

Schindler Elevator Appeal Hearing – May 27, 2014 Meeting Minutes (Draft)

Attendees:

Kent Beers
Alan S. Bachman
Lois Wiesemann
Mark E. Arnold
Scott M. Lilja
Dale Gardener
Steve Sparti
Jackie Freeman
Michael Carter
Stephanie Castro
Jared Gardner
Chiarina Bautista

Kent Beers, Chief Procurement Officer, called the meeting to order.

Schindler Elevator, Dale Gardner opening -

The Procurement Code was amended on March 29, 2014 and changed some of the procedural requirements for the Procurement Code. Because the award was awarded after the statute was amended, Dixie State University was required to abide by the 2014 amendments. Section 63G-6a-708 (1)(a), required Dixie to include with their decision, a justification statement. There is no justification statement. Dixie did not comply with the statute. The protest officer made one up and it is the last page of the decision. Only the Committee can make the justification statement, and because of that the case needs to be remanded. The justification statement is mandatory by the Code and it is not there, and so it is arbitrary and capricious. The justification statement should have explained the score, and how the proposal provided the best value to the procurement unit in comparison with the other proposals. It is important because Schindler Elevator was the lowest bidder. Also, the decision does not contain the cost benefit analysis and is not in the record anywhere. Is it a one year or five year contract? The last time this was bid out was five years ago, and had the same type of contract. The history shows it is really a five year contract. The RFP required cost increases that they wanted for those additional years. In 63G-6a-1703 (3)(a)(i), renewal periods are supposed to be excluded. The cost benefit analysis is in not in Section 63G-6a-1708. The legislature did not mean to exclude renewal periods. Schindler technicians are all licensed and listed 150 universities for which they provide the same type of service and they are not sure why they lost the contract, because there was no justification statement provided.

Dixie State University, Michael Carter opening – The statute went into effect a week before the award was issued and no one on our team was aware of the changes that were made to the Utah Procurement Code in which it relates to the issues we are dealing within this matter. There was a justification statement provided by Ms. Freeman, once she was aware of the particular, and prepared that in consultation with the Committee. It was prepared by Ms. Freeman, but in consultation with the Committee members. It is in the record and that work is present in the

material. However, it was not timely prepared. They were not timely aware of the statute. When statutes are amended, they are done with some transitional period of time. This statute was in effect the day it was signed, with no transitional awareness period to be implemented and so it caught everyone flat footed. There was no blatant disregard to comply with the statute. There is room for argument regarding the cost benefit analysis. The contract was for one year, with the potential for four consecutive years renewal. They took the position, that the award they were looking at was the first year subject to satisfactory performance, as stated in RFP, and the difference was just under \$6,000, so there was no basis for the cost benefit analysis.

The scoring system can be a matter of judgment and subjectiveness, depending on what the Committee knew about elevators and the technicians involved. They scored based on their individual basis and their individual opinions, so there is nothing to be questioned about each of these Committee members, or evaluating the criteria. The Committee should be given the benefit of the doubt that they made a good decision and we believe there was nothing arbitrary and capricious in their decision. They may have known the technicians from the winning bidder, they may have had different dealings with them, but the numbers do not suggest anything bias in their decision.

Rebuttal by Schindler Elevator – This project needs to start over with a new RFP because the Committee did not issue a justification statement. The amended version of the Procurement Code requires the Committee to issue the justification statement with the award, and that was not done. Jackie Freeman was the protest officer; she was supposed to referee and had no authority to help the Committee issue the justification statement. It is undisputed that the justification statement was not made. If the Procurement Unit does not comply with the Utah Procurement Code, then that is one definition of clearly erroneous, arbitrary and capricious, and so this Board is obligated to reverse the decision. Jackie Freeman's statement for the justification statement does not comply with the requirements of the statute. There was not a cost benefit analysis done, and both sides agree that hinges upon whether this is a five year contract or a one year contract. The reason this is a five year contract is because the last time this was re-bid was five years ago. They kept the contract going for five years. The RFP itself required the parties to include cost increases for the remaining years of the contract, and there was no need to do that if it was a one year deal. If it is a five year contract, then there has to be a cost benefit analysis. The scoring was inconsistent because TK and Otis said they both could respond in one hour, but they did not get identical points. They have no idea why their scores are different, since there was no cost benefit analysis. Schindler asks the Committee to remand this back so it complies with the Procurement Code.

Rebuttal by Dixie State University – Schindler is disputing the timeliness of the justification statement. If you look at the statement, Jackie Freeman talks about the scoring, the way cost was considered, and she tried to follow the statute. It does not have the signature of the Committee members. She is reflecting what the Committee members reflected back to her. It was not timely. But, as soon as they could comply, they complied with the statute. It is a Committee statement about justification. It is important to note, Jackie Freeman noted what the Committee thought was the best value for the University. There is nothing arbitrary and capricious with their scores.

Looking at Section 63G-6a-1703, the total value is under \$500,000, and the bond of \$20,000 was adequate. The previous contract had run its 5 years, and so we issued a new RFP. If you look at the RFP, it talks about a contract period on page 7 of the RFP. The contract may be renewed for additional one year periods for four consecutive years; and the contract will not exceed five years. The statute does not require the cost benefit analysis, or, the statute is not very clear on this issue. The renewal contract periods will be considered if the performance is satisfactory.

The justification statement was provided, but not provided timely. Once Dixie found out that we needed to provide the justification statement, they provided it as soon as possible, and they were not trying to disregard the statute in any way.

Statement by Mark Arnold (for TK) – Dixie State University needs excellent service and the contracts will only be renewed if the service is satisfactory. The reason the contract has been renewed is because they have performed satisfactory services and have been married and tried on the shoes so to speak. Their company provides excellent service and has done this type of work for years. Schindler Elevator has been given an explanation, and is hanging their hat on some procedural error on their part, and clearly everyone believes nothing has been done unethically or dishonestly. They want to continue to do our job and to provide excellent service to Dixie State University.

The statute for interpretation regarding the cost-benefit analysis is stated below:

63G-6a-708(2) If, in determining the best value to the procurement unit, the evaluation committee awards the highest score, including the score for cost, to a proposal other than the lowest cost proposal, and the difference between the cost of the highest scored proposal and the lowest cost proposal **exceeds the greater of \$10,000 or 5% of the lowest cost proposal**, the evaluation committee and the conducting procurement unit shall prepare an informal written cost-benefit analysis that:

- (a) explains, in general terms, the advantage to the procurement unit of awarding the contract to the higher cost offeror; and
- (b) except as provided in Subsection (5):
 - (i) includes the estimated added financial value to the procurement unit of each criterion that justifies awarding the contract to the higher cost offeror; and
 - (ii) demonstrates that the value of the advantage to the procurement unit of awarding the contract to the higher cost offeror exceeds the value of the difference between the cost of the higher cost proposal and the cost of the lower cost proposals.

Statement by Schindler Elevator - Schindler said Dixie State University wishes they did a cost-benefit analysis or a justification statement, but they did not. Schindler is using Section 63G-6a-1703(3), as evidence that the cost-benefit analysis is intended to apply to the full contract period, including renewal periods. Schindler believes the justification statement has to be completed when the award is announced and it was not. It should be done after the scoring and before the award is announced.

Dixie State University believes the statute is specific to determining a bond, therefore not applicable to other sections of the Procurement Code. Dixie State believes the code is silent on the initial period of the contract, or the many possible renewal periods.

Closing statement Dixie State University – Dixie believes this process was handled seriously by their team; the Committee scored the proposals fairly and they feel strongly that they chose the right company for the contract. They believe the fact that they did not provide the justification statement when they announced the award has no bearing on what the outcome of the RFP evaluation would have been. Ms. Freeman just did not know when the statute took effect. Ms. Freeman assumed it would be effective on May 1st, like last year. Ms. Freeman does not believe the Committee did anything wrong or did anything unethical. The Committee believes they chose the right company for the contract.

Closing statement Schindler Elevator – This case needs to be remanded. Looking at the new Procurement Code, Dixie required to issue the justification statement when they announced the award. The document that was attached to the decision by the protesting officer does not contain the elements required by the statute. The legislature required that you “shall” provide the justification statement and that was not done. That needed to be done, so the other companies can see why they did not get the award. The cost benefit analysis is required if they include the renewable contract terms; and they provided the reasons why they believe the Committee should include the renewable terms. If the Committee believes the cost benefit analysis should have been done, then this case must be remanded. There are two companies who proposed the same response time, and they got different scores. TK gave you what they thought were the reasons, but they were not in the record. They do not know why and they cannot know why they got those scores, and so this needs to be remanded so they can do the cost benefit analysis and the justification statement. Therefore their decision is arbitrary and capricious.

Motion made by Jared Gardner to go into closed session for deliberations, motion seconded by Stephanie Castro. Motion passed unanimously.

Panel went into closed session

Motion made by Jared Gardner to go back into open session, motion seconded by Stephanie Castro. Motion passed unanimously.

Panel went back into open session

Three Issues the Panel deliberated on in closed session: (1) A justification statement should have been issued by Dixie State University and it was not. (2) A cost benefit analysis should have been completed and was not. (3) There were discrepancies of the scoring in the technical evaluation.

Motions and decision:

- (1) The appeal based on the cost benefit analysis is denied. A cost benefit analysis is not required, because in the panel's opinion it was a one year contract and renewal periods are not to be included. The one year period is the term of the contract.
- (2) The panel upholds the appeal on the basis that the justification statement was not properly issued. Referring to U.C.A. Section 63G-6a-708, the justification statement issued with the decision of Dixie State University does not properly address the requirements of the justification statement in the Procurement Code. *See U.C.A. for further clarification.* The panel recommends that in accordance with Section 63G-6a-1702, the panel is remanding it back to Dixie State University so they can prepare a proper justification statement with the requirements provided in the statute. The evaluation committee and the procurement unit shall work together in providing the justification statement.
- (3) The panel denies the appeal on the grounds that there was inappropriate scoring in the technical evaluation. It is the opinion of the committee that the evaluation committee members are the ones best suited to interpret, assess, and evaluate the technical scores and proposals and assign scores to them. They are the ones most familiar with the campus, and they are the experts to decide which proposal provides the best value for Dixie State University. It is not the place for the appeals panel to step over an evaluation committee. The evaluation committee spent the time reading and accessing the proposals, point by point. There is a subjective nature in all RFPs when it comes to the technical scoring.

A written formal determination will be issued within seven days, as described in statute.

Dixie State University asked about being reimbursed for the costs associated with defending this appeal, citing Section 63G-6a- 1904. Alan stated that it is not in the panel's discretion to rule on this issue. This is a self-operating statute. There is nothing for the procurement appeals panel to do on this issue.

Meeting adjourned.