



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

September 29, 2011

Mr. Robert L. Feldman
Assistant General Counsel
ThyssenKrupp Elevator Corporation
5701 Pine Island Road, Ste. 390
Tamarac, FL 33351

Re: RFP #10/11-245MC (SUNY Stony Brook)

Dear Mr. Feldman:

I am writing in response to your letter of June 17, 2011 (the "Initial Protest") protesting the bid process of Stony Brook Request for Proposal #10/11-245MC (the "RFP") and your reply (the "Reply") dated July 1, 2011, to the State University of New York at Stony Brook's (the "University") answer of June 29, 2011 (the "Answer"). In the Initial Protest you state that "[b]ecause the [RFP] was intended to result in a public work contract involving an expenditure in excess of \$35,000, the [RFP] is governed by New York's General Municipal Law § 103." Section 103 of the General Municipal Law ("GML") generally requires that such contracts be awarded on the basis of lowest cost.

Initially we note that, contrary to your assertion, the University is not subject to GML § 103. Section 103, by its terms, is limited to political subdivisions and GML § 100(1) defines "political subdivision" as "a municipal corporation, school district, district corporation and board of cooperative educational services." The State University of New York ("SUNY") is none of these but, rather, is a state agency (*see Westgate North, Inc. v. State University of New York*, 354 NYS 2d 281, 286 [Court of Claims 1973]). Therefore, section 103 would not apply to its procurements. Further, this procurement for elevator and escalator maintenance, inspection and modification is a contract for services, not a public work contract. Procurements of service contracts for state agencies are generally governed by State Finance Law ("SFL") § 163. While State Finance Law § 160(9) (which defines state agency for purposes of section 163) and Education Law § 355(5) provide an exception for certain service contracts entered into by SUNY below

an established monetary threshold, the value of this contract exceeds the established threshold, and thus the procurement is governed by SFL § 163.

Accordingly, the relevant question is whether the University complied with the applicable provisions of SFL §163 in conducting this procurement. The SFL § 163 distinguishes between contracts for commodities and contracts for services. While section 163(3) generally requires that contracts for *commodities* be awarded on the basis of lowest price, section 163(4) provides that *service contracts* must generally be awarded on the basis of “best value,” a method that optimizes quality, cost and efficiency among responsive and responsible bidders (*see* State Finance Law § 163[1][j]). Because this is a contract for services above the established threshold, the University was required to award on the basis of best value.

Before rendering such an award, the agency must undertake a cost-benefit analysis and adopt an evaluation methodology reasonably designed to accomplish this result (*see Transactive Corp. v. New York State Dep't of Soc. Services*, 236 AD2d 48, 53 [3d Dept 1997], *aff'd on other grnds*, 92 NY2d 579 [1998]). Consistent with this requirement, the University stated in the RFP that “[t]he award process is based on best value with the award being made to the highest scoring bidder” (pg. 8). Additionally, consistent with the requirements of SFL § 163(9)(b), the University stated in the specifications, that cost and technical merit would be afforded weights of 30% and 70%, respectively. Further, the University included in the specifications a detailed description of the scoring methodology to be used by the University in determining best value. We conclude that this more than satisfied the requirements of SFL § 163(7), which requires the contracting agency to document “in the procurement record and in advance of the initial receipt of offers . . . the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted.” Thus, we find that the University followed the proper procedure for awarding this service contract.

Your Initial Protest and Reply also question the overall fairness and integrity of this procurement because the University failed to publicly announce the pricing for each bid submitted at the bid opening. The SFL § 163 does not require a public bid opening for procurements of commodities or services. Therefore, the University was not legally required to hold any formal bid opening. We note, however, that the University stated in the RFP that a “bid opening” would occur on a particular date and that sealed bids would be “publicly opened and read” (RFP at pg. 3). You argue that the University did not follow through on this statement. However, in an e-mail dated June 17, 2011 from Laura Beck, Contracts Officer at the University, to Mary La Corte (a copy of which was provided to you and the successful bidder, Schindler Elevator Corporation, on September 16, 2011), Ms. Beck states that the University advised bidders at the mandatory bidders conference that, at the bid opening, University representatives would read only the names of the entities submitting proposals and would not read their proposed prices. In your

September 19 response, you do not refute Ms. Beck's statement that she advised bidders in this regard and, indeed, in a separate response to this Office, Schindler confirmed that bidders were told as much. Therefore, we find that the University followed the procedure set forth in the RFP, as clarified at the mandatory bidder's conference.

In your September 19 response, you argue that, notwithstanding Ms. Beck's announcement at the mandatory bidders conference, the University's subsequent act of opening the bids without reading aloud the pricing contents was a "sham" with no value, and therefore warrants our rejection of this contract. We disagree. Clearly, a bid opening for an RFP does not have the same significance as a bid opening for an Invitation For Bids ("IFB") since, in the case of an IFB, the bid opening identifies the lowest bidder and therefore the presumptive awardee of the contract; whereas, in the case of an RFP, the identification of the best value offerer cannot be made until the technical scoring process is complete. As a result, many state agencies do not hold public bid openings for RFPs. Nonetheless, it is important to note that, in conducting a best value procurement using an RFP, the Office of General Services, the State's lead procurement agency, uses a process similar to that used here by the University, where it holds a bid opening and only the names of bidders, but not pricing, is announced. Based on the foregoing, we do not agree that the University's failure to publicly announce the bid pricing evidences favoritism, fraud or corruption.

In light of the above, we find that the issues raised in the protest are not of sufficient merit to overturn the award of the contract and, therefore, the protest is denied.

Sincerely,



Charlotte E. Breeyear
Director, Bureau of Contracts

CEB:arr

cc: R. Minetti - Schindler Elevator Corp.
J. Fabian - SUNY Stony Brook