

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

In the Matter of Protest of:

Otis Elevator Company

Medical University of South Carolina  
IFB No. 4842-11/05/2012-94461  
Provide All Labor, Equipment, and  
Materials Necessary for the  
Modernization of Elevators 44 and 45 at  
The Institute of Psychiatry

**BEFORE THE CHIEF PROCUREMENT OFFICER**

DECISION

CASE NO.: 2012-152

POSTING DATE: January 25, 2013

MAILING DATE: January 25, 2013

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest dated December 5, 2012, from Otis Elevator Company (Otis). With this invitation for bids (IFB), the Medical University of South Carolina (MUSC) attempts to procure all labor, equipment, and materials necessary to modernize and maintain Elevators 44 and 45 at the Institute of Psychiatry. Following the evaluation of the bids received, MUSC posted its intent to award to American Elevator (AE). Otis protested the award, alleging "AE is not a responsible or responsive bidder" because (1) AE does not provide the 24-hour per day, year round elevator monitoring as specified in the IFB and (2) AE does not provide the response time as specified in the IFB.

In order to resolve the matter, the CPO conducted a hearing January 15, 2013. Appearing before the CPO were Otis, represented by John Schmidt, Esq.; AE, represented by Rick and Travis Easler; and MUSC, represented by Joseph Goode, Esq.

**NATURE OF PROTEST**

The letter of protest is attached and incorporated herein by reference

**FINDINGS OF FACT**

The following dates are relevant to the protest:

1. On October 18, 2012, MUSC issued IFB4842-11/05/2012-94461. (Ex. 1)
2. On October 30, 2012 conducted a pre-bid conference.
3. On November 2, 2012, MUSC issued Amendment #1. (Ex. 2) This amendment merely extended the opening date. It had no effect on this protest.
4. On November 8, 2012, MUSC issued Amendment #2 answering the questions received from prospective bidders (Ex. 4).
5. On November 16, 2012, MUSC opened the three bids received tabulating them as follows:

<u>Bidder</u>	<u>Total Bid</u>
AE	\$215,734
Thyssen Krupp	266,985
Otis	357,926

(Ex. 6)

6. On November 27, 2012, MUSC posted its intent to award to AE. (Ex. 4)
7. On December 5, 2012, Otis filed its protest of the intent to award with the CPO.

### **SOLICITATION REQUIREMENTS**

MUSC solicited bids to renovate/modernize and maintain elevators 44 and 45 at its Institute of Psychiatry. According to the IFB, “Items to be modernized include: Machines, Motors, Control systems, cab interiors, signal fixtures, door locks, door operators, safety devices and wiring.” (Ex. 1, p. 13, Scope of Solicitations) MUSC clarified that the solicitation also required the contractor to maintain the two elevators as well. (Ex. 1, p. 13, III. Scope of Work, B. Intent, Item a.)

### **DISCUSSION**

According to testimony, MUSC previously contracted with Otis on a sole source basis to maintain 170 elevators on the Charleston campus. The current solicitation for updates and maintenance of two elevators is MUSC’s first competed procurement for elevator service in

years. Otis challenged MUSC's award to AE alleging AE is not a responsible or responsive bidder because: (1) AE does not provide the monitoring as specified in the IFB, and (2) AE does not provide the response time as specified in the IFB.

Regarding award of an IFB, the Consolidated Procurement Code (Code) 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." (11-35-1520 (10) Award) The Code defines a responsive bidder as, "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals." (11-35-1410(7)) The Code defines a responsible bidder 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))

### **Responsiveness**

#### **(1) AE does not provide the monitoring as specified in the IFB**

Regarding monitoring the operation of the elevators, the IFB required bidders to provide:

**REMOTE ELEVATOR MONITORING:** Provide a microprocessor system that continuously monitors the elevators on a 24-hour per day, year-round basis. The system will notify a 24-hour dispatching center that an elevator is inoperative by sending a message via telephone line.

(Ex. 1, p. 20, Specifications)

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k. Install a microprocessor system that continuously monitors the elevators on a 24-hour per, year-round basis. The system will notify a 24-hour dispatching center that an elevator is inoperative by sending a message via telephone line. Upon receipt of such message, the Contractor will initiate the dispatch of personnel for emergency minor adjustment callback service.

(Ex. 1, p. 23, Specifications, Item C.k.)

Otis did not allege that AE's bid does not provide monitoring, but rather that "AE's bid does not provide the monitoring as specified in the IFB." Otis alleged AE's approach was not in conformance in a variety of ways, including:

- the equipment AE intends to use, an E.C.C. Model DL-20 elevator multi-function processor, does not interface as specified;
- although in use in western states, the system is not used often in the east;
- it sends trouble signals via a Google Voice account to AE's technicians

According to the Easlars, the DL-20 would perform all functions required in the solicitation. Otis offered no competent testimony to refute their assertion. Absent any evidence that the DL-20 will not work, all Otis has raised is speculation that the DL-20 may create a contract administration issue for MUSC sometime in the future.

(2) AE does not provide the response time as specified in the IFB

Regarding response time, the IFB required:

Response Time: The Contractor is required to provide a thirty (30) minute response time from 7:00 am to 5:00 pm, Monday through Friday, and two (2) hours at all other times. The Contractor shall provide Service Coverage that is capable of responding to at least two (2) Service Calls simultaneously to any of the elevators under this warranty period during normal working hours. Emergency calls for elevators carrying trapped passengers shall also be responded to within thirty (30) minutes during normal working hours, and within one (1) hour after normal working hours.

(Ex. 1, p. 27, Warranty and Full maintenance, Item b.iv.)

Otis alleged that AE could not respond in accordance with the requirement.

Rick and Travis Easler of AE responded that AE would comply with the response time requirements of the IFB. According to their testimony, AE's office is in Summerville, SC, which

is twenty miles away. AE employs two full-time elevator service mechanics plus mechanics that install the equipment. Two AE staff members service elevators full time in downtown Charleston under contracts with the City of Charleston, the County of Charleston, and the Veterans Administration Hospital. One routinely serves the Charleston peninsula from Calhoun Street south; the other routinely serves the peninsula from Calhoun Street north. Since this procurement only involves two elevators, they testified that they do not feel AE needs to dedicate one person for just this contract, but AE could respond using its existing staff stationed in Charleston and from Summerville.

Otis argued it would be impossible for AE to meet the response time requirements. They contended that upon receipt of a call, an AE technician would have to stop work at his current job site, secure that elevator, drive to MUSC from either their work site or Summerville, locate parking at MUSC, and walk to the MUSC elevator site. In fact, Otis effectively argued that no other company but itself could respond within thirty minutes. Their argument is based principally on the fact that, due to the breadth of its current contracts with MUSC to maintain 170 elevators, MUSC provides Otis with a permanent work site on campus. AE and MUSC disagree with Otis.

AE offered its bid without qualification; thereby obligating itself to all terms and conditions therein. Debra Cannon of MUSC evaluated AE's bid and determined it responsive. As the protestant, it is Otis' burden to prove by the preponderance of the evidence that MUSC's determination of responsiveness was wrong. Otis has failed to meet this burden.<sup>1</sup>

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<sup>1</sup> Regarding response time, the CPO observes that if no one but Otis could comply with the response time requirement—because MUSC provides Otis with a work site on campus—the solicitation would be patently unfair to all other bidders. Therefore, the response time requirement would be unduly restrictive and in violation of the Code.

## **Responsibility**

Regarding Otis' allegation that AE was not a responsible bidder, the duty of determining the responsibility of offerors to the IFB falls upon the procurement manager. Only a responsible offeror may be awarded a contract. 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)) The Code defines a responsible offeror 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.

Debra Cannon of MUSC testified that she determined AE a responsible bidder after verifying no suspensions or debarments had been imposed upon AE, consulting with the MUSC engineering department, and calling three references provided by AE. In response to the question, "How would you rate their (AE's) performance?" according to Ms. Cannon, the references answered: "Excellent" (Canterbury House), "Excellent. Rate above them all" (City of

Charleston), and “Good to Exc(ellent)” (Charleston County). In response to the question “Would you hire them again for this service?” according to Ms. Cannon, the references answered, “Yes” (Canterbury House), “Absolutely” (City of Charleston), and “Yes” (Charleston County). Thereafter, Ms. Cannon prepared a written determination of award writing, “American Elevator has been determined to be the lowest responsive, responsible bidder for this project.” (Ex. 7)

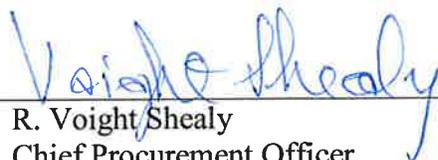
As the protestant, it is Otis’ burden to prove that MUSC’s determination of responsibility was not only wrong, it was clearly erroneous, arbitrary, capricious, or contrary to law.” (11-35-2410) Otherwise, Ms. Cannon’s determination of responsibility is “final and conclusive.”

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.C. R.I. 1981).

The only evidence Otis offered that remotely bears on AE's responsibility was Mr. Easler's concession that his company had not previously installed the DL-20 remote monitoring equipment. It offered nothing to contradict the references supporting the procurement officer's determination, nor did it challenge AE's general competency as elevator technicians. Otis therefore failed to prove that Ms. Cannon's determination of responsibility was clearly erroneous, arbitrary, capricious, or contrary to law. This ground of protest is denied.

**DETERMINATION**

For the foregoing reasons the protest is dismissed.



R. Voight Shealy  
Chief Procurement Officer  
For Supplies and Services



Date

Columbia, S.C.

**STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW**  
*Protest Appeal Notice (Revised January 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.

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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 83.1 of the 2012 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); 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**

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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:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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.**



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December 5, 2012

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: MUSC Solicitation IFB 4842-11/05/2012-94461  
PROVIDE ALL LABOR, EQUIPMENT, AND MATERIALS NECESSARY FOR THE  
MODERNIZATION OF ELEVATORS 44 and 45 AT THE INSTITUTE OF PSYCHIATRY

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 American Elevator. (“AE”) This protest is timely as the Notice of Intent to Award was posted November 27, 2012. Otis has standing as an actual, aggrieved bidder. The grounds of this protest are set forth below.

This procurement involves an IFB to obtain Elevators, and related, essential services for MUSC Institute of Psychiatry.

Otis protests the notice of intent to award a contract to AE because AE is not a responsible or responsive bidder, because AE did not meet all of the material and essential requirements of the IFB with respect to performance, particularly performance as described more fully, below. Otis also challenges that AE is a responsible bidder whose bid is fully responsive.

The IFB at page 20, Specifications, Item IV. B, defines Remote Elevator Monitoring as follows: “REMOTE ELEVATOR MONITORING: Provide a microprocessor system that continuously monitors the elevators on a 24-hour per day, year-round basis. The system will notify a 24-hour dispatching center that an elevator is inoperative by sending a message via telephone line.”

AE’s bid does not and cannot meet this requirement. AE does not provide the monitoring as specified in the IFB. Such monitoring is safety-related, and is a mandatory, essential and non-

waiveable requirement of the IFB.

Likewise, at page 23 of the IFB, IV. Specifications, Item C. k. requires as follows:

“k. Install a microprocessor system that continuously monitors the elevators on a 24-hour per, year-round basis. The system will notify a 24-hour dispatching center that an elevator is inoperative by sending a message via telephone line. Upon receipt of such message, the Contractor will initiate the dispatch of personnel for emergency minor adjustment callback service.”

AE’s bid does not and cannot meet this requirement. AE does not provide the monitoring as specified in the IFB. Such monitoring is safety-related, and is a mandatory, essential and non-waiveable requirement of the IFB.

Additionally, at page 26 of the IFB, with regard to Warranty, Maintenance and Response time, the IFB required as follows at pages 26-27:

***“F. Warranty and Full Coverage Maintenance***

a. **Warranty Service Requirements:** Provide a complete one year manufactures warranty for parts and labor on the installation to be reflected in the cost of goods. The one year warranty service period should include full coverage maintenance service including all callbacks and repairs.

b. The (1) year warranty service coverage must include the following:

i. **Modernization Maintenance Period:** Maintenance service consisting of a minimum of monthly examinations, adjustments and lubrication of the elevator equipment shall be provided by the elevator contractor for a period of twelve (12) months after the elevator has been turned over for the customer’s use. This service shall not be subcontracted, but shall be performed by the elevator contractor. All work shall be performed by competent employees during regular working hours of regular working days and shall include emergency 24-hour callback service. This service shall not cover adjustments, repairs or replacement of parts due to negligence, misuse, abuse or accidents caused by persons other than the elevator contractor. Only genuine parts and supplies as used in the manufacture and installation of the original equipment shall be provided.

ii. **Response Time:** Response time is defined as the elapsed time between the service call and the Contractor’s arrival at the elevator in need with appropriate equipment/tools. MUSC shall be billed at agreed upon contracted rate only for work that occurs after normal working hours. The Contractor shall provide twenty-four (24) hour answering service. An answering machine shall not be substituted for this requirement.

iii. **Normal Working Hours:** Normal working hours are defined as 7 am – 5 pm, Monday through Friday.

iv. **Response Time:** The Contractor is required to provide a thirty (30) minute response time from 7:00 am to 5:00 pm, Monday through Friday, and two (2) hours at all other times. The

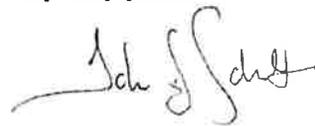
Contractor shall provide Service Coverage that is capable of responding to at least two (2) Service Calls simultaneously to any of the elevators under this warranty period during normal working hours. Emergency calls for elevators carrying trapped passengers shall also be responded to within thirty (30) minutes during normal working hours, and within one (1) hour after normal working hours.”

AE’s bid does not and cannot meet this requirement. AE does not provide the response time as specified in the IFB. Such response time is safety-related, and is a mandatory, essential and non-waiveable requirement of the IFB.

On information and belief, no bidder other than Otis met this mandatory and essential, non-waiveable requirement. Therefore, Otis protests the award, and requests a stay, a hearing and a determination that the other bidders were non-responsive and an award of the contract to Otis as the lowest responsive and responsible bidder.

Otis requests a stay of any award to American Elevator, a hearing on this matter, and that the contract be awarded to Otis as the next lowest responsive and responsible bidder. Otis reserves the right to amend this protest under law.

Very truly yours,

A handwritten signature in black ink, appearing to read "John E. Schmidt, III". The signature is fluid and cursive, with a long horizontal stroke at the beginning and a large, looped "S" for the last name.

John E. Schmidt, III