

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

Oracle Elevator Company

University of South Carolina
Best Value Bid No. USC-BVB-2485MR
Elevator preventative Maintenance and
Repair services of the Vertical
Transportation Equipment for the
Columbia Campus of USC

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2013-144

POSTING DATE: March 14, 2014

MAILING DATE: March 14, 2014

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest dated November 27, 2013, from Oracle Elevator Company (Oracle). With this Best Value Bid (BVB), the University of South Carolina (USC) attempts to procure elevator preventative maintenance and repair services of the vertical transportation equipment (passenger elevators, handicap lifts, freight elevators, and dumb waiters, per the Scope of Work, ex. 3, p. 14, Item 2) for the Columbia campus. Following the evaluation of the bids received, USC posted its intent to award to Otis Elevator Company (Otis). Oracle protested the award, alleging multiple violations of law.

In order to resolve the matter, the CPO conducted a hearing January 14, 2014. Appearing before the CPO were: Oracle, represented by Jeremy Hodges, Esquire; Otis, represented by John Schmidt, Esquire; and USC, represented by George Lampl, Esquire. The hearing was not concluded the first day and was continued March 4, 2014.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference. In summary, Oracle protested USC's award to Otis on multiple grounds, as follows.¹

1. Potential Value of the Award - Oracle challenged USC potential value of the award of \$4 million arguing the sum total of Otis' price was only \$2,796,600 leaving \$1.2 million uncompleted.
2. USC engaged in post-award negotiations that are prohibited by the Consolidated Procurement Code
3. Otis' price was unreasonably low and materially unbalanced
 - a. Otis' proposal also contains a poison pill that will cause the University's elevator maintenance and repair costs to increase dramatically during the course of this contract that was not properly accounted for during the evaluation and scoring process . . . These artificially low and below market proposals made Otis the apparent low bidder, but in no way reflect the actual cost of providing these services to USC. Put simply, Otis will lose money on those units (and others).
 - b. Otis' total monthly maintenance and repair proposal – of \$38,600 – is also well below market.
 - c. In an effort to make up its losses on those units, however, Otis bid an outlandish \$725 per month per unit for the seven MRL units currently on campus.
4. Collusive Bidding/Anticompetitive Trade Practices- Otis has also made other arrangements to recoup its losses under this contract. Upon information and belief, Otis has requested and will receive tens of thousands of dollars per month from a work preservation fund operated by the International Union of Elevator Contractors (IUEC) to offset the money it will lose by intentionally submitting an artificially low bid. Otis' arrangement with the union work preservation fund is not indefinite . . . and at some point during the life of the contract, it will expire. At that point, Otis will be losing thousands of dollars a month on this contract and may very well decide to walk away from it instead of renew it for the full five year term.
5. Otis' prior record of integrity with USC was given insufficient consideration
6. Otis' bid is not responsive because, among other deficiencies, it fails to include information required by section B. 2 and 3 of the Contractors Qualifications section of the bid, and the resident vendor preference was incorrectly applied to portions of this award despite the fact that the contract involves "a single award with a total potential value in excess of five hundred thousand dollars." S.C. Code Ann. § 11-35-1524(E)(2).

¹ Oracle did not number its grounds of protest. The numbers are the CPO's.

PROTEST GROUNDS WITHDRAWN

Oracle withdrew its protest allegations that Otis would “walk away from it (the contract) instead of renew it for the full five year term.” [Protest letter, first partial paragraph, p. 4] Otis’ bid was nonresponsive because, “it fails to include information required by section B. 2 and 3 of the Contractors Qualifications section of the bid, and the resident vendor preference was incorrectly applied to portions of this award despite the fact that the contract involves “a single award with a total potential value in excess of five hundred thousand dollars.” [Protest letter, second complete paragraph, p. 4]

MOTIONS TO DISMISS

Otis and USC offered motions asking the CPO dismiss virtually the entire protest. The CPO withheld judgment on the motions choosing instead to hear the issues.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On July 25, 2013, USC published the BVB.
2. On August 1, 2013, USC issued Amendments 1, 2, 3, and 4.
3. On August 13, 2013, USC issued Amendment # 5.
4. On August 19, 2013, USC issued Amendments 6 and 7.
5. On September 12, 2013, USC issued Amendment #8. (Ex. 2)
6. On September 20, 2013, USC issued Amendment #9.
7. On September 27, 2014, USC issued Amendment #10, a total redraft of the BVB. (Ex. 3)
8. On October 11, 2013, USC issued Amendment #11.
9. On October 15, 2013, USC issued Amendment #12.
10. On November 18, 2013, USC posted its Intent to Award. (Ex. 9)
11. On November 27, 2013, Oracle filed its protest with the CPO.

12. On December 2, 2013, USC suspended its intent to award. (Ex. 10)

DISCUSSION – BEST VALUE BIDDING

USC processed the solicitation as a best value bid. Best value bidding is authorized under the Consolidated Procurement Code, Section 11-35-1528. The Code explains, “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] Regarding evaluation, the Code adds, “The 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] 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.” [11-35-1528(8) Award].

USC’s Award Criteria were:

- Cost – 60%
- Bidder’s Qualifications & Experience – 40%.

[Ex. 3, p. 26]

SOLICITATION REQUIREMENTS – SCOPE OF WORK

With this solicitation², USC attempts in a single contract to address virtually all USC Columbia’s current and future vertical transportation preventative maintenance and repair needs under one umbrella contract. The BVB reads, “It is the intent of the University of South Carolina to solicit proposals for the services of a qualified vendor to provide complete elevator

² This procurement is a re-solicitation of a procurement originally awarded to Oracle, protested by Otis, and cancelled by the CPO upon request by USC.

maintenance and repair services of the vertical transportation equipment for the Columbia campus.” [Ex. 3, Scope of Solicitation, p. 3] The only exclusions are “modernizations” of existing units [Ex. 3, Exclusions, p. 17] and existing and new vertical transportation units still under warranty.³ As warranties expire, those units will be added to this contract as well.

SOLICITATION REQUIREMENTS – PRICE PROPOSALS

For their price-business proposals, USC asked bidders to offer pricing for:

- Monthly maintenance and repair charge
 - This aspect of the business proposals was supported by a complete schedule of every vertical transportation device by location and type on the USC-Columbia campus. (Appendix C) Bidders were directed to offer itemized pricing for each device, total the itemized prices, and insert the grand total on the bidding schedule.
- Labor rates for:
 - Hourly rate for one mechanic multiplied by 20 hours estimated per month for a monthly total
 - Hourly rate for a team (one mechanic and one helper) multiplied by 10 hours estimated per month for a monthly total

[(Ex. 3, Part VIII. Bidding Schedule, p. 37)]

THE EVALUATION RESULTS

Evaluation – Cost – 60%

USC tabulated the price proposals mathematically as follows:

<u>Bidder</u>	<u>Monthly Price</u>	<u>Bidder Price Score</u>
1. Otis	\$46,610	180.0
2. Oracle	\$56,460	138.6
3. Carolina Elevator Service	\$80,173	104.4
4. Thyssen Krupp Elevator Corp.	\$83,640	93.6
5. Schindler Elevator Corp.	\$112,600	68.4

³ The BVB provides a list of exceptions [Ex. 3, Scope of Work, p. 14, item 6], but the exceptions listed therein were actually included by USC in the award. The “exception” is that the successful contractor may charge extra for those services.

[Ex. 6]

Evaluation – Bidder’s Qualifications & Experience-40%

Three evaluators scored the technical proposals as follows:

<u>Bidder</u>	<u>Bidder Technical Score</u>
1. Otis	119.6
2. Thyssen Krupp	110.0
3. Oracle	100.0
4. Schindler	96.0
5. Carolina Elevator	95.6

Evaluation Summary

Following evaluation of the technical proposals and the price proposals, USC completed the evaluation. The composite scores were as follows:

<u>Bidder</u>	<u>Total Score</u>
Otis	299.60
Oracle	238.6
Thyssen Krupp	203.6
Carolina Elevator	196.4
Schindler Elevator	164.4

[Ex. 7]

Otis’s bid was scored highest for price, bidder’s qualifications and experience and total score.

CONCLUSIONS OF LAW

Protest Ground #1: Potential Value of the Award - Oracle challenged USC’s potential value of the award of \$4 million arguing the sum total of Otis’ price was only \$2,796,600 leaving \$1.2 million uncompleted.

USC attempted to consolidate all elevator and vertical lift equipment maintenance and repairs on the Columbia campus under a single contract. USC can predict with certainty the monthly maintenance charges for the vertical equipment currently on campus. USC can also predict with certainty that repairs to vertical transportation equipment will become necessary during the contract term due to equipment failure or vandalism. USC’s gave all prospective

bidders notice of its intention in the solicitation to award an “all inclusive” contract, *i.e.*, “It is the intent of the University of South Carolina to solicit proposals to provide complete elevator preventative maintenance and repair services of the vertical transportation equipment” [Ex. 3, Scope of Solicitation, p. 3](emphasis added), and “Ongoing construction of new facilities and modernization of existing equipment dictates that certain equipment will be added to this agreement in the future.” [Ex. 3, Bidding Schedule, p. 37] USC wrote further:

The purpose of this best value bid is to solicit bids from qualified sources to furnish FULL ELEVATOR MAINTENANCE AND REPAIR SERVICES for the University of South Carolina’s Columbia campus. The successful contractor must furnish the following, including but not limited to, all supplies, materials, maintenance service vehicles, communication needs, labor, labor supervision, tools, test equipment, special equipment, parts, trouble call service, testing, reports, and lubricants necessary to provide complete preventative maintenance, adjustment, repairs and replacements for the vertical transportation systems described herein.

[Ex. 3, Part III. B. Scope of Work, p. 13]

USC even included an attachment of entitled “Potential Add-on elevator Units to Long Term Maintenance Contract” that clearly addressed additional elevators it plans to add during the contract term. [Ex. 13]

While USC can predict with certainty the scope of equipment to be covered by the contract, it cannot predict with certainty what repairs, the severity of those repairs, the frequency of the repairs, or the cost of repairs that may occur. USC addressed this uncertainty by developing an award scenario that asked bidders to offer responses based upon an evaluated amount. In that evaluated amount analysis, USC combined offers for monthly maintenance on known units plus hourly rates it could use to predict expenses for repairs that may occur. In doing so, USC attempted, as best it could, to compete the unknown portion of the work. Such an approach is not uncommon in state solicitations.

USC notified all prospective bidders of the “evaluated amount” scenario it would use to determine the most advantageous offer, taking into consideration all evaluation factors set forth in the best value bid. None of the bidders protested USC’s approach. USC employed the approach as announced. Therefore, this protest ground is denied.

Protest Ground #2: USC engaged in post-award negotiations that are prohibited by the Consolidated Procurement Code.

Oracle alleged post-award negotiations are prohibited by the Code, but cited no section of the Code, either in its letter or at the hearing, supporting its allegation. Therefore, this protest ground is dismissed as vague.

Section 11-35-4210(2)(b) requires that “[a] protest ... must set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided.” *See also Appeal by NBS Imaging Systems*, Panel Case No. 1993-16 (challenge to broad areas of the RFP were too vague; more complex solicitations require greater specificity in protest). The Procurement Review Panel has eschewed overly technical analyses of protest letters. The Panel has required that the protest must in some way alert the parties to the general nature of the grounds for protest. *Protest by Sterile Services Corporation*, Panel Case No. 1983-17. An effective way to do this is by alleging that some provision of the solicitation has been ignored, or that the award of the contract has violated some statute or regulation. *Appeals of Logisticare Solutions, LLC, and Medical Transportation Management, Inc.*, Panel Cases Nos. 2011-1 and 2011-2 (Order on motion to dismiss issued May 11, 2011); *cf. Appeal by Coastal Rapid Public Transit Authority*, Panel Case No. 1992-16 (protestant must show the State departed from standards set forth in the Procurement Code and the RFP). This protest letter does neither.

Further, the Code does authorize the State to negotiate price. It 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, unless otherwise provided for in this section.” [11-35-1528(1)] Section 11-35-1520 reads, “Before the posting of the award, the procuring agency may negotiate with the lowest responsive and responsible bidder.” [11-35-1520(10)] Therefore, no violation of the Code was proven to have occurred.

Protest Ground #3: Otis’ price was unreasonably low and materially unbalanced. Otis’ proposal also contains a poison pill that will cause the University’s elevator maintenance and repair costs to increase dramatically during the course of this contract that was not properly accounted for during the evaluation and scoring process . . . These artificially low and below market proposals made Otis the apparent low bidder, but in no way reflect the actual cost of providing these services to USC. Put simply, Otis will lose money on those units (and others). Otis’ total monthly maintenance and repair proposal – of \$38,600 – is also well below market. In an effort to make up its losses on those units, however, Otis bid an outlandish \$725 per month per unit for the seven MRL units currently on campus.

Oracle alleged, in related grounds, Otis’ bid was artificially low, below its actual cost, for certain requirements of the solicitation, which would cause Otis to lose money on those requirements, and materially unbalanced, outlandishly high for several MRL units, which would cause USC to actually pay much more over the life of the contract.

Otis’ bid price was indeed lower than its competitors. However, USC ensured a fixed price for year one, the only guaranteed term of the contract, as well as, a process for addressing price adjustments thereafter. The BVB specified “the initial term of this agreement is one year from the effective date.” [Ex. 3, Term of Contract – Effective Date/Initial Contract Period, p. 34] The BVB specified further, “At the end of the initial term, and at the end of each renewal term, this contract shall automatically renew for a period of one year, unless contractor receives notice that the state elects not to renew the contract at least thirty (30) days prior to the date of

renewal.” [Ex. 3, Term of Contract – Option to Renew, p. 35] Regarding price increases, the BVB read:

Adjustments of Price or Time for Performance. If any such change increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, an adjustment shall be made in the contract price, the delivery schedule, or both, and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract. [Ex. 3. Part VII. Terms and Conditions - B. Special, Changes, Item (2)]

Upon approval of the Procurement Officer, prices may be adjusted for any renewal term. Prices shall not be increased during the initial term. Any request for a price increase must be received by the Procurement Officer at least one hundred and eighty (180) days prior to the expiration of the applicable term and must be accompanied by sufficient documentation to justify the increase. If approved, a price increase becomes effective starting with the term beginning after approval. A price increase must be executed as a change order. [Ex. 3, Price Adjustment – Limited – After Initial Term Only, p. 33]

Regarding, unbalanced bidding, the BVB read:

Unbalanced bidding. The State may reject an Offer as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the State even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.

[Ex. 3, II. Instructions to Offerors - A. General Instructions, p. 8]

The Procurement Review Panel addressed unbalanced bidding writing, “Looking again at the language of the IFB clause quoted above, the Panel finds that the following elements must be proven in the instant case to establish a materially unbalanced bid: (1) there must be evidence showing that some prices are significantly less than cost for some line items; (2) there must be evidence showing that some prices are significantly more than cost for some line items; and (3) there is a reasonable doubt that the bid will result in the lowest overall cost to the State despite being the low evaluated bid. *Appeal by Advanced Imaging Systems, Inc.*, Panel Case No. 2013-7

Oracle argues Otis' bid is materially unbalanced in that Otis bid an unreasonably low price for seven (7) units of a total of well over 100 units. Oracle did not prove Otis bid less than its cost for any units or significantly more than its cost for the MRL units. Oracle has certainly not proven that Otis' bid prices will not result in the lowest cost to the State. Therefore, the protest ground is denied.

Protest Ground #4: Collusive Bidding/Anticompetitive Trade Practices- Otis has also made other arrangements to recoup its losses under this contract. Upon information and belief, Otis has requested and will receive tens of thousands of dollars per month from a work preservation fund operated by the International Union of Elevator Contractors (IUEC) to offset the money it will lose by intentionally submitting an artificially low bid. Otis' arrangement with the union work preservation fund is not indefinite . . . and at some point during the life of the contract, it will expire. At that point, Otis will be losing thousands of dollars a month on this contract and may very well decide to walk away from it instead of renew it for the full five year term.

Oracle alleged Otis' bid should be rejected as a collusive effort with a third party, the International Union of Elevator Contractors (IUEC) "that is anti-competitive and which violates the spirit, if not the letter of the Procurement Code and possibly South Carolina ethics laws, including S.C. Code Ann. Section 8-13-790" and "may violate established federal law." Oracle alleged further Otis will received tens of thousands of dollars per month from a work preservation fund operated by the IUEC to offset the money it will lose by intentionally submitting an artificially low bid.

The only specific statute Oracle alleged Otis violated was S.C. Code Ann. Section 8-13-790. The statute reads:

SECTION 8-13-790. Recovery of amounts received by official or employee in breach of ethical standards; recovery of kickbacks.

(B) Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order under it, it is conclusively presumed that the amount of the kickback was included in the price of the subcontract or order and ultimately borne by the State or governmental entity and is recoverable hereunder from the subcontractor making the kickback. Recovery from one offending party does not preclude recovery from other offending parties.

Section 8-13-790 addresses a subcontractor making a kick back to a prime contractor or higher tier subcontractor in connection with the award of a subcontract. The Code defines subcontractor as, "'Subcontractor' means any person having a contract to perform work or render service to a prime contractor as a part of the prime contractor's agreement with a governmental body." [S.C. Code 11-35-310(30)] The IUEC is not a subcontractor to Otis under this definition.

In the remainder of this protest ground, that Otis has violated "the spirit, if not the letter of the Procurement Code and possibly South Carolina ethics laws" (other than 8-13-790) and "may violate (unspecified) established federal law" is dismissed as vague.

Protest Ground #6: Otis' prior record of integrity with USC was given insufficient consideration. Specifically, the evaluators failed to consider the fact that during the bid process for this solicitation, Otis' counsel repeatedly threatened to file a lawsuit against USC for the return of pulse monitoring devices that were attached to the MRL elevator units currently on campus.

With this ground, Oracle alleges Otis is not a responsible bidder. As noted previously, this solicitation is a re-solicitation of the same requirement. The first solicitation was conducted because USC's incumbent contractor for elevator maintenance advised USC that it would not exercise an extension option. USC declared an emergency procurement for maintenance services to bridge the gap between the lapse of the incumbent's contract and completion of the new solicitation. After soliciting quotations under the emergency declaration, USC awarded the emergency contract to Oracle, which allowed USC adequate time to process the first solicitation. The first solicitation was also awarded to Oracle. Otis protested USC's awards of the emergency and the first solicitation to Oracle. After a hearing before the CPO, USC asked the CPO to cancel its award of the first solicitation prior to performance; a request the CPO granted. Otis and USC contemplated legal action regarding the pulse monitoring devices attached to the seven Otis Gen

II elevators on campus. Legal action was never filed. At any rate, both Otis and USC have every right to exercise their legal rights.

The Code reads, “Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts.” [11-35-1810(1)] USC determined Otis a responsible bidder, which the Code defines as “a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.” [11-35-1410(6)]

Pursuant to Regulation 19-445.2125(A) promulgated by the South Carolina Budget and Control Board, factors to be considered include whether a prospective contractor has:

- (1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (2) a satisfactory record of performance;
- (3) a satisfactory record of integrity;
- (4) qualified legally to contract with the State; and
- (5) supplied all necessary information in connection with the inquiry concerning responsibility.

According to the South Carolina Procurement Review Panel (Panel), the procurement officer is obligated to determine responsibility before award and may consider any source of information. *Protest of CollegeSource, Inc.*, Panel Case No. 2008-4 (citing Code Section 11-35-1810(1) and Reg.19-445.2125(B)). A procurement officer’s responsibility determination is a matter of discretion and cannot be overturned unless the protestant shows it was “clearly erroneous, arbitrary, capricious, or contrary to law.” Code Section 11-35-2410(A). In *Protest of Value*

Options, Panel Case No. 2001-7, the Panel noted that procurement officers are given broad discretion in making their responsibility determinations because these are a matter of business judgment. The Panel explained that “[t]o prove arbitrary and capricious conduct such as will permit the court to overturn a procurement decision, the aggrieved bidder must demonstrate a lack of reasonable or rational basis for the agency decision or subjective bad faith on the part of the procuring officer or clear and prejudicial violation of relevant statutes and regulations which would be tantamount to a lack of reasonable or rational basis.” *Id.*, citing *Robert E. Derecktor of Rhode Island, Inc. v. Goldschmidt*, 516 F.Supp. 1085 (D.R.I. 1981).

Oracle offered no compelling evidence that USC’s determination that Otis was a responsible bidder was arbitrary, capricious, contrary to law, or clearly erroneous. Therefore, this protest ground is denied.

DETERMINATION

For the foregoing reasons the protest is dismissed.⁴



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services

March 14, 2014

Date

Columbia, S.C.

⁴ The CPO expresses his apprehension about USC’s “cushion” in the total potential award amount of \$4 million. While USC did not guarantee Otis this much work, USC reserved the right to award all \$4 million to Otis. The CPO sees this difference as merely one of semantics – USC awarded Otis a \$4 million contract.

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, 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.

Nelson Mullins

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November 27, 2013

**Via Electronic Mail to protest-mmo@mmo.sc.gov
& Hand Delivery**

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

RE: In the matter of: Solicitation No.: USC-BVB-2485-MR(Revised)
Elevator Preventative Maintenance and Repair Services of the Vertical
Transportation Equipment for the Columbia Campus of USC

Dear Mr. Shealy:

We represent Oracle Elevator Co. in connection with the solicitation and award of the above referenced contract. Please allow this letter to serve as notice that Oracle protests the notice of intent to award a contract to Otis Elevator Company. This protest is timely as the Notice of Intent to Award was posted on November 18, 2013. Oracle has standing as an actual, aggrieved bidder, and the grounds for its protest are set forth below.

The estimated potential value of the contract, as set forth in the Intent to Award, is \$4 million. This is markedly higher than the amount of Otis' bid, which – including anticipated labor costs for work excluded under the contract – is approximately \$2,796,600. It appears that there has not been any meaningful competition with respect to more than \$1.2 million of work under this contract.

Further, the University of South Carolina and Otis have, upon information and belief, engaged in post-award negotiations that are prohibited by the Consolidated Procurement Code. Specifically, after bids were opened Otis was required or encouraged to substantially lower its proposed monthly cost for servicing the seven MRL (machine room less) elevators covered by

Mr. Voight Shealy
November 27, 2013
Page 2

this contract, which was a component of Otis' base monthly maintenance and repair bid. The changing of material terms in a bid after bid opening is specifically prohibited by the Procurement Code. Moreover, to the extent Otis was allowed to change its proposal with respect to the MRL units (or any other units), the disparity between Otis' bid total and the estimated potential value of the contract in the Intent to Award (as noted above) is even greater.

Otis' proposal also contains a poison pill that will cause the University's elevator maintenance and repair costs to increase dramatically during the course of this contract that was not properly accounted for during the evaluation and scoring process. In an effort to be the low bidder, Otis intentionally lowered its proposed costs for maintaining nearly every type of vertical transportation unit on campus. For example, the monthly market cost for maintaining a hydraulic elevator is between \$150 and \$200 per month. Otis' proposes to maintain and service the eighty-one hydraulic elevators on USC's Columbia campus for \$50 per month per unit. Similarly, the monthly market cost for maintaining a traction elevator is \$300 to \$450 per month. Otis bid \$270 per unit per month for the eighty-eight traction elevators on campus. These artificially low and below market proposals made Otis the apparent low bidder, but in no way reflect the actual cost of providing these services to USC. Put simply, Otis will lose money on those units (and others).

Otis' total monthly maintenance and repair proposal – of \$38,600 – is also well below market. Because union wages are publicly available and widely published, Otis' minimum costs of providing the personnel required by this contract can be easily determined. The solicitation requires each bidder to provide a minimum of three mechanics and one helper who will be dedicated to performing under this contract on a full time basis. The minimum salaries, including fringe benefits, for three union mechanics and one union helper in this market total nearly \$41,000. As such, Otis' monthly costs will be at least \$2,400 more than its bid on this contract.

In an effort to make up its losses on those units, however, Otis bid an outlandish \$725 per month per unit for the seven MRL units currently on campus. The monthly market cost for maintaining a MRL unit is \$300 to \$450 per month. As such, Otis' proposal for MRL units is roughly double the market cost and is an obvious attempt to support its below market proposals on other units. This poison pill will also cause USC's monthly maintenance costs to rise drastically during the course of this contract because the elevators in buildings currently under construction and those planned for construction during the life of this contract are almost without exception MRL units. In the next six months alone, USC will bring fourteen MRL units on line that will be added to this contract. The cost of adding just those fourteen elevators to this contract will increase USC's monthly maintenance cost by \$10,150 under Otis' proposal ($14 \times \$725 = \$10,150$). This drastic escalation in price caused by adding MRL units in new construction and those slated for modernization at Otis' greatly exaggerated costs were not given adequate consideration during the evaluation process. Additionally, although Otis was apparently the low bidder on the date bids were opened, at some point during the life

Mr. Voight Shealy
November 27, 2013
Page 3

of the contract that may not be true. As new MRL units are added and Otis' charges skyrocket, Oracle's proposal may in fact provide the lowest overall cost to USC over the life of the contract since it proposed to maintain MRL units for a reasonable, near market cost of \$480 per month.

The solicitation documents specifically provide the Procurement Officer with authority to reject any offer that is unreasonable to price. Otis' proposed price for servicing MRL units is unreasonably high and its offer should have been rejected. Likewise, its overall proposed monthly maintenance and repair proposal is unreasonably low and should have also been rejected. Similarly, the solicitation also authorizes USC to reject an offer as nonresponsive if the prices are materially unbalanced between line items or subline items. The bid explains that "[a] bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is reasonable doubt that the bid will result in the lowest overall cost to the State even though it may be the low evaluated bid . . ." Revised USC BVB-2485-MR, RESPONSIVENESS (d), (e), p. 8. As shown above, Otis' bid is materially unbalanced. Otis' proposals for nearly every type of elevator and vertical transportation unit – except MRL units and escalators – are significantly less than cost, and its proposals for MRL units and escalators are significantly above cost. As such, Otis' bid should have been rejected as materially unbalanced and nonresponsive by USC.

Otis has also made other arrangements to recoup its losses under this contract. Upon information and belief, Otis has requested and will receive tens of thousands of dollars per month from a work preservation fund operated by the International Union of Elevator Contractors (IUEC) to offset the money it will lose by intentionally submitting an artificially low bid. By way of background, Unions deduct fees from workers' paychecks to finance work preservation or market recover program funds. The funds are then used to pay subsidies or rebates to selected contractors, like Otis. Non-union contractors, like Oracle, do not have access to these work preservation funds. Use of work preservation funds virtually guarantee that the unionized bidder/contractor will be selected because a nonunion bidder/contractor cannot compete against below market bids unless they lower their bid so much that they receive little or no profit. The union bidder/contractor still realizes a full profit on the job, however, (despite a below market bid) because it will be reimbursed by the promise of a subsidy or rebate from the union's work preservation fund.

Otis' job targeting amounts to a collusive effort with a third party to rig the competitive bidding process that is anti-competitive and which violates the spirit, if not the letter of the Procurement Code and possibly South Carolina ethics laws, including S.C. Code Ann. § 8-13-790. Additionally, if any federal funds are used in any project that is covered by this contract, Otis' arrangement with the IUEC work preservation fund may also violate established federal law. Because Otis failed to disclose its plan to receive subsidies from a third party during the solicitation process, and because its plan is anti-competitive, lacks integrity, and is specifically designed to drive non-union contractors out of the market, Otis should not have been found to

Mr. Voight Shealy
November 27, 2013
Page 4

be a responsible bidder, and the contract should be awarded to the lowest, responsible bidder. Moreover, Otis' arrangement with the union work preservation fund is not indefinite (upon information and belief it is a six month commitment) and at some point during the life of the contract, it will expire. At that point, Otis will be losing thousands of dollars a month on this contract and may very well decide to walk away from it instead of renew it for the full five year term¹ which would be fundamentally unfair to USC, as it undoubtedly wants a five year contract so that it does not have to repeat the solicitation process again in the near future. The likelihood of Otis providing USC with a five year contract under its current proposal is extremely low.

Otis' prior record and record of integrity with USC was also given insufficient consideration during the evaluation process. Specifically, the evaluators failed to consider the fact that during the bid process for this solicitation, Otis' counsel repeatedly threatened to file a lawsuit against USC for the return of pulse monitoring devices that are attached to the MRL elevator units currently on campus. Otis' position in those communications was that USC had wrongfully converted these devices by preventing Otis from retrieving and removing the devices from the MRL units and that as a result, Otis was entitled to equitable relief from the University and would be filing a complaint for conversion. Because Otis was threatening USC with lawsuits while this solicitation was ongoing, Otis should not have been found to be a responsible bidder, and the contract should be awarded to the lowest, responsible bidder.

Finally, Otis' bid is not responsive because, among other deficiencies, it fails to include information required by section B. 2 and 3 of the Contractors Qualifications section of the bid, and the resident vendor preference was incorrectly applied to portions of this award despite the fact that the contract involves "a single award with a total potential value in excess of five hundred thousand dollars." S.C. Code Ann. § 11-35-1524(E)(2).

Oracle fully reserves the right to add to, amend and supplement this protest as permitted by applicable law following the receipt and opportunity to review information requested from USC on November 18, 2013, which as of the date of this filing have not been made available for review. Oracle requests a stay of any award to Otis, a hearing on this matter, and that the intent to award to Otis be cancelled, and that the contract be awarded to Oracle.

¹ Just as the previous contractor elected to do. Incidentally, the previous contractor had this contract at a base monthly maintenance and repair cost of approximately \$51,000 – or \$12,400 more than Otis' bid and nonetheless chose not to renew it after one year out of a concern over its lack of profitability.

Mr. Voight Shealy
November 27, 2013
Page 5

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeremy C. Hodges". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Jeremy C. Hodges

JH1:

cc: Dixon Robertson, Esq. (via e-mail/.pdf)