STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION/DETERMINATION

In the Matter of Protest of:

Otis Elevator Company

University of South Carolina

University of South Carolina
BVB No. USC-BVB-2360-LW
Elevator Preventative Maintenance and Repair Services of the Vertical Transportation Equipment for the Columbia Campus

CASE NO.: 2013-111

POSTING DATE: June 24, 2013
MAILING DATE: June 24, 2013

This matter is before the Chief Procurement Officer (CPO) pursuant to a protest filed by Otis Elevator Company (Otis) under authority of South Carolina Code Section 11-35-4210 against the University of South Carolina's best value bid # USC-BVB-2360-LW. The CPO conducted a hearing on the protest on May 14, 2013. Appearing before the CPO were Otis, represented by John Schmidt, Esquire; Oracle, represented by Rivers Stillwell and Jeremy Hodges, Esquires; and USC, represented by George Lampl, Esquire. Following the hearing, due to the late hour, the CPO granted a request by the parties to file closing arguments by Friday, May 17, 2013. Otis and Oracle filed their closing arguments. USC filed, instead, a request that the CPO cancel the award prior to performance per S.C. Regulation 19-445.2085(C).

The CPO conducted an evaluation of the request to cancel the award and granted the request. The CPO authored a written determination cancelling the award to Oracle prior to performance. (Copy attached)

DETERMINATION

Since the intent to award to Oracle has been cancelled, this protest is dismissed as moot.

Appeal by Analytical Automation Specialists, Inc., Panel Case No. 1999-1.

Voight Shealy

R. Voight Shealy
Chief Procurement Officer
For Supplies and Services

6/24/2013
Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised June 2013)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: http://procurement.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 108.1 of the 2013 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars ($250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. *[The Request for Filing Fee Waiver form is attached to this Decision.]* If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, an incorporated business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201

_____ _____
Name of Requestor Address

_____ _____
City State Zip Business Phone

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1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:
_____
_____
_____
_____

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this
_____ day of _____, 20_____

_____ _____
Notary Public of South Carolina Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

_____
Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.

SCHMIDT & COPELAND LLC
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April 1, 2013

Via Email to protest-mmo@mmo.sc.gov

Mr. Voight Shealy
Chief Procurement Officer for Goods and Services
Material Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

RE: Protest of Notice of Intent to Award re: Solicitation USC-BVB-2360-LW, Elevator Preventative Maintenance and Repair Services of the Vertical Transportation Equipment for the Columbia Campus

Dear Mr. Shealy:
This firm represents Otis Elevator Company ("Otis") in connection with the solicitation and award as to the above referenced Invitation for Bid Solicitation. Otis hereby protests the notice of intent to award a contract to Georgia Elevator DBA Oracle Elevator Co. ("Oracle"). This protest is timely as the Notice of Intent to Award was posted March 21, 2013. Otis has standing as an actual, aggrieved bidder. The grounds of this protest are set forth below.

This procurement involves an IFB to obtain Elevator Preventative Maintenance and Repair Services of the Vertical Transportation Equipment for the Columbia Campus.

Otis protests the notice of intent to award a contract to Oracle because Oracle. As of Friday, March 29, 2013, USC had not provided to Otis the documents requested under appropriate law on March 22, 2013. On Friday, March 29, USC had agreed to copy the materials for Otis' review, but as of April 1, 2013, Otis has not been advised that they are available. However, based on what Otis knows as of this date, and without the benefit of such documents, it appears, as an initial matter, that the award amount stated on the notice of intent to award is markedly higher than the actual bid of Oracle. The contract value is stated at approximately 4 Million Dollars, but the amount of the Oracle bid was indicated to be 2.97 Million.

Further, Otis protests that Oracle is not, on information and belief, a responsible or responsive bidder, because Oracle did not meet all of the material and essential requirements of the solicitation with respect to performance, and Oracle does not possess all required personnel, skills, experience and materials required to perform the contract, and lacks the ability to obtain them. Specifically, a prospective contractor must demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

(1) evidence that such contractor possesses such necessary items;
(2) acceptable plans to subcontract for such necessary items; or
(3) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

Otis believes, among other things, that Oracle does not have documentation/proof consistent with the above that it has access to the proprietary service tools that are necessary to maintain all elevator control equipment on campus (specifically the Otis Gen2 and Thyssen Krupp TAC control systems).

Once reason for Otis' belief in this regard is that Oracle was awarded an emergency contract for the services in question late last year, based on very limited "competition." In that competition, Otis was literally given only a few hours notice to provide its proposal and price to perform the services. The contract was then awarded to Oracle without a public opening of bids, and there was not posting of any award of such contract to Oracle, and Otis was never notified that the award had even been made until much later, when Otis inquired of the status of the bid. Otis was told that the bid had been awarded to Oracle some time ago, and that Oracle's bid was just barely under that of Otis.

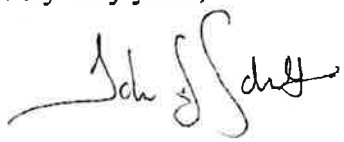
Then, during Oracle's performance of the contract, it turned out that Oracle was completely unable to handle a maintenance issue involving an Otis Gen2 elevator at the campus, and Otis had to be called to perform the work in place of Oracle. This took place only a few months ago. Because Oracle was not qualified and able to do the work just a few months ago, there is not indication that Oracle's status in that regard has changed.

;
In the same way, Otis believes that Oracle does not have documentation/proof consistent with the above that it has access to a device to monitor the Gen2 belts as required by local law/code and as therefore required by the solicitation. As before, Oracle's lack of this important tool and experience using it has not changed in any way since a few months ago when Oracle could not handle the very issues at USC.

Otis fully reserves the right to add to, amend and supplement this protest as allowed by law, following receipt of the data requested on March 22.

Otis requests a stay of any award to Oracle, a hearing on this matter, and that the intent to award to Oracle be cancelled, and that the contract be awarded to Otis.

Very truly yours,



John E. Schmidt, III

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	BEFORE THE CHIEF PROCUREMENT OFFICER
In the Matter of: Request for Cancellation of Award Prior to Performance: University of South Carolina University of South Carolina BVB No. USC-BVB-2360-LW Elevator Preventative Maintenance and Transportation Equipment for the Columbia Campus	**WRITTEN DETERMINATION** POSTING DATE: June 24, 2013 MAILING DATE: June 24, 2013

This matter initially came before the Chief Procurement Officer (CPO) pursuant to a protest filed by Otis Elevator Company (Otis), under authority of South Carolina Code Section 11-35-4210, against the University of South Carolina's best value bid # USC-BVB-2360-LW. (CPO Case # 2013-111) With this solicitation, USC attempted to procure elevator preventative maintenance and repair services of vertical transportation equipment for the Columbia Campus. Following the solicitation of best value bids (BVB), USC posted an intent to award to Georgia Elevator dba Oracle Elevator Company (Oracle). Otis protested USC's intent to award alleging: (1) "the award amount stated on the notice of intent to award is markedly higher than the actual bid of Oracle. The contract value is stated at approximately 4 Million Dollars, but the amount of the oracle bid was indicated to be 2.97 Million", (2) "Oracle is not, on information and belief, a responsible or responsive bidder, because oracle did not meet all the material and essential requirements of the solicitation with respect to performance, and Oracle does not possess all required personnel, skills, experience and materials required to perform the contract, and lacks the ability to obtain them."

In order to resolve the matter, the CPO conducted a hearing May 14, 2013. Appearing before the CPO were Otis, represented by John Schmidt, Esquire; Oracle, represented by Rivers

Stillwell and Jeremy Hodges, Esquires; and USC, represented by George Lampl, Esquire. At the end of the hearing, due to the late hour, the CPO granted a request by the parties to file closing arguments by Friday, May 17, 2013. Otis and Oracle filed their closing arguments. USC filed, instead, a request that the CPO cancel its award to Oracle.

CANCELLATION OF AWARD

In a letter dated, May 17, 2013, George Lampl, USC Associate General Counsel, asked the CPO to cancel USC's award prior to performance under authority of S.C. Code Ann. Reg. 19-445.2085(C)(1) (Inadequate or ambiguous specifications) and (4) (The invitation did not provide for consideration of all factors of cost to the State). Counsel supplemented USC's request by letter dated June 11. Copies of both letters are attached.

As justification for USC's request, Mr. Lampl wrote, "The University acknowledges that the solicitation was flawed in that it failed to require bidders to commit to a labor rate for repair work." He wrote further, "the University intends to revise the solicitation to require bidders to provide an hourly labor rate for repair work and to incorporate this information into the evaluation of the bids it receives. The University will also clarify other aspects of the solicitation in order to assure an apples-to-apples competition."

USC never provided the CPO with its intended amendments to the specifications, so the CPO has been unable to determine fully their significance. In response to a follow-up by the CPO regarding specific amendments to the specifications, Mr. Lampl responded, in part, "If the CPO decides to cancel the award per USC's request, then USC will most probably opt to restructure the solicitation as a 'full service' contract pursuant to which the winning vendor is clearly responsible for both maintenance and repairs based on a single monthly charge."

S.C, Code Ann. § 11-35-1520(10) requires award of a contract must be made to the lowest responsive and responsible bidder "[u]nless there is a compelling reason to reject bids as

prescribed by regulation of the board…." Section 11-35-1520(7) provides "Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency." Section 11-35-1528(1) makes these provisions applicable to best value bids. Regulation 19-445.2085(C) authorizes cancellation of an award prior to performance reading:

> After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:
>
> (1) Inadequate or ambiguous specifications were cited in the invitation;
> (2) Specifications have been revised;
> (3) The supplies, services, information technology, or construction being procured are no longer required;
> (4) The invitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;
> (5) Bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;
> (6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;
> (7) Administrative error of the purchasing agency discovered prior to performance, or
> (8) For other reasons, cancellation is clearly in the best interest of the State.

Taken together, these provisions authorize the Chief Procurement to cancel an award of a contract before performance begins, when a compelling reason exists and one or more of the grounds listed in the Regulation are present.

DISCUSSION

The Scope of Work read: "It is the intent of the University of South Carolina to solicit proposals for the services of a qualified vendor to provide complete elevator preventative maintenance and repair services of the vertical transportation equipment for the Columbia campus." (Ex. 1, p. 3) The BVB reads further, "The purpose of this best value bid is to solicit

bids from qualified sources to furnish complete elevator maintenance and repair services for the University of South Carolina. Regarding staffing, the contractor was required to provide a minimum of "three (3) mechanics and one (1) helper." (Ex. 1, p. 13, Scope of Work, Item B) USC also advised bidders that "Additional work may be requested" and "Repair services shall be invoked at the University's request." (Ex. 1, p. 13, Scope of Work, Items C and F.)

Regarding award, the solicitation read:

> **VI. Award Criteria**
>
> AWARD CRITERIA –BEST VALUE BIDS (JANUARY 2006): Award will be made to the highest ranked, responsive and responsible offeror whose offer is determined to be the most advantageous to the State.
>
> EVALUATION FACTORS – BEST VALUE BID (JANUARY 2006) Offers will be evaluated using only the factors stated below. Numerical weightings are provided for each evaluation factor. All evaluation factors, other than cost (which must be at least 60%), will be considered prior to determining the effect of cost on the score for each offeror. Once evaluation is complete, all responsive offerors will be ranked from most advantageous to least advantageous.
>
> A. Total Cost 60%
>
> B. Bidder's Profile & Demonstrated Experience 40%
>
> UNIT PRICE GOVERNS (JAN 2006): In determining award, unit prices will govern over extended prices unless otherwise stated.

(Ex. 1, p. 26)

In its evaluation of Total Cost (60%), USC assigned the following values for bid prices:

(1) Hourly charge for one mechanic to provide standby elevator service at Williams-Brice Stadium for football games and events for a minimum of eight (8) hours per event for 6-7 (home) games per year. For scoring purposes, this price was worth 3% of the 60% value for Total Cost.

(2) Hourly charge for one mechanic to provide elevator service for eight hours for one day in January and two days in August during resident hall move-ins. For scoring purposes, this price was worth 2% of the 60% value for Total Cost.

(3) Monthly preventative maintenance sum total for all vertical transportation devices on campus (Ex. 1, Appendix C) For scoring purposes, this price was worth 80% of the 60% value for Total Cost.

(4) Cost-plus overhead surcharge percentages for overhead and profit on materials and supplies used for repairs. (See Ex. 1, p. 36, Part VIII. Bidding Schedule/Price-Business Proposal) For scoring purposes, this mark-up was worth 15% of the 60% value for Total Cost.

Bidders submitted their bids accordingly. For example, Oracle submitted the following bid prices as USC requested:

Item #1– Hourly Charge for a Standby Mechanic for Football Games	$660.00
Item #2– Hourly Charge for Mechanic for Dorm Move-in Days	$660.00
Item #3– Monthly Preventative Maintenance Total	$49,800.00
Item #4– Mark-up on Materials and Supplies	10% for overhead 10% for profit

Lana Widener, USC Procurement Officer, evaluated mathematically the prices bid according to the percentages (weights) for the four factors identified in the BVB for Total Cost and scored the price offers as follows:

Bidder	Evaluated Price	Total Cost Score
Oracle	$39,876.00	60.00
Carolina Elevator	$50,761.70	47.40
Schindler Elevator	$55,203.20	43.20
Thyssenkrupp Elevator	$101,252.93	27.60
Otis	$95,925.35	25.20

Three USC officials reviewed and scored subjectively the offers for Bidder's Profile & Demonstrated Experience (40%). Ms. Widener merged their scores with her mathematical scores for Total Cost scores and determined the ranking of bidders as follows:

Bidder	BP&DE	Total Cost	Total Score
Oracle	97.60	180.00	277.60
Carolina Elevator	86.00	142.20	228.40

Bidder	BP&DE	Total Cost	Total Score
Schindler Elevator Group	94.00	129.60	223.40
Otis	107.20	75.60	182.80
Thyssenkrupp Elevator	99.60	82.80	182.40

(Ex. 5)

USC determined Oracle to be the highest ranked bidder and posted its Intent to Award to Oracle for an estimated potential value of $4 million. The intent to award value of $4 million drew the protest from Otis because Oracle's price for Monthly Preventative Maintenance was about $3 million, not $4 million. ($49,800/month x 12 months x 5 years = $2,988,000). At the protest hearing, Ms. Widener could not explain how she determined the estimate total potential value of the contract to be $4 million.

USC's BVB offered bidders a contract for: (a) on-site repairs as needed for equipment located at Williams-Brice Stadium for six or seven home football games annually, (b) repairs to equipment located in residence halls for move-in days estimated as one day in January and two days in August annually, (c) preventative maintenance of all vertical transportation equipment for the Columbia Campus, and (d) correction of current deficiencies in USC's elevators, and (e) any and all repairs resulting after the date of award. USC asked bidders to bid pricing for: (a) the hourly rate for one elevator mechanic for a minimum of eight hours of on-site repairs as needed to elevators located at Williams-Brice Stadium for six or seven home football games annually, (b) the hourly rate for one elevator mechanic for a minimum of eight hours for on-site repairs to equipment located in residence halls for move-in days estimated as one day in January and two days in August annually, (c) a monthly fixed fee for preventative maintenance of each and every vertical transportation equipment for the Columbia Campus, (d) a percentage mark-up on

materials and supplies used in the course of the contract for overhead, and (e) a percentage mark-up on materials and supplies used in the course of the contract for profit.

The scope of the solicitation included correction of current deficiencies to USC's elevators. Instead of identifying elevator deficiencies itself, USC asked each bidder to provide a list of current deficiencies with his bid. The BVB read:

> If in the opinion of the University such repairs are necessary, the contractor may be required to perform all or part of the repairs prior to establishing a maintenance contract for elevators. However, the University reserves the right to have identified repairs performed by another party prior to turning the elevators over to the contractor for maintenance.

(Ex. 1, p. 14, Equipment Inspection)

For example, Oracle provided a List of Deficiencies Found from the Site Visit six pages long that identified fifty-seven (57) pre-existing deficiencies with USC's elevators. USC did not ask bidders to offer pricing for correcting current deficiencies with its elevators nor consider pricing this work in determining the award. While USC did not guarantee the awarded bidder the work, USC clearly reserved the right to retain the awarded bidder to complete the work without further competition. The scope of the solicitation also included any and all possible, but yet unknown, repairs outside the scope of preventative maintenance during the life of the contract without further competition.

While the scope of the solicitation clearly does not guarantee that USC will use the preventative maintenance contractor for either repairing the current deficiencies or making repairs arising during the contract, USC could. As competition for existing deficiencies and repairs that may become necessary during the contract, USC asked bidders to offer a percentage mark-up on materials and supplies used in the course of the contract for overhead, and a percentage mark-up on materials and supplies used in the course of the contract for profit.

However, USC did not compete any other costs associated with one-off repairs, primarily labor rates.

Using Oracle's bid for example, the estimated value of the different aspects of the contract, were as follows by category:

Aspect	Oracle's Bid	Unit of Measure	Total Value
Williams-Brice	$220.00[1]	8 hours x 7 games/year	$12,320
Residence Halls	$220.00[1]	8 hours x 3 move-in days	$5,280
Preventative Maintenance	$49,800	per month	$2,988,000
Repairs			
Actual repair costs			unknown
10% overhead		unknown	unknown[2]
10% profit		unknown	unknown[2]
Competed Award Total			$3,005,600
USC's Estimated Potential Value of Contract			$4,000,000
Uncompeted Award			$994,400

(1) USC evaluated the combined rates of: Hourly rate - Monday-Friday = $220 + Hourly rate Saturday – Sunday = $220 + Hourly rate Holidays = $220, but the actual value is the per hour rates. Since Oracle bid the same hourly rates for all categories, one does not need to factor in the rates for different days.

(2) At this point, future repair costs are completely unknown. Under the scheme of the BVB, these percentages will be applied to whatever Oracle's cost for materials and supplies used for the future repairs.

In response to a vendor question, USC identified $292,046 in repairs "outside" of the maintenance contract during 2011 and 2012. (Amendment No. 7, p. 10) Extended over the maximum five-year term of the current solicitation, that means over $730,000 in projected repairs. As reflected in the table above, USC has not competed at least $994,400 of the estimated

potential value of $4,000,000. Additionally, USC awarded, albeit at its discretion, correction of equipment deficiencies at award (Ex. 1, Part III, Scope of Work, Equipment Inspection: A., p. 14) and repairs that may become necessary during the life of the contract. Jerome Provence, USC's Facilities Safety Manager, testified at the protest hearing. At the request of Otis's counsel, he added the prices on Oracle's "List of Deficiencies." His total was $2,397,600. Depending on the calculus, between three-quarters of a million dollars and nearly two and a half million dollars of work may be awarded to Oracle under this contract—work for which there has been no meaningful competition.

Regarding soliciting best value bids, the Consolidated Procurement Code reads, "When a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive best value bidding subject to the provisions of Section 11-35-1520 and the ensuing regulations. (11-35-1528 (1) Conditions for Use)" USC offered no such determination justifying the use of a best value bid. The Code reads further, "The purpose of best value bidding is to allow factors other than price to be considered in the determination of award for specific supplies, services, or information technology based on pre-determined criteria identified by the State" (11-35-1528 (2) Best Value Bidding) and "[t]he best value bid must state the factors to be used in determination of award and the numerical weighting for each factor. Cost must be a factor in determination of award and cannot be weighted at less than sixty percent." (11-35-1528 (5) Evaluation Factors)

Regarding award of a best value bid, the Consolidated Procurement Code requires, "Award must be made to the responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the State, taking into consideration all evaluation factors set forth in the best value bid. The contract file shall contain the basis on which the award is made

and must be sufficient to satisfy external audit." (11-35-1528(8) Award) As noted above, the Code applies the requirements of Section 11-35-1520 to a best value bid, unless expressly altered by Section 11-35-1528. Section 11-35-1520(10) requires "notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids."

Inherent in the application of Section 11-35-1520 to a best value bid is a requirement that the actual lowest bidder be determined for the scope of work being solicited. That was impossible in this case. In spite of the fact that USC reserved the right to engage the awarded bidder's services to remedy deficiencies in its current equipment and to perform future repairs to elevators, USC did not consider either in the award; thereby overlooking almost $1 million it estimated repairs and an untold amount to remedy existing deficiencies in its equipment identified by the bidders.

Further, for future repairs, the only price requested by USC was (a) a percentage of the bidder's cost whatever that may be on repairs for his overhead and a percentage of the bidder's cost whatever that may be for his profit. No other basis for award or pricing of repairs was considered by USC.[1] In the absence of any meaningful cost information, or other basis of determining the vendor's cost for this work, the award of almost $1 million to Oracle for repairs was a cost-plus-a-percentage-of-cost contract. Regarding types and forms of contracts, the Consolidated Procurement Code reads, "any type of contract that will promote the best interests of the State may be used, except that the use of a cost-plus-a-percentage-of- cost contract must be approved by the appropriate chief procurement officer." (11-35-2010. Types of contracts;

[1] USC did ask bidders to submit hourly rates for a mechanic, but only for two types of events: home football games at Williams-Brice Stadium and residence hall move-in days.

contracting documents and usage instructions, Types of Contracts) USC did not request CPO approval of a cost-plus-a-percentage-of-cost contract.

The CPO finds USC's award in violation of law in that: (1) USC failed to provide a written determination as required by S.C. Code Section 11-35-1528 to conduct this solicitation as a best value bid, (2) USC failed to solicit competition for correcting the current deficiencies to its elevators or for almost $1 million for future repairs to its vertical transportation equipment, and (3) USC failed to obtain CPO approval of a cost-plus-a-percentage-of-cost contract for repairs as required by S.C. Code Section 11-35-2010. These three factors combine to furnish a compelling reason not to award the contract. Consequently, the CPO finds that USC's request to cancel the award prior to performance should be granted.

AUTOMATIC STAY

In the event of a protest, the Code imposes a stay of the procurement. It reads:

> In the event of a timely protest pursuant to subsection (1), the State shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the appropriate chief procurement officer, or, in the event of timely appeal to the Procurement Review Panel, until a decision is rendered by the panel except that solicitation or award of a protested contract is not stayed if the appropriate chief procurement officer, after consultation with the head of the using agency, makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the best interests of the State.

(11-35-4210(7)) In a recent decision the Procurement Review Panel interpreted this provision to prohibit cancelation of an award without lifting the stay. The Panel also emphasized the importance that the CPO and agency head consult prior to taking any action with respect to a procurement when a stay is in effect. *Appeal by Excent Corporation*, Panel Case No. 2013-2.

In his letter of June 11, 2013, USC's counsel represents that President Pastides "believes that it is in the best interests of the University for the Chief Procurement Officer to cancel the award without further delay and for the University to restructure the solicitation…." Because the

University must have an elevator repair contractor for the safety of its students, faculty, staff, and visitors, I find it is necessary to lift the stay to protect the best interests of the State.

DETERMINATION

For the foregoing reasons, the automatic stay imposed by Code Section 11-35-4210(7) is hereby lifted; USC's request to cancel the award to Oracle is granted; and the solicitation is remanded to USC to correct the deficiencies of its solicitation and rebid.

Voight Shealy

R. Voight Shealy
Chief Procurement Officer
For Supplies and Services

6/24/2013
Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Written Determination Appeal Notice (Revised June 2013)

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b) states:

> (1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:
> (b) requests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: http://procurement.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 108.1 of the 2013 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars ($250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the S.C. Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6), 11-35-4330, and/or 11-35-4410.... Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. *[The Request for Filing Fee Waiver form is attached to this Decision.]* If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201

_____ _____
Name of Requestor Address

_____ _____
City State Zip Business Phone

---

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:
_____
_____
_____
_____

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this
_____ day of _____, 20_____

_____ _____
Notary Public of South Carolina Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

_____
Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.

UNIVERSITY OF
SOUTH CAROLINA

OFFICE OF THE GENERAL COUNSEL

May 17, 2013

VIA EMAIL AND FACSIMILE

Mr. Voight Shealy
Chief Procurement Officer
S.C. Budget and Control Board
1201 Main Street, Ste. 600
Columbia, SC 29201

Re: IN THE MATTER OF: Protest of Otis Elevator Company
Solicitation No.: USC-BVB-2360-LW
Case No. 2013-111

Dear Mr. Shealy:

The University of South Carolina hereby requests the Chief Procurement Officer to cancel the Intent to Award posted on March 21, 2013, in connection with the referenced solicitation. The Procurement Code Regulations authorize the Chief Procurement Officer to cancel an award before performance has begun if the Chief Procurement Officer determines in writing that certain conditions are met. S.C. Code Reg. 19-445.2085(C).

In the present case, the University's Best Value Bid explicitly included both repair services and maintenance services within the scope of the solicitation. However, the solicitation was structured such that the University asked bidders to submit pricing only for the maintenance component of the contract, whereas the University would negotiate pricing for most repair work with the successful bidder on a case-by-case basis. The University has estimated that the repair component of the contract may exceed $1 million over the life of the contract.

The University acknowledges that the solicitation was flawed in that it failed to require bidders to commit to a labor rate for repair work. If the Chief Procurement Officer cancels the award pursuant to the University's request, then the University intends to revise the solicitation and require bidders to provide an hourly labor rate for repair work and to incorporate this information into the evaluation of the bids it receives. The University will also clarify other aspects of the solicitation in order to assure an apples-to-apples competition among the bidders and to minimize the likelihood of another protest.

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The Regulations authorize the Chief Procurement Officer to cancel an award before performance has begun if inadequate or ambiguous specifications were cited in the invitation. S.C. Code Reg. 19-445.2085(C)(1). The Chief Procurement Officer may also cancel the award if the invitation did not provide for consideration of all factors of cost to the State. S.C. Code Reg. 19-445.2085(C)(4). The University believes that these regulatory provisions are applicable to this case and that consequently the Chief Procurement Officer should cancel the Intent to Award.

Sincerely,

George W. Lampl, III
Associate General Counsel

cc: W. Dixon Robertson, III, Esq. (via email)
Rivers S. Stillwell, Esq. (via email)
Jeremy C. Hodges, Esq. (via email)
John E. Schmidt, III, Esq. (via email)

UNIVERSITY OF
SOUTH CAROLINA

OFFICE OF THE GENERAL COUNSEL

June 11, 2013

VIA EMAIL AND FACSIMILE

Mr. Voight Shealy
Chief Procurement Officer
S.C. Budget and Control Board
1201 Main Street, Ste. 600
Columbia, SC 29201

Re: IN THE MATTER OF: Protest of Otis Elevator Company
Solicitation No.: USC-BVB-2360-LW
Case No. 2013-111

Dear Mr. Shealy:

This is in follow up to my letter to you dated May 17, 2013, regarding the referenced protest.

In the May 17 letter, the University requested you to cancel the Intent to Award posted on March 21, 2013 in connection with Solicitation No. USC-BVB-2360-LW pursuant to S.C. Code Reg. 19-445.2085(C). The University noted that the regulations authorize the Chief Procurement Officer to cancel an award before performance has begun if inadequate or ambiguous specifications were cited in the invitation and if the invitation did not provide for consideration of all factors of cost to the State. S.C. Code Reg. 19-445.2085(C)(1) and (4).

The University continues to believe that the foregoing regulatory provisions are applicable in this instance and therefore the CPO should cancel the Intent to Award. However, it is the University's understanding that the Procurement Review Panel recently articulated its position that the automatic stay imposed by S.C. Code Ann. §11-35-4210(7) precludes any action by the CPO, including cancellation, with regard to a protested solicitation if the protest is pending unless the CPO first lifts the stay after consultation with the head of the using agency.

The president of the University of South Carolina, Dr. Harris Pastides, has been apprised of the referenced solicitation and protest. He was informed that cancellation of the award would enable the University to restructure the solicitation to ensure fair and adequate competition among the vendors for the repair component of the contract, which may exceed $1 million over the life of the contract. Therefore, Dr. Pastides believes that it is in the best interests of the University for the Chief Procurement Officer to cancel the award without further delay and for the University to restructure the solicitation as noted above.

Please let me know if you require additional information from me in connection with this request. Thank you for your consideration.

Sincerely,

George W. Lampl, III
Associate General Counsel

cc: W. Dixon Robertson, III, Esq. (via email)
Rivers S. Stillwell, Esq. (via email)
Jeremy C. Hodges, Esq. (via email)
John E. Schmidt, III, Esq. (via email)