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## Protest Decision

**Matter of:** Otis Elevator Company

**Case No.:** 2019-107

**Posting Date:** September 28, 2018

**Contracting Entity:** Clemson University

**Solicitation No.:** 106124272

**Description:** Elevator Maintenance Contract

### DIGEST

Protest of award is dismissed. Otis Elevator's letter of protest is included by reference.  
[Attachment 1]

### AUTHORITY

The Chief Procurement Officer<sup>1</sup> (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on materials in the procurement file and applicable law and precedents.

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<sup>1</sup> The Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

## **BACKGROUND**

Solicitation Issued	7/25/2018
Intent to Award Issued	8/27/2018
Protest Received	9/5/2018

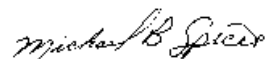
## **ANALYSIS**

Clemson issued this Invitation for Bids on July 25, 2018 to acquire elevator maintenance for up to five years. The solicitation included a spreadsheet that requested an annual price for maintenance on each of approximately 145 elevators. Award was to be made to the responsible bidder offering the lowest total annual cost to maintain all elevators plus additional hourly costs for one year. Bids were received on August 22, 2018. An Intent to Award was posted to ThyssenKrupp Elevator (TK) on August 27, 2018 in the amount of \$2,595,750. Clemson is not authorized to award a contract for goods and services in excess of \$2,000,000 and the contract awarded without authority to TK has been cancelled. Since the contract will presumably be resolicited immediately, Otis' protest is moot.

## **DECISION**

For the reasons stated above, the protest of Otis Elevator Company is dismissed as moot.

For the Materials Management Office



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Michael B. Spicer  
Chief Procurement Officer

Attachment 1



Attorneys and Counselors at Law

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September 5, 2018

Via Email to [protest-mmo@mmo.sc.gov](mailto:protest-mmo@mmo.sc.gov)

Chief Procurement Officer  
Materials Management Office  
SFAA  
1201 Main Street, Suite 600  
Columbia, South Carolina 29201

RE: Initial Protest of 8/27/2018 Notice of Intent to Award to ThyssenKrupp Elevator  
Clemson University Solicitation Number: 106124272  
Description: Elevator Maintenance Contract

Dear Chief Procurement Officer:

This firm represents Otis Elevator Company ("Otis") in connection with the above matter and submits this initial protest of the Notice of Intent to Award a contract to ThyssenKrupp Elevator, ("TK"), first posted August 27, 2018. This protest is timely filed. Otis reserves the right to timely amend this protest as permitted by law. In accordance with applicable law, this protest letter is intended to provide notice of the issues to be decided. Accordingly, it does not purport to set forth all facts and evidence in support of the protest issues. Otis supplies herewith only key portions of relevant materials in the interest of brevity. Otis reserves the right to offer facts, evidence and argument in support of the protest at any time as may be permitted by law. Otis requests due notice and any hearing at which it will present facts, evidence and argument on these issues and any others as may be properly raised under law. If a hearing will not be held, Otis requests that the CPO advise of any deadlines for the submission of evidence, argument and reply by Otis to any arguments against Otis' position and in support of this protest.

#### **BACKGROUND AND ISSUES OF PROTEST**

This protest concerns the procurement by Clemson University ("Clemson") to solicit bids for an Elevator Maintenance Contract. See Exhibit A 1-3. The handling of TK's Bid and the Notice of Intent to Award are remarkable.

The IFB contained two components that each of the two bidders supplied: 1) An "Annual Maintenance Total for Elevators and Lifts" (calculated as the sum of the Annual Price to maintain each specific Clemson Elevator listed in the bid) and 2) An "Additional Hourly Cost Per Year

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Total.” See Appendix A, Bidding Schedule. The sum of these two items was the “bid amount” on which award was to be based. TK was selected as the low bid based on its bid as submitted, attached as Exhibits A 4-19 and B1-2.

In this case, like Otis, TK bid a specific amount to be its “Additional Hourly Cost Per Year Total”, just as the bid invitation clearly required. Id. Like Otis, TK also clearly bid a specific “Annual Price” for each elevator on the bid sheet, just as the bid invitation clearly required. Id. And TK entered and logged into the State’s online bid system its bid of \$38,200 as its “Annual Maintenance Total” just as the bid invitation clearly required. A-17 (and many others like pages among the attached). TK itself filled out documents indicating its prices were “annual.” TK even itself filled out the value \$38,200.00 as the “Unit Price” and as the “Total” and TK itself inserted the designation “yr” as the UOM (unit of measure) on its own bid. See, e.g., A 17. TK filled out numerous pages identifying that the prices to be provided in each instance were annual prices, and charts that referenced that the price to be filled out was the “Annual” price. TK did the same with sub-item prices. Each elevator on the list was given an “annual” maintenance price, which footed as an “Annual Maintenance Total.”

TK’s “Annual Price” for each elevator, as well as its “Annual Maintenance Total” of \$38,200 was lower than Otis had offered. See B 1-2. Thus, TK’s bid would have been the low bid overall at TK’s *recorded total annual cost of \$98,950*. This same figure was registered as TK’s “price” as well as its “*extended price*,” since the Unit of Measure in the bid invitation was unequivocally “annual.”

Despite the above, however, after bid opening and publication, and prior to bid award, the procurement official undertook to *modify* TK’s submitted Annual Maintenance Total, and every line of its Annual Price on each and every elevator on the bid sheet that TK itself submitted. See Exhibits D 1 and E 1. The procurement officer also changed TK’s total “extended” bid price of \$98,950.00 (\$38,200.00<sup>1</sup> plus \$60,750.00<sup>2</sup> see Exhibit C 1) to \$ 519,150.00 (See Exhibit E 1). The result of these changes was to *significantly change* the “Annual Maintenance Total” included in the bid TK submitted and filled out itself from \$38,200.00 to \$458,400.00 after bid opening. The procurement official made these enormous changes to the TK bid herself *after bid opening and before award, without any prior written request from TK, and without any documentation from TK* – in other words in contravention of the clear and unambiguous requirements of the controlling statutes. As a consequence, a notice of intent to award was issued to TK not for its “Response Total” of \$98,950.00 as registered by TK itself, but instead for \$519,150.00 annually.

If TK wished to honor its unmodified bid price of \$38,200.00 for Annual Maintenance, Otis would not be in a position to protest. Also, if TK were not willing to honor its “as bid price,” TK would be entitled to request relief from the obligation to perform at that price – to withdraw its bid due to error. The Consolidated Procurement Code would allow both of these actions.

<sup>1</sup> “Annual Maintenance Total for Elevators and Lifts”

<sup>2</sup> “Additional Hourly Cost Per Year Total”

But it is clear today that TK does not intend to honor their actual "as bid" price. Instead, it appears that the purchasing officer and TK have decided to increase that "as bid" price by hundreds of thousands of dollars, using an approach specifically prohibited by the Code and Panel and CPO decisions.

The Code does not allow the Procurement Officer to treat the bid as she did. Additionally, the Code does not allow a bidder or the State to modify the bid as was done. For TK, it should be enough for it to be relieved of its duty to perform under an erroneous bid, if the process for such relief is applied for, engaged, and warranted.

The Award to TK as it is stated is contrary to the Procurement Code, Regulations, policies and prior CPO and Procurement Review Panel Decisions and is unlawful for the reasons stated herein. If TK will not honor its actual as bid Annual Maintenance Total price (without the improper modification), Otis is entitled to the Notice of Intent to Award as the lowest responsive and responsible bidder.

The Procurement Code defines a responsive bidder as "a person who has submitted a bid . . . which conforms in all material aspects to the invitation for bids." S.C. Code Ann. § 11-35-1410(7). By law, the bid of a vendor who fails to submit a bid that conforms to the invitation for bids must be rejected. Here, it appears that the Purchasing Officer determined that TK did not submit a bid that conformed in all material respects to the invitation for bids. But instead of rejecting the bid as the Code mandates, she undertook to change or "fix" that bid. The Code never allows that. In fact, the operative statute requires that the bid be rejected. S.C. Code Ann. § 11-35-1410(7).

In this case, the Procurement Officer specifically made a determination that TK's bid was a *minor informality or irregularity*. However, the Panel has previously determined that a pricing error does not qualify as a *minor informality or irregularity*. In a 2009 case involving TK, it was suggested at the Panel hearing that the Panel should allow a procurement officer to "fix" TK's bid and treat a pricing defect as a minor informality or irregularity. The Panel held as follows:

The Procurement Code defines a minor informality as one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.

S.C. Code Ann. § 11-35-1520(13) (Supp. 2008). The Panel finds that the change between the price bid (\$ 180,000.00) and the price awarded (\$ 244,440.00) had more than a trivial effect on the total bid price.

Here, the proposed “fix” would change the bid price from \$98,950 to \$ 519,150.00 – an even more significant increase than the one the Panel previously struck down. A large price increase to the State over the as bid price is simply not permitted as a minor informality.

In a 2016 Decision, Kustom Signals, Inc., 2016 CPO LEXIS 40; 2016-135, the CPO recognized that:

Section 11-35-1520(6) requires that:

Bids must be accepted unconditionally *without alteration or correction*, except as otherwise authorized in this code.

Section 11-35-1520(7) states in pertinent part that:

After bid opening, *changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted.*<sup>3</sup> [Emphasis added.]

Regulation 19-445-2070(A) states that:

Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.

In Protest of Palmetto Bus Sales, 2012 CPO LEXIS 44, 2012-131, the CPO recognized:

The Code even provides a process for a bidder to ask to withdraw or correct its bid, as it stipulates, "After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it." (§ 11-35-1520 (7) Correction or Withdrawal of Bids) *The supporting regulations require, "A bidder or offeror must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder's or offeror's mistake is*

<sup>3</sup> The matter was not handled as a request for correction of bid mistake. However, any such change was prejudicial to the State as the price is exponentially higher than what was clearly and unambiguously bid as an annual price, and thus is to the State's disadvantage to permit. Further, the change is prejudicial to fair competition because it was evidently left to guess, and the bidder's own post-bid opening choice as to whether the "mistaken" annual price was really a weekly price, a monthly price, a quarterly price, a semi-annual price, or some other. Nothing in the bid suggests one of these – but instead, only "annual." Giving only one competitor that choice, discretion and leeway *after* bids are submitted is unfair to all others.

*clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency, or the designee of either.*" (Regulation 19-445.2085, Correction or Withdrawal of Bids, (A) General Procedure). However, Palmetto never submitted a written request to correct its bid. The regulation reads further, "To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition." (Reg. 19-445.2085 B. Correction Creates Low Bid. )

Note that here the official record shows that there was: (i) no written request by TK as required, (and thus, obviously, no legally conforming request with all requisite proof); and (ii) no approval by a CPO or by an Agency Head; and (iii) no designation of authority by either. Accordingly, it is undisputable that proper and legally binding protocols were not followed.

In Appeal of Cannon Construction Co., 2012 CPO LEXIS 42, Case 2011-9, it was stated:

Under the Procurement Code, the State must unconditionally accept bids in construction procurements "without alteration or correction, except as otherwise authorized in this code." S.C. Code § 11-35-3020(b) (2011) (emphasis added). The correction of "inadvertently erroneous" bids is addressed by section 11-35-1520(7) of the Procurement Code, which provides in pertinent part:

After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted. *After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it.* Except as otherwise provided by regulation, *all decisions to permit the correction . . . of bids . . . 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.* S.C. Code Ann. § 11-35-1520(7) (2011). The correction of bids is also governed by regulation 19-445.2085, which establishes [¶9] the following procedure:

A bidder . . . must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request

must document the fact that the bidder's . . . mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officer or head of a purchasing agency, or the designee of either. S.C. Code of State Regulations R 19-445.2085(A) (2011).

The Panel has interpreted these provisions in the past and has held that an *inadvertent mistake in a bid must be evident from the bid documents themselves and correctable from the information contained therein without consulting the bidder*. See In re: Protest of Brantley Construction Co., Panel Case No. 1994-6 (June 14, 1994) (in situation where bidder's alleged mistake was underlining "add to" instead of "deduct from" on one item in its bid, the Panel found that the bid could not be corrected under the Procurement Code and the governing regulation because the mistake could only be identified and corrected by contacting the bidder, which would inject the potential for compromising the integrity of the sealed bid process); In re: Protest of Miller's of Columbia, Panel Case No. 1989-3 (April 24, 1989) (where bidder failed to indicate four required unit prices on its bid even though an overall lot price was given, a mistake which was clearly evident on the face of the bid, the procurement officer could not correct the bid by filling in the unit prices without contacting the bidder, a practice not allowed by the Procurement Code). Thus, in order to establish that a correction should have been allowed, a *bidder must prove that the mistake is evident from the bid document itself and that the correction is one that could be made from the information already available to the procurement officer*. [Emphasis added.]

Here, the TK bid as submitted specifically reiterated over and over that its prices and the components thereof *were annual prices*. There was not a single word or indication in the materials submitted by TK to the contrary, or that "monthly" or any other periodic pricing was instead submitted. Rather, the procurement official simply *surmised* that a very low price had to be a *monthly* price – even though the objective of competitive bidding is to bid lowest and vendors are allowed to bid well below cost if they so choose. The price is repeatedly stated as an *annual* price, and there is no reason to believe that the price was instead a monthly price or pricing over any other period. And nothing whatsoever suggested what interval the "mistaken" price was "meant to be" – other than annual.

It is plain that among all things a procurement official is not permitted to do, one of them is to decide without any request, after bid opening, what pricing was actually "intended" aside from the price that is specifically stated in the bid itself by a vendor for a given product or service. Such an



approach places the purchasing officer into tenuous, and even dangerous territory, outside the "four corners of the bid."

Here, if TK is unwilling to stand by the Annual Maintenance Price of \$38,200.00 and its own Annual Pricing as submitted, then the law requires that its bid must be rejected, and an award to Otis is in order. The bidder alone is responsible for their bid. There is no exception. A bidder who omits essential data, or who fails to make their best bid, has no remedy. A vendor who arrives late with a bid, or sends it to a wrong address, or who cannot log into the State's system in time - even through good faith error - as well as in a myriad of other circumstances that conspire to prevent a bidder from presenting its best bid, has no remedy. Like everyone else, even bidders must sometimes learn hard lessons the hard way.

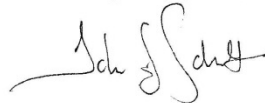
### **CONCLUSION**

Based on the grounds set forth herein, Otis asks that the automatic stay be imposed; that the CPO cancel the notice of intent to award the contract to TK; and that the CPO Order that the notice of intent to award to TK shall be issued to Otis as the lowest responsive and responsible bidder.

Otis also requests an opportunity to be heard at any hearing in this matter. If the CPO determines that a hearing will not be held, Otis requests that the CPO provide Otis and all other parties a deadline by which they may provide evidence (to be shared with Otis for reply) for the CPO to consider in reaching its decision, and the date on which the CPO's review will be completed.

Otis also asks that, to the extent not already provided, the CPO immediately require that the entire procurement file and all records of or related to the procurement in the hands of the using agency and the SFAA be provided to the undersigned on behalf of Otis as required by S.C. Code § 11-35-410, the South Carolina Consolidated Procurement Code and under the S.C. Freedom of Information Act. In these circumstances, because neither the State nor TK appear to commit to have TK perform at the actual price TK submitted in its bid, the award must be issued to Otis.

Very truly yours,



John E. Schmidt, III

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

*Protest Appeal Notice (Revised June 2018)*

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.

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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 111.1 of the 2018 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, 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  
1205 Pendleton Street, Suite 367, Columbia, SC 29201**

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\_\_\_\_\_  
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:

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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: \_\_\_\_\_

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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.**