRoyal Corporation for the furniture which was delivered?

14 A Yes.

15

16 MR. KAESTNER: I have no further ques-
17 tions of this witness.

18 THE COURT: All right, Mr. Spencer.

19

20

21

CROSS-EXAMINATION

22 BY MR. SPENCER:

23

24

25

Q Did you pay the entire amount that you
had been advised you were to pay them by Mr. Mosteller, or
did you pay them more?

Bromley - Cross

147

1 A I received separate invoices from
2 InterRoyal Corporation, and the price that was quoted to me
3 by Mr. Mosteller, it did not add up to the price he quoted
4 me until InterRoyal submitted their invoice and he submitted
5 his.

6 Q The invoice you received from InterRoyal
7 plus the \$41,000.00 invoice you received from Mr. Mosteller
8 added up to the correct amount did they not?

9 A No, it did not.

10 Q It did not?

11 A No, it did not. Mr. Mosteller was
12 charging me an additional \$2,000.00 over and above what he
13 quoted me.

14 Q So that left \$39,000.00, then?

15 A That's correct.

16 Q So \$39,000.00 of it did add up?

17 A Yes, it did.

18 Q Now, you say you paid Mr. Mosteller
19 \$25,000.00?

20 A That is right.

21 Q When?

22 A In April of '77.

23 Q Was that not in connection with the
24 divorce settlement?

25 A It was not.

Bromley - Cross

148

1 Q Do you have the check?

2 A Do I have the check?

3 Q Yes.

4 A The Court should have the check.

5 Q The Court? You mean Mr. Kaestner?

6 A I turned over --

7
8 THE COURT: I didn't know he was the
9 Court.

10
11 A Those records were subpoenaed and
12 those checks were not returned to me.

13 Q To whom did you deliver them?

14 A I delivered them here to this Court.

15 Q To whom?

16 A My attorney did, upstairs on the third
17 floor.

18 Q Was Mr. Kaestner there?

19 A No.

20 Q Was Mr. Barry there?

21 A I don't know who was present. My
22 attorney, we came together and he went in, met with someone
23 and turned the entire box of records over.

24 Q And the check was a part of those
25 records?

Bromley - Cross

149

1 A There were three checks, uh-huh,
2 totaling \$25,000.00.

3 Q And they are no longer in your posses-
4 sion? You don't know where they are now?

5 A No, they were not returned.

6 Q Now, your testimony concerning this
7 work sheet, now you say you received a call from David, he
8 told you he was no longer with InterRoyal, and he didn't tell
9 you why?

10 A No, he didn't.

11 Q And he told you that, or you then went
12 into his desk, which was in your office, and took it from his
13 file?

14 A That is correct.

15 Q All right, now this must it have been
16 sometime in February?

17 A It was.

18 Q Of '77?

19 A Yes, it was.

20 Q Now you were asked the question on
21 direct, was David Mosteller involved with Trend Contract
22 Furnishings and you responded, "No, he is not", the question
23 having been in the past tense, and your answer having been
24 in the present. Was David Mosteller ever involved with
25 Trend Contract Furnishings?

Bromley - Cross

150

1 A No.

2 Q Wasn't Trend Contract Furnishings
3 originally a proprietary company as opposed to being a
4 corporation?

5 A That is correct, a sole proprietorship.

6 Q And Dave did not work with you in setting
7 that up?

8 A That company has been in my name. Dave
9 had no access to any of the accounts. No, that has always
10 been a sole proprietorship.

11 Q He was on the checking account, wasn't
12 he, as a signature?

13 A He was not on the checking account, no.

14 Q You are testifying to that under oath?

15 A Yes, I am. I don't recall him ever
16 being on the checking account.

17 Q Now, you are saying you don't recall.
18 A minute ago you said he was not. Which is it? Are you
19 sure or you just don't recall?

20 A He may at one point have put his name
21 on it. He tried to take money out of my account. How do
22 I know? To my knowledge, no, David Mosteller was never on
23 a signature card on any of my accounts.

24 Q The way you know is, you say it was
25 a sole proprietorship, and I presume that was you?

Bromley - Cross

151

1 A That's correct.

2 Q Mrs. Bromley, how long were you married
3 to Mr. Mosteller?

4 A Fifteen years.

5 Q And what did you do before you married
6 him, by way of employment?

7 A I was a student.

8 Q And after you married him, were you
9 occupied? Did you have an occupation other than housework?

10 A Yes, I worked for an engineering firm.

11
12 MR. KAESTNER: Objection. I don't see
13 the relevancy of this.

14 THE COURT: Show me where it is rele-
15 vant, where you are going.

16
17 Q Where did you learn the furniture
18 business?

19 A Where did I learn the furniture business?
20 Primarily through the connections of my husband.

21 Q And where did you learn what was
22 necessary for you to set up Trend Contract Furnishings and
23 operate it?

24 A I have some knowledge of my own.
25

1 MR. KAESTNER: Again, Your Honor, I
2 object. What she learned and where she learned
3 it doesn't seem to be material or relevant to the
4 issue of whether or not David Mosteller quoted
5 her prices which included samples and installation.

6 THE COURT: Well, I really don't see
7 any relevancy to where she learned it. I assume
8 if her husband was in it, that they learned it
9 together. They were married for fifteen years.

10 MR. SPENCER: That is my assumption,
11 Your Honor, and I want to get my assumption into
12 the record at this point.

13 THE COURT: What?

14 MR. SPENCER: I say I wanted to get my
15 assumption in the record is the point, so that it
16 is more than just my assumption.

17 THE COURT: It might be better to argue
18 it, Mr. Spencer, than it is to put it in the
19 record.

20 MR. SPENCER: Well, does the Court
21 leave me a choice? Do I have the choice as well
22 to put it in the testimony or argue it, or is
23 the Court telling me --

24 THE COURT: I don't think it is rele-
25 vant where she learned her occupation. Her

Bromley - Cross

153

1 testimony is clear at this point.

2 MR. SPENCER: Then I gather, Your Honor,
3 that you are sustaining the objection?

4 THE COURT: That's right.

5 MR. SPENCER: Note my exception. 0

6 Q Have you given any money back to the
7 Commonwealth of Virginia?

8 A Not at this moment I have not.

9 Q Have you been sued for any?

10 A Yes, I have, and I have made an agree-
11 ment with the State, and yes, I am paying the State back.

12 Q And when were you sued?

13 A I was sued in --

14
15 MR. KAESTNER: Your Honor, the court
16 records in the court will show when Mrs. Bromley
17 was sued, and I will stipulate, if counsel wishes,
18 that Mrs. Bromley, along with Mr. Mosteller and
19 several other people, many of the witnesses who
20 appeared here today with their companies, Litton
21 Industries, General Medical, Ginn-Southern and
22 Mrs. Adylett were sued in connection with all
23 the sales of institutional furniture, and that
24 the Commonwealth has entered into settlement
25 agreement with Mrs. Bromley, with General

Bromley - Cross

154

1 Medical, with Everett-Waddey and with Ginn-Southern.

2 THE COURT: All right, that ought to
3 suffice.

4 MR. SPENCER: Well, if Your Honor
5 please, I still think we are entitled to know
6 when. If he is willing to stipulate all of that,
7 then I would ask that we get a certified copy from
8 the clerk of the suit papers and a copy of the
9 agreement.

10 THE COURT: You should have gotten that
11 Monday, or not Monday, but Tuesday, if it was
12 relevant to your case. You knew the testimony
13 then. You should have been prepared. Maybe at
14 the next recess, Mr. Spencer, you can go downstairs
15 and get one. You are not supposed to prepare a
16 case the day of the trial.

17 MR. SPENCER: Your Honor please, I am
18 sure the Court is correct, but I learned this last
19 night a few minutes before 6:00 o'clock.

20 THE COURT: Well, our Clerk's office
21 has been open since 9:00 o'clock. Our court
22 started at approximately quarter to ten.

23 MR. SPENCER: (Addressing Mr. Kaestner)
24 The expression of amazement, do you have a
25 question?

Bromley - Cross

155

1 THE COURT: No, sir, the Court will
2 handle this matter. Lawyers do not discuss mat-
3 ters without permission of the Court. Let
4 us move along with the trial.

5 MR. SPENCER: Your Honor please, of
6 course as the record shows, my objection to her
7 testimony in its entirety stands.

8 THE COURT: I fully understand that.

9 MR. SPENCER: We have no other questions.

10
11
12 REDIRECT EXAMINATION

13 BY MR. KAESTNER:

14 Q Mrs. Bromley, where did you get the
15 \$25,000.00 to pay him?

16 A From the State.

17 Q Did you bill the State?

18 A Yes, I did.

19 Q Did you get the money back from the
20 State and then send it to him?

21 A Yes.

22 Q In other words, the State had already
23 sent you your money?

24 A Yes.

25 Q How much did they send you?

Bromley - Redirect

156

1 A At that time they sent me about
2 \$120,000.00.

3 Q Which would include the \$41,000.00?

4 A Yes, you know. I received a partial
5 payment at the end of March, the first of April, and the rest
6 of the payment in May.

7 Q And of that, you remitted \$25,000.00
8 to him, based on this invoice for \$41,000.00?

9 A That is correct.

10 MR. KAESTNER: No further questions.

11
12
13 RECROSS-EXAMINATION

14 BY MR. SPENCER:

15 Q Mrs. Bromley, what was the total amount
16 you received from the State?

17 A I believe it was somewhere around the
18 range of \$157,000.00 on that particular order.

19 Q With the change orders?

20 A No.

21 Q How much total?

22
23 MR. KAESTNER: Again, I object. The
24 change orders are a part of separate transactions
25 and not material.

Bromley - Recross

157

1 THE COURT: Just ask her how much she
2 received from the State, that's all.

3 Answer that, how much did you receive
4 from the State on the entire job?

5 THE WITNESS: The change orders, too?

6 THE COURT: With everything.

7 THE WITNESS: It came to about three
8 hundred eighty some thousand, I believe. You know,
9 I don't have the accurate figures in front of me.

10
11 Q And the three hundred and eighty some
12 thousand dollars was for furniture based on the same bid as
13 the original bid you had put in?

14 A That is correct.

15
16 THE COURT: All right, any further
17 questions, gentlemen?

18 All right, next witness. You may step
19 down.

20
21 - - - - -
22 WITNESS STOOD ASIDE.

23
24
25 MR. KAESTNER: Your Honor, the next

1 witness that the Commonwealth had planned to call
2 was Raymond Kyber of Ginn-Southern. Mr. Kyber was
3 under subpoena to appear here, unfortunately Mr.
4 Kyber had a wife who was in the hospital and he had
5 to return to Florida. Counsel for the defense and
6 the Commonwealth have entered into an agreement
7 pursuant to which certain documents --

8 THE COURT: This is Ginn-Southern?

9 MR. KAESTNER: -- of Ginn-Southern will
10 be introduced.

11 MR. SPENCER: We are trying to expedite
12 the matter and be somewhat cooperative.

13 THE COURT: All right, thank you, Mr.
14 Spencer. The Court appreciates it.

15 MR. KAESTNER: The first stipulation will
16 be a copy of a check issued by Ginn-Southern to
17 David Mosteller in the amount of \$1,517.36.

18 MR. SPENCER: 71.

19 MR. KAESTNER: I'm sorry, my mistake.
20 \$1,571.36, and the back of that check bearing the
21 name of David Mosteller. And an invoice in the
22 sum of \$1,571.36 from David Mosteller. We would
23 introduce this as Commonwealth's Exhibit Number 20.
24

25 NOTE: At this point the above-referred-

1 to check and invoice are marked and filed as
2 Commonwealth's Exhibit Number 20.

3
4 MR. KAESTNER: Again, a copy of a check
5 issued by Ginn-Southern to David Mosteller, the
6 front and back of that check, and an invoice from
7 Mr. Mosteller. The check is in the amount of
8 \$7,000.00 and the invoice from David Mosteller in
9 the amount of \$7,000.00. I would like this
10 marked Commonwealth's Exhibit Number 21.

11
12 NOTE: At this point the above-referred-
13 to check and invoice are marked and filed as
14 Commonwealth's Exhibit Number 21.

15
16 MR. KAESTNER: The Commonwealth calls
17 Mr. Frank McEntee.

18
19
20 FRANCIS X. MCENTEE, JR., a witness
21 called by the Commonwealth, first being duly sworn, testi-
22 fies as follows:

23 DIRECT EXAMINATION

24 BY MR. KAESTNER:

25 Q

Mr. McEntee, for the record, could you

McEntee - Direct

1 state your full name?

2 A Francis X. McEntee, Jr.

3 Q And what is your present position?

4 A I am employed in the Quotations
5 Department of InterRoyal Corporation.

6 Q And in that position, do you have
7 occasion to work with price quotations?

8 A Yes.

9 Q Mr. McEntee, I would like to refer you
10 to a document previously marked for identification purposes
11 as Commonwealth's Exhibit Number 34, and I ask if you have
12 ever seen this before?

13 A This is a confirmation of a price
14 quotation of Tom Collins in the Quotation Department to
15 Dave Mosteller.

16 Q And what does this refer to?

17 A Lynchburg Training School.

18 Q And what is the purpose of this document?

19
20 MR. SPENCER: If Your Honor please, he
21 has identified it as a document from someone else,
22 Tom Collins, specifically.

23
24 Q Is this a document that is produced
25 in the normal course of business?

McEntee - Direct

161

1 A Yes.

2 Q And is it part of the business practice
3 in your corporation to produce such a document?

4 A Yes, sir.

5 Q And did there come a time when you
6 assumed control over this particular job?

7 A Yes.

8 Q And why did you assume control over
9 that particular job?

10 A Mr. Collins was let go by InterRoyal
11 Corporation.

12 Q At that time did you review the various
13 pieces of paper that were in the file?

14 A Yes.

15 Q And was this document in the file?

16 A This document was.

17 Q Do you recognize this document as being
18 the document which Mr. Collins prepared?

19 A Yes.

20 Q And it was prepared in the normal course
21 of business?

22 A That is correct.

23 Q And what is the purpose --

24 MR. SPENCER: We are back to my objection,

25 Your Honor.

McEntee - Direct

162

1 THE COURT: Overruled.

2 MR. SPENCER: He can identify the docu-
3 ments.

4 THE COURT: Overruled.

5 MR. SPENCER: Note my exception.

6
7 Q In the normal course of business, what
8 is the purpose of this type of document?

9 A This would be to confirm the quotations
10 given verbally.

11 Q By quotations, you are referring to
12 what?

13 A Prices.

14 Q I would like you to direct your atten-
15 tion to the bottom of the first page of the document and to
16 the second page of the document. What are those?

17 A This would be the terms and conditions
18 that we would be supplying merchandise under.

19 Q And these would be the only terms and
20 conditions under which you would be supplying merchandise?

21 A Yes.

22 Q Would there be any other memoranda
23 that you are aware of where you would set forth, in the
24 normal course of business, additional terms and conditions?

25 A Not at this stage.

McEntee - Direct

163

1 MR. KAESTNER: I would like to introduce
2 this as Commonwealth's Exhibit Number 22.

3 MR. SPENCER: Your Honor please, I would
4 additionally object to this on the grounds that
5 certain portions of it are totally illegible. I
6 think we are entitled to the original.

7 THE COURT: All right, I will overrule
8 the objection.

9 MR. SPENCER: Note my exception.

10
11 NOTE: At this point the above-referred-
12 to confirmation of price quotation is marked and
13 filed as Commonwealth's Exhibit Number 22.

14
15 Q Mr. McEntee, I would like to direct your
16 attention to the description column in Commonwealth's Exhibit
17 Number 22, and ask you what is that description about?

18 A Which item now?

19 Q What are we describing? What is being
20 described in the description column?

21 A It would be the construction, other
22 than our standard construction.

23 Q Would you review the description?

24 A The first is a 4564SK1 bed. The second
25 is an L5321S-match wardrobe, with 180S shelf, 1CP partition.

McEntee - Direct

164

1 X equals locks on doors. Number 4, L4101A --

2 Q Mr. McEntee, let me stop you for a
3 moment. Do you know what this furniture, what material this
4 furniture would be constructed of?

5 A Yes.

6 Q What would this be?

7 A This would be constructed with this
8 chip core with a high pressure laminate, with chip core back-
9 ing sheet on the back side. Shelving would be constructed
10 of steel, the drawers would be constructed of steel. The
11 mirror would be shatterproof, tempered glass.

12 Q Is Fiber-X different than chip core?

13 A Yes.

14 Q Would you review the description column--

15 A Continue down?

16 Q Yes, and would you just indicate if you
17 see Fiber-X?

18 A No, none of this material would be
19 Fiber-X.

20 Q Who would provide, in the normal course
21 of business, who would provide that description?

22 A That would be provided by the Quotations
23 Department.

24 Q I would like to show you a copy of this
25 document that has been previously been marked for identification

McEntee - Direct

165

1 as Commonwealth's Exhibit 35, and ask you if you have ever
2 seen that before?

3 A Yes, I have.

4 Q And what is that document?

5 A This is the original copy of a salesman's
6 order form.

7 Q And who would prepare that?

8 A That is prepared by the salesman,
9 signed off by the vendor.

10 Q And the salesman, what would the
11 salesman do with that document?

12 A He would send it to the Quotations
13 Department if the job was quoted.

14 Q Who prepared that document?

15 A That was prepared by David Mosteller.

16 Q Now, in reviewing this document, again,
17 do you find any reference to Fiber-X?

18 A There is no reference to Fiber-X.

19
20 MR. KAESTNER: I would like to introduce
21 Commonwealth's Exhibit Number 23.

22
23 NOTE: At this point the above-referred-
24 to salesman's order form is marked and filed
25 as Commonwealth's Exhibit Number 23.

McEntee - Direct

166

1 Q Mr. McEntee, do you know whether it
2 would have cost InterRoyal more to produce the furniture
3 for Lynchburg, Buildings 15 through 20, had Fiber-X been
4 used?

5 A InterRoyal could not have provided the
6 furniture in Fiber-X.

7 Q Why?

8 A InterRoyal had discontinued the use of
9 Fiber-X material at this time and before.

10 Q InterRoyal was no longer using Fiber-X?

11 A No longer using it.

12
13 MR. KAESTNER: Thank you, Mr. McEntee.

14 I have no further questions.

15 THE COURT: All right, Mr. Spencer.

16

17

18

CROSS-EXAMINATION

19 BY MR. SPENCER:

20 Q To whom did the orders go as they were
21 received from the various dealers?

22 A They were sent to Mr. Mosteller.

23 Wait, let me clarify that. The first orders we received
24 were these copies, these. This document that I was just
25 shown was sent to me prior to our receiving the actual orders

McEntee - Cross

167

1 from the dealers.

2 Q But when you received the orders from
3 the dealers, each one specified Fiber-X, did they not?

4 A I haven't seen those documents. I
5 would have to look at those documents.

6 Q I show you Exhibit 3 and ask you if
7 this isn't a copy of what you received from the dealers, and
8 their orders?

9 A This is not an order that we would have
10 received from the dealer. This is, to me, a bid document.

11 Q And you do not concede that that is the
12 way your orders come in, too?

13 A Our orders would come in on a form
14 prepared by the dealer.

15 Q Do you know where the orders were that
16 you received in this case?

17 A Where the orders were? Could you
18 clarify?

19 Q Where they are, the orders that you
20 received for the Lynchburg job? Where are they?

21 A I believe they are here as evidence,
22 sir.

23 Q Who has them?

24 A I believe the State.

25 Q The State has them?

1 A I believe so. That is a supposition,
2 though.

3
4 THE COURT: You really never know what
5 the dealer quotes to you as a price?

6 THE WITNESS: No, sir.

7 THE COURT: That is none of your busi-
8 ness, as long as InterRoyal --

9 THE WITNESS: That is none of my
10 business as long as InterRoyal --

11 THE COURT: Gets their money?

12 THE WITNESS: Right.

13 THE COURT: There is no set mark-up that
14 InterRoyal --

15 THE WITNESS: We have no control over
16 what our dealers add on, if that is your question.

17 THE COURT: In other words, if I sold
18 your product here in Virginia, I could put a
19 hundred percent mark-up on it, and as long as I
20 sold it, you wouldn't care?

21 THE WITNESS: That is correct.

22 THE COURT: And you are more or less
23 the gentleman in charge of seeing that these
24 orders are properly priced and go to the proper
25 factory for manufacturing?

1 THE WITNESS: That is basically correct.

2 THE COURT: And that is where your
3 duties end?

4 THE WITNESS: That is where my duty
5 would end.

6 THE COURT: If I had a complaint then,
7 I would come to you about it, like if it hasn't
8 been shipped yet?

9 THE WITNESS: You could come to me, or
10 that would be handled by my Customer Service
11 Department.

12 THE COURT: But yours is pricing and
13 seeing that it gets to the right place to be
14 manufactured?

15 THE WITNESS: To be manufactured cor-
16 rectly, yes, sir.

17 THE COURT: How large is InterRoyal?

18 THE WITNESS: We are around a 45 million
19 dollar company.

20 THE COURT: Do you have your own plants
21 or --

22 THE WITNESS: We have right now five
23 plants in operation.

24 THE COURT: I keep thinking this is the
25 company that got in contempt, but it is not.

1 That company is from New York, too.

2 MR. SPENCER: I'm sorry you found out
3 they weren't the ones, Judge.

4 I have no further questions.

5 THE COURT: Any further questions?

6 If none, I understand this gentleman has a plane
7 at 4:30 back to New York. Can he go?

8 MR. SPENCER: Yes, sir.

9 - - - - -

10 WITNESS STOOD ASIDE.

11

12 MR. KAESTNER: The Commonwealth would
13 like to call Mr. John Alexick.

14

15

16 JOHN ALEXICK, a witness called by the
17 Commonwealth, having been previously sworn, resumes his
18 testimony as follows:

19 DIRECT EXAMINATION

20 BY MR. KAESTNER:

21 Q Mr. Alexick, you have previously
22 identified yourself for the record, who you are, so I am not
23 going to go through that again. But I am going to ask you
24 if you recall receiving, whether or not the Lynchburg
25 Training Center received any samples from David Mosteller?

Alexick - Direct

171

1 A There were no samples for Buildings 14
2 through 20. However, subsequent to 14 through 20 being
3 factored and set up, I think it was in the late fall, and
4 don't hold me to this time, I don't remember exactly, but
5 there is a receiving report which will support this, we got
6 a call from Mr. Mosteller, I think, from Catawba, North
7 Carolina. He said, "John, I have two electric beds, several
8 bedside cabinets, several overbed, one or more overbed
9 tables, and some beside rails. These are abandoned samples
10 turned over to me and I can dispose of them as I wish. Would
11 your institution be interested?" I said, "Dave, let me call
12 you back. I would like to clear it with Mr. Peckman and
13 the hospital building, if these would be suitable for us."
14 And Mr. Mosteller assured me that this would be gratis, no
15 charge. It would not involve in any way any responsibility
16 for payment.

17 I related this to Mr. Peckman and he
18 agreed that I should talk with Mrs. Dorothy Cook, who was
19 then our Director of Health Services, that if she were
20 interested, she indicated to bring the samples up, we would
21 check them, and if they are of any service to us, we would
22 put them to use.

23 Mr. Mosteller brought them up that
24 afternoon. There were several nurses from the Hospital
25 Service who came down and looked over the items. Mr.

Alexick - Direct

172

1 Lankford was called over to possibly view the receipt and
2 placement. And they were acceptable and we kept them. And
3 again, it was agreed that there was no charge on them.

4 Now, Mr. Lankford made out a receiving
5 report which indicates the number, and I think Mr. Mosteller
6 gave Mr. Lankford what the estimated value of those was, and
7 we did put them in service. And we later acknowledged
8 these to the State Hospital Board as a gift received for the
9 institution.

10 Q Now, do you recall, you indicated in
11 your testimony that you received an electric bed?

12 A There were two electric beds in this.

13 Q Did you purchase electric beds pursuant
14 to the requisition which you sent to the Department of
15 Purchases and Supply for Buildings 14 through 20?

16 A No, sir. Electric beds around the
17 mentally retarded would not have been accepted generally.
18 They would be dangerous.

19 Q And you indicated that you purchased
20 a bedside cabinet. Was that in any way related to the
21 requisition you sent to them?

22 A They were totally different items.

23 Q And you indicated that you received
24 some bedrails?

25 A These bedrails subsequently turned out

Alexick - Direct

173

1 not to be compatible with any of the beds that we had.

2 Q So were the samples that you received
3 from Mr. Mosteller in any way, were they used in any way to
4 convince you to specify InterRoyal furniture on your
5 requisition?

6 A That was after the fact to all of this.
7 May I comment that in years, maybe fifteen or twenty years
8 prior to this, InterRoyal had provided us with two electric
9 beds at maybe a year or two apart, and they are probably
10 still at the institution.

11 Q Tell me, you indicated that Mr.
12 Mosteller called you from Catawba. Do you know whether or
13 not the samples that you received came from Catawba?

14 A I did not, at the time, see these.
15 I do not know the origin of the call.

16
17 MR. KAESTNER: Thank you, Mr. Alexick.

18 I have no further questions.

19 MR. SPENCER: I have no questions.

20 THE COURT: All right, thank you, sir.

21
22 - - - - -
23 WITNESS STOOD ASIDE.

24
25 MR. KAESTNER: The Commonwealth would

1 like to call Mr. Lankford.

2
3
4 LEWIS LANKFORD, a witness called by the
5 Commonwealth, first being duly sworn, testifies as follows:

6 DIRECT EXAMINATION

7 BY MR. KAESTNER:

8 Q Mr. Lankford, did you ever receive
9 any samples from David Mosteller?

10 A I received some merchandise donated to
11 us.

12 Q Can you describe that merchandise?

13 A Yes, it was two beds, electric bed,
14 overhead bed, bedside cabinets, chairs.

15 Q Did you receive any other merchandise
16 from Mr. Mosteller?

17 A No, sir.

18 Q At the time that you received this
19 merchandise from Mr. Mosteller, did Mr. Mosteller indicate
20 anything to you regarding whether you would be charged for
21 the furniture?

22 A No, sir.

23 Q He did not indicate anything to you?

24 A Not to my recollection, no.

25 Q Do you know whether you were to be

Lankford - Direct

1 charged for the furniture?

2 A No, my superior had told me that he got
3 a telephone call from Mr. Mosteller that he was going to bring
4 those things --

5 MR. SPENCER: Objection, Your Honor.

6 THE COURT: Objection sustained.

7
8 Q Do you know where that material came
9 from?

10
11 THE COURT: I don't see where it is
12 material where it came from. It has already been
13 testified that he called him from North Carolina
14 and said he had some things.

15 MR. KAESTNER: The only reason I was
16 attempting to introduce it was because Mr.
17 Chalkley had indicated that certain furniture had
18 been delivered to Lynchburg from Catawba.

19 THE COURT: That has been explained thus
20 far.

21
22 Q Mr. Lankford, were you present when
23 the large order of furniture for Buildings 15 through 20
24 arrived at Lynchburg?

25 A Yes, I received it.

Lankford - Direct

176

1 Q And do you know who took the beds off the
2 truck?

3 A The buildings and grounds crew.

4 Q And do you know who put the beds in the
5 wards?

6 A At the time you wouldn't put them on the
7 ward. 20 Building had a vacant ward, and we put the beds in
8 there.

9 Q Do you know who put them in the wards?

10 A No, I don't.

11 Q There were some bedside cabinets that
12 were received. Do you know who took those off the truck?

13 A Buildings & Grounds.

14 Q Do you know whether they were assembled
15 or not when you received them?

16 A They were already assembled.

17 Q Do you know who put them in the wards?

18 A Buildings and Grounds.

19 Q And there were also some wardrobes?
20 Do you know who put them off the truck?

21 A I did, at the warehouse, stored them in
22 the warehouse, because they came knocked down in packages,
23 in bundles, rather, with wire around them, and I put them
24 all in there. And as the men started, they would come and
25 get the component parts and take them to the ward.

Lankford - Direct

177

1 Q Do you know who assembled those?

2 A I understand from Mr. Alexick that they
3 hired some people to do it.

4 Q Do you know who assembled those?

5 A I don't know the names of the people, no.

6 Q Do you know whether they were State
7 employees?

8 A No, they were hired to do this.

9 Q They were hired by who?

10 A By Administration.

11 Q Is that by the Administration of the
12 Lynchburg Hospital?

13 A Right.

14 Q And these are the people who assembled
15 the wardrobes?

16 A That's right.

17
18 MR. KAESTNER: I have no further
19 questions, Your Honor.

20 MR. SPENCER: I have no questions.

21 THE COURT: All right, you may step
22 down, Mr. Lankford. Thank you.

23
24 - - - - -

25 WITNESS STOOD ASIDE.

1 MR. KAESTNER: May we have a moment?

2 THE COURT: What do you mean by a moment?

3 MR. KAESTNER: The next witnesses that
4 I plan to call are the Comptroller and the Treasurer
5 to stipulate to the payment, to present evidence
6 of payments on the part of the Commonwealth to
7 various vendors and I have those witnesses out in
8 the hall. But in the past Mr. Spencer has stipu-
9 lated to some of those, and I would like to review
10 the documents with him.

11 THE COURT: Well, do you mean just a
12 minute or five or ten?

13 MR. KAESTNER: Could we take ten minutes?

14 THE COURT: The Court will recess for
15 ten minutes.

16
17 NOTE: At this point a recess is had,
18 after which the hearing is resumed, viz:

19
20 THE COURT: Next witness.

21 MR. KAESTNER: The Commonwealth would
22 like to call Nancy Stoll.

23

24

25

1 NANCY STOLL, a witness called by the
2 Commonwealth, first being duly sworn, testifies as follows:

3 DIRECT EXAMINATION

4 BY MR. KAESTNER:

5 Q Would you please state your name?

6 A Nancy Worsham Stoll.

7 Q What is your occupation?

8 A Staff Assistant in the Comptroller's
9 office.

10 Q In that position, are you familiar with
11 vendor invoices?

12 A Yes, I am.

13 Q Are you familiar with payment pro-
14 cedures on those invoices?

15 A Yes, I am.

16 Q I would like to show you a copy of a
17 document and ask you if you can describe that?

18 A To what extent?

19 Q What is that?

20 A This is a State invoice form that
21 draws a pay check.

22 Q Do you know if that invoice was paid?

23 A Yes, it appears that this invoice was
24 paid. It gives the warrant number and the date of the
25 payment.

CRANE - SNEAD & ASSOCIATES, INC.

COURT REPORTERS

908 N. THOMPSON STREET.

RICHMOND, VIRGINIA

PHONE 355-4335

Stoll - Direct

180

1 Q And how would this invoice be paid?

2 A It would go to Daily Entry Section
3 where it would be keyed out of the computer. A check would
4 be printed and sent to the Treasurer's office for signature
5 and disbursement.

6 Q Do you know if that was done in this
7 case?

8 A Yes, it was.

9 Q And is this an official state document?

10 A Yes, it is.

11

12 MR. KAESTNER: I would like to introduce
13 this into evidence as Commonwealth's Exhibit
14 Number 24.

15 THE COURT: We will introduce these
16 all as one.

17 MR. KAESTNER: Very well.

18

19 Q I would like to show you a copy of this
20 invoice and ask you if you know whether that invoice has
21 been paid?

22 A Yes, this invoice was also paid. It
23 bears the date and the warrant number.

24 Q And would this have been paid pursuant
25 to the procedure you just described?

Stoll - Direct

181

1 A Yes, indeed.

2 Q I would like to show you a copy of this
3 invoice submitted by Litton Office Products and ask whether
4 that invoice was ever paid?

5 A Yes, it was also.

6 Q And is that paid pursuant to the same
7 procedures that you have described previously?

8 A Correct.

9 Q I would like to show you a copy of this
10 invoice drawn to the Bank of the Commonwealth and ask you if
11 you know whether this invoice has been paid?

12 A Yes, sir, on the same procedures.

13 Q As you described previously?

14 A Right.

15 Q And I would like to show you one
16 further document which is a copy of an invoice to Ginn-
17 Southern in the amount of \$951.00. Do you know whether that
18 invoice was paid?

19 A Yes, it was under the same procedures.

20
21 MR. SPENCER: How much was that one?

22 MR. KAESTNER: \$951.00.

23 MR. SPENCER: And 40 cents?

24 MR. KAESTNER: And 40 cents, right.

25

Stoll - Direct

182

1 Q If I understand it, one of the purposes
2 of your office is to draw checks?

3 A That is correct.

4 Q And those checks are then sent to the
5 Treasurer?

6 A Correct.

7 Q For what purpose?

8 A To be signed by the State Treasurer
9 and disbursed.

10
11 NOTE: At this point the above-referred-
12 to group of invoices is marked and filed as
13 Commonwealth's Exhibit Number 24.

14
15 MR. KAESTNER: Thank you. I have no
16 further questions, Your Honor.

17 THE COURT: Mr. Spencer.

18
19
20 CROSS-EXAMINATION

21 BY MR. SPENCER:

22 Q Miss Stoll, you testified from the docu-
23 ments that you know that your office prepared the warrants?

24 A Yes, sir.

25 Q Those are the checks?

Stoll - Cross

183

1 A Same thing. The warrant number and the
2 check number are not always the same.

3 Q Well, now what is it? Is it the check
4 or the warrant?

5 A The check and the warrant is the same
6 document. It bears two numbers, a check number which is
7 predetermined, and a warrant number that is assigned at the
8 time that it is drawn.

9 Q Now you say that you can look at the ones
10 for General Medical and you know that this register, that
11 this warrant was registered on your register of warrants?

12 A The document that I have just been
13 shown bore our warrant number and the date that it was
14 drawn.

15 Q But you also said that you knew it had
16 been paid?

17 A It was drawn. It means that it is paid
18 in our office because when we write the check, that is when
19 it is paid.

20 Q So far as your office is concerned?

21 A That's correct.

22 Q But after that, it has to go to the
23 Treasurer, be signed and sent out?

24 A That's correct.

25 Q So you didn't mean to infer by that,

Stoll - Cross

184

1 that the person who had sent the invoice had necessarily
2 received payment?

3 A I could not say that, no, sir.

5 MR. SPENCER: All right, thank you.

6 I have no other questions.

7 THE COURT: Is that all?

8 MR. KAESTNER: No further questions.

9 THE COURT: You may be excused.

11 - - - - -

12 WITNESS STOOD ASIDE.

14 MR. KAESTNER: The Commonwealth would
15 like to call Mr. Frank Williams.

18 FRANK H. WILLIAMS, a witness called by
19 the Commonwealth, first being duly sworn, testifies as
20 follows:

21 DIRECT EXAMINATION

22 BY MR. KAESTNER:

23 Q Mr. Williams, would you give us your
24 full name, please?

25 A Frank H. Williams.

Williams - Direct

185

1 Q And what is your present position?

2 A Assistant Treasurer for the Commonwealth
3 of Virginia.

4 Q In your capacity as Assistant Treasurer
5 for the Commonwealth of Virginia, is it your responsibility
6 to sign and issue checks sent to you by the Comptroller's
7 office?

8 A Yes, sir.

9 Q And where is the Treasurer's office
10 located?

11 A It is located in the State Finance
12 Building, north of the James.

13 MR. SPENCER: Where?

14 THE WITNESS: North of the James River,
15 in the State Finance Building, Capitol Square.

16
17 Q I would like to show you a copy of
18 this check that went to Ginn-Southern in the amount of
19 \$46,618.60, and ask you if you can tell whether that check
20 was issued?

21 A Yes, sir.

22 Q How do you know it was issued?

23 A It is signed by the State Treasurer,
24 Mr. Watts.
25

Williams - Direct

186

1 Q I would like to show you a copy of this
2 check made payable to Ginn-Southern in the amount of \$951.40,
3 and ask whether you know if that check has been issued?

4 A Yes, sir.

5 Q Signed by Mr. Watts?

6 A Yes, sir.

7 Q I would like to show you a copy of this
8 check made out to Litton Office Products in the amount of
9 \$35,715.60, and ask whether that check was issued?

10 A Yes, sir.

11 Q And how do you know that?

12 A Signed by Mr. Watts.

13 Q I would like you to take a look at this
14 document which is a copy of a check issued to the Bank of
15 the Commonwealth in the amount of \$156,618.00, and ask whether
16 that was check was issued?

17 A Yes, sir, signed by Mr. Watts.

18 Q Are these checks official documents of
19 the Commonwealth of Virginia?

20 A Yes, sir.

21
22 MR. KAESTNER: I would like to introduce
23 these into evidence as Commonwealth's Exhibit
24 Number 25.
25

Williams - Direct

187

NOTE: The above-referred-to checks
are marked and filed as Commonwealth's Exhibit
Number 25.

Q And all of those checks, are they official documents of the Commonwealth of Virginia?

A Yes, sir.

Q And were all of these checks issued by the Department of the Treasurer in the State Finance Building?

A Yes, sir.

MR. KAESTNER: Thank you very much.

I have no further questions.

MR. SPENCER: I have no questions.

THE COURT: Thank you. You may be excused, sir.

WITNESS STOOD ASIDE.

MR. KAESTNER: The Commonwealth calls
Charles Bryant.

1
2 CHARLES D. BRYANT, a witness called by
3 the Commonwealth, first being duly sworn, deposes and says,
4 viz:

5 DIRECT EXAMINATION

6 BY MR. KAESTNER:

7 Q Mr. Bryant, would you state your full
8 name, please?

9 A My name is Charles D. Bryant, B-r-y-a-n-t.

10 Q And what is your present position?

11 A I am a Special Agent with the Bureau of
12 Criminal Investigation, Department of State Police.

13 Q In the course of the performance of your
14 duties, did you have occasion to interview Mr. David
15 Mosteller?

16 A Yes, sir, I did.

17 Q And where did that interview take place?

18 A That interview took place at Division I,
19 north of Richmond, Virginia.

20 Q How did Mr. Mosteller come to be in your
21 office?

22 A Mr. Mosteller telephoned me and we
23 arranged for an appointment with him to come in. He at that
24 point wanted to speak to me as opposed to my seeking him out.

25 Q And at the time that you met with Mr.

Bryant - Direct

189

1 Mosteller, did you advise him of his constitutional rights?

2 A Yes, sir, I did.

3 Q What form did you use?

4 A I used the --

5
6 MR. SPENCER: We stipulate, Your Honor,
7 that he was properly advised.

8 THE COURT: All right, it is stipulated
9 that he was properly advised under the Miranda
10 vs. Arizona and understood his rights.

11
12 Q Did you have occasion in that discussion
13 to discuss the Lynchburg Training Center Buildings 15 through
14 20, with Mr. Mosteller?

15 A Not specifically Buildings 15 through
16 20 because on August 31, 1978, when I had really just com-
17 menced the investigation, I was not knowledgeable as to which
18 building, perhaps. But we did talk specifically about
19 Lynchburg and generally about all State jobs.

20 Q And during the course of your conver-
21 sation with Mr. Mosteller, did Mr. Mosteller describe the
22 practices that he followed in providing prices to vendors
23 dealing with the Commonwealth?

24 A We talked about that, yes, sir, and he
25 indicated to me that he had never given different vendors

Bryant - Direct

190

1 different prices on the same job, and specifically he said
2 he had not done that with regard to the Lynchburg job.
3

4 MR. KAESTNER: Thank you. I have no
5 further questions of this witness.
6
7

8 CROSS-EXAMINATION

9 BY MR. SPENCER:

10 Q What day was this, sir?

11 A August 31, 1978.
12

13 MR. SPENCER: I have no further questions.

14 THE COURT: All right, Mr. Bryant.
15

16 - - - - -

17 WITNESS STOOD ASIDE.
18

19 MR. KAESTNER: The Commonwealth rests,
20 Your Honor.

21 MR. SPENCER: If Your Honor please, I
22 would move to strike the Commonwealth's evidence
23 as to each of the indictments before the Court
24 today and I would specifically, if the Court would
25 permit, I would start with the last of the indict-

1 ments, F10-970, which was identified earlier as
2 the indictment dealing with General Medical
3 Contract Services.

4 MR. KAESTNER: We concur in the defense's
5 motion with respect to General Medical Indictment
6 970.

7 THE COURT: I agree with you. I haven't
8 heard any evidence about that. We all three agree
9 on that one. Thank you for agreeing.

10 MR. SPENCER: Judge, thank you. And I
11 will try the other three, if Your Honor please.
12 I don't like to sound like a broken record, but
13 again, the position of the defendant is that
14 no criminal offense has been shown to any of these
15 remaining three indictments, and there is not
16 sufficient evidence on which to find the defendant
17 guilty of any criminal offense. And that as a matter
18 of fact, if there be a criminal offense that it
19 is all one offense rather than six separate of-
20 fenses as charged in the two counts of the three
21 indictments.

22 I would go, if the Court please, to Ginn-
23 Southern, which is the 969 indictment. I would
24 point out to the Court that there is no testimony
25 whatsoever that Ginn-Southern ever either received

1 payment, if Your Honor will permit me, ever
2 received payment or that they ever paid anyone.

3 THE COURT: Well, they have a stipulation
4 now, Mr. Spencer. I have been looking at that.
5 They are the bills for cost of abandoned samples
6 used in selling furniture for the job at Lynchburg
7 Training School and Hospital, \$1,571.36. Then
8 they have a check made payable -- that was dated
9 November 10th. They have a check dated November
10 22, 1976, to Dave Mosteller, and on the back it is
11 signed Dave Mosteller. So I assume that was the
12 stipulation. That is evidence.

13 MR. SPENCER: Well, the stipulation, Your
14 Honor, is as to the pieces of paper, but there is
15 no testimony as to the significance of that paper.
16 Now the Court may, as has been done before, draw
17 inferences therefrom.

18 THE COURT: That is what I am supposed to
19 do at this point.

20 MR. SPENCER: Sir?

21 THE COURT: That is what I am supposed to
22 do at this point, all reasonable inferences.

23 MR. SPENCER: All right, sir. Then as
24 to that one, as to 969, I assume that at this time
25 my motion is overruled?

1 THE COURT: Overruled, yes. ①

2 MR. SPENCER: '68, Your Honor --

3 THE COURT: You might have a good point
4 in this one.

5 MR. SPENCER: Sir?

6 THE COURT: You might have a good point
7 in this one.

8 MR. SPENCER: '68, I would reemphasize
9 my argument and state that the testimony is that
10 the evidence falls far short of what is necessary
11 to raise even the situation where the Court may, by
12 inference, find sufficient evidence to overrule
13 the motion.

14 THE COURT: I don't think there is any
15 question that under Mrs. Bromley's testimony what
16 was going on. In fact she added a lot of knowledge
17 to the Court as to what was going on. He was
18 getting one price from the factory and giving the
19 dealer another price, and that is where he got the
20 money for the installation from. In fact, that is
21 a clear point that she made. The only point that
22 I really see, I don't mean to cut you short, but
23 that was Trend, Incorporated. I can't see but
24 one transaction for \$41,000.00 which she paid
25 \$25,000.00. It is only one bill. He has got that

1 lumped together. He did send other bills, but he
2 never got the money. He sent a bill here that
3 says installation, labor for wardrobe set-up and
4 abandoned samples, and it is \$41,000.00. That is
5 the only representation that is made. So I think
6 that is only one count.

7 MR. SPENCER: Yes, sir, Count 1.

8 THE COURT: The others are broken down
9 into separate transactions. So what I will really
10 do, I just will merge that into one count, Mr.
11 Spencer, which would really mean that he took and
12 stole, by false representation, more than \$100.00,
13 at this point of the evidence. I don't know what
14 his evidence will be, and that leaves Everett-
15 Waddey.

16 MR. SPENCER: Judge, by merging it I
17 then gather that the second count of that indict-
18 ment is done away with?

19 THE COURT: Yes. It is only one count
20 of larceny, grand larceny because there is only one
21 representation. I mean he combined them into
22 both, but that is one act of installation and the
23 samples, where before he would send one for instal-
24 lation and one for samples.

25 And the last one is Everett-Waddey.

1 MR. SPENCER: Everett-Waddey, if Your
2 Honor please, the Court will recall they declined
3 to pay the greater portion of what was billed to
4 him.

5 THE COURT: Yes, Mr. Axselle got them
6 to pay twenty-seven some hundred dollars.

7 MR. SPENCER: Yes, sir, to Mr. Axselle.

8 THE COURT: Well, as the attorney.

9 MR. SPENCER: Yes, and that is the end
10 of the evidence.

11 THE COURT: Well, I presume that he per-
12 formed his duty, I guess, and remitted the money
13 to him, subject to his fee.

14 MR. SPENCER: On that basis, Your Honor,
15 I would have to move that the evidence be struck
16 as to both counts, or certainly that the Court
17 take the same action as in the former case and
18 strike or merge the two counts.

19 THE COURT: Well, I think the Court is
20 going to merge that, too, because it was only one
21 check. It was two representations, but it was
22 not clear to me how much was for abandoned samples
23 and how much was for that. But it was a repre-
24 sentation which the Commonwealth at this point
25 has removed, about that furniture in North Carolina.

1 But it is uncontradicted evidence at this time that
2 that was a gift to the State and so recorded in the
3 Minutes from the hospital. So on that, I will merge
4 that, Mr. Spencer, and make it one count. So that
5 really leaves only four counts.

6 This one is dismissed altogether on
7 General Medical. Let me help the Clerk a little
8 bit on the Court's ruling. All right, 970, 10-970
9 the Court dismissed. Granted motion to strike as
10 there was no evidence presented to the Court on
11 this one. All right, to go back to 967, two-count
12 indictment, the Court merges the two counts into
13 Count 1 of grand larceny. Then overrules the
14 defendant's motion to strike the charge.

15 On 968, the Court merges the two counts
16 into one count and overrules the defendant's motion
17 to strike the Commonwealth's evidence as to grand
18 larceny.

19 And on Ginn-Southern, the Court leaves
20 intact and overrules the defendant's motion to
21 strike both of those.

22 All right, Mr. Spencer excepts to the
23 Court's ruling, but finds the dismissal. He does
24 not except to my ruling on the dismissal.

25 MR. SPENCER: Certainly not.

1 THE COURT: All right, are you ready to
2 go forward with your evidence?

3 MR. SPENCER: Yes, sir. We rest.
4 I renew my motion as to the remaining four counts.

5 THE COURT: The Court's ruling will be
6 the same and I would overrule your motion and note
7 his exception.

8 MR. SPENCER: May I add certain grounds,
9 Your Honor?

10 THE COURT: Well now, do you want to add
11 or do you want to argue your case on the merits?

12 MR. SPENCER: Well, I will argue on the
13 merits then.

14 THE COURT: All right, you may argue on
15 the merits.

16 Mr. Kaestner, you may start.

17 MR. KAESTNER: Your Honor, Mr. Mosteller
18 now stands charged with four counts of grand
19 larceny by false pretense. During the course of
20 today's trial, we have demonstrated quite clearly
21 that Mr. Mosteller engaged in a planned pattern of
22 conduct which was intended to defraud the
23 Commonwealth tens of thousands dollars. Mr.
24 Mosteller's intent began long before the requisition
25 ever hit the Department of Purchases and

1 Supply. It began at the Lynchburg Training Center
2 where he spoke with Mr. Alexick, in developing
3 specifications which later became incorporated in
4 this requisition. During those conversations, the
5 testimony stands uncontradicted that no samples
6 were ever used or were samples ever viewed. The
7 testimony stands uncontradicted that Mr. Mosteller
8 clearly understood that no installation would be
9 required of him and that the furniture would be
10 installed by the personnel at the Lynchburg
11 Training School.

12 Once the requisition was forwarded to the
13 Department of Purchases and Supply, all of a sudden
14 there was a possibility of competition from other
15 sources. Mr. Mosteller then had to take steps to
16 insure that other manufacturers' furniture could
17 not deal and could not secure this particular job,
18 and he did a host of things. First, and this one
19 failed. First he worked with, at the pre-bid
20 conference, he exhibited a piece of Fiber-X and he
21 indicated that the materials that the furniture
22 had to be manufactured of be Fiber-X. And Addendum
23 Number 2 was created as a result of Mr. Mosteller's
24 representation concerning Fiber-X. There was a
25 set of specifications of the product.

1 Paragraph 10 of the addendum Number 2
2 indicates that the State wanted Fiber-X or Fiber
3 Resin products. There has been testimony that had
4 the manufacturer attempted to provide that parti-
5 cular product that the cost of Fiber-X pieces of
6 furniture would have been in excess of the cost of
7 a particle board or chip board piece of furniture.

8 Mr. Mosteller then was faced with the
9 possibility or the problem of avoiding competition
10 from other sources, and to this end Mr. Mosteller
11 gave to the various vendors certain conditions
12 to place on the back of their bids. Those bids
13 are a part of the record introduced as Commonwealth's
14 Exhibit 3. The first of those conditions becomes
15 most important, and that condition is that this
16 job must be awarded all or nothing InterRoyal.
17 Split among InterRoyal dealers is acceptable.

18 THE COURT: Well, that is good business.

19 MR. KAESTNER: Well, it is certainly
20 good business for Mr. Mosteller.

21 THE COURT: Wouldn't that be good busi-
22 ness for anybody? "I'll give a bid on this
23 project if you will buy it all from me?"

24 MR. KAESTNER: Yes, Your Honor, except
25 that Mr. McEntee testified with respect to the

1 price memoranda that the conditions which were
2 provided to Mr. Mosteller were the conditions
3 listed on the bottom price of that price memoranda
4 and on the second page of that price memoranda --

5 THE COURT: Well, I don't mean to
6 interrupt you, Mr. Kaestner, but the bidding
7 practices, I am not really too worried about that
8 because I think I see exactly what transpired in
9 this case. Had I just picked the prices up,
10 excluded other people, by skill, from the bidding,
11 then that might be antitrust somewhere. But a
12 lot of business, I guess, is done that way, and
13 that is good business, if they had made all the
14 money at InterRoyal, it would be all right.

15 Let's get to the point where the scheme
16 comes in. He raised the prices and then sends
17 the bill for installation and for samples that
18 never existed, isn't that the crux of your case?

19 MR. KAESTNER: Yes, Your Honor, but it
20 is also important regarding that first point,
21 because it is our contention that that is another
22 indication of Mr. Mosteller's intent to defraud.
23 From that point Mr. Mosteller received prices
24 from the manufacturer and provided different
25 prices to his vendors. He received a lower price

1 from the manufacturer and supplied higher prices
2 to the vendors. In addition to that, he supplied
3 each vendor with different prices on the same
4 piece of furniture. That is the work-up sheet that
5 Mrs. Bromley testified she had taken from Mr.
6 Mosteller's files. And if one compares that with
7 the various bid documents and the work-up sheets
8 submitted by Everett-Waddey and submitted by
9 Trend Contract Interiors, the Court will find that
10 in fact Mr. Mosteller, on each piece of furniture,
11 not only supplied a different price than he had
12 received and a higher price than he had received
13 from the InterRoyal Corporation, but gave each
14 vendor a different price on the same piece of
15 furniture, thus permitting each of the vendors to
16 win a particular portion of the contract for the
17 purchase of furniture. Once each of the vendors
18 had won a particular of that contract, Mr.
19 Mosteller then went forward and Mr. Mosteller
20 billed each of the vendors for installation and
21 abandoned samples. He billed Trend Contract
22 Interiors for \$41,000.00 worth of installation and
23 abandoned samples, and the testimony is uncon-
24 tradicted that no abandoned samples were left at
25 Lynchburg other than those that were donated

1 clearly by Mr. Mosteller, and that no samples were
2 used in developing the specifications. The testi-
3 mony is also uncontradicted that the personnel at
4 the Lynchburg Training School did all of the instal-
5 lation work with the exception of certain limited
6 portions done by Mr. McIntyre. Mr. Alexick testi-
7 fied that Mr. McIntyre was at the Lynchburg Training
8 School for an afternoon of one day, through the
9 afternoon of another day, and then was back at the
10 Training School perhaps as much as a day and a
11 half. And yet Mr. Mosteller billed Trend \$41,000.00
12 worth of installation. Mr. Mosteller billed Ginn
13 for \$7,000.00 worth of installation. If the Court
14 refers to that particular invoice that Mr.
15 Mosteller submitted, that invoice is \$7,000.00
16 for installation and assembling of knocked down
17 wardrobes. The problem is that Ginn didn't sell
18 knocked down wardrobes. Ginn sold chest of drawers
19 and they came preassembled.

20 Mr. Lankford testified that he and his
21 crew took those off the truck and placed them on
22 the ward. And here we have again Mr. Mosteller
23 not only submitting a bill for which service was
24 never performed, but submitting a bill for work
25 which never had to be done. We have Mr. Mosteller

1 submitting repeated invoices to each of the vendors
2 for abandoned samples, and it is completely uncon-
3 tradicted that those samples did not exist.

4 The prices that various vendors paid to
5 Mr. Mosteller for the abandoned samples and for the
6 installation charges were passed on to the
7 Commonwealth, and they were passed on to the
8 Commonwealth in the bid pricing. The witnesses who
9 have testified here indicated that they received
10 their prices from Mr. Mosteller and that based upon
11 those prices they computed their bid to the
12 Commonwealth of Virginia. They have also testified
13 that the prices that Mr. Mosteller gave them included
14 the charge of not only the furniture to InterRoyal
15 Corporation but also subsequent invoices which Mr.
16 Mosteller would provide.

17 With respect to Ginn-Southern it is
18 particularly important to know that Ginn-Southern
19 was not the lower bidder with respect to the chest
20 of drawers, but that rather that Thonet was the
21 low bidder with respect to those chests of drawers.
22 And yet Ginn-Southern was awarded that contract
23 because of the conditions on the back of the bid.

24 We submit, Your Honor, that all of this
25 amounts to a repeated invoicing of vendors for

1 goods and services which never existed. The
2 inclusion of those in prices, given to the vendor,
3 and which were used by those vendors, all designed
4 to do nothing else but to get from the Commonwealth
5 of Virginia tens of thousands of dollars for labor
6 never performed and for goods never delivered.
7 These are not isolated instances. These were
8 repeated acts performed over an extended period of
9 time. We submit that the evidence stands
10 uncontradicted. We also submit that the evidence
11 demonstrates not only Mr. Mosteller's intent to
12 defraud, but also that Mr. Mosteller used false
13 pretenses to accomplish that fraud because each of
14 those invoices for abandoned samples indicate that
15 those samples were delivered to the Lynchburg
16 Training School. The witnesses and their uncon-
17 tradicted testimony is that they were not. Each
18 of those invoices for installation services per-
19 formed, purportedly performed by Mr. Mosteller, and
20 the testimony is uncontradicted that it was not. And
21 thus we have a false pretense since the price is
22 covered by, the sum covered by those invoices was
23 included in the prices Mr. Mosteller quoted and were
24 relied upon by the vendors in computing their
25 bids. It is clear that the vendors relied

1 upon a misrepresentation. The Commonwealth
2 issued its purchase order to the various vendors
3 based upon their bids to it. It is clear that the
4 Commonwealth, too, relied. It is equally clear
5 that the Commonwealth is the victim of this crime
6 for tens of thousands of dollars. We ask that Mr.
7 Mosteller be convicted on all counts.

8 THE COURT: Mr. Spencer?

9 MR. SPENCER: If Your Honor please, as
10 before, this is not a case of a criminal offense.
11 This is a situation in which the Commonwealth
12 solicited bids to dealers, made up the bids based
13 in part upon information given to them by Mr.
14 Mosteller, and based in part upon the addition of
15 their mark-up for profit.

16 THE COURT: Well, Mr. Spencer, let me
17 interrupt you. What would you call it if a man
18 sends something out that never existed and collected
19 money for it? Is that good business? I would
20 like to have --

21 MR. SPENCER: If Your Honor please, I
22 have my mind so filled with the facts in this
23 case that I don't know that I can comprehend what
24 the Court is asking. If a man sends out what,
25 Judge?

1 THE COURT: Sent out a bill to another
2 individual charging him \$41,000.00, and I under-
3 stand the relationship that has been brought out
4 in the Court on that, and has never been there
5 and never done any work, never had any samples
6 there, and the man, and this is uncontradicted
7 evidence, demands under the threat of personal
8 violence, \$25,000.00 the next day at 12:00 o'clock.
9 That is not a crime?

10 MR. SPENCER: Well, I think that is a
11 crime, Your Honor. I think that is extortion.
12 But it is against Barbara Bromley.

13 THE COURT: Then when the vendors rely
14 on the manufacturer, and in this world we have to
15 have some reliance, he sends a bill for samples,
16 he sends a bill for installation, knowing full
17 well, as the man told me the other day, he is
18 the only one who knows who committed the crime.
19 He knew full well that he had not done the work
20 and had received the money. What would you call
21 that?

22 MR. SPENCER: Well, Judge --

23 THE COURT: Only one vendor even
24 checked it.

25 MR. SPENCER: Well, Judge, based on

1 what the Court is saying, what you are asking is
2 what would I call that arrangement? Certainly
3 under no stretch of the imagination would I call
4 it larceny from the Commonwealth.

5 THE COURT: What would you call it?

6 MR. SPENCER: If this is larceny, then
7 it is larceny from the man I sent the bill to and
8 who paid me.

9 THE COURT: Well, that is your defense,
10 it is not stealing from the Commonwealth but from
11 the man who paid the money?

12 MR. SPENCER: Your Honor, our position
13 is that it is not stealing, but I am taking the
14 Court's example which is --

15 THE COURT: Well, I am taking the
16 evidence. Show me where the evidence is different?

17 MR. SPENCER: The evidence is different
18 in that these bids contain, with the understanding
19 of the people involved, they knew the factors were
20 built in. They contain the built-in accommodation
21 for these payments to Mosteller, and they received
22 the information from him. They calculated their
23 bid. They put it on the paper. They sent it to
24 the Commonwealth and the Commonwealth says, "fine.
25 If you'll furnish us with 640 beds at this price,

1 then we will --

2 THE COURT: Where is it on here, on the
3 bid, installation charges?

4 MR. SPENCER: On the bid?

5 THE COURT: Yes.

6 MR. SPENCER: There is nothing on the
7 bid.

8 THE COURT: In fact the invitation to
9 bid was exactly to the contrary, wasn't it?

10 MR. SPENCER: Judge, I can only say that
11 I believe the testimony, the evidence is that
12 they factored in the extra money. They had the
13 figure. They had another figure which was put into
14 evidence which was the actual cost from InterRoyal
15 Corporation. They paid InterRoyal that cost.
16 They paid Mosteller the other portion of it, which
17 he invoiced to them as installation and samples,
18 and they kept for themselves their mark-up.

19 THE COURT: Why did he invoice it,
20 samples under the evidence now, and that is the
21 only thing I can try the case on, under the evidence
22 there is no evidence before this Court that there
23 ever existed samples. Now why would a man do
24 that?

25 MR. SPENCER: Well, Judge, if he had

1 invoiced it to them as popcicles and it had been
2 factored in the bid and they paid it, it would
3 still not be a larceny from the Commonwealth.
4 And that is what we are charged with by the indict-
5 ments and by the Bill of Particulars.

6 THE COURT: Well, you are going back to
7 the other thing, that because the Commonwealth
8 didn't actually deliver the money to him, that he
9 was not stealing from the Commonwealth?

10 MR. SPENCER: They didn't deliver the
11 money to him, and the person to whom the Common-
12 wealth did deliver the money received the amount of
13 money the Commonwealth had said, "We will pay you
14 for these beds or these chests or these wardrobes".

15 THE COURT: All right, I take it this
16 Court would have jurisdiction of places in
17 Richmond. I think Everett-Waddey, I call it, I
18 guess it is Litton now, or Ginn, both of them are
19 within the jurisdiction of this Court. Suppose
20 he had been charged with larceny from those people?
21 Would your position be different?

22 MR. SPENCER: Yes, sir.

23 THE COURT: It would?

24 MR. SPENCER: Yes.

25 THE COURT: Do you think he stole from

1 those people?

2 MR. SPENCER: Well, Judge, I am certainly
3 not going to stand here and say I think that my
4 client stole from anyone. If you want to know who
5 I think stole, I think the officials of InterRoyal
6 stole from the Commonwealth of Virginia, and I
7 think the suggestion throughout this case is that
8 there was some strange arrangement between the
9 officials of InterRoyal and the officials of the
10 State of Virginia.

11 THE COURT: Well, I am not asking you to
12 plead your client guilty, but I think we have a
13 duty to be intellectually honest.

14 MR. SPENCER: Sir?

15 THE COURT: I think we have a duty to be
16 intellectually honest.

17 MR. SPENCER: I am perfectly willing to do
18 that. Perhaps then, the proper answer would be that
19 I would decline to answer the question.

20 THE COURT: All right, I won't make you
21 answer the question on that basis, but I am searching
22 for the defense, other than the fact that the
23 Commonwealth paid the money to the vendor, and in
24 turn the vendor paid it to him. Because I don't
25 see any way under anything that I have heard and

1 learned that it is not a fraudulent scheme to
2 defraud the Commonwealth. Now, you give me some
3 evidence that I have overlooked. I will be glad
4 to hear you and see it.

5 MR. SPENCER: Your Honor please, I would
6 cite again, taking a fairly recent case,
7 Bourgeois against the Commonwealth, 217 Va. 268.
8 I refer the Court particularly to Page 272 in that
9 opinion, which the Court says in order to convict
10 one of larceny by false pretenses, that the
11 Commonwealth must prove four elements of the
12 offense charged. One, an intent to defraud,
13 2, an actual fraud, 3, use of false pretenses for
14 the purpose of perpetrating the fraud, and 4, a
15 commitment of the fraud by means of false pre-
16 tenses used for the purpose, that is the false
17 pretenses to some degree must have induced the
18 owner to part with his property. Moreover the
19 false pretense must be a representation as to
20 an existing fact or past event. Mr. Mosteller has
21 made no representation to the Commonwealth of
22 any sort. If, for the purposes of argument, you
23 term the thing which he did, according to the
24 evidence, as a false pretense, then they certainly
25 were not misrepresentations as to an existing fact

1 or a past event. They were representations as to
2 a requirement for the future. And I would submit
3 that the evidence in this case falls short of
4 what is required in the long line of cases in
5 Virginia, beginning with Fay and Abel and coming
6 down through Bourgeois and the other subsequent
7 cases.

8 I will conclude my argument by pointing
9 out to the Court that there is no evidence whatso-
10 ever that the Commonwealth ever paid a nickel to
11 anybody. The evidence that was finally adduced
12 by the next-to-the-last two witnesses, Mr. Williams
13 and Mrs. Stoll, Mrs. Stoll testified that she knows
14 that the warrants were prepared and were sent to
15 the Treasurer for his signature. She cannot say
16 that the person who drew the invoice had been
17 paid. Mr. Williams testified only that he was
18 responsible for seeing to the signing and issuing
19 of the checks. He identified four checks and he
20 stated as to each check, in response to the quest-
21 ion, "Do you know that this check was issued?"
22 "Yes, I do, because it was signed by Mr. Watts".
23 And he further testified that these are official
24 documents and are already in the State Finance
25 Office in Richmond.

1 There is no testimony whatsoever that
2 any of the checks were ever paid. For that matter,
3 there is no testimony that the checks were ever
4 delivered to any person.

5 THE COURT: I think I specifically asked
6 Mrs. Bromley where she got the money from and she
7 said from the State of Virginia, is my recollection
8 of the testimony.

9 All right, stand up.

10 MR. SPENCER: Judge, if I may respond to
11 the Court's comment, there is no evidence that the
12 State of Virginia ever paid her. There is evi-
13 dence paid the Bank of the Commonwealth in Norfolk.

14 THE COURT: Well, that was her testimony.
15 I haven't heard that.

16 Stand up.

17
18 NOTE: At this point the defendant is
19 standing.

20
21 THE COURT: On the evidence heard by
22 the Court, on Indictment 967 involving Everett-
23 Waddey, the Court now finds you guilty of grand
24 larceny as charged in that amended indictment.

25 On the Indictment 968 involving Trend,

1 Incorporated, the Court now finds you guilty of
2 grand larceny as charged in that indictment.

3 And on Indictment 969 dealing with Ginn
4 Southern, the Court now finds you guilty of grand
5 larceny as alleged in both counts of the indictment.

6 In accordance with the earlier Court
7 ruling, the Court will continue these matters
8 until May 6th for a presentence hearing at the
9 time of the sentencing.

10 Now, Mr. Barry, you said to the Court
11 this morning that the rest of the cases would need
12 to be dismissed?

13 MR. BARRY: That is correct. We don't
14 intend to prosecute them.

15 THE COURT: On motion of the Commonwealth,
16 those cases are dismissed.

17 MR. BARRY: That is correct. We do not
18 intend to go any further.

19 THE COURT: Mr. Mosteller, you will now
20 be committed to the Sheriff of this city and held
21 until time as the Court sentences you.

22 MR. SPENCER: Judge, I am somewhat taken
23 aback. I certainly would ask that my client be
24 permitted to remain on bail.

25 THE COURT: That is not the procedure

1 in this jurisdiction, Mr. Spencer. We commit
2 people to jail during the course of the presentence
3 report, after there having been a finding of
4 guilty, to assist the Probation Department in
5 preparing the presentence report, and the defendant
6 is available to the Probation Department. Under
7 the statute, any time he serves in jail, he will
8 get credit for.

9 MR. SPENCER: Judge, I will advise the
10 Court that we have every intention for filing a
11 petition for appeal as to all of these matters.

12 THE COURT: All I have to do is suspend
13 execution of sentence. I do not have to set bond
14 under the statute.

15 MR. SPENCER: Is there any grounds
16 which I have missed that might cause the Court
17 to permit Mr. Mosteller to continue working and go
18 back to Norfolk pending this case?

19 THE COURT: Unless there is a tremendous
20 hardship upon conviction, we send everyone to
21 jail until the presentence report. If you can
22 demonstrate to the Court some extreme hardship,
23 then the Court will take that under consideration.

24 MR. SPENCER: Judge, is there any
25 possibility, then, may I ask this, once the

1 presentence report is in hand, I gather that the
2 Court will sentence and we will then advise the
3 Court of our intention to appeal?

4 THE COURT: That's right, after the final
5 judgment. The Court is only entering a finding
6 at this time of guilt. It is not an appealable
7 matter.

8 MR. SPENCER: Would the Court move up the
9 date of the presentence report and I would then,
10 after sentencing, ask that my client be admitted
11 to bail?

12 THE COURT: I will cross that at the
13 time he is actually sentenced.

14 MR. SPENCER: Sir?

15 THE COURT: I will cross that at the
16 time of sentencing.

17 MR. SPENCER: Well, Judge, the sentencing
18 has been set at May 6th, which is largely, and
19 perhaps erroneously, I understood was to accommodate
20 me. I would much prefer that the Court advance the
21 date of sentencing to the earliest possible date
22 and I will simply postpone my personal needs.

23 Judge, I can't, I really cannot find it
24 in my heart to have this man held in custody for
25 almost two months, well, as a matter of fact, for

1 two months to the day, if any part of it is because
2 I am hospitalized.

3 THE COURT: Well, it takes from six
4 to seven weeks to get a presentence report in
5 this jurisdiction. I can't help that because the
6 Probation Officer works hard. If you can get it
7 quicker, I will try to move it up. But it will
8 take at least five weeks. Today is the 6th. That
9 would be April 10th.

10 MR. SPENCER: I will postpone the
11 hospitalization, Your Honor, and ask the Court to
12 move it up to April 10th. I would also advise
13 counsel that I would appear tomorrow before the
14 Supreme Court for a release of the prisoner.

15 April 10th, Your Honor?

16 THE COURT: Yes.

17 All right, gentlemen, anything further?

18 MR. BARRY: No, sir.

19 THE COURT: If there is nothing further,
20 the Court will adjourn until tomorrow morning.

21
22 NOTE: At this point the defendant is
23 placed in the custody of the Sheriff of the City
24 of Richmond and the hearing is adjourned.

25 * * * * *

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, 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 Rules of Court 5:9(a) effective March 1, 1972.

Given under my hand this ____ day of May, 1980.

(Original signed)
Nancy D. Cook, C.S.R. - R.F.R.

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1
2 I, _____, Deputy Clerk
3 of the Circuit Court of the City of Richmond, Division I,
4 certify that the within transcript of the trial of the case
5 of Commonwealth vs. David Mosteller was this day received and
6 filed with the record in this case.
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Deputy Clerk

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

DIVISION I

COMMONWEALTH OF VIRGINIA

vs.

DAVID MOSTELLER

Complete TRANSCRIPT of the sentencing in the above,
when heard on May 6, 1980, before the Honorable James E.
Wilkinson, Judge.

APPEARANCES:

Learned Barry, Esquire,
Assistant Commonwealth Attorney for the City of Richmond;

Reid M. Spencer, Esquire,
607 Plaza One Building, Norfolk, Virginia,
Counsel for the Defendant;

The defendant, David Mosteller, in person.

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I N D E X

WITNESS

DIRECT

Michael R. Walker

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Reported by EMB

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2
3 NOTE: The hearing begins at 10:12 a.m.,
4 viz:

5 MR. BARRY: Your Honor, this is a pre-
6 sentence report before the Court upon numerous
7 convictions of grand larceny that were tried before
8 the Court. The Commonwealth has reviewed the pre-
9 sentence report prepared by Mr. Lee of the Richmond
10 Probation Office.

11 THE COURT: What is the total you have?

12 MR. BARRY: Total what, sir?

13 THE COURT: Counts. Do you have seven or
14 eight?

15 MR. BARRY: Our records indicate seven,
16 I believe.

17 THE COURT: I have got nine numbers. All
18 right. Let's get it straight. In Indictment No.
19 10-965, how many counts do you have on that?

20 MR. BARRY: Three.

21 THE COURT: Three? Okay. Indictment
22 10-966?

23 MR. BARRY: One of the counts, Your Honor,
24 was dismissed. The other count was proceeded on.

25 THE COURT: All right. How about 10-967?

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1 MR. BARRY: I would have to look at the
2 records. I don't have the numbers.

3 THE COURT: Oh; you don't?

4 MR. BARRY: No, sir.

5 THE COURT: (After thumbing through papers)
6 There are eight counts. That's what I have.

7 MR. BARRY: All right. I was not sure if
8 the Court had or had not dismissed one. All of them
9 are grand larceny charges.

10 MR. SPENCER: Yes, sir. There are eight
11 counts.

12 THE COURT: All right.

13 MR. BARRY: Three separate indictments.

14 THE COURT: All right. Three counts, one
15 count, and then, the remaining counts in the final
16 indictment.

17 MR. BARRY: Your Honor, there are some
18 corrections to be made to the report, minor
19 corrections. On Page 7 of the report in the final
20 paragraph beginning with the sentence "Mr. Mosteller
21 indicated that he," and going down to the second line,
22 "according to Mr. Meeks," in there should be the
23 statement "Mr. Meeks (Chief Security Officer for
24 Philco-Ford Corporation) this conversation," and
25 the remaining is correct. His title simply was left

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1 out.

2 Your Honor, we have no other corrections
3 or deletions to the report. It's accurate on its
4 face. It was prepared by both Mr. Lee and
5 Mr. Christie. Mr. Christie is from the Virginia
6 Beach Probation Department.

7 The Commonwealth has some additional
8 information concerning AID or the American
9 Institution of Developers. We have a witness that
10 we would like to call at this time with the Court's
11 concurrence.

12 THE COURT: All right. Where is he?

13 MR. BARRY: Present in court;
14 Mr. Michael Walker.

15 THE COURT: All right.

16 MR. BARRY: Mr. Walker, if you would come
17 forward, please.

18
19 MICHAEL R. WALKER, a witness called on
20 behalf of the Commonwealth, having been duly sworn, testified
21 as follows:

22 DIRECT EXAMINATION

23 BY MR. BARRY:

24 Q Sir, would you tell the Court your full
25 name and your present occupation?

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1 A Michael R. Walker, Vice President and
2 Treasurer with the AID health care centers.

3 Q Where is that located, sir?

4 A Wayne, Pennsylvania.

5 Q Sir, how long have you been working for
6 that particular industry?

7 A I've been working for that company for
8 two years. Originally, I was employed by AID, Inc. as a
9 staff accountant beginning in May of 1971.

10 Q In May of 1971, you joined the American
11 Institution of Developers?

12 A That's correct.

13 Q At what point in time did you take over
14 then in that particular position as an accountant?

15 A May 17th, 1971.

16 Q Sir, at that particular time, did you have
17 occasion to know or to know of a Mr. Mosteller?

18 A Yes.

19 Q What position did he hold in the company?

20 A He was a purchasing agent.

21 Q And specifically involved in what materials,
22 what purchasing items?

23 A The purchasing of capital equipment for the
24 various operating companies.

25 Q Did there come a time that he was

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1 dismissed from the corporation?

2 A He left the corporation in October or
3 November of 1971.

4 Q Did you have occasion then to be placed
5 in an investigative capacity with another accounting firm?

6 A Shortly after he left the company, I was
7 asked to investigate a series of transactions that occurred
8 under his tenure as a purchasing agent for the company.

9 Q And in what position and who did you work
10 with, sir?

11
12 MR. SPENCER: Excuse me, Your Honor,
13 Mr. Barry. Judge, I'm having difficulty hearing
14 the witness. Might I stand up here?

15 THE COURT: Yes, sir; or the witness can
16 speak louder, either way. Maybe he'll speak louder.

17 MR. BARRY: Put the microphone a little
18 closer and sit back and relax.

19
20 BY MR. BARRY: (Continuing)

21 Q In that capacity as an accountant, who did
22 you work with concerning this investigation?

23 A I worked with Main & LaFrantz Company,
24 which was a CPA firm that was hired by AID to accumulate
25 documents regarding an insurance claim that the company

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1 intended making regarding actions that had taken place during
2 Mr. Mosteller's tenure with the company.

3 Q Specifically, could you relate to the Court
4 what, if anything, your investigation revealed concerning
5 these activities?

6 A Investigation revealed that the company,
7 AID, had incurred losses in excess of a hundred thousand
8 dollars as a result of merchandise purchased through
9 Mr. Mosteller.

10 Q Now, specifically, what did your individual
11 investigation reveal as the format for this loss?

12 A We reviewed purchase orders, invoices,
13 check approvals for the transactions, the quality of the
14 merchandise received compared to the quality of the merchan-
15 dise that was ordered, and it was found that the quality of
16 the merchandise ordered was far superior to the quality of
17 the merchandise received.

18 Q Well, did you note any other irregularities
19 in the purchasing procedure?

20 A We also found that merchandise had been
21 ordered through Mr. Mosteller and was delivered to a vacant
22 lot and that invoices had been approved for payment by
23 Mr. Mosteller and that the merchandise was nowhere to be
24 found.

25 Q All right. Did you finally receive a

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1 settlement based on all these irregularities?

2 A The settlement with the insurance company
3 was for approximately \$25,000.00 for the claim which totaled
4 approximately \$125,000.00.

5 Q You said you were still with this particu-
6 lar company, or has it changed since that particular time?

7 A Well, the company has gone through several
8 reorganizations and mergences since May of '71.

9 Q All right. Then, what is your specific
10 occupation at this time?

11 A I'm Vice President and Treasurer with the
12 division of the company called AID Health Care Centers, Inc.

13 Q Sir, were you aware of anything back in
14 1979 that accounted for a dramatic personnel change within
15 the company?

16 A Not in 1979.

17 Q Excuse me. 1971?

18 A There were no dramatic personnel changes
19 in '71. The only thing of significance was that the parent
20 company exchanged their ownership and subsidiary company for
21 an ownership in the parent company.

22 Q Did that affect you at all?

23 A No.

24 Q Sir, were you involved at all with the
25 dismissal of Mr. Mosteller?

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1 A No.

2

3

MR. BARRY: Thank you very much, sir.

4

MR. SPENCER: Can I have just a moment,

5

Your Honor?

6

THE COURT: Yes, sir.

7

MR. SPENCER: (After speaking off the

8

record with the defendant) I have no questions.

9

THE COURT: All right. Thank you,

10

Mr. Walker. You may step down, sir.

11

12

WITNESS STOOD ASIDE

13

14

MR. BARRY: Sir, other than the items

15

stated in the presentence report and Mr. Walker's

16

testimony, the Commonwealth would rest.

17

THE COURT: All right. Mr. Spencer?

18

MR. SPENCER: We have no evidence to

19

present, Your Honor. I presume that the procedure

20

to be followed is that the Commonwealth will argue

21

its position now and that we would then respond.

22

THE COURT: Yes, sir.

23

MR. SPENCER: All right, sir.

24

THE COURT: All right, Mr. Barry. That

25

concludes all the evidence. Do you have any

1 argument?

2 MR. BARRY: Yes, sir.

3 THE COURT: All right, sir.

4 MR. BARRY: Concerning the facts of this
5 particular case, Your Honor, we sat through three
6 days and presented a great deal of evidence. I
7 don't think the Court has any questions now as to
8 exactly what the procedure was and the method in
9 which Mr. Mosteller took thousands of dollars from
10 the Commonwealth of Virginia, but this presentence
11 report brings to mind some interesting facts that
12 concern the Commonwealth greatly.

13 The State Police, through Investigator
14 Bryant, took the time to go up and check into his
15 background. Mr. Kaestner, now in the Commonwealth
16 Attorney's office, did some additional investigation,
17 and the three of us together have found that at the
18 four jobs that Mr. Mosteller has held in the last,
19 say, ten years, one, he got through without any
20 difficulty, the original job at Westinghouse, but
21 that he was fired from Philco-Ford Corporation for
22 certain improprieties, that he was dismissed from
23 the American Institution of Developers, and that he
24 is not subject to rehire because of certain dis-
25 honesties, and Mr. Walker at that particular time

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1 was the man most familiar with the exact procedure
2 that was being used by Mr. Mosteller and in a
3 position of trust; that is, as a purchasing agent,
4 and he was able to tell us that certain items were
5 shipped to vacant lots, that certain goods of
6 shoddy value were the actual items that the company
7 received, but they paid for better quality items,
8 and that an entire settlement or loss of \$25,000.00
9 was made, and finally his last employer, InterRoyal
10 Corporation, states that he was terminated for
11 breach of corporate policies and that he would not
12 be rehired.

13 So, we have a position where no longer do
14 we have a man who can come before the Court and say
15 "Judge, this is not a crime. I didn't do anything
16 wrong. I think that this is good business practice,
17 because the last three of the four jobs he has had
18 obviously would indicate some dishonesty, some
19 improprieties and an ability to get something in a
20 position of trust.

21 The Commonwealth would then state that yes,
22 he may have no record, and yes, this may be his first
23 offense, but it is such a large offense, and it took
24 place over such a long period of time, and he has
25 such a background for this particular type of work,

1 i.e. business dishonesty, that there is no question
2 in the Commonwealth's mind that to remove this man
3 from the Commonwealth and place him into a penal
4 institution would be most appropriate, and the
5 Commonwealth would respectfully submit that a
6 penitentiary sentence would be an advisable sentence.
7 He didn't shoot anybody. We could present no blood
8 before the Court, but he sat down and methodically
9 calculated how to steal large sums of money from
10 not only the Commonwealth of Virginia, but through
11 dishonesty and distrust of his own company, and to
12 remove him to a position of probation and allow him
13 to go back out into the street would be a disservice
14 to the community. The Commonwealth respectfully
15 requests that viewed his entire work record --

16 THE COURT: You mean if I give him pro-
17 bation, I would be doing a disservice?

18 MR. BARRY: The Commonwealth thinks so.

19 THE COURT: All right. I just wanted to
20 get that clarified.

21 MR. BARRY: The large sums of money that he
22 took, the Commonwealth would submit, were not for
23 food or anything like that, nothing that the
24 Commonwealth can deal with. Probation would not be
25 appropriate in this case.

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1 THE COURT: All right, Mr. Spencer.

2 MR. SPENCER: If Your Honor please, I
3 believe it's perhaps not necessary that I review
4 any of the prior statements made to the Court. I'm
5 sure that the Court has in mind the things that
6 have been heretofore told him with reference to this
7 case.

8 As to these cases and the status of these
9 cases today, the issue is one of punishment. As to
10 the probation report, these allegations are from
11 far back and from the recollections of persons who
12 were involved far back, and what influence the Court
13 will grant to them is something that I, of course,
14 can only speculate on. I think that the Court ought
15 to view the case in its status as this case before
16 this Court.

17 The particular offenses were found by the
18 Court to be of a nature to warrant a conviction
19 under the larceny by false pretenses statute. I
20 would remind the Court that our position from the
21 outset has been that we had no serious dispute with
22 the facts as alleged by the Commonwealth and as shown
23 by them through their witnesses. I would dispute
24 the matters discussed by counsel in argument, but as
25 to the matters of evidence that came to the Court

1 through the witnesses, they are basically not in
2 dispute.

3 The fact remains that this was a situation
4 in which the Commonwealth asked for bids on furniture
5 and received bids, sealed bids, and accepted the
6 lowest bid and received the merchandise which it had
7 requested.

8 THE COURT: How about the bills they
9 received where no work was done? How about that?

10 MR. SPENCER: The Commonwealth never re-
11 ceived any such bills, Your Honor.

12 THE COURT: Well, the vendors did.

13 MR. SPENCER: The vendors received those
14 bills; yes, sir.

15 THE COURT: Is it your position that that's
16 honest?

17 MR. SPENCER: Judge, it's my position --

18 THE COURT: Or your client's position, I
19 should say. I'll put it that way.

20 MR. SPENCER: It's our position that the
21 indictments here and the bill of particulars
22 specify an offense against the Commonwealth and a
23 larceny from the Commonwealth and that any evidence
24 that this was a larceny from or an offense against a
25 vendor would not be pertinent under these indictments.

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16

1 THE COURT: Suppose you had a little boy
2 and you broke a window and had the little boy go up
3 to the window and you said "Stick your finger up
4 there and get that diamond ring," and the little boy
5 sticks his hand in there and gets it. Is the boy
6 guilty of breaking and entering, grand larceny?

7 MR. SPENCER: I would think not, Your Honor.

8 THE COURT: I didn't think so. As far as
9 the law is concerned, I have no question.

10 MR. SPENCER: I understand that the Court
11 does not.

12 THE COURT: The Supreme Court might have a
13 different view.

14 MR. SPENCER: I would certainly hope so,
15 Judge.

16 THE COURT: I don't give you much hope,
17 but nevertheless, you might have some.

18 MR. SPENCER: I'm sure the Court has
19 confidence in itself.

20 THE COURT: Yes, sir.

21 MR. SPENCER: We are nonetheless here today
22 to hear from the Court as to what it feels is
23 appropriate punishment. The Commonwealth has stated
24 that it is of the opinion that probation would be a
25 disservice. I presume that to mean a disservice to

1 the public at large. I see nothing in the record
2 that would indicate that this would be a disservice
3 to the public at large.

4 Now, had the Commonwealth addressed itself
5 to the matter of this case being a warning to
6 others, then based upon the Commonwealth's interpre-
7 tation of the evidence and the Court's interpreta-
8 tion of the evidence, that would certainly be
9 argument which the Court, I should think, would take
10 into consideration, but as to the facts in the case,
11 there is much that speaks to permitting this young
12 man to remain out and to continue to support his
13 family and to meet his obligations as set forth in
14 the report.

15 THE COURT: Mr. Barry, do you have any
16 rebuttal?

17 MR. BARRY: Excuse me, sir?

18 THE COURT: Do you have any rebuttal?

19 MR. BARRY: No, sir; I do not.

20 THE COURT: All right, gentlemen. The Court
21 has given the case a great deal of thought.
22 Mr. Spencer has raised a question on behalf of his
23 client that there was no larceny by trick, and I
24 would have great misgivings if this were to be the
25 law. I don't think it's the law. I feel strongly

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1 that the Commonwealth has shown beyond any doubt
2 the scheme, a way to defraud, a willful, deliberate,
3 premeditated act on behalf of the defendant, and the
4 amount of profit a businessman makes is of no
5 interest to the Court or the judicial branch of
6 government -- that lies with the executive of the
7 legislative branch -- so long as the transaction is
8 one of honesty. I don't think we can call this good
9 business.

10 As the Court heard the evidence, it was a
11 scheme where it was built into a bid whereby the
12 defendant could use an innocent person, which was
13 the vendor, to perpetrate its fraud. The vendors
14 were conduits. The thing that bothers me is that
15 only one vendor in my recollection raised any point,
16 and that was Lee Industries. Mr. Chalkley testified
17 that he raised the point, and for some reason,
18 against his advice, his company gave in and paid the
19 bill. I don't know the reason. It's none of the
20 Court's business, but certainly, he saw that it was
21 wrong, and perhaps if he had stuck to it or could
22 have persuaded his company to do otherwise, it could
23 have saved the taxpayers and the State a lot of
24 money.
25

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1 The defendant appears to have no remorse,
2 no sense of wrongdoing and no sense of honesty.
3 This bothers the Court. I don't believe that anybody
4 can agree that this is good business but one of
5 dishonest intent.

6 I really think that the testimony heard
7 this morning, the Court should disregard in the
8 sense of punishment, because it's really another
9 crime. If he committed a crime in Pennsylvania,
10 they never convicted him of it. So, I don't think
11 I can, in fairness, take that into consideration
12 except perhaps under the sense of if it had been
13 a good character witness.

14 Many times, the defendant sat and worked
15 this up, and it's clear to me that he knew how much
16 he could get out of any contract for himself. There
17 was a vast amount of money involved. It's not like
18 maybe sometimes when you get a little behind and you
19 might embezzle or you might steal, and you come into
20 Court and say to the public "I'm sorry. I erred."
21 Then, perhaps, the Court could see more forgiveness
22 and exercise more compassion, but under the facts
23 of this case, the Court really sees nothing that it
24 can work with with the defendant, and therefore,
25 the Court feels that the best course to take would

1 be to incarcerate the defendant under the rulings
2 of the Court.

3 Would you stand up, please?
4

5 NOTE: The defendant is standing.
6

7 THE COURT: Under Indictment 10-965, the
8 Court has three counts of grand larceny, and on each
9 count, the Court sentences you to serve two years in
10 the Virginia State Penitentiary.

11 Under Indictment 10-966, the Court
12 sentences you to serve two years in the Virginia
13 State Penitentiary.

14 Under Indictment 10-967, one count, the
15 Court sentences you to serve three years in the
16 Virginia State Penitentiary.

17 Under Indictment 10-968, the Court
18 sentences you to serve three years in the Virginia
19 State Penitentiary, which will make a total of 14
20 years in the Virginia State Penitentiary.

21 Under Indictment 10-969, the Court will
22 suspend the imposition of any sentence but will run
23 that for a period of 20 years, and upon your release
24 from confinement, the Court places you on supervised
25 probation.

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21

1 MR. SPENCER: I beg your pardon, sir?

2 THE COURT: Upon his release from confine-
3 ment, the Court will place him on supervised proba-
4 tion. I assume that he will be on parole, but this
5 is to make it doubly sure.

6 MR. SPENCER: Does the Court intend to fix
7 the period of probation?

8 THE COURT: 20 years, the statutory period.

9 MR. SPENCER: All right, sir.

10 THE COURT: (Addressing the defendant) You
11 may have your seat, sir.

12 Now, I assume, Mr. Spencer, that you would
13 now like to note your exception to the Court's
14 ruling.

15 MR. SPENCER: Yes, I would, Your Honor, but
16 before that, I want to be certain, since the
17 probation report only made reference to seven
18 offenses -- I want to be certain that I have a
19 correct ruling from the Court as to each of the
20 counts in which the defendant was found guilty.

21 THE COURT: 965 contained three counts.

22 MR. SPENCER: Yes, sir.

23 THE COURT: On each count, the Court
24 sentences him to two years in the State Penitentiary.

25 MR. SPENCER: Yes, sir.

1 THE COURT: Under 966, there was one count.
2 The Court dismissed some of that count. The Court
3 sentences him to two years in the State Penitentiary.

4 MR. SPENCER: Yes, sir.

5 THE COURT: Under 967, there was one count.
6 The Court sentences him to three years in the
7 Virginia State Penitentiary.

8 MR. SPENCER: Yes, sir.

9 THE COURT: Under 968, one count, the
10 Court sentences him to three years in the
11 Virginia State Penitentiary, making a total of 14
12 years, and on Counts 1 and 2 in Indictment 969,
13 the Court suspends the imposition of any sentence at
14 this time and places him on supervised probation up-
15 on his release.

16 MR. SPENCER: So, there are two counts
17 involved in the suspended sentence?

18 THE COURT: Yes, sir; and that's under
19 Indictment 969.

20 MR. SPENCER: Thank you, Your Honor.

21 THE COURT: All right.

22 MR. SPENCER: If Your Honor please, on
23 behalf of the defendant -- well, I would, of course,
24 like to be certain that the record reflects that our
25 motions were properly made to strike the

1 Commonwealth's evidence at the conclusion of its
2 principal and at the conclusion of the whole case
3 and exceptions were taken.

4 THE COURT: Yes, sir.

5 MR. SPENCER: I would first ask the Court
6 for a stay of execution to permit the defendant to
7 effect an appeal to the Supreme Court in this case.

8 THE COURT: Well, I'll stay the execution
9 and not send him to the penitentiary, but I'm not
10 going to set bond. That's discretionary with the
11 Court.

12 MR. SPENCER: I would formally move that
13 the Court make the transcripts by order a part of
14 the record.

15 THE COURT: The Court will be glad to do
16 that, and I'll instruct the court reporter at this
17 time that the transcript will be written up and filed
18 with the Clerk of this Court within 60 days from
19 today and made a part of the record in this case.

20 MR. SPENCER: If Your Honor please, I
21 believe that with the exception of asking the Court
22 to reconsider its position on setting bond and
23 admitting the defendant to bail pending the appeal,
24 that that would conclude the procedure.

25 THE COURT: Well, quite frankly, I think

1 by his prior actions in different places around
2 the country as stated in the report, the Court has
3 great apprehension, and the Court has set sentence
4 at 14 years. I will suspend the execution of
5 committing him to the penitentiary, which means he
6 will stay in the City Jail. That's what my
7 interpretation of this is. For misdemeanors, I have
8 to grant bond, but these are felonies. I can sus-
9 pend the execution and not commit him to the
10 penitentiary. That was done basically in the old
11 days out in the counties to keep the person there in
12 the locality for the lawyer to work with, but the
13 Code says the Court may set bond, and I think it's
14 discretionary, and this is an exercise of my
15 judicial discretion.

16 MR. SPENCER: If Your Honor please --

17 THE COURT: You may go to the Supreme
18 Court. They may set bond.

19 MR. SPENCER: Yes, sir. I gather there is
20 no point in me pursuing the argument further?

21 THE COURT: No, sir. That is correct.

22
23
24 HEARING CONCLUDED
25

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CERTIFICATE OF COURT REPORTER

I, Eileen M. Beran, hereby certify that I, having first been duly sworn, was the court reporter in the Circuit Court of the City of Richmond, Division I, on May 6, 1980, at the time of the hearing herein.

I further certify that the foregoing transcript is, to the best of my ability, true and accurate, and that this transcript is prepared and is filed pursuant to Rules of Court 5:9(a), effective March 1, 1972.

Given under my hand this 28th day of May, 1980.

(ORIGINAL SIGNED)

EILEEN M. BERAN
Registered Professional Reporter

I, _____, Deputy Clerk of the Circuit Court of the City of Richmond, Division I, hereby certify that the foregoing transcript of the Commonwealth of Virginia versus David Mosteller was timely filed on this _____ day of _____, 1980.

Deputy Clerk,
Circuit Court of the City of Richmond, Division I

ASSIGNMENTS OF ERROR

(1) Whether the Court erred in overruling the defendant's Motions to Strike with respect to all grand larceny indictments involved herein in that the evidence failed, as a matter of law; to support a conviction under Virginia Code §18.2-178, as amended.

(2) Whether the Court erred in overruling the defendant's Motions to Strike with respect to all grand larceny indictments involved herein in that the evidence was insufficient to support a conviction under Virginia Code §18.2-178, as amended.