

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

OfficeMax North America, Inc.

Materials Management Office
Reverse Auction IFB No 5400004672

Statewide Term Contract
Printing Paper & Envelopes

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2012-136

POSTING DATE: September 7, 2012

MAILING DATE: September 7, 2012

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest dated August 6, 2012, from OfficeMax North America, Inc. (OfficeMax). With this reverse auction invitation for bids (IFB), the South Carolina Materials Management Office (MMO) attempts to procure statewide term contracts for fifty-three line items of various papers and envelopes. On August 3, 2012, MMO posted an intent to award. Lot 14 was awarded to Mac Papers, Inc. (Mac Papers).¹ (Ex. 6) OfficeMax protested the non-award of Lot 13-Copy Paper-Desktop Delivery Items-Recycled and the award for Lot 14-Copy Paper-Regular Delivery-Recycled.

In order to resolve the matter, the CPO conducted a hearing August 28, 2012. Appearing before the CPO were OfficeMax, represented by Hardy Meyer and Greg Rangnow; Mac Papers, represented by David Williams; and MMO, represented by John Stevens, State Procurement Officer.

¹ The intent to award read "No award is made on Items 37-42 Lot 13." Due to the protest, Lot 13 has yet to be awarded, but Office Max has been determined the lowest responsive bidder.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference. A summary of OfficeMax's grounds of protest are as follows: A.—OfficeMax was the actual low bidder for Lot 13 and 14, but because OfficeMax was instructed to include the eBridge administrative fee of one and one-half percent (1.5%) with its bids, the bid amounts it actually submitted are overstated; A.c.—The awarded competitor is providing a higher Lot total than previously presented during the auction; B.—The State of South Carolina neglected to communicate the requirements in how pricing should be entered into the auction platform and therefore created a prejudicial environment for those vendors that received additional instructions from the auction vendor; C.—The State of South Carolina did not communicate in a timely manner and in accordance with the RFP expectation "Amendments to the Solicitation" changes to the material terms of the RFP (alleging this was prejudicial to OfficeMax), and; D.—The Intent to Award issued on August 3, 2012 does not include an award to Office Max for Lot 13. As relief, OfficeMax requests award of both Lots 13 and 14.

WITHDRAWAL OF PROTEST

Following a motion to dismiss by MMO, OfficeMax withdrew all protests regarding Lot 13, as it has yet to be awarded.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On June 14, 2012, MMO issued IFB No. 5400004548 for Statewide – Printing Paper & Envelopes. The IFB called for questions to be submitted by June 21, 2012 and bids (called an Intent to Participate by eBridge) to be submitted by July 6, 2012. (Ex. 1) The IFB included instructions from the state's reverse auction facilitator, eBridge, regarding use of its reverse

auction platform. The eBridge instructions confirmed the opening date of July 6, offered training on the eBridge process July 6 – 9, 2012, and scheduled the on-line auction for July 10, 2012. (Ex. 2, p. 3, Important Milestones)

2. On June 14, 2012, MMO issued Amendment #1 to the IFB. It moved the opening date from July 6 to July 12, 2012 and moved the auction date from July 10 to July 17, 2012. (Ex. 3)
3. On July 11, 2012, MMO issued Amendment #2 to the IFB. It moved the opening date from July 12 to July 19, 2012 and moved the auction date from July 17 to July 24, 2012. It also added the State Procurement Office administrative fee of 0.75% requiring bidders to add the fee to their bids, collect and remit it to State Procurement. (Ex. 4)
4. On July 24, 2012, MMO issued Amendment #3 to the IFB. It moved the auction date from July 24 to July 27, 2012. (Ex. 5)
5. On July 19, 2012, MMO opened the bids/Intents to Participate.
6. On July 27, 2012, MMO with eBridge, conducted the on-line auction.
7. On July 29, 2012, OfficeMax sent an email to Rebecca Flaherty of eBridge copying Theresa Watts of MMO asserting, “We ran into technical difficulties on our end, which prohibited us from entering pricing as the auction ran out of time. (Ex. 13)
8. On August 3, 2012, MMO posted an Intent to Award the IFB including Lot 14, Copy Paper Regular Delivery Recycled (Items 43-47), to Mac Papers. Regarding Lot 13, the Intent read, “No award is made on Item(s) 37-42 Lot 13.” (Ex. 6)
9. On August 6, 2012, OfficeMax filed its protest.
10. On August 13, 2012, MMO suspended its Intent to Award for all lots awarded. (Ex. 7)
11. On August 21, 2012, since all lots were not protested, MMO amended the suspension of award to lift the suspension of awards for all lots not protested, but leaving in place the suspension of award for Lot 14. (Ex. 8)²

EXPLANATION OF ON-LINE BIDDING

MMO conducted the procurement as a competitive online bid, in a reverse auction format (which is bidders competing on-line and in the same time-frame with other potential suppliers in an attempt to become the lowest priced vendor chosen to supply the goods or services required

² With OfficeMax’s protest of Lot 13, it has yet to be awarded.

by the State), under authority of S.C. Code section 11-35-1529. Subsection (2) allows, “The State may require bidders to register before the Opening Date and Time and, as a part of that registration, to agree to any terms, conditions, or other requirements of the solicitation.” Using the terminology of the IFB, this was the opening date. Relative to the protest, the Code provides the following regarding the auction process:

The solicitation must designate both an Opening Date and Time and a Closing Date and Time. The Closing Date and Time need not be a fixed point in time, but may remain dependent on a variable specified in the solicitation. At the Opening Date and Time, the State must begin accepting real-time electronic bids. The solicitation must remain open until the Closing Date and Time . . . Following receipt of the first bid after the Opening Date and Time, the lowest bid price must be posted electronically to the Internet and updated on a real- time basis. At any time before the Closing Date and Time, a bidder may lower the price of its bid, except that after Opening Date and Time, a bidder may not lower its price unless that price is below the then lowest bid. Bid prices may not be increased after Opening Date and Time. Except for bid prices, bids may be modified only as otherwise allowed by this code.

All other requirements of the Code regarding invitations for bids (11-35-1520) apply to on-line bidding.

The State does not possess a functioning system capable of facilitating on-line bidding so the State has contracted with eBridge as its on-line bidding contractor. For each auction, eBridge provides its on-line bidding system, assists the procurement officer and the bidders to facilitate the on-line bid, and conducts the auction. For its services, MMO allows eBridge to charge the successful bidder a fee of one and one-half percent (1.5%) of the value of any contract awarded pursuant to the on-line auction.

CONCLUSIONS OF LAW

Protest Ground: A. OfficeMax was the actual low bidder for Lot 14, but because OfficeMax was instructed to include the eBridge administrative fee of one and one-half percent (1.5%) with its bids, the bid amounts it actually submitted for the auction were overstated and B. The State of

South Carolina neglected to communicate the requirements in how pricing should be entered into the auction platform and therefore created a prejudicial environment for those vendors that received additional instructions from the auction vendor.

OfficeMax protests MMO's award of Lot 14, Copy Paper Regular Delivery, Recycled, (Items 43 – 47) to Mac Papers alleging, "Instruction received by OfficeMax in regards to how the pricing was to be entered into the auction site by eBridge was inaccurate and caused Office Max to significantly misstate net pricing by Lot . . . but also a misrepresentation of the actual intended pricing for the State of South Carolina of Lot 14 as listed in the RFP." Office Max wrote further, "The misstatement of the accurate pricing and bid entry process is therefore causing a misrepresentation of the intended pricing (OMX Price) and the price that was entered into the auction platform (eBridge Price)." This allegation relates to the instructions of how the bidders were to factor eBridge's fee into their bids and present their price. OfficeMax added the eBridge fee into its bid and submitted its prices with the fee included. Now, OfficeMax alleges the eBridge fee caused its bid to be higher than Mac Papers' bid.

Regarding the eBridge fee, the eBridge instructions, which were incorporated into the IFB read, "The awarded supplier is obligated to pay a transaction fee to eBridge pursuant to the Terms & Conditions accepted upon placement of initial bid. The fee will be based on the final total purchase price assessed as One and One Half Percent (1.5%). The transaction fee is assessed on the final selling price." (Ex. 2, p. 4) It reads further relevant to an indefinite date, indefinite quantity solicitation, which describes the contract being awarded here:

- 11. Fees.** The design, maintenance and operation of the Solution requires substantial costs and investment incurred by eBridge. Thus, a transaction fee based on the total final purchase price stated upon award will be charged to the awarded supplier. Said fee will be assessed to the awarded supplier at the rate of one and one half percent (1.5%) of the awarded price. All fees are to be paid to eBridge by the awarded supplier in the following manner:

Definitive Bids: Payment is made once delivery is made to the Buyer and awarded supplier is paid by the Buyer.

IDIQ (indefinite date, indefinite quantity) Bids: Payment will be made on monthly transactions based upon actual purchases made during the month. This agreement is binding on all renewable and/or evergreen/roll-over contracts until and unless such time Buyer re-bids same in a manner consistent with acceptable procurement procedures.

Suppliers will insure this transaction fee is included in every bid they submit before or during an auction. You further acknowledge any payment made by a Buyer with respect to a sale in which you were the winning supplier, whether or not such payment is made directly to you or a third party, will cause you to be immediately liable to eBridge for the Fee. Because these fees are expected to be INCLUDED in your pricing, these fees shall not be delineated in your invoicing to the Buyer. (emphasis added)

OfficeMax alleged eBridge representative Rebecca Flaherty, who instructed its representatives in the on-line bidding process, made a misstatement about adding the 1.5% eBridge fee into its price thereby aggrieving OfficeMax. Ms. Flaherty coordinated this auction for eBridge, answering questions for bidders. She conducted tutorials for bidders who requested them, including OfficeMax. During testimony, Ms. Flaherty stated OfficeMax submitted its first questions and requested a tutorial July 25, two days before the auction. During the tutorial, she discussed the eBridge fee and recommended that bidders add the 1.5% eBridge fee on top of their pricing. She stated she offered instructions consistently to all bidders during the tutorials. She added that before any bidder was allowed to participate in the auction, the bidder was required to answer if they agreed to bid electronically and if they agreed to the eBridge fee. As bidders log into the auction system, eBridge requires each bidder to click “Accept” to confirm its agreement to pay eBridge the fee. Otherwise, the bidder is denied access to the eBridge auction platform. Every bidder for this auction accepted the requirement to pay eBridge. Asked if Mac Papers was required to pay eBridge the 1.5% fee, she answered “yes.”

In its own argument, OfficeMax asserted the actual bids for Lot 14 were as follows:

<u>Bidder</u>	<u>Actual Bid Entered Into eBridge’s System</u>
Mac Papers	\$1,823,000.00

OfficeMax

\$1,828,030.38

However, OfficeMax argues that the inclusion of the eBridge fee in its price caused its bid to be higher than Mac Papers' bid; that absent the eBridge fee, it would have been the low bidder.³ After the fact, OfficeMax argues that the CPO should subtract the eBridge fee from its bid, recalculate the lowest bid, and award it Lot 14.

OfficeMax's request is patently in violation of the Consolidated Procurement Code, which stipulates, "Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted." (11-35-1520(6), Bid Acceptance and Bid Evaluation) The supporting regulations add, "To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition." (19-445.2085(B), Correction Creates Low Bid) There is no clear evidence that OfficeMax somehow misstated its bid. In fact, the opposite is true. OfficeMax admits that it entered the price of \$1,828,030.38 for Lot 14 into the eBridge system.

Both OfficeMax and Mac Papers accepted responsibility to pay eBridge its 1.5% fee and submitted their on-line bids. The solicitation imposed the eBridge fee on the successful contractor; therefore all bidders had to account for the eBridge fee in their bids. Presumably, all bidders added the eBridge fee into their bids and passed that additional cost onto the State, but it

³ OfficeMax did not allege that Mac Papers violated the bidding instructions and handled the eBridge fee any differently or that Mac Papers did not include the eBridge fee in its bid price.

was up to each bidder to decide its bidding strategy. Regardless, Mac Papers accepted responsibility to pay eBridge the 1.5% administrative fee. The same requirement was imposed equally upon OfficeMax and Mac Papers. To allow OfficeMax to change its bid now would be patently prejudicial to all other bidders. Therefore, these protest grounds are denied.

Protest Ground A.c.: The awarded competitor is providing a higher Lot total than previously presented during the auction

OfficeMax alleged, “The winning bid at the time of the auction was \$1,823,000, yet the Lot total based on the pricing in the Intent to Award document is \$1,823,016.92.”

Lot 14, which consisted of Items 43 – 47, was awarded based on the sum total of the weighted average prices for all items of the lot. According to testimony, the difference of \$16.92 resulted from rounding the weighted average prices for items 43-47 and calculating the composite total for Lot 14. The difference did not result from any impropriety on the part of Mac Papers or MMO. Mac Papers’ bid is lower than OfficeMax’s bid by thousands of dollars; far more than the \$16.92 quibbled over here. This protest is denied.

Protest Ground C: The State of South Carolina did not communicate in a commonly acceptable timely manner and in accordance with the RFP expectation “Amendments to the Solicitation” changes to the material terms of the RFP (alleging this was prejudicial to OfficeMax)

The solicitation was amended three times. Each time, the bid submittal dates and the auction dates were adjusted outward. The first two amendments allowed seven days each for OfficeMax to adjust its schedule. The third amendment only allowed three days for adjustment. OfficeMax argues that Amendments 1 and 2 established a custom standard of seven days that MMO should have followed for all subsequent amendments. OfficeMax asserts that MMO’s decision to only allow bidders three days to adjust to Amendment 3 was prejudicial to

OfficeMax. The CPO disagrees. There was no seven-day requirement of the Code or a guarantee; only one assumed by OfficeMax. Further, the final amendment imposed the same requirement on all bidders, not just OfficeMax. The protest is denied.

In an email dated July 29, 2012, from Hardy Meyer to Rebecca Flaherty copying Theresa Watts, Mr. Meyer wrote, "We ran into technical difficulties on our end, which prohibited us from entering pricing as the auction ran out of time." (Ex. 13) Once initial bids are submitted, the auction process allows bidders to lower their bids in response to competitors' bids. The bidding instructions establish the bidding and rebidding parameters. During the hearing, OfficeMax admitted that its delay in rebidding was a product of its own internal approval process, not the State's bidding parameters. Therefore, this 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 July 2012)

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 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).

**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.

To: State of South Carolina - MMO
 From: OfficeMax North America, Inc. ("OfficeMax")
 Date: August 6, 2012

CONFIDENTIAL

Subject: Written Protest of Intent to Award – Solicitation 5400004548
 Statewide – Printing Paper and Envelopes

Pursuant to Section 11-35-4210, Section (1), Subsection (b), OfficeMax is hereby filing a protest against the intent to award Statewide Contract – Printing Paper and Envelopes (Solicitation 5400004548). As an actual bidder, OfficeMax is aggrieved by the award of this contract, specifically the award of Lot 13 and 14 as listed in the RFP document. OfficeMax sets forth below the grounds of the protest and the relief requested:

- A. Instruction received by OfficeMax in regards to how the pricing was to be entered into the auction site by EBridge Global was inaccurate and caused OfficeMax to significantly misstate net pricing by Lot, which as a result caused not only an additional step in the calculation and therefore a delay in being able to enter pricing into the platform in a timely manner, but also a misrepresentation of the actually intended pricing for the State of South Carolina of Lot 14 as listed in the RFP document. OfficeMax pricing to the users by Lot was in fact lower than the awarded vendor's pricing by Lot.
 - a. On August 26, 2012, at 1:00PM EST, OfficeMax received a tutorial from Rebecca Flaherty (EBridge Global) to illustrate how the auction site was to be operated during the actual live auction of Solicitation 5400004548. During this tutorial, OfficeMax requested clarification on what net pricing to enter into the auction entry platform. OfficeMax was instructed by EBridge Global to enter pricing that equals the net Lot price as it is calculated by provided usage in RFP document, plus a 1.5% administration fee requested to be paid to EBridge Global by OfficeMax. Below is the calculation for Lot 13 and Lot 14 that OfficeMax used to bid on respective Lots:

Lot 13 – Copy Paper - Desktop Delivery Items – RECYCLED						
Item	Quantity	UOM	Item Description	Cost	OMX Price	Ebridge Pricing
37	9,467	Case	Standard Bond, 8.5 x 11 - Desktop Del.	\$ 29.25	\$ 276,875.52	\$ 281,028.65
38	131	Case	Standard Bond, 8.5 x 14 - Desktop Del.	\$ 45.50	\$ 5,960.36	\$ 6,049.76
39	66	Case	Standard Bond, 11 x 17 - Desktop Del.	\$ 35.75	\$ 2,359.30	\$ 2,394.69
40	5,605	Ream	Standard Bond, 8.5 x 11 Color Desktop	\$ 3.49	\$ 19,536.88	\$ 19,829.94
41	229	Case	Standard Bond, 8.5 x 11 3-hole Desktop	\$ 35.75	\$ 8,186.81	\$ 8,309.61
		Case	Color Printer/Copier - 8.5 x 11 Desktop	\$	\$	\$

	42	175		36.26	6,345.67	6,440.86
Lot Total					\$ 319,264.54	\$ 324,053.51
Lot 14 – Copy Paper – Regular Delivery – RECYCLED						
Item	Quantity	UOM	Item Description	Cost	OMX Price	Ebridge Pricing
43	229	Case	Recycled Standard Bond - 8.5 x 11 3-Hole	\$ 35.75	\$ 8,186.81	\$ 8,309.61
44	9,467	Case	Recycled Standard Bond - 8.5 x 11	\$ 29.25	\$ 276,875.52	\$ 281,028.65
45	131	Case	Recycled Standard Bond - 8.5 x 14	\$ 45.50	\$ 5,960.36	\$ 6,049.76
46	66	Case	Recycled Standard Bond - 11 x 17	\$ 35.75	\$ 2,359.30	\$ 2,394.69
47	5,605	Ream	Recycled Standard Bond - Colored	\$ 3.49	\$ 19,536.88	\$ 19,829.94
49	348	Case	Color Printer & Copier - 8.5 x 11 paper	\$ 36.26	\$ 12,618.83	\$ 12,808.11
50	54,605	Case	Laser Printers/Copiers Paper - 8.5 x 11	\$ 26.33	\$ 1,437,512.50	\$ 1,459,075.19
51	518	Case	Laser Printers/Copiers Paper - 8.5 x 14	\$ 50.31	\$ 26,062.61	\$ 26,453.55
52	301	Case	Laser Printers/Copiers Paper - 11 x 17	\$ 39.54	\$ 11,902.35	\$ 12,080.88
Lot Total					\$ 1,801,015.15	\$ 1,828,030.38

- b. The misstatement of the accurate pricing and bid entry process is therefore causing a misrepresentation of the intended pricing (OMX Price) and the price that was entered into the auction platform (Ebridge Price). In the scenario for Lot 14 as state in the RFP document, OfficeMax ended the auction at \$1,828,030.38 for the total Lot versus the winning bid of \$1,823,000 by a competitor. In preparation to bid below the at that time winning price, OfficeMax did not only have to follow its own operational processes to calculate unit pricing by line and then Lot total pricing, but also add an additional step to add the requested 1.5% Ebridge fee to its pricing, which resulted in OfficeMax inability to enter a lower bid than \$1,823,000 into the auction platform prior to the end of the auction, when in fact, OfficeMax net pricing to the customer was already below the pricing entered by the competitor by nearly \$22,000.
- c. Furthermore, in analyzing the pricing provided by the listed vendor for Lot 14 on the Intent to Award issued on August 3, 2012, the pricing offered to the State of South

Carolina by line item and Lot total is higher than the pricing that was provided as the lowest bid by total for Lot 14 during the auction. The winning bid at the time of auction was \$1,823,000, yet the Lot total based on the pricing in the Intent to Award document is \$1,823,016.92:

Lot 14 – Pricing as submitted in Intent to Award Document for Vendor Mac Paper					
Item	Quantity	Unit of Measure	Item Description	Item Price	Line Total
43	229	Case	Recycled Standard Bond - 8.5 x 11 3-Hole	\$ 30.63	7,014.27
44	9,467	Case	Recycled Standard Bond - 8.5 x 11	\$ 28.99	274,448.33
45	131	Case	Recycled Standard Bond - 8.5 x 14	\$ 38.24	5,009.44
46	66	Case	Recycled Standard Bond - 11 x 17	\$ 30.06	1,983.96
47	5,605	Ream	Recycled Standard Bond - Colored	\$ 3.59	20,121.95
49	348	Case	Color Printer & Copier - 8.5 x 11 paper	\$ 36.10	12,562.80
50	54,605	Case	Laser Printers/Copiers Paper - 8.5 x 11	\$ 26.99	1,473,788.95
51	518	Case	Laser Printers/Copiers Paper - 8.5 x 14	\$ 37.22	19,279.96
52	301	Case	Laser Printers/Copiers Paper - 11 x 17	\$ 29.26	8,807.26
Lot Total					1,823,016.92

- d. OfficeMax is therefore providing substantially lower pricing than its competitor in Lot 14, which was misrepresented due to inaccurate instruction received by the auction site personnel prior to the auction. Furthermore, OfficeMax's proposed pricing is transparent and complies with our ethics as a company, whereas the awarded competitor is providing a higher Lot total than previously presented during the auction. In fact, as seen in Section A. above, OfficeMax intends to offer the "OMX Price" for Lot 13, a Lot won in auction to the State of South Carolina, as it was the price that OfficeMax perceived it was bidding, when competing in the auction. Therefore, OfficeMax should be provided with the award of Lot 14 in its entirety.
- B. The State of South Carolina neglected to communicate the requirements on how pricing should be entered into the auction platform and therefore created a prejudicial environment for those vendors that received additional instructions from the auction vendor, EBridge Global and/or Rebecca Flaherty.

- a. The State of South Carolina must accurately illustrate how the bid data needs to be entered into the auction platform utilized by the State of South Carolina at the time. The lack of instructions of any kind created a prejudicial environment, in which

- OfficeMax took the initiative to receive instructions from the facilitator of the auction, and was aggrieved in the process. Had clear instructions been communicated by the State of South Carolina, the State of South Carolina would have created an equal opportunity environment, which lacked during this auction process.
- b. During an EBridge facilitated auction for Statewide Toner for the State of South Carolina, OfficeMax received the same instructions as it received during this auction. For the Toner auction facilitated on June 19, 2012 by EBridge Global, OfficeMax and all other offerors were instructed by EBridge Global to add the EBridge Global administration fee and the State of South Carolina administration fee into the offered discount structure. That auction was based on a DFL decision, therefore, if OfficeMax provided a DFL of 20%, EBridge Global asked to enter a DFL of 22.25%, equal the 20%DFL to the end user plus 1.5% to the EBridge administration fee and 0.75% to the State of South Carolina administration fee. This is consistent with the instructions we received from EBridge prior to this auction, only that we were instructed to only include 1.5%.
 - c. Due to the lack of communicating requirements, the State of South Carolina has issued an Intent to Award to an offeror, that is offering higher pricing than OfficeMax has provided in its offer. Therefore, OfficeMax should be provided with the award of Lot 14 in its entirety.
- C. The State of South Carolina did not communicate in a commonly acceptable timely manner and in accordance with the RFP expectation "Amendments to the Solicitation" changes to the material terms of the RFP. The lack of the appropriate communication had a material effect on the overall proposal, specifically including pricing offered by OfficeMax, which was prejudicial to OfficeMax.
- a. The State of South Carolina posted Solicitation 5400004548 in its original version on June 13, 2012. In that document, the State intended to conduct the auction for this RFP on July 10, 2012 with an award date of July 12, 2012. On June 15, 2012, an additional document was posted, titled "EBridge Instructions", which specified the timelines of the original RFP document, but did not detail the data entry process into the auction site. On July 3, 2012, the State of South Carolina issued Amendment 1, which moved the auction date to July 17, 2012 and the award date to July 28, 2012. On July 11, 2012, the State of South Carolina issued Amendment 2, moving the auction to July 24, 2012, with an award date of July 25, 2012. In that same document, the State of South Carolina answered questions posted by potential bidders, which were due to the State June 21, 2012. The deadline for questions was not moved with any of the amendments, yet the answers to the questions were posted 20 days after the due date and 1 day after the original auction was to be held. In the same document, the State added an administration fee for all net sales under the RFP. On July 27, 2012 at 11:31AM EST, the State issued an Amendment 3, which moved the auction date to July 27, 2012 at 10:00AM EST. That Amendment was posted after the auction was conducted, which did not allow the "Offerors" to acknowledge this amendment as required in the RFP expectation "Amendments to the Solicitation".
 - b. OfficeMax inquired to the State of South Carolina and to the auction facilitator EBridge Global about the auction scheduled on July 24, 2012, starting on July 23, 2012, with no official response from the State of South Carolina. The State issued an email July 23, 2012 at 5:09PM EST, stating that the auction was cancelled and will be moved. OfficeMax received no further communication from the State. The only communication

received in regards to a newly scheduled date was received from EBridge Global on July 24, 2012 at 3:17PM EST, but an amendment to the RFP was not issued at the time. OfficeMax was able to schedule a tutorial to better understand the auction site and the requirements to enter the pricing on July 26, 2012. At that time, OfficeMax received instructions to include the 1.5% administration fee into the calculation when entering its offers by Rebecca Flaherty (EBridge Global). Any attempts to communicate with Theresa Watts directly from July 24, 2012 through July 27, 2012 were not successful.

- c. Due to the lack of communication or inconsistency of communication according to its own guidelines, the State has made an award for Lot 14 for Solicitation 5400004548 to an offeror at higher total Lot pricing than proposed OfficeMax pricing. The award should be revised and OfficeMax should be awarded Lot 14 in its entirety.

- D. The Intent to Award issued on August 3, 2012 does not include an award to OfficeMax for Lot 13 as listed in the RFP document. OfficeMax was the lowest bidder during the auction for this Lot and has provided required documentation to the State of South Carolina.
 - a. During the electronic auction, OfficeMax provided the State of South Carolina with a Lot total including a 1.5% administration fee of \$324,053.51. Therefore the Lot total without the administration fee is \$319,264.54 with the pricing structure provided in Section A. above. OfficeMax received participated in several telephone conversations with Theresa Watts on August 3, 2012 discussing the issue and was made aware, that this Lot would be awarded to OfficeMax. Due to the incorrect guidance received prior to the auction, OfficeMax overstated the pricing and is intent to provide the lower Lot total pricing to the State of South Carolina, as originally intended by OfficeMax. The Intent to Award should be revised and re-issued to include Lot 13 and an award to OfficeMax at the pricing listed in Section A. above.

- E. Relief Request:
 - a. OfficeMax has been aggrieved by the award of Lot 14 as listed in the RFP document for Solicitation 5400004548 to another offeror, even though OfficeMax pricing provided a greater cost benefit to the State of South Carolina, as well as the lack of an award for Lot 13 in its entirety. OfficeMax seeks the following relief:
 - i. Revise the Intent to Award for Solicitation 5400004548, and award Lot 13 at pricing listed in Section A in its entirety to OfficeMax.
 - ii. Revise the Intent to Award for Solicitation 5400004548, and award Lot 14 at pricing listed in Section A in its entirety to OfficeMax.
 - iii. Revise the Intent to Award for Solicitation 5400004548, and clearly break out and define the awarded Lots by vendor, to include in the definition of the Lot the type of delivery allotted for the award Lot. For example, define that Lot 13 is a desktop delivery Lot, while Lot 14 and all line items include regular delivery only.
 - iv. Revise the Intent to Award for Solicitation 5400004548, and clearly define the cost structure of desktop delivery charges for all vendors. For example, if vendor chooses to charge the State of South Carolina for desktop delivery, on what basis is the provided desktop delivery charge calculated: per box or per delivery.
 - v. **Notwithstanding OfficeMax's response to this Protest to Intent of Award, OfficeMax expects to negotiate in good faith the terms and conditions of any**

definitive agreement including any changes to the RFP after the award of the contract.

- vi. It is OfficeMax desire to negotiate the outcome of this Protest with the State of South Carolina. If a mutually agreeable outcome cannot be reached, OfficeMax seeks relief in form of voiding the existing Intent to Award issued on August 3, 2012 in relation to Solicitation 5400004548 and seeks issuance of a new Solicitation for the Statewide Printing Paper and Envelope contract.

Please respond to this formal Protest of the Intent to Award the Statewide Printing Paper and Envelope Contract in writing via email no later than August 9, 2012. Please communicate with Hardy Meyer as your primary contact for this Protest. Please communicate any questions in writing via email.

Sincerely,



Hardy Meyer
District Sales Manager
(Primary Contact)
hardymeyer@officemax.com
Tel. 706.231.3612



Greg Rangnow
Vice President, Sales
Authorized Representative
gregrangnow@officemax.com

For reference:

ARTICLE 17.
LEGAL AND CONTRACTUAL REMEDIES
SUBARTICLE 1.
ADMINISTRATIVE RESOLUTION OF CONTROVERSIES

SECTION 11-35-4210. Right to protest; procedure; duty and authority to attempt to settle; administrative review; stay of procurement.

(1) Right to Protest; Exclusive Remedy.

(a) A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An Invitation for Bids or Request for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this code.

(b) Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) **within ten days of the date award or notification of intent to award,**

whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(c) The rights and remedies granted in this article to bidders, offerors, contractors, or subcontractors, either actual or prospective, are to the exclusion of all other rights and remedies of the bidders, offerors, contractors, or subcontractors against the State.

(d) The rights and remedies granted by subsection (1) and Section 11-35-4410(1)(b) are not available for contracts with an actual or potential value of up to fifty thousand dollars.

(2) Protest Procedure. (a) A protest pursuant to subsection (1)(a) must be in writing, filed with the appropriate chief procurement officer, and set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. The protest must be received by the appropriate chief procurement officer within the time provided in subsection (1).

(b) A protest pursuant to subsection (1)(b) **must be in writing and must be received by the appropriate chief procurement officer within the time limits established by subsection (1)(b).** At any time after filing a protest, **but no later than fifteen days after the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code, a protestant may amend a protest** that was first submitted within the time limits established by subsection (1)(b). A protest, including amendments, 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.

(3) Duty and Authority to Attempt to Settle Protests. Before commencement of an administrative review as provided in subsection (4), the appropriate chief procurement officer, the head of the purchasing agency, or their designees may attempt to settle by mutual agreement a protest of an aggrieved bidder, offeror, contractor, or subcontractor, actual or prospective, concerning the solicitation or award of the contract. The appropriate chief procurement officer, or his designee has the authority to approve any settlement reached by mutual agreement.

(4) Administrative Review and Decision. If in the opinion of the appropriate chief procurement officer, after reasonable attempt, a protest cannot be settled by mutual agreement, the appropriate chief procurement officer shall conduct promptly an administrative review. The appropriate chief procurement officer or his designee shall commence the administrative review no later than fifteen business days after the deadline for receipt of a protest has expired and shall issue a decision in writing within ten days of completion of the review. The decision must state the reasons for the action taken.

(5) Notice of Decision. A copy of the decision under subsection (4) along with a statement of appeal rights pursuant to Section 11-35-4210(6) must be mailed or otherwise furnished immediately to the protestant and other party intervening. The appropriate chief procurement officer, or his designee, also shall post a copy of the decision at a date and place communicated to all parties participating in the administrative review, and the posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal provided in Section 11-35-4210(6).

(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.

(7) Automatic Stay of Procurement During Protests. In the event of a timely protest pursuant to subsection (1), the State shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the appropriate chief procurement officer, or, in the event of timely appeal to the Procurement Review Panel, until a decision is rendered by the panel except that solicitation or award of a protested contract is not stayed if the appropriate chief procurement officer, after consultation with the head of the using agency, makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the best interests of the State.

(8) Notice of Chief Procurement Officer Address. Notice of the address of the appropriate chief procurement officer must be included in every notice of an intended award and in every invitation for bids, request for proposals, or other type solicitation.

HISTORY: 1981 Act No. 148, Section 1; 1985 Act No. 109, Section 2; 1993 Act No. 178, Section 36; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 52.