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| STATE OF SOUTH CAROLINA                     | ) | BEFORE THE SOUTH CAROLINA |
|   | ) | PROCUREMENT REVIEW PANEL  |
| COUNTY OF RICHLAND                          | ) |                           |
|   | ) |                           |
|   | ) | ORDER                     |
| IN RE: Appeal by DTZ, Inc.                  | ) |                           |
|   | ) | Case No. 2016-6           |
| Sol. No. 5400001770                         | ) |                           |
| Contract No. 4400002499                     | ) |                           |
| Facilities Management Services for South    | ) |                           |
| Carolina State University                   | ) |                           |
|   | ) |                           |
| (Contract Controversy – Claim for Interest) | ) |                           |

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This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on July 14, 2016, pursuant to a request for review by DTZ, Inc. (DTZ)<sup>1</sup> under sections 11-35-4230(6) and 11-35-4410(1)(a) of the Consolidated Procurement Code (the Procurement Code). In February of 2015, DTZ brought a contract controversy claim against South Carolina State University (SCSU) related to the facilities management services DTZ has been performing for SCSU for a number of years. In the instant appeal, DTZ seeks review of the Chief Procurement Officer's (the CPO's) March 24, 2016, written determination denying DTZ's claim to recover interest on unpaid amounts due under its contract with SCSU. At the hearing before the Panel, John E. Schmidt, III, Esquire, represented DTZ. W. Dixon Robertson, III, Esquire, represented the CPO. Vernie L. Williams, Esquire, and Dwayne T. Mazyck, Esquire, appeared on behalf of SCSU, but did not participate in oral argument.

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<sup>1</sup> The Panel notes that DTZ, Inc. was formerly known as UGL Services Unicco Operations Co. and UNICCO Service Company. Record at PRP28. Furthermore, the Panel understands that DTZ's legal name was changed to "C&W Facility Services Inc." on November 29, 2015, and that the South Carolina Secretary of State's office has accepted this legal name change. *Id.* However, for the sake of simplicity and because the claim was originally filed under the name DTZ, Inc., the Panel has retained the name "DTZ" throughout this order.

## Background

DTZ brought its request for resolution of a contract controversy before the CPO on February 20, 2015. Record at PRP60 – PRP68. DTZ’s claims were based on facilities management services that it had performed under a contract with SCSU, but for which it had not received payment. *Id.* Among other claims, DTZ asserted a right to recover interest at the rate of 15% per annum on the unpaid amounts as allowed by the parties’ contract and section 11-35-45 of the Procurement Code. Record at PRP62 – PRP63, ¶¶ 11 -12; PRP64, ¶ 24; PRP65, ¶ 31. The CPO entered two judgments against SCSU: one in the amount of five million three hundred ninety-nine thousand, eight hundred ninety-five and 59/100 (\$5,399,895.59) dollars<sup>2</sup> and one in the amount of sixty eight thousand, five hundred eighty-five and 71/100 (\$68,585.71) dollars.<sup>3</sup> In his March 24, 2016, written determination, the CPO also found that DTZ failed to comply with the notice requirement of section 11-35-45(B) of the Procurement Code and therefore was not entitled

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<sup>2</sup> *Request for Resolution of a Contract Controversy By: DTZ, Inc., et al., v. South Carolina State University and the State of South Carolina*, CPO Case No. 2015-130, [http://www.mmo.sc.gov/webfiles/MMO\\_spo/Protest%20Decisions/2015-130\\_DTZ\\_v\\_SCState.pdf](http://www.mmo.sc.gov/webfiles/MMO_spo/Protest%20Decisions/2015-130_DTZ_v_SCState.pdf) (June 29, 2015) (last accessed July 19, 2016). In this written determination, the CPO also dismissed the State of South Carolina as a party to the dispute, and DTZ appealed this portion of the decision to the Panel. The Panel affirmed the CPO’s dismissal of the State of South Carolina for lack of jurisdiction by order dated October 12, 2015. *Appeal by DTZ, Inc.*, Panel Case No. 2015-3. DTZ has appealed the Panel’s decision to the Circuit Court, where it is currently pending. At no time has SCSU disputed that it owes the amount awarded by the CPO in his June 29, 2015, written determination.

<sup>3</sup> *Matter of: DTZ, Inc., et al.* (March 24, 2016) PRP3 – PRP9. Although it apparently questioned some of the invoices submitted by DTZ at the time of the CPO’s hearing in June of 2015, SCSU subsequently withdrew some of its objections and failed to respond to the CPO’s request for an update by January 8, 2016. Record at PRP125; PRP4. The Panel notes that SCSU has not disputed that it owes DTZ the additional amount awarded by the CPO on March 24, 2016. However, in an e-mail to the CPO’s counsel dated August 7, 2015, counsel for SCSU did dispute the rate of interest sought by DTZ, stating:

DTZ’s interest penalty calculation is based on an interest rate of 15%, the maximum allowed pursuant to SC Code Ann. Section 11-35-45. However, a 15% interest assessment is improper because it is clearly violative of the Comptroller General’s current annual percentage rate of 6.25% applicable to late payments by a state agency. *Comptroller General’s Disbursement Regulations, Late Payment Charge Regulations* (July 2014) (“Pursuant to Section 11-35-45, the current annual percentage rate established by the Comptroller General’s Office on March 28, 1994 is 6.25 %.”). <http://www.cg.sc.gov/guidanceandformsforstateagencies/Documents/DisbursementRegulations-11102014.pdf>.

Record at PRP125.

to recover interest on the unpaid amounts due under the contract. On April 1, 2016, DTZ filed an appeal with the Panel, asking it to review the CPO's determination regarding its right to recover interest.

In addition to the undisputed facts referenced above, the Panel notes that the parties' contract included the following payment clause:

(c) Payment and interest shall be made in accordance with S.C. Code Section 11-35-45. Contractor waives imposition of an interest penalty unless the invoice submitted specifies that the late penalty is applicable.

Record at PRP111. Furthermore, invoices DTZ submitted to SCSU indicated payment terms of "Net 30" and bore the following legend: "AN INTEREST CHARGE OF 1-1/2% PER MONTH WILL BE CHARGED ON OVERDUE ACCOUNTS." Record at PRP12 – PRP26.

#### **Conclusions of Law**

This appeal is before the Panel pursuant to section 11-35-4410(1)(a) of the Procurement Code, which charges the Panel with the responsibility to conduct a *de novo* review of a CPO's written determination. S.C. Code Ann. § 11-35-4410(1)(a) (2011). In previous contract controversy cases, the Panel has observed that the CPO's order has no precedential value and that "the Panel is not bound by any aspect of it" in conducting a *de novo* hearing. *In re: Protest of McCrory Constr. Co.*, Panel Case Nos. 1994-13 & 1995-7 at 2 – 3 (May 29, 1995); *see also In re: Protest of M.B. Kahn Constr. Co.*, Panel Case No. 1995-13 at 7 (January 18, 1996) ("[T]he Panel's *de novo* hearing allows the Panel to evaluate the evidence presented and render a decision. The Panel rejects any suggestion that the Panel is bound by the decision of the Architect [interpreting the contract specifications] or the CPO.") Because the sole issue before the Panel is the legal question of whether DTZ is entitled to recover interest on the past due amounts owed by SCSU, the Panel did not receive additional evidence at its hearing. Rather, the Panel heard oral arguments

on the legal issue and bases its decision on the applicable legal rules and the documents presented in the written record before it.

DTZ argues that the CPO erred by misreading the applicable Procurement Code statute and by applying an inapposite statute and cases interpreting that statute instead. The applicable Procurement Code provision is section 11-35-45, which provides in pertinent part:

(B) All agencies and institutions of the State are required to comply with the provisions of this section. Only the lump sum institutions of higher education are responsible for the payment of all goods or services within thirty work days after the acceptance of the . . . services and proper invoice, whichever is received later, and shall pay an amount not to exceed fifteen percent per annum on any unpaid balance which exceeds the thirty work-day period, *if the vendor specifies on the statement or the invoice submitted to such institutions that a late penalty is applicable if not paid within thirty work days after the acceptance of goods or services.*

(C) The Comptroller General shall issue written instructions to the agencies to carry out the intent of this section. All offices, institutions, and agencies of state government shall fully cooperate with the Comptroller General in the implementation of this section.

S.C. Code Ann. § 11-35-45 (2011) (emphasis added).

As noted by the CPO in his written determination, the highlighted language above was added to subsection (B) by 1993 Act No. 178, § 12. In the absence of a Panel decision interpreting section 11-35-45 since the amendment to subsection (B), the CPO chose to consider precedent narrowly interpreting the interest statute that applies to construction contract disputes, S.C. Code Ann. Section 29-6-50.<sup>4</sup> The Panel finds that this was error not only because the instant dispute is

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<sup>4</sup> Section 29-6-50 provides:

If a periodic or final payment to a contractor is delayed by more than twenty-one days or if a periodic or final payment to a subcontractor is delayed by more than seven days after receipt of periodic or final payment by the contractor or subcontractor, the owner, contractor, or subcontractor shall pay his contractor or subcontractor interest, beginning on the due date, at the rate of one percent a month or a pro rata fraction thereof on the unpaid balance as may be due. *However, no interest is due unless the person being charged interest has been notified of the provisions of this section at the time request for payment is made.* Nothing in this chapter shall prohibit owners, contractors, and subcontractors, on private construction projects only, from agreeing by contract to rates of interest

not a construction case, but also because the language of section 29-6-50 is not sufficiently similar to be truly analogous. First, section 29-6-50 sets a definite interest rate of 1% per month, or 12% per annum. Second, section 29-6-50 requires notice of its specific provisions in the request for payment. Finally, section 29-6-50 sets a shorter timeline for payment.

In contrast, section 11-35-45(B) sets a maximum interest rate of 15% per annum and section 11-35-45(C) authorizes the Comptroller General “to issue instructions” applying to all state agencies, including lump sum institutions such as SCSU. The Comptroller General has issued such instructions in a publication entitled “State of South Carolina Statewide Disbursement Regulations”<sup>5</sup> and has established an annual percentage rate of 6.25%. SC Statewide Disbursement Regulations at 95, ¶ 5. Thus, unlike a construction contractor, a vendor awarded a contract under the Procurement Code cannot readily determine the appropriate interest rate by simply reading the applicable statute.<sup>6</sup>

Furthermore, section 11-35-45(B) does not require one seeking payment to provide notice of the statute’s provisions, but merely to give notice that “a late penalty is applicable.” The record before the Panel establishes that the invoices DTZ submitted to SCSU all stated that interest would

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and payment periods different from those stipulated in this section, and this event, these contractual provisions shall control, provided the requirements of Section 29-6-30 and this section are specifically waived, by section number, in conspicuous bold-faced or underlined type. In case of a wilful breach of the contract provisions as to time of payment, the interest rate specified in this section shall apply.

S.C. Code Ann. § 29-6-50 (2007) (emphasis added). Because the Panel finds section 29-6-50 inapposite to the case at hand, it need not address the cases interpreting it that were also cited by the CPO in his order.

<sup>5</sup> The complete Disbursement Regulations may be accessed at [http://www.cg.sc.gov/guidanceandformsforstateagencies/Documents/CGsAPP/03-31-16/DisbursementRegulation\\_03-31-16.pdf](http://www.cg.sc.gov/guidanceandformsforstateagencies/Documents/CGsAPP/03-31-16/DisbursementRegulation_03-31-16.pdf). (last accessed July 20, 2016). For ease of reference, the portion of the Disbursement Regulations governing late payment charges pursuant to section 11-35-45 has been attached to this order as Panel Exhibit A.

<sup>6</sup> The Panel notes that the State’s standard payment clause, quoted above on page 3 of this order, references only section 11-35-45. The Panel suggests that this clause be amended either to reflect the interest rate established by the SC Statewide Disbursement Regulations or to include a reference to those regulations.

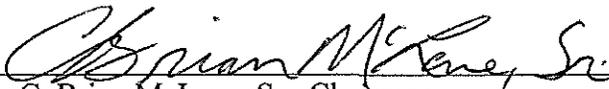
be charged on overdue accounts. The Panel finds that this notice is sufficient to satisfy the requirements of section 11-35-45 and the payment clause of the parties' contract. Moreover, the Panel is not persuaded that the rate of 1-1/2% per month stated on its invoices is fatal to DTZ's claim, particularly in light of the difficulty of determining the appropriate interest rate under section 11-35-45. *Accord In re: Protest of Bytes and Types*, Panel Case No. 1988-20 (February 21, 1989) (in a case applying section 11-35-45 prior to its amendment in 1993, the Panel adjusted the rate of interest claimed by a vendor so that it would not exceed the maximum rate of 15%).

### **Conclusion**

Therefore, for the reasons stated herein, the Panel hereby reverses the decision of the CPO with regard to DTZ's interest claim and remands the case to him for calculation of an interest award in favor of DTZ and in accord with the SC Statewide Disbursement Regulations.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

  
BY: C. Brian McLane, Sr., Chairman

Date: July 28, 2016.  
Columbia, SC