

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: Appeal by Otis Elevator Company	)	
	)	Case No. 2013-8
	)	
	)	
Emergency Solicitation, Issued December	)	
19, 2012 for USC Elevator Preventative	)	
Maintenance and Repair Services for the	)	
Vertical Transportation Equipment for the	)	
Columbia Campus	)	

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This matter came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for further administrative review under sections 11-35-4210(6) and 11-35-4410 of the Consolidated Procurement Code (the Procurement Code). Otis Elevator (Otis) appealed the August 26, 2013, decision of the Chief Procurement Officer for Supplies and Services (the CPO) dismissing its protest as untimely. In the hearing before the Panel, John E. Schmidt, III, Esquire, represented Otis. Jeremy C. Hodges, Esquire, represented Oracle Elevator Company (Oracle). George W. Lampl, III, Esquire, represented the University of South Carolina (USC), and William Dixon Robertson, III, Esquire, represented the CPO.

**Discussion**

The only issue decided by the CPO, and thus, the only issue before the Panel, is the question of whether Otis’s protest was timely filed. Upon a careful reading of Otis’s protest letter; its appeal letters of June 18, 2013,<sup>1</sup> and August 30, 2013; and the CPO’s order,<sup>2</sup> the Panel finds the following facts are undisputed:

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<sup>1</sup> When the CPO failed to schedule a hearing on its protest, Otis appealed “the constructive denial” of that protest to the Panel. Thereafter, the CPO agreed to hear the protest, and Otis withdrew its appeal to the Panel on July 22, 2013. *In re: Appeal by Otis Elevator Company*, Panel Case 2013-6 (July 30, 2013).

1. At the end of November 2012, the USC's incumbent vendor notified USC that the vendor would not renew its existing contract and would cease performing preventative maintenance and repair services on the vertical transportation devices (elevators, escalators, dumbwaiters, and lifts) at USC's Columbia campus at the end of the contract term. USC determined that it would not have time to conduct a traditional solicitation and have a new vendor in place when the current contract expired. Therefore, USC concluded that an emergency procurement was appropriate to bridge the period between the end of that contract and an award under a new solicitation.<sup>3</sup> Record at PRP6.

2. On December 19, 2012, USC requested quotes from four vendors, including Otis. USC's e-mail requesting the quotes advised bidders that a purchase order would be awarded the next day and that the service agreement "would be in effect for the months of January and possibly extended through February of 2013." Record at PRP17 (Exhibit attached to Otis's May 13, 2013 protest letter); and Record at PRP69 – PRP70 (Exhibit attached to Otis's August 30, 2013 appeal letter).

3. On January 2, 2013, Otis called USC to find out when an award would be made and learned that the contract had been awarded to another vendor. Record at PRP26.

4. On January 3, 2013, Otis sent an e-mail requesting that USC send it "the pricing that was submitted by all bidders for the USC interim maintenance bid." Record at PRP127. (This e-mail is referenced by Otis in its August 30th appeal letter to the Panel. Record at PRP44). USC responded that same day and provided Otis with the bidders' base bids, hourly rates, and total pricing. Record at PRP128. The figures provided by USC indicate that Oracle was the low bidder. *Id.* Otis acknowledged receipt of this information. *Id.*

5. In late April, Otis requested and received information from USC related to the emergency contract. Record at PRP14. This information was requested in conjunction with a separate protest. Record at PRP45. After receiving this information, Otis filed a protest on May 13, 2013, challenging the award to Oracle on the ground that Oracle's bid was submitted late and alleging other irregularities with the emergency procurement.

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<sup>2</sup> Although Otis's August 30th appeal letter to the Panel complains that the CPO considered facts outside of its protest letter in reaching his decision, Otis nowhere asserts, nor did it argue to the Panel at its hearing, that those findings are factually inaccurate.

<sup>3</sup> The Panel notes that USC issued a solicitation on January 14, 2013, seeking best value bids for elevator maintenance and service for a one-year term, renewable for a maximum of five years. The intended award under this solicitation was protested, and USC requested that the CPO cancel the solicitation under Regulation 19-445.2085(C). The CPO complied with USC's request and canceled the solicitation on June 24, 2013. A new solicitation was issued on July 25, 2013, and the bid opening date has been set for October 22, 2013. See <http://purchasing.sc.edu/sadownload.php?sid=1438&q=Solicitations> (last accessed October 17, 2013).

Otis's primary argument to the Panel regarding the timeliness of its protest relies on the following language of section 11-35-4210(1)(b), which requires that a protesting bidder file its protest "within ten days of the date of award or notification of intent to award, whichever is earlier, is posted in accordance with this code." S.C. Code Ann. § 11-35-4210(1)(b) (2011). Otis argues that because USC has never posted an award notice of the emergency contract to Oracle, the protest period has not expired and its May 13th protest is therefore timely. Conversely, USC, the CPO, and Oracle all argue that the statutory and regulatory provisions governing emergency procurements do not require the posting of an award or intended award notice and that section 11-35-4210(1)(b)'s trigger, that is, the posting of the award notice, is inapplicable. Thus, the Panel must first determine whether the posting of an award notice was required in this case.

Emergency procurements are governed by section 11-35-1570 which provides:

*Notwithstanding any other provision of this code, the chief procurement officer, the head of a purchasing agency, or a designee of either officer may make or authorize others to make emergency procurements only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations promulgated by the board; and provided, that such emergency procurements shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.*

S.C. Code Ann. § 11-35-1570 (2011) (emphasis added).<sup>4</sup> The Panel finds that this statutory provision does not mention any posting requirement, nor does it incorporate by reference the requirements of competitive sealed bidding set forth in section 11-35-1520 of the Procurement Code.<sup>5</sup> Indeed, the provision's introductory clause – "notwithstanding any other provision of

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<sup>4</sup> The Panel notes that Otis has challenged neither the existence of an emergency nor USC's determination to proceed under this provision of the Procurement Code.

<sup>5</sup> Section 11-35-1520(10) establishes the posting requirement of a notice of award or intended award for the competitive sealed bidding source selection method. S.C. Code Ann. § 11-35-1520(10) (2011). Unlike section 11-

this code” – clearly indicates that emergency procurements are set apart from the more customary source selection methods.<sup>6</sup> Likewise, the ensuing regulation to section 11-35-1570, Regulation 19-445.2110, contains no requirement that an agency post a notice of award of an emergency contract. S.C. Code of State Regulations, Regulation 19.445.2110 (2011). Therefore, the Panel concludes that because USC was not required to post an award notice, Otis’s argument that the protest period remains open until ten days after such posting occurs is without merit.

In light of the fact that section 11-35-1570 did not require USC to post a notice of award, the Panel agrees with the CPO that the question then becomes when the protest period begins. If one accepts that the purpose of a posting requirement is to place all bidders on notice that an award has been made, then it is reasonable to apply an actual notice standard in circumstances where the posting of a formal notice is not required. *See Hannah v. United Refrigerator Services, Inc.*, 312 S.C. 42, 47, 430 S.E.2d 539, 542 (1993) (“A person who knows of a thing has notice thereof.”) (citation omitted). Otis knew that USC was seeking emergency elevator maintenance services beginning on January 1, 2013. Moreover, it certainly knew on January 3, 2013, that it had not received the contract when it asked for and received the pricing information which indicated Oracle was the low bidder. Thus, the Panel finds that Otis knew all that it needed to know to file a protest on January 3rd and that its failure to protest until May, some four months later, means that neither the CPO nor the Panel has jurisdiction to hear the matter.

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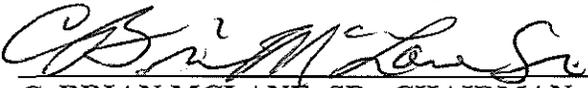
35-1570, the statutory sections governing other source selection methods *do* explicitly reference section 11-35-1520. *See, e.g.*, S.C. Code Ann. § 11-35-1525(1) (2011) (incorporating the provisions of section 11-35-1520 for competitive fixed price bidding); *accord* § 11-35-1528(1) (competitive best value bidding); § 11-35-1529(1) (competitive online bidding); and § 11-35-1530(1) (competitive sealed proposals).

<sup>6</sup> The Panel implicitly recognized this status in one of its few decisions involving emergency procurements, when it observed that agencies should exercise caution using the emergency procurement procedure “because it suspends the normal safeguards built into the [procurement] system.” *In re: Protest of Homer L. Spires*, Panel Case No. 1988-6 (September 14, 1988).

Therefore, for the reasons stated herein, the Panel affirms the decision of the CPO dismissing Otis's protest for lack of jurisdiction.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY:   
**C. BRIAN MCLANE, SR., CHAIRMAN**

This 30<sup>th</sup> day of October, 2013.

Columbia, South Carolina