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GRANT GILLESPIE
EXECUTIVE DIRECTOR

THE DIVISION OF PROCUREMENT SERVICES

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DIVISION DIRECTOR
(803) 734-8018

MICHAEL B. SPICER
INFORMATION TECHNOLOGY MANAGEMENT OFFICER
(803) 737-0600
FAX: (803) 737-0639

Written Determination

Matter of: Cancellation of Award to ThyssenKrupp Elevator

Case No.: 2019-110A

Posting Date: September 28, 2018

Contracting Entity: Clemson University

Solicitation No.: 106124272

Description: Elevator Maintenance Contract

This matter is before the Chief Procurement Officer for Information Technology (CPO) pursuant to a request from Clemson University [Ex. 1], pursuant to Regulation 19-445.2015A, to terminate a contract for elevator maintenance that was awarded without authority to ThyssenKrupp Elevator.

BASIS FOR THE REQUEST

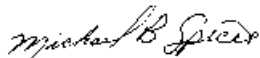
Clemson issued this Invitation for Bids on July 25, 2018, for elevator maintenance. Clemson is authorized by the State Fiscal Accountability Authority to conduct solicitations and award contracts for goods and services with a total potential value not to exceed \$2,000,000.00.

Clemson received bids on August 22, 2018, and posted an award to ThyssenKrupp with a total potential value of \$2,595,750.00 (\$519,150.00 per year for five years) on August 27, 2018. [Ex. 2] Clemson lacked the authority to make this award. Clemson recognized the error and requested cancellation of the award prior to performance in accordance with Regulation 19-445.2015(A) which states:

Upon finding after award that a State employee has made an unauthorized award of a contract or that a contract award is otherwise in violation of law, the appropriate official may ratify or affirm the contract or terminate it in accordance with this section. The contract may be terminated and reasonable termination costs, if any, may be awarded as provided in this section. The contract may be ratified and affirmed only if it is in the best interests of the State. The decision required by this subsection A may be made by the chief procurement officer, the head of a purchasing agency, or a designee of either officer, above the level of the person responsible for the person committing the act.

DETERMINATION

The award to ThyssenKrupp was unauthorized. Regulation 19-445.2015A provides that an unauthorized contract may be ratified “only if it is in the best interests of the State.” No interest of the State is served by ratifying an unauthorized contract before any performance has occurred, and where the burden of re-solicitation is slight. Accordingly the contract is terminated. Clemson is directed to procure its requirements for elevator maintenance in accordance with the Code.



Michael B. Spicer
Chief Procurement Officer

Exhibit 1



September 11, 2018

TO: Mr. Michael B. Spicer
Information Technology Management Office
1201 Main Street, Suite 430
Columbia, SC 29201

**Procurement &
Business Services**

Clemson University
400 19th Parkcenter Road
Clemson SC
29634-6346

P 864-659-2390
F 864-659-2324

Re: Ratification Notice – 19.445.2015; Unauthorized Procurement

Dear Mr. Spicer:

In review of the procurement files upon receiving notice of the protest of our solicitation and award for our Elevator Maintenance contract (solicitation #106124272), we were made aware that the Intent to Award was signed with an annual contract amount of \$519,150. This amount, over the five year potential term of the contract exceeds our \$2,000,000 certification authority to award such a contract, resulting in an unauthorized procurement. Given this oversight on our part, we are requesting the contract award be terminated to allow us to properly solicit for this contract.

Our elevator contract was last bid out five years ago and awarded with an annual contract amount of \$218,000. We knew when preparing this new contract that with growth on campus and additional requirements added to the scope, that the value of the contract was going to increase, but the Procurement Officer never envisioned it would more than double in cost and therefore did not consider our \$2,000,000 certification limit, which was the first error made in this procurement. The second error was when the Intent to Award document was reviewed and signed. The University President has delegated signatory authority to the Procurement Director, and in his absence, to the Senior Procurement Officer. In this particular case, it was the Senior Procurement Officer that reviewed and signed the award document. She mistakenly viewed the contract as being a total potential value of \$519,150 versus that amount being the "annual" amount over the five year potential term of the contract – a total potential value of over \$2.5M. This was



an award that never should have been signed based on the value of the bids that were received.

As corrective action, all the University Procurement Officers have been reminded of our procurement certification limits and the process for submitting requests to the State Procurement Office to solicit contracts as well as requesting delegation authority from the Chief Procurement Officer has been reviewed. I am confident they understand the criticality of our certification limits and authority to enter into contracts. I have also counseled the Senior Procurement Officer regarding this specific event in addition to providing retraining on signing award documents in general.

With your approval to terminate this contract award, we will then present a Request for Delegation of Authority to the Material Management Officer for consideration to re-solicit the contract for our Elevator Maintenance and will proceed accordingly re-soliciting through our office or via the State Procurement Office.

We understand this oversight has created an unfortunate and complicated situation with the protest of this specific contract award. It was clearly never our intent to do something improper with the unauthorized procurement nor pertaining to the facts raised in the protest. However given the series of missteps that occurred in the awarding of this contract, we believe that it is in the best interest of the State to terminate this contract award and request that you do so in accordance with Regulation 19-445.2015.

Respectfully,

A handwritten signature in black ink, appearing to read "M. Nebesky".

Michael Nebesky
Procurement Director

Exhibit 2



Intent to Award

Posting Date: 8/27/2018

This is a statement of intent to award a contract and becomes the official statement of award effective 8:00 A.M. EST, 10.30.2018 unless otherwise suspended or canceled. Vendors are cautioned not to begin work on the contract or incur any costs associated with the contract prior to the effective date of the contract. Clemson University assumes no liability for the expenses incurred by vendors prior to the effective date of the contract.

Procurement and Business Services

Clemson University
ASB 108 Perimeter Road
Clemson SC
29634-5365

P 864-656-2390
F 864-656-2394

Award inquiries should be addressed to the Contracting Officer at kbperry@clemson.edu. Bidder's right to protest as listed in section 11-35-4210(1)(b) in the South Carolina Consolidated Procurement Code applies to this award. "Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract."

Protest to be filed with:

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201
Facsimile: 803-737-0639
E-mail: protest-mmo@mmo.state.sc.us

Solicitation #: 106124272

Issue Date: 7.25.2018

Closing Date: 8.22.2018

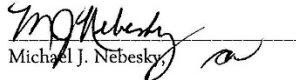
Description: Elevator Maintenance Contract

Awarded To: ThyssenKrupp Elevator
161 Johns Road
Suite E
Greer, SC 29650

Estimated Contract Amount: \$519,150.00 Annually

Initial Contract Period: 10.30.2018 thru 10.29.2019

Maximum Contract Period: 10.30.2018 thru 10.29.2023


Michael J. Nebesky



Director, Procurement and Business Services

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Written Determinations Appeal Notice (Revised June 2018)

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.

(Emphasis added.) *See generally Protest of Three Rivers Solid Waste Authority by Chambers Development Co., Inc.*, Case Nos. 1996-4 & 1996-5, *Protest of Charleston County School District*, Case No. 1985-5, *Charleston County School Dist. v. Leatherman*, 295 S.C. 264, 368 S.E.2d 76 (Ct.App.1988).

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**

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.