

THOMAS P. DINAPOLI
STATE COMPTROLLER



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ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

October 6, 2011

Mr. Matthew R. Yelland
Senior Sales Consultant
KONE, Inc.
25 Post Road
Albany, NY 12205

RE: Elevator Maintenance Bid T-172

Dear Mr. Yelland:

This letter of determination is in response to the protest (hereinafter "Protest") filed on May 24, 2011 by KONE, Inc. (hereinafter "Kone") of the award made by the State University of New York College of Agriculture and Technology at Cobleskill (hereinafter "SUNY Cobleskill") to Otis Elevator Company (hereinafter "Otis"). The procurement conducted by SUNY Cobleskill was a mini-bid off of New York State Office of General Services (OGS) Back Drop Contract 21340.

The Office of the State Comptroller (hereinafter "this Office") has considered the Protest as well as the records submitted to this Office by SUNY Cobleskill with the award under Bid T-172. As detailed below, we have determined that the issues raised in the Protest are not of sufficient merit to overturn SUNY Cobleskill's award to Otis.

In the Protest you assert that the correct prevailing wage rates were not used by any of the bidders in the "time charge" section of their cost proposals and that ... "[e]ven if the prevailing wage rate was amended to be accurate then used to calculate the winning bid, the difference in the prevailing wage rates while formulating the pricing strategy for the bid was compromised."

This procurement was conducted on the basis of low cost consistent with the OGS Back Drop contract. Bidders were required to submit a cost proposal consisting of two components: 1) the annual cost for maintenance; and, 2) time and materials cost for any repairs not covered under the Full Service Contract as specified in the OGS backdrop contract. The "time and materials" component was comprised of the time charge and the materials charge. The issue

raised in your Protest pertains to the time charge section of the "time and materials" component. The IFB specifications stated that:

The time and materials portion of the bid shall be computed as follows: for the **time charge** multiply the percent markup over the current prevailing wage rate plus supplemental benefits at the time of the bid, by the estimated number of hours that will be required. . .

The bid sheet that was provided to bidders required, with respect to the time and materials portion of the bid, that bidders fill in a: "Prevailing Rate for Mechanic," a "Prevailing Rate for Helper," a "Prevailing Rate for Mechanic Team" (presumably the sum of the first two amounts); and a Percent mark Up over Prevailing Wage Rate for team. The Prevailing Wage Rate for Mechanic Team was then multiplied by the bidder's mark-up and then multiplied by 50 (the estimated annual repair hours which was a fixed number by SUNY Cobleskill), to arrive at the time charge portion of the time and materials component.

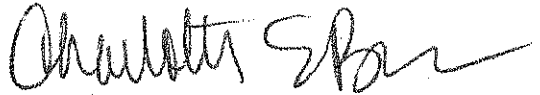
You do correctly assert that all of the bidders submitted the wrong prevailing wage rates. The prevailing wage rate is a fixed number and should have been filled on the bid sheet by SUNY Cobleskill (just as it filled in the estimated repair hours). Indeed, since this procurement was a mini-bid off of an OGS Backdrop Contract, SUNY Cobleskill should have followed the instructions given by OGS with respect to conducting mini-bids off of the contract, which instructed agencies to fill in the prevailing wage rate on the bid sheet. However, in an April 1, 2011 response to an e-mail from you, Laura Gross at SUNY Cobleskill directed you to the OGS Back Drop contract to locate the appropriate prevailing wage rates. If you looked at the Back Drop contract, it contained a link that would lead you to schedules on the Department of Labor website that contained the appropriate prevailing wage rates. Additionally, in reviewing the bids, SUNY Cobleskill did substitute the correct prevailing wage rates for the incorrect rates utilized by the bidders, and recomputed the bids and awarded the contract on that basis. Clearly, however, there was some confusion among the bidders and the failure of SUNY Cobleskill to include the governing prevailing wage rate did nothing to clear up this confusion.

Nonetheless, based upon our review, we are satisfied that any confusion concerning the prevailing wage rate did not, ultimately, affect the award of this contract. There were only three variables that went into the calculation of the costs proposals: the annual maintenance fees for all facilities, the mark-up for the time charge (i.e., labor) component and the mark-up for the materials component. Otis's bid for the annual maintenance fee, the largest component of cost, was \$35,856, while the fee you submitted in your bid was \$43,500, the fee submitted by Schindler Elevator Corporation was \$45,480 and the fee submitted by Albany Elevator was \$50,400. With respect to the "time charge" mark-up, Otis submitted the second lowest mark-up rate of 75% after Albany Elevator's rate of 70%. With respect to the mark-up for the materials component, Otis and Kone submitted the lowest mark-ups of 10% each. Furthermore, Otis would be the lowest bidder regardless of whether the calculation was performed utilizing the incorrect prevailing wage rates submitted by the bidders or utilizing the correct rates as was done by SUNY Cobleskill in making the award.

Finally, we do not believe that we should withhold our approval based upon your assertion that if the correct prevailing wage rates had been provided, the bids may have been formulated differently. As noted previously, the correct prevailing wage rates were available to bidders through the link provided in the OGS back drop contract. Furthermore, contractors in this industry should be aware of the correct current prevailing wage rate since that is the minimum rate they are required to pay their employees. Additionally, the bidders presumably know their other costs, including any premium over the prevailing wage rate that they may pay their employees, as well as their desired profit. With this information, a bidder should be able, by supplying the three variables, to structure its bid as it sees fit to arrive at its desired final total bid quote.

Therefore, we have determined that the issues raised in your protest are not of sufficient merit to overturn the award of the contract. As a result, the Protest is hereby denied and this Office will be approving the SUNY Cobleskill/Otis contract.

Sincerely yours,



Charlotte E. Breyear
Director, Bureau of Contracts

CEB:arr

cc: Laura Gross – SUNY Cobleskill
Jeremiah Heller – Otis Elevator Co.
Tim Piche – Otis Elevator Co.