

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In the Matter of Protest of:

Office Depot/Max

Materials Management Office
IFB # 5400006696

Statewide Term Contracts for
Office Supplies & Copy Paper

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO. 2014-121

POSTING DATE: June 10, 2014
MAILING DATE: June 10, 2014

This matter is before the Chief Procurement Officer (CPO) pursuant to a protest filed by Office Depot/Max¹ under authority of South Carolina Code Section 11-35-4210. With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure statewide term contracts for office supplies and copy paper. After evaluating the bids received, on February 20, 2014, Teresa Watts, MMO Procurement Manager, determined Office Depot/Max's bid nonresponsive. On April 1, 2014, MMO posted one of its intents to award to Form & Supply, Inc. On April 11, 2014, protested MMO's intent to award alleging a plethora of violations of the Consolidated Procurement Code (the Code) and the IFB.

As the issues to be decided are clear, the CPO makes this decision without benefit of a hearing, based upon an administrative review of the protest letter [Ex. 1 attached]; Ms. Watts' written determination declaring Office Depot/Max's bid nonresponsive [Ex. 2 attached]; and the procurement file.

¹ According to the IFB cover page, the bid was submitted in the name of "Office Depot Inc." However, the bid, the Office Depot/Max logo imprinted on every page of the bid and the protest letter, and the protest letter refer to Office Depot/Max, as well as, Office Depot.

NATURE OF PROTEST

The letter of protest and Ms. Watts' written determination are attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On August 14, 2013, MMO conducted a pre-solicitation conference with all the current contractors.
2. On September 26, 2013, MMO published the IFB. [Ex. 3]
3. On October 7, 2013, MMO conducted a Pre-bid Conference.
4. On October 8, 2013, MMO closed the period allowed for questions from prospective bidders.
5. On October 10, 2013, MMO issued Amendment #1. [Ex. 4] The amendment provided answers to bidders' questions and extended the question period until October 14, 2014.
6. On October 15, 2013, MMO issued Amendment #2 answering more questions raised by the prospective bidders. [Ex. 5]
7. On October 30, 2013, MMO issued Amendment #3 with no relevance to this protest. [Ex. 6]
8. On November 5, 2013, MMO issued Amendment #4 with no relevance to this protest. [Ex. 7]
9. On November 20, 2013, MMO issued Amendment #5 with no relevance to this protest. [Ex. 8]
10. On December 5, 2013, MMO issued Amendment #6 with no relevance to this protest. [Ex. 9]
11. On January 21, 2014, MMO issued Amendment #7 with no relevance to this protest. [Ex. 10]
12. On February 5, 2014, MMO issued Amendment #8 with no relevance to this protest. [Ex. 11]
13. On February 11, 2014, MMO issued Amendment 9 with no relevance to this protest. [Ex. 12]
14. On February 18, 2014, MMO opened the bids.
15. On February 20, 2014, Ms. Watts determined Office Depot/Max's bid nonresponsive. [Ex. 2]
16. On April 1, 2014, MMO posted its Intent to Award. [Ex. 13]
17. On April 11, 2014, Office Depot/Max filed its protest with the CPO. [Ex. 1]

DISCUSSION

MMO solicited bids for statewide term contracts for office supplies and copy paper.

According to the Scope of the Solicitation,

The State of South Carolina seeks to establish contracts to furnish, warehouse and provide inside, desktop delivery of office supplies, copy paper and envelopes. The State's intent is to increase efficiency, reduce the complexity and cost of the procurement of office supplies, decrease turnaround time, and to develop and implement a system that facilitates and assures a smooth process for all functions relative to the procurement of office and copy paper supplies.

The intent of this solicitation is to award one (1) contract to a contractor that will provide services statewide and one (1) contract per region of the State for service to each of the three (3) regions identified in the attachment. All told, the State intends to award up to four (4) contracts. During the maximum contract period, it is the State's intent that customers will have two (2) contractors to choose from in each region; the "statewide" contractor and one (1) regional contractor. A regional contractor may sell only in a region for which it has received an award. No single bidder will be considered for award for both statewide service and service to an individual region, however.

If at any time during the term of the contracts one or more contracts end prematurely for any reason, the State, at its option, and in its sole discretion, may either re-award a contract or contracts based upon the original offers submitted in response to this solicitation or re-solicit for either the statewide or regional contracts no longer in force.

Office Depot/Max submitted its bid, titled "Proposal to State of South Carolina for Office Supplies and Copy Paper." The bid reproduced the text of the entire solicitation, and included comments following twenty-four of the terms of the invitation for bids and a "clarification of pricing" following the bid form itself. Some of the comments explained how Office Depot/Max intended to perform the contract. Others, however, appeared to challenge the terms of the IFB.

Ms. Watts determined eleven of the twenty-five explanations made the Office Depot/Max bid nonresponsive to the requirements of the IFB. In its protest letter Office Depot/Max alleged Ms. Watts violated the Code. It argued that none of Ms. Watts' eleven points was a material aspect of the IFB; therefore, they were "minor informalities or irregularities" and the Code

required Ms. Watts to either allow Office Depot/Max to cure each perceived deficiency or waive it. Office Depot/Max wrote:

With regard to “minor informalities or irregularities,” South Carolina law is clear that the “procurement officer shall either give the bidder an opportunity to cure any deficiency ... *or waive such deficiency when it is to the advantage of the State.*” Further, the Solicitation itself states that only offers that fail to “conform to ... material requirements ... may be rejected as nonresponsive.”

Pursuant to the Solicitation, and as explained herein, OfficeMax was a “responsive bidder” and each of the purported deficiencies in the Proposal are – at most – “minor.” Further, waiving those purported deficiencies would be to the advantage of the State because OfficeMax offered lower overall costs to the State for its office supplies. Accordingly, OfficeMax’s proposal should not have been deemed nonresponsive.

[Emphasis in original]

CONCLUSIONS OF LAW

MMO processed this solicitation as an invitation for bids. Unlike a request for proposals, which are evaluated subjectively, the basis for awarding an IFB is, in theory, simple – lowest price compliant with the specifications. Regarding award of an invitation for bids, the Consolidated Procurement Code reads, “notice of an award or an intended award of a contract [must be given] 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 supporting regulations add, “Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.” [S.C. Code Ann. Reg. 19-445.2070A, Rejection of Individual Bids]. Further, “Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids.” 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)] In basic terms, a responsive bid requires no more than a price and a signature.

The State structures its solicitations as requests for irrevocable, binding offers to contract. A bid must accept all material terms of the solicitation, or it will be rejected as non-responsive. Through this process the State controls the terms of its contracts. More importantly, the requirement of responsiveness is essential to competition. Responsiveness—that all evaluated bids are offering exactly the same performance and on the same terms—is what allows the State to fairly compare offers. If the State cannot compare bids, because some are responsive and others are not, there is no competition. And without competition the State can't know if it is getting the best deal possible.

As noted by Office Depot/Max, the Code does authorize acceptance of bids that meet the “essential requirements of the invitation for bids” even bids with a minor informality or irregularity, which the Code defines as, “one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.” The Code authorizes, “the procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing.” [11-35-1520(13) Minor Informalities and Irregularities in Bids] For clarity, the Code continues by providing specific examples of minor informalities and irregularities, which are:

- (a) failure of a bidder to return the number of copies of signed bids required by the solicitation;
- (b) failure of a bidder to furnish the required information concerning the number of the bidder's employees or failure to make a representation concerning its size;
- (c) failure of a bidder to sign its bid, but only if the firm submitting the bid has formally adopted or authorized the execution of documents by typewritten,

printed, or rubber stamped signature and submits evidence of that authorization, and the bid carries that signature or the unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned document, such as the submission of a bid guarantee with the bid or a letter signed by the bidder with the bid referring to and identifying the bid itself;

(d) failure of a bidder to acknowledge receipt of an amendment to a solicitation, but only if:

(i) the bid received indicates in some way that the bidder received the amendment, such as where the amendment added another item to the solicitation and the bidder submitted a bid, on it, if the bidder states under oath that it received the amendment before bidding and that the bidder will stand by its bid price; or

(ii) the amendment has no effect on price or quantity or merely a trivial or negligible effect on quality or delivery, and is not prejudicial to bidders, such as an amendment correcting a typographical mistake in the name of the governmental body;

(e) failure of a bidder to furnish an affidavit concerning affiliates;

(f) failure of a bidder to execute the certifications with respect to equal opportunity and affirmative action programs;

(g) failure of a bidder to furnish cut sheets or product literature;

(h) failure of a bidder to furnish certificates of insurance;

(i) failure of a bidder to furnish financial statements;

(j) failure of a bidder to furnish references;

(k) failure of a bidder to furnish its bidder number

Clearly, each example offered would be “matter of form or is some immaterial variation from the exact requirements of the invitation for bids.”

In analyzing whether an irregularity in a bid is material, the Procurement Review Panel focuses on the statutory language requiring “more than a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured.” [*Id.*]

Using this approach the Panel has held the following are *not* minor informalities:

- failing to provide a fixed price when required in the solicitation, *Appeal by Transportation Management Services, Inc.*, Panel Case No. 1992-15
- failing to provide information regarding insurance, *id.*
- failing to acknowledge an amendment that includes substantive changes in the scope of work, *Protest of General Sales Co.*, Case No. 1989-20
- failing to complete a bid schedule by omitting unit prices for some items, *Protest of Otis Elevator Company*, Panel Case No. 2009-2

- failing to specify installation charges, *Protest of Miller's Tire Service*, Panel Case No. 1984-6
- modification of termination for convenience clause, *Protest of Abbott Laboratories*, Panel Case No. 1997-4

Responsiveness of a bid must be determined from the four corners of the bid itself. *Protest of Two State Construction Co.*, Panel Case No. 1996-2 (“[a] bid must be found responsive on its face and cannot be changed after bid opening.”)

Following her evaluation of Office Depot/Max’s bid, Teresa Watts, MMO Procurement Manager, prepared the following written determination rejecting Office Depot/Max’s bid as nonresponsive. Due to the length and the critical nature of the determination, the CPO incorporates the determination into this decision with CPO Analysis following matters critical to this decision. Ms. Watts wrote:

Office Depot/Max qualified its offer. Excerpts are listed in the following order:

1. **The original solicitation, and**
2. **Office Depot’s response follows (in blue).²**

Section II Instructions to Offerors- A. General Instructions

Certification Regarding Debarment and other Responsibility Matters- Page 6

1. (2) "Principals," for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

In regards to the definition of "principal", as a public company with shares traded on the open market, Office Depot cannot certify as to its owners (shareholders).

CPO Analysis: The CPO accepts Office Depot/Max’s qualification regarding shares traded on the open market as responsive, but reminds Office Depot/Max that, by submitting an offer,

² Office Depot/Max used blue text for its “explanations.” In Section III of the bid, where the scope of work is specified, there is as much or more blue text as there is text from the IFB.

Office Depot/Max certified that all other officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within its business entity.

Certification Regarding Debarment and Other Responsibility Matters Page 6 –

2. (ii) Offeror has not, within a three-year period preceding this offer, had one or more contracts terminated for default by any public (Federal, state, or local) entity.

Office Depots response:

In regards to subsection (ii) above, Office Depot is party to thousands of contracts with public sector customers. The majority of these contracts contain provisions allowing the customer to terminate the contract at any time. There are a myriad of reasons why a customer would elect to terminate a contract with Office Depot prior to the scheduled expiration date. There have been no contract terminations that would adversely affect Office Depot's ability to perform under this contract if selected as a vendor.

CPO Analysis: In its protest, Office Depot/Max wrote, “Office Depot explained that its contracts generally contain termination provisions and it would be impossible to know in every instance why a particular customer elected to cease doing business with Office Depot. Indeed, knowledge of each customer’s motivation would require information beyond what a prudent company would, if could, have.” Certainly, customers such as the State of South Carolina include contract conditions that allow them to exit contracts amenably such as termination for convenience or nonrenewal. However, Office Depot/Max refused to answer the question asked, which was “one or more contracts terminated for default.” [Emphasis added] Therefore, Office Depot/Max was nonresponsive to this requirement.³

³ The procurement officer’s determination and Office Depot/Max’s protest are focused on responsiveness. The question Office Depot/Max refused to answer goes directly to a vendor’s responsibility. The Code defines 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) Responsible bidder or offeror] The CPO can think of few issues more pertinent to a vendor’s responsibility than whether its other public contracts were terminated for breach. Instead of confirming that no government had taken such an action against it, Office Depot/Max’s explanation explicitly avoids meeting the solicitation’s requirement.

3. **Section III. Scope of Work/Specifications – Page 15 (B)**

The following items are EXCLUDED from this contract*: (See comments below)

1. Information technology products as defined by the South Carolina Consolidated Procurement Code, General Provisions, Subarticle 5, including

Copiers and copier supplies,
New and refurbished laser toner cartridges,
Laser Printers,
Computers (including laptops), monitors,
Keyboards and terminals,
Facsimile equipment, and
Television equipment.

2. All furniture, whether metal or wood

3. Flags, US and SC

4. Lab Equipment and Supplies

5. Towels and Toilet Tissue

6. Batteries

7. Break room supplies

8. Janitorial supplies

9. First-aid supplies

10. Electric or electronic business equipment (cameras and time-date stamps)

11. Truckloads of Paper

*Products within categories are determined by Contractor in accordance with its standard classifications.

CPO Analysis: MMO was clear that the items listed were excluded from the contracts to be awarded pursuant to this IFB. Reasons for the exclusions vary, but many of the excluded items are covered by other state term contracts, e.g., copiers and copier supplies, toner cartridges, computers, keyboards, and terminals, television equipment, furniture, flags, lab equipment and supplies, toilet tissue, and truckloads of paper. The state is contractually obligated to be true to its obligations with those other contractors. It cannot authorize or allow sales of contract items within these contracts. Office Depot/Max qualified its bid by reserving the determination of excluded sales for “its standard classifications.” Therefore, Office Depot/Max was nonresponsive.

Same Section -item (C) Inside Delivery Definition- Page 15

4. Inside delivery pertains to deliveries to any location within a customer occupied building. A participating agency may have multiple ordering locations and the contractor will be required to deliver office supplies to each individual location, not to one central location. Office supplies will be required to be delivered to the desktop of the individual ordering.

OfficeMax offers tremendous flexibility relative to cost center ordering and delivery. We offer desktop delivery, dock delivery or delivery to key drop points within a given facility. A dedicated, uniformed driver will perform our desktop deliveries.

Your OfficeMax Account Executive can provide you with the available options to accommodate your specific requirements. Desktop deliveries to locations within our Metropolitan Delivery Zones will be included in your purchase price. However, inside delivery charges for locations outside of our Metropolitan Delivery Zones shall be prepaid and charged back. Whatever your desktop delivery needs, OfficeMax will work to ensure the most cost effective program for you. (Underlining applied by State Procurement Office personnel).

CPO Analysis: With this response, Office Depot/Max's bid added a delivery surcharge "for locations outside of our Metropolitan Delivery Zones" to be prepaid and charged back to those agencies and agency offices. In its protest, Office Depot/Max argued, "The entire state of South Carolina is considered a "Metropolitan Delivery Zone." If such was the case, why add the comment at all?

The IFB made it clear that inside delivery was required across the State, reading, "The Contractor(s) will furnish, warehouse and provide inside, desktop delivery of office supplies, as requested, for all state agencies located in the coastal, midlands and upper regions of South Carolina." [IFB, Ex. 3, Part III, Scope of Work/Specifications, Office Supply Scope of Work/Specifications, p. 15]

Regarding charges for delivery, the IFB required:

7. Deliveries shall be FOB destination, freight prepaid. It is agreed by the parties hereto that delivery by the contractor to the common carrier does not constitute delivery to the State. Any claim for loss or damage shall be between the contractor and the carrier.

8. Individual orders for less than \$50.00 are exempt from FOB requirements. The contractor shall ship these orders prepaid, and add no more than \$10.00 shipping and handling charge to the invoice as a separate charge and include in the invoice total for payment by ordering agency.

[IFB, Ex. 3, Part III, Scope of Work/Specifications, Office Supply Scope of Work/Specifications, p. 17]

In its protest, Office Depot/Max argued Office Max was simply explaining how the charges will be determined for delivery to individual locations and to the desktops of the individuals ordering.” However, the IFB stipulated and expressly limited the bidder’s delivery charges to no more than \$10.00 and only for orders less than \$50.00. By stating terms different from the express requirements of the IFB, Office Depot/Max’s bid was nonresponsive. Because Office Depot/Max’s imposition of delivery charges not authorized by the IFB effects price and delivery, it is, by definition of the Code, not a minor informality or irregularity.

Same Section item (D) Minimum Orders - Page 15

5. In order to encourage agencies to purchase from minority and women-owned businesses, use of this contract is not mandatory for orders less than \$250.00.

(a) NONMANDATORY ORDERS

Any respondent submitting an offer with a minimum order/ship quantity or dollar value, unless otherwise called for in the solicitation, will be determined “non-responsive” and its bid(s) will not be considered for award.

OfficeMax believes that is important to be up front with our customers about any applicable costs or fees. We do not charge “hidden” fees. If customers order any furniture (as allowed hereunder) or special order items that are subject to delivery or restocking fees, this will be communicated by Customer Advocates before the order is placed. OfficeMax does not expect any additional fees to apply to your account. However, if an unforeseen situation arises, we are committed to communicating these costs clearly before orders are placed. (Underlining applied by State Procurement Office personnel).

CPO Analysis: The IFB required:

The list price in the manufacturer’s catalog will be a firm fixed price from January 1, 2014 – December 31, 2014. Contractor shall not change any pricing/data to

include the punch-out catalog until MMO approves any submitted price increases in accordance with the price adjustment clauses in section VII. B.

All services outlined herein shall be included in the percent discount and encompassing spreadsheets (no additional costs will be paid, except as allowed for under the Delivery Services Clause).

[IFB, Ex. 3, Prices, p. 24] Additionally, as noted above in item 4, the IFB prohibited delivery charges except for a maximum \$10.00 delivery charge for orders less than \$50.00.

In its protest, Office Depot/Max argued it was merely being “up front with our customers about any applicable costs.” However, Office Depot/Max’s own words, “OfficeMax does not expect any additional fees to apply to your account. However, if an unforeseen situation arises, we are committed to communicating these costs clearly before orders are placed.” [Emphasis added] Clearly, Office Depot/Max attempted to qualify its acceptance of the IFB’s term prohibiting additional charges for minimum orders. Therefore, Office Depot/Max was nonresponsive to the minimum order requirement of the IFB.

6. **Same section item -9 Order Completeness Page 17**

ORDER COMPLETENESS

Order Fill rate shall be maintained at 96% or greater. Order Fill rate is defined as “the number of line items on an order filled completely as ordered divided by the total number of line items on an order.” MMO reserves the right to request an ad hoc report from the Contractor to monitor order completeness. In the event orders are not filled at a 96% or greater level, the contractor may be held in default and their contract terminated.

At OfficeMax, our standard lead-time is next-day delivery. In fact, we reach 95% of the U.S. with next-day delivery, via our full service Customer Fulfillment Centers nationwide. OfficeMax has the infrastructure in place to support your locations.

We take customer orders until 5:00 PM in your local time zone. Warehouse staff will pick orders, build order routes, and load trucks from 3:00 PM to midnight. Drivers come in at 6:00 AM to start delivering orders, and in most cases, end their day around 4:30 PM after delivering their entire route.

Special ordered items have 2-day to 3-week lead-times that vary widely across manufacturers, products, etc. Given the wide range of products that we are asked to source, we cannot offer a standard special order lead-time. Our goal is simply to keep

special order lead-times as short as possible. Our success in doing this is illustrated by our 99% next-day average across all lines ordered.

All prices are FOB destination. There are no additional minimum order amounts or freight charges, except on large furniture orders (as allowed hereunder) and unique situations. Some furniture items may include delivery, set up, or installation charges, but these charges would be clearly communicated at the time of order by your local OfficeMax Account Executive.

In the event that OfficeMax is temporarily out of stock on an item, we notify our customers in one of the following ways:

- A backordered item will be noted on a FaxBack or email order confirmation.
- A backordered item will be noted on the packing list received with the order.
- Our internet ordering system provides in-stock/backorder status.
- Customers phoning in orders will be notified of a backorder at the time of order placement.

When filling backorders, the first step is letting the system logic try to fill the item using our major wholesalers, United Stationers and S.P. Richards. If the system is unable to fill a line, it prints it on a daily report for Purchasing to source the backordered item. If an item is discontinued, unavailable, or has an unusual lead-time, the customer is called and given a choice of canceling the order or specifying an alternate.

The order is then placed to ship from the nearest, quickest source. At each step in the above process, more and more orders get filled, so by the time we issue purchase order numbers to fill backorders, we are usually dealing with 1-2% of our total lines.

The time it takes to fulfill a backorder is hard to quantify because the order will remain open even if it is partially filled. So if 100 items are ordered and only 50 are available, the 50 will be sent right away, leaving the remaining 50 still on backorder. Then, down the line, if 20 more become available and are sent, this process continues until the order is completely filled or cancelled, but the number of days keeps tallying. Nationally, we average 7 days to fill all backorders completely, and this includes unusual items and items with low usage.

CPO Analysis: In her determination, Ms. Watts only quoted a sub-item 9 of Part III, Scope of Work, H. Delivery and Additional Ordering Requirements. Sub-item 9, read in concert with Item H imposed specific Fill Rate Targets, as follows:

3. Standard delivery is 2 business days from the placement of order or ARO, whichever is sooner, for in-stock items.

Example: Order 4:55 pm Monday deliver Wednesday

The delivery fill rate is 96% for in-stock items.

4. Backorder delivery is 4 business days from the placement of the original order or ARO, whichever is sooner for non-stock items.
Example: Order 4:55 pm Monday deliver Friday
All backordered items must have an expected delivery date on the packing slip.

[IFB, Ex. 3, Delivery and Additional Ordering Requirements, p. 16]

In its protest, Office Depot/Max argued, “Nothing in OfficeMax’s response is contrary to maintaining the required Order Fill Rate (as defined in the Solicitation). Rather, OfficeMax thought it would be helpful to provide the State with information surrounding its fulfillment statistics and back order process.”

Instead of merely accepting MMO’s terms, Office Depot/Max wrote almost an entire page of conditions, causing unnecessary obscurity. Some conditions meet MMO’s requirements, e.g., “we reach 95% of the U.S. with next-day delivery”, but other conditions do not, e.g., “Special ordered items have 2-day to 3-week lead-times” and “The time it takes to fulfill a backorder is hard to quantify . . . Nationally, we average 7 days to fill all backorders completely, and this includes unusual items and items with low usage.” Neither Office Depot/Max’s 2-day to 3-week delivery nor its 7 days to fill all backorders completely is responsive to the IFB.⁴

7. Section VII: Terms and Conditions – A. General- Page 25

ASSIGNMENT (JAN 2006)

No contract or its provisions may be assigned, sublet, or transferred without the written consent of the Procurement Officer. [07-7A004-1]

⁴ One entire section of the Office Depot/Max response is irrelevant. It reads:

There are no additional minimum order amounts or freight charges, except on large furniture orders (as allowed hereunder) and unique situations. Some furniture items may include delivery, set up, or installation charges, but these charges would be clearly communicated at the time of order by your local OfficeMax Account Executive.

As noted previously, MMO excluded furniture from these contracts altogether. [IFB, Ex. 3, Excluded Items, p. 15]

Notwithstanding, Office Depot, Inc. may assign its right to receive payment for products and services hereunder to its subsidiaries or affiliates without the written consent of the Procurement Officer.

CPO Analysis: In its protest, Office Depot/Max wrote “Office Depot reserved the ability to assign its right to payment to a different entity – OfficeMax. That was necessary as a result of the merger between the two companies.” Office Depot/Max might have simply provided that response in its bid. MMO is aware of the merger of the two firms. Instead, Office Depot/Max took unequivocal exception to the requirements of the IFB.

This standard clause of the solicitations originates with a State Regulation that reads, “No State contract is transferable, or otherwise assignable, without the written consent of the Chief Procurement Officer, the head of a purchasing agency, or the designee of either; provided, however, that a contractor may assign monies receivable under a contract after due notice from the contractor to the State.” [19-445.2180. Assignment, Novation, and Change of Name, A. No Assignment] Because the regulation expressly allows what Office Depot/Max requested, its exception to the anti-assignment provision does not make its bid nonresponsive.

8. Same Section- Contractors Liability Insurance- Page 30

CONTRACTOR'S LIABILITY INSURANCE (MAR 2013):

(a) Contractor shall procure from a company or companies lawfully authorized to do business in South Carolina and with a current A.M. Best rating of no less than A: VII, and maintain for the duration of the contract, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work and the results of that work by the contractor, his agents, representatives, employees or subcontractors. (b) Coverage shall be at least as broad as:

(1) Commercial General Liability (CGL): Insurance Services Office (ISO) Form CG 00 01 12 07 covering CGL on an "occurrence" basis, including products-completed operations, personal and advertising injury, with limits no less than \$1,000,000 per occurrence. If a general aggregate limit applies, the general aggregate limit shall be twice the required occurrence limit. This contract shall be considered to be an "insured contract" as defined in the policy.

(2) Auto Liability: ISO Form Number CA 00 01 covering any auto (Code 1), or if Contractor has no owned autos, hired, (Code 8) and non-owned autos (Code 9), with limits no less than \$1,000,000 per accident for bodily injury and property damage.

(3) Worker's Compensation: As required by the State of South Carolina, with Statutory Limits, and Employer's Liability Insurance with limit of no less than \$1,000,000 per accident for bodily injury or disease.

(b) Every applicable Using Governmental Unit, and the officers, officials, employees and volunteers of any of them, must be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of the Contractor including materials, parts or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Contractor's insurance at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10 and CG 20 37 if a later edition is used.

(c) For any claims related to this contract, the Contractor's insurance coverage shall be primary insurance as respects the State, every applicable Using Governmental Unit, and the officers, officials, employees and volunteers of any of them. Any insurance or self-insurance maintained by the State, every applicable Using Governmental Unit, or the officers, officials, employees and volunteers of any of them, shall be excess of the Contractor's insurance and shall not contribute with it.

(d) Prior to commencement of the work, the Contractor shall furnish the State with original certificates and amendatory endorsements or copies of the applicable policy language effecting coverage required by this section. All certificates are to be received and approved by the State before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive the Contractor's obligation to provide them. The State reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by this section, at any time.

(e) Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions. In addition, the Contractor shall notify the State immediately upon receiving any information that any of the coverages required by this section are or will be changed, cancelled, or replaced.

(f) Contractor hereby grants to the State and every applicable Using Governmental Unit a waiver of any right to subrogation which any insurer of said Contractor may acquire against the State or applicable Using Governmental Unit by virtue of the payment of any loss under such insurance. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not the State or Using Governmental Unit has received a waiver of subrogation endorsement from the insurer.

(g) Any deductibles or self-insured retentions must be declared to and approved by the State. The State may require the Contractor to purchase coverage with a lower deductible or retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention.

(h) The State reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.
[07-7B056-1]

OfficeMax carries insurance that is standard for our type of business. We can provide an appropriate level of insurance coverage for State of South Carolina. Currently, our insurance provider is National Union. The following is a general outline of what the

intended coverage will be. At the time of finalization, OfficeMax will provide certificates of insurance that document binding coverage for the life of the agreement.

Office Depot's insurance is as set forth in our MOI and standard insurance policies. Office Depot does have deductible and self-insured retentions. If there are minimum levels that the State requires and you can provide that information we are happy to discuss.

CPO Analysis: Office Depot/Max's statement in its proposal, "If there are minimum levels that the State requires and you can provide that information" ignores the stipulated limits listed in the IFB and repeated by Ms. Watts above, which were: Commercial General Liability - \$1,000,000 per occurrence, Auto Liability - \$1,000,000 per accident for bodily injury and property damage, and Worker's Compensation - \$1,000,000 per accident for bodily injury or disease. Worse, Office Depot/Max's response "we are happy to discuss" offers no agreement whatsoever to comply with the mandatory insurance requirements of the IFB. In its protest, Office Depot/Max argued, "There was no indication that OfficeMax could not or would not comply with the insurance mandates of the Solicitation." The CPO disagrees. There was certainly no offer by Office Depot/Max to comply with the IFB's insurance requirements either. Office Depot/Max was nonresponsive to the IFB requirement for Contractor's Liability Insurance. *Cf. Appeal by Transportation Management Services, Inc.*, Panel Case No. 1992-15 ("The Panel finds the requirement that information on comprehensive insurance be provided relates to the quality of performance and that the absence of such information is not a minor technicality under Reg. 19-445.2080.")

9. **PRICE ADJUSTMENTS (JAN 2006) page 33**

(1) Method of Adjustment. Any adjustment in the contract price made pursuant to a clause in this contract shall be consistent with this Contract and shall be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the Contractor (including profit, if otherwise allowed):

- (a) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
- (b) by unit prices specified in the Contract or subsequently agreed upon;

(c) by the costs attributable to the event or situation covered by the relevant clause, including profit if otherwise allowed, all as specified in the Contract; or subsequently agreed upon;

(d) in such other manner as the parties may mutually agree; or,

(e) in the absence of agreement by the parties, through a unilateral initial written determination by the Procurement Officer of the costs attributable to the event or situation covered by the clause, including profit if otherwise allowed, all as computed by the Procurement Officer in accordance with generally accepted accounting principles, subject to the provisions of Title 11, Chapter 35, Article 17 of the S.C. Code of Laws.

(2) Submission of Price or Cost Data. Upon request of the Procurement Officer, the contractor shall provide reasonably available factual information to substantiate that the price or cost offered, for any price adjustments is reasonable, consistent with the provisions of Section 11-35-1830. [07-7B160-1]

For all references of Contractor's cost in the RFP, pursuant to Section 11-35-1830, as our pricing is based upon established contract pricing, Office Depot is not required to provide its cost data to the State. We hereby submit this for clarification purposes, that we will not be providing our cost data in regards to any provision hereunder.

CPO Analysis: In its protest, Office Depot/Max wrote, "That statement is completely consistent with Section 11-35-1830, which unambiguously provides that cost or pricing data is not required to be furnished "where the contract price is based on established catalog prices or market prices."

The Section of the Code referenced by the clause reads, in part:

SECTION 11-35-1830. Cost or pricing data.

(1) Contractor Certification. A contractor shall, except as provided in subsection (3) of this section, submit cost or pricing data and shall certify that, to the best of his knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of mutually determined specified date prior to the date of....

(3) Cost or Pricing Data Not Required. The requirements of this section shall not apply to contracts:

(b) where the contract price is based on established catalog prices or market prices....

One might argue the Code's exceptions apply to this solicitation in that the solicitation has been adequately competed and the prices of items are based on established catalog prices.

That argument ignores the facts that the IFB does allow prices increases, but it reads, “Prices shall not be increased during the initial term.” [IFB, Ex. 3, Price Adjustment – Limited – After Initial Term Only, p. 33] Further, regarding catalog prices, the IFB reads, “The list price in the manufacturer’s catalog will be a firm fixed price from January 1, 2014 – December 31, 2014. Contractor shall not change any pricing/data to include the punch-out catalog until MMO approves any submitted price increases in accordance with the price adjustment clauses in section VII. B.” [IFB, Ex. 3, Prices, p. 24]⁵ Office Depot/Max’s refusal to comply causes its bid to be, at minimum, apparently nonresponsive.

10. PRICING DATA -- AUDIT -- INSPECTION (JAN 2006) Page 33

[Clause Included Pursuant to Section 11-35-1830, - 2210, & -2220] (a) Cost or Pricing Data. Upon Procurement Officer's request, you shall submit cost or pricing data, as defined by 48 C.F.R. Section 2.101 (2004), prior to either (1) any award to contractor pursuant to 11-35-1530 or 11-35-1560, if the total contract price exceeds \$500,000, or (2) execution of a change order or contract modification with contractor which exceeds \$100,000. Your price, including profit or fee, shall be adjusted to exclude any significant sums by which the state finds that such price was increased because you furnished cost or pricing data that was inaccurate, incomplete, or not current as of the date agreed upon between parties. (b) Records Retention. You shall maintain your records for three years from the date of final payment, or longer if requested by the chief Procurement Officer. The state may audit your records at reasonable times and places. As used in this subparagraph (b), the term "records" means any books or records that relate to cost or pricing data submitted pursuant to this clause. In addition to the obligation stated in this subparagraph (b), you shall retain all records and allow any audits provided for by 11-35-2220(2). (c) Inspection. At reasonable times, the state may inspect any part of your place of business which is related to performance of the work. (d) Instructions Certification. When you submit data pursuant to subparagraph (a), you shall (1) do so in accordance with the instructions appearing in Table 15-2 of 48 C.F.R. Section 15.408 (2004) (adapted as necessary for the state context), and (2) submit a Certificate of Current Cost or Pricing Data, as prescribed by 48 CFR Section 15.406-2(a) (adapted as necessary for the state context). (e) Subcontracts. You shall include the above text of this clause in all

⁵ As discussed in the next section, the “core requirements” or market basket pricing is not based on established catalog price. It is, therefore, subject to the cost and pricing data provisions of Section 11-35-1830 and Reg. 19-445.2125, if a requested change to the core requirements pricing exceeds \$500,000. Another IFB clause limits annual increases to no more than the consumer price index. These provisions combine to make it unlikely the cost data requirements will ever be triggered. So long as price changes totaling \$500,000 remain possible, though, the State cannot allow a vendor to declare in his bid that he will not be bound by the law.

of your subcontracts. (f) Nothing in this clause limits any other rights of the state. [07-7B185-1]

For all references of Contractor's cost in the RFP, pursuant to Section 11-35-1830, as our pricing is based upon established contract pricing, Office Depot is not required to provide its cost data to the State. We hereby submit this for clarification purposes, that we will not be providing our cost data in regards to any provision hereunder. We respectfully request that in the event of an audit, if a third party auditor is used, that Office Depot and the State mutually agree upon such third party auditor.

CPO Analysis: Office Depot/Max's statement, "our pricing is based upon established contract pricing" is true for its "balance of catalog" discount, but not so for the 100 market basket items the IFB required bidders to bid specifically. This solicitation requirement addresses "Any adjustment in the contract price" and it clearly is a requirement of bidding. Office Depot/Max's refusal to comply causes its bid to be overtly nonresponsive.

Regarding Office Depot/Max's request, "We respectfully request that in the event of an audit, if a third party auditor is used, that Office Depot and the State mutually agree upon such third party auditor", it is not nonresponsive and may be granted or denied by MMO.

11. Section VIII page 37 and final paragraph in their offer

Language inserted on the Bidders Schedule.

*Please see following page for clarification of pricing being offered hereunder

Our pricing offered hereunder shall be in accordance with the following:

For items that are not included in the market basket, but are contained in the "OfficeMax Maxi Catalog" that is in circulation at the time of the order and are classified by OfficeMax or Office Depot as office supply items, and excepting out any excluded items under Section III (B) hereunder, such items will be priced at 60% off of list price designated in our response above, exclusive of bulk pricing discount, clearance items, promotional items or other specials. OfficeMax Maxi Catalog pricing shall be updated on an annual basis.

The "OfficeMax Maxi Catalog" is OfficeMax's full-line office products catalog which is published in hard copy form once per year.

We reserve the right to offer additional products and services to purchasers hereunder, provided such products and services are not excluded items under Section III (B)

hereunder. Items that are not identified in the market basket (core items) or classified as office supplies in the OfficeMax Maxi Catalog shall not be subject to the discounts or pricing methodology otherwise set forth in the resulting agreement. Rather, prices for such items will be established by OfficeMax or Office Depot in its discretion and will be presented to the State or end user purchaser at the point of sale or otherwise at the time of order placement.

CPO Analysis: Office Depot/Max wrote, “For items that are not included in the market basket, but are contained in the ‘OfficeMax Maxi Catalog’ that is in circulation at the time of the order and are classified by OfficeMax or Office Depot as office supply items, and excepting out any excluded items under Section III (B) hereunder, such items will be priced at 60% off of list price designated in our response above, exclusive of bulk pricing discount, clearance items, promotional items or other specials.” Office Depot/Max’s exclusion of “bulk pricing discount, clearance items, promotional items or other specials” is acceptable only if those items are discounted at least 60%. Otherwise, this exception was nonresponsive.

Office Depot/Max wrote, “We reserve the right to offer additional products and services to purchasers.” Under this IFB, the State has not offered to buy and has not competed in accordance with the Consolidated Procurement Code additional products and services. Therefore, it would be unlawful for state agencies to purchase items and services other than those competed and covered expressly by this IFB.

Determination:

Office Depot/Max has conditioned its offer and does not meet the requirements set forth in the original solicitation.

CPO Analysis: The CPO agrees with Ms. Watts. Individually, many of the exceptions Office Depot/Max stated to the requirements of the IFB warrant rejection of its bid outright. Collectively, the number and scope of exceptions in Office Depot/Max’s bid exceed anything in this CPO’s twenty years of experience.

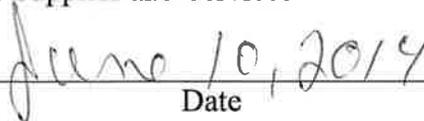
DETERMINATION

MMO processed this procurement as an IFB, not a request for proposals. Unlike a RFP, which often seeks offeror ingenuity in developing a solution to assist the State with an issue or problem, an IFB dictates specific mandatory requirements and asks bidders to accept or reject those dictated requirements – to bid or not. MMO had previously sought input from prospective bidders, including Office Depot/Max through a pre-solicitation meeting, a pre-bid meeting, several question and answer periods, and nine (9) amendments. All the State asked bidders was to complete the bidding schedule and sign their bids agreeing to all terms and conditions. Office Depot/Max chose, instead, to modify, qualify, and condition its bid, thereby obscuring its commitment to the State's terms.

It is apparent that Office Depot/Max approached its response as a proposal, not a bid, annotating serious comments, exceptions and restrictions eleven times throughout its bid.⁶ Office Depot/Max argues those annotations were merely its attempts to be forthcoming and transparent. The annotations also attempt to alter, or at a minimum, obscure, specific mandatory requirements of the IFB. Individually, some of Office Depot/Max's annotations were responsive. Others were blatant exceptions to mandatory and essential requirements of the IFB affecting price, quality and delivery. The protest is denied.



R. Voight Shealy
Chief Procurement Officer
For Supplies and Services


Date

Columbia, S.C.

⁶ MMO waived fourteen of the twenty-five comments that Office Depot/Max inserted in its bid.

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

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 108.1 of the 2013 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, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by 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**

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.



April 11, 2014

Via Electronic Mail and UPS

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201
protest-mmo@mmo.sc.gov

Re: Protest Related to Solicitation No. 5400006696

Dear Sir or Madam:

Pursuant to Section 11-35-4210 of the South Carolina Code, Office Depot, Inc. ("Office Depot")¹ is hereby protesting: (a) the intended award of Solicitation No. 5400006696 (the "Solicitation") to Forms and Supply, Inc. – an entity whose overall cost to the state exceeds that proposed by OfficeMax; and (b) South Carolina's non-responsiveness determination related to OfficeMax's proposal (the "Proposal") in connection with the Solicitation. The grounds supporting this protest are more fully set forth below.

Applicable Standards

Section 11-35-1410(7) of the South Carolina code defines a "[r]esponsive bidder or offeror" 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." (emphasis added). Further, Section 11-35-1520(13) makes clear that:

A minor informality or irregularity is one which is merely a matter of form or *is some immaterial variation from the exact requirements* of the invitation for bids having no effect or merely a trivial or negligible effect on the total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.

(emphasis added). With regard to "minor informalities or irregularities," South Carolina law is clear that the "procurement officer shall either give the bidder an opportunity to cure any deficiency . . . or *waive such deficiency when it is to the advantage of the State.*" (*Id.*; emphasis added). Further, the Solicitation itself

¹ OfficeMax Incorporated ("OfficeMax") – the entity that submitted the bid response to the solicitation at issue – is an indirect wholly owned subsidiary of Office Depot.

states that only offers that fail to “conform to . . . *material* requirements . . . may be rejected as nonresponsive.” (Proposal, p. 10; emphasis added).

Pursuant to the Solicitation, and as explained herein, OfficeMax was a “responsive bidder” and each of the purported deficiencies in the Proposal are – at most – “minor.” Further, waiving those purported deficiencies would be to the advantage of the State because OfficeMax offered lower overall costs to the State for its office supplies. Accordingly, OfficeMax’s Proposal should not have been deemed non-responsive.

Purported Deficiencies

On February 20, 2014, Theresa Watts, a Procurement Manager with the State, issued a document setting forth 11 excerpts from the Proposal that are purportedly “relevant to the Determination of Non-Responsiveness.” There is no discussion as to why these items are relevant to such a determination, nor is there any discussion about what makes them “material” as defined under South Carolina law. Instead, the document consists solely of portions of the Solicitation cut-and-pasted along with the corresponding portions of the Proposal. For your convenience and the sake of brevity, a copy of Ms. Watts’s letter is attached hereto. Below, OfficeMax explains why these purported deficiencies are not material.

1. Certification Regarding Debarment and other Responsibility Matters

For purposes of the certification required by the Solicitation, the term “[p]rincipals” is defined as, among other things, “owners” of the entity submitting the proposal. In response to this requirement, the Proposal simply notes that Office Depot is a public company and thus it cannot make a certification related to the many thousands of its shareholders. That kind of explanation is not only permitted by the Solicitation, it is required:

If Offeror is unable to certify the representations stated in paragraphs (a)(1) [it] must submit a written explanation regarding its inability to make the certification.

(Proposal, p. 8). Moreover, the explanation is completely consistent with the portion of the Solicitation making clear that “[t]he knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.” (Proposal, p. 8). Making the type of certification required by the Solicitation on behalf of every shareholder of Office Depot would require information well beyond what a prudent company would have in its possession.

If the State is concerned about debarment, Office Depot can represent that it is not presently debarred, suspended, proposed for debarment or declared

ineligible for the award of contracts by any state or federal agency. As such, this aspect of the Proposal is appropriate, reasonable and complies in all material respects with the Solicitation. The Procurement Manager should not have utilized this as a basis for finding the Proposal non-responsive.

2. Certification Regarding Debarment and Other Responsibility Matters

In response to a certification relating to termination of contracts for default, Office Depot explained that its contracts generally contain termination provisions and that it would be impossible to know in every instance why a particular customer elected to cease doing business with Office Depot. Indeed, knowledge of each customer's motivation would require information beyond what a prudent company would, or could, have. OfficeMax's response to this certification was appropriate, responsive and in material compliance with the Solicitation. As a result, this aspect of the Proposal should not be a basis for a non-responsiveness finding.

3. Scope of Work/Specifications

Pursuant to the Solicitation, there are certain items that would be specifically excluded from the resultant contract, including broad categories such as laser printers, lab equipment and janitorial supplies. In responding to the Solicitation, OfficeMax noted that "[p]roducts within categories are determined by Contractor in accordance with its standard classifications." (Proposal, p. 17). That comment does not alter the contract or cause the Proposal to be non-responsive. Indeed, that explanation is completely consistent with the Solicitation's requirements that certain enumerated items be excluded. As a result, this aspect of the Proposal is appropriate and should not be a basis for a non-responsiveness finding.

4. Inside Delivery Definition

This portion of the Solicitation required OfficeMax to agree to "deliver office supplies to each individual location, not to one central location" and that "[o]ffice supplies will be required to be delivered to the desktop of the individual ordering." (Proposal, p. 17). OfficeMax agreed to each of those requirements, explaining only that "inside delivery charges for locations outside of our Metropolitan Delivery Zones shall be prepaid and charged back." (*Id.*). This is not a material non-conformity with the Solicitation and should not be a basis for finding the Proposal non-responsive. Indeed, this is not a deviation at all. The entire state of South Carolina is considered a "Metropolitan Delivery Zone." In any event, OfficeMax was simply explaining how the charges will be determined for delivery to individual locations and to the desktops of the individuals ordering.

5. Minimum Orders

The Solicitation states that "[a]ny respondent submitting an offer with a minimum order/ship quantity or dollar value . . . will be determined 'non-responsive'

...” (Proposal, p. 18). In responding to this section, OfficeMax noted the importance of being “up front with our customers about any applicable costs” and then stated that certain “special order items” may have restocking or delivery fees associated with them. OfficeMax said nothing about minimum order/ship quantities and never indicated that it would fail to comply with this section of the Solicitation. OfficeMax noted expressly that it “does not expect any additional fees to apply to your account.” (*Id.*) In fact, the Proposal does not contemplate “special order items” and the fees associated with them would not be charged under any resulting agreement with the State. In any event, OfficeMax’s attempt to have full disclosure and transparency with the State does not amount to material non-compliance with the Solicitation and should not serve as a basis for finding the Proposal non-responsive.

6. Order Completeness

The Solicitation requires that “Order Fill Rate shall be maintained at 96% or greater.” (Proposal, p. 20). Nothing in OfficeMax’s response is contrary to maintaining the required Order Fill Rate (as defined in the Solicitation). Rather, OfficeMax thought it would be helpful to provide the State with information surrounding its fulfillment statistics and back order process. In fact, OfficeMax specifically noted that it “has the infrastructure in place to support your locations.” (*Id.*) This aspect of the Proposal complies in all material respects with the Solicitation and should not have caused OfficeMax’s Proposal to be deemed non-responsive.

7. Assignment

The Solicitation prohibits assignment of any “contract or its provisions . . . without written consent of the Procurement Officer.” (Proposal, p. 34). In response, the Proposal states that Office Depot may assign its right to payment to a subsidiary or affiliate without written consent. (*Id.*) That is not inconsistent with the Solicitation’s mandate. There is a distinction between performance of the agreement and the right to payment thereunder. Office Depot reserved the ability to assign its right to payment to a different entity – OfficeMax. That was necessary as a result of the merger between the two companies. It did not – and was not attempting to – reserve a right to assign its own performance of the agreement. This clarification is consistent with the Solicitation and should not serve as a basis for a finding of non-responsiveness.

8. Liability Insurance

The Solicitation contains certain requirements related to the procurement of liability insurance. (See Proposal, p. 39). OfficeMax stated that it “can provide an appropriate level of insurance coverage for the State of South Carolina.” (*Id.* at 40). There is no indication that OfficeMax could not or would not comply with the insurance mandates of the Solicitation. In fact, OfficeMax stated that “[i]f there are

minimum levels [of insurance] that the State requires and you can provide that information we are happy to discuss.” These comments are in material conformity with the Solicitation and should not serve as a basis for a finding of non-responsiveness.

9. Price Adjustments

There is a provision in the Price Adjustments section of the Solicitation stating that “[u]pon request of the Procurement Officer, the contractor shall provide reasonably available factual information to substantiate that the price or cost offered . . . is reasonable, *consistent with the provisions of Section 11-35-1830.*” (Proposal, p. 42; emphasis added). The Proposal states in response that because “our pricing is based upon established contract pricing, Office Depot is not required to provide its cost data to the State.” (*Id.*). That statement is completely consistent with Section 11-35-1830, which unambiguously provides that cost or pricing data is not required to be furnished “where the contract price is based on established catalog prices or market prices.” While Office Depot will not provide cost information, it has no objection to providing other information to establish the reasonableness of any price adjustments as called for under the Solicitation. Because the pricing in the Proposal is based on established contract pricing, this section of the Solicitation should not serve as a basis for a finding of non-responsiveness.

10. Pricing Data –Audits

Again citing Section 11-35-1830, the Solicitation states “you shall submit cost or pricing data” upon request of the Procurement Officer. For the same reasons discussed above, the Proposal makes clear that there is no requirement that cost data be provided to the State. (Proposal, p. 43). Office Depot will permit audits as contemplated under the Solicitation, which may require the disclosure of pricing data, but not the disclosure of cost data consistent with Section 11-35-1830. Thus, this section of the Solicitation should not serve as a basis for a finding of non-responsiveness.

11. Pricing Clarification

On the final page of the Proposal it states that, except for excluded items, non-market basket items will be priced at 60% off of list price. (Proposal, p.51). It further states that, except for excluded items and those falling outside of any other pricing methodology, items will be sold at prices presented to the State for consideration. It is unclear what issue the State took with this response. But, in any event, nothing contained in this section of the Proposal renders it out of material compliance with the Solicitation.

* * *

OfficeMax did not condition its offer to the State. Nor did OfficeMax fail to materially comply with the Solicitation. For the reasons set forth above, the State should: (a) not award the relevant contract to Forms and Supply, Inc.; and (b) either deem OfficeMax's Proposal to be in material conformity with the Solicitation and consider it for purposes of awarding the relevant contract, or waive any purported deficiencies or non-compliance because doing so would be beneficial to the State by way of lower office supply costs.

I am happy to have a call to discuss these or any other issues you may have. Office Depot reserves its right to amend this protest in accordance with Section 11-35-4210(2)(b) of the South Carolina Code.

Sincerely,

A handwritten signature in black ink, appearing to read "Pollman", with a long horizontal flourish extending to the right.

Jim Pollman

Regional Vice President, South Region

DETERMINATION OF A NON-RESPONSIVE BID

Solicitation Number 5400006696
Submitted by Office Depot/Max

The following are excerpts from the original solicitation relevant to the Determination of Non-Responsiveness:

Original Solicitation: Page 8, Responsiveness/Improper Offerors

(C.) Responsiveness. Any Offer which fails to conform to the material requirements of the Solicitation may be rejected as nonresponsive. Offers which impose conditions that modify material requirements of the Solicitation may be rejected. If a fixed price is required, an Offer will be rejected if the total possible cost to the State cannot be determined. Offerors will not be given an opportunity to correct any material nonconformity. Any deficiency resulting from a minor informality may be cured or waived at the sole discretion of the Procurement Officer. [R.19-445.2070 and Section 11-35-1520(13)]

Office Depot/Max qualified its offer. Excerpts are listed in the following order:

1. The original solicitation, and
2. Office Depot's response follows (in blue).

Section II Instructions to Offerors- A. General Instructions

Certification Regarding Debarment and other Responsibility Matters- Page 6

1. (2) "Principals," for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

In regards to the definition of "principal", as a public company with shares traded on the open market, Office Depot cannot certify as to its owners (shareholders).

Certification Regarding Debarment and Other Responsibility Matters Page 6 –

2. (ii) Offeror has not, within a three-year period preceding this offer, had one or more contracts terminated for default by any public (Federal, state, or local) entity.

Office Depots response:

In regards to subsection (ii) above, Office Depot is party to thousands of contracts with public sector customers. The majority of these contracts contain provisions allowing the customer to terminate the contract at any time. There are a myriad of reasons why a customer would elect to terminate a contract with Office Depot prior to the scheduled expiration date. There have been no contract terminations that would adversely affect Office Depot's ability to perform under this contract if selected as a vendor.

3. Section III. Scope of Work/Specifications – Page 15 (B)

The following items are EXCLUDED from this contract*: (See comments below)

1. Information technology products as defined by the South Carolina Consolidated Procurement Code, General Provisions, Subarticle 5, including

Copiers and copier supplies,
New and refurbished laser toner cartridges, Laser Printers, Computers (including laptops), monitors, Keyboards and terminals, Facsimile equipment, and Television equipment.

2. All furniture, whether metal or wood
3. Flags, US and SC
4. Lab Equipment and Supplies
5. Towels and Toilet Tissue
6. Batteries
7. Break room supplies
8. Janitorial supplies
9. First-aid supplies
10. Electric or electronic business equipment (cameras and time-date stamps)
11. Truckloads of Paper

*Products within categories are determined by Contractor in accordance with its standard classifications.

Same Section -item (C) Inside Delivery Definition- Page 15

4. Inside delivery pertains to deliveries to any location within a customer occupied building. A participating agency may have multiple ordering locations and the contractor will be required to deliver office supplies to each individual location, not to one central location. Office supplies will be required to be delivered to the desktop of the individual ordering.

OfficeMax offers tremendous flexibility relative to cost center ordering and delivery. We offer desktop delivery, dock delivery or delivery to key drop points within a given facility. A dedicated, uniformed driver will perform our desktop deliveries.

Your OfficeMax Account Executive can provide you with the available options to accommodate your specific requirements. Desktop deliveries to locations within our Metropolitan Delivery Zones will be included in your purchase price. However, inside delivery charges for locations outside of our Metropolitan Delivery Zones shall be prepaid and charged back. Whatever your desktop delivery needs, OfficeMax will work to ensure the most cost effective program for you. (Underlining applied by State Procurement Office personnel).

Same Section item (D) Minimum Orders - Page 15

5. In order to encourage agencies to purchase from minority and women-owned businesses, use of this contract is not mandatory for orders less than \$250.00.

(a) NONMANDATORY ORDERS

Any respondent submitting an offer with a minimum order/ship quantity or dollar value, unless otherwise called for in the solicitation, will be determined "non-responsive" and its bid(s) will not be considered for award.

OfficeMax believes that is important to be up front with our customers about any applicable costs or fees. We do not charge "hidden" fees. If customers order any furniture (as allowed hereunder) or special order items that are subject to delivery or restocking fees, this will be communicated by Customer Advocates before the order is placed. OfficeMax does not expect any additional fees to apply to your account. However, if an unforeseen situation arises, we are committed to communicating these costs clearly before orders are placed. (Underlining applied by State Procurement Office personnel).

6. Same section item -9 Order Completeness Page 17

ORDER COMPLETENESS

Order Fill rate shall be maintained at 96% or greater. Order Fill rate is defined as “the number of line items on an order filled completely as ordered divided by the total number of line items on an order.” MMO reserves the right to request an ad hoc report from the Contractor to monitor order completeness. In the event orders are not filled at a 96% or greater level, the contractor may be held in default and their contract terminated.

At OfficeMax, our standard lead-time is next-day delivery. In fact, we reach 95% of the U.S. with next-day delivery, via our full service Customer Fulfillment Centers nationwide. OfficeMax has the infrastructure in place to support your locations.

We take customer orders until 5:00 PM in your local time zone. Warehouse staff will pick orders, build order routes, and load trucks from 3:00 PM to midnight. Drivers come in at 6:00 AM to start delivering orders, and in most cases, end their day around 4:30 PM after delivering their entire route.

Special ordered items have 2-day to 3-week lead-times that vary widely across manufacturers, products, etc. Given the wide range of products that we are asked to source, we cannot offer a standard special order lead-time. Our goal is simply to keep special order lead-times as short as possible. Our success in doing this is illustrated by our 99% next-day average across all lines ordered.

All prices are FOB destination. There are no additional minimum order amounts or freight charges, except on large furniture orders (as allowed hereunder) and unique situations. Some furniture items may include delivery, set up, or installation charges, but these charges would be clearly communicated at the time of order by your local OfficeMax Account Executive.

In the event that OfficeMax is temporarily out of stock on an item, we notify our customers in one of the following ways:

- A backordered item will be noted on a FaxBack or email order confirmation.
- A backordered item will be noted on the packing list received with the order.
- Our internet ordering system provides in-stock/backorder status.
- Customers phoning in orders will be notified of a backorder at the time of order placement.

When filling backorders, the first step is letting the system logic try to fill the item using our major wholesalers, United Stationers and S.P. Richards. If the system is unable to fill a line, it prints it on a daily report for Purchasing to source the backordered item. If an item is discontinued, unavailable, or has an unusual lead-time, the customer is called and given a choice of canceling the order or specifying an alternate.

The order is then placed to ship from the nearest, quickest source. At each step in the above process, more and more orders get filled, so by the time we issue purchase order numbers to fill backorders, we are usually dealing with 1-2% of our total lines.

The time it takes to fulfill a backorder is hard to quantify because the order will remain open even if it is partially filled. So if 100 items are ordered and only 50 are available, the 50 will be sent right away, leaving the remaining 50 still on backorder. Then, down the line, if 20 more become available and are sent, this process continues until the order is completely filled or cancelled, but the number of days keeps tallying. Nationally, we average 7 days to fill all backorders completely, and this includes unusual items and items with low usage.

7. Section VII: Terms and Conditions – A. General- Page 25

ASSIGNMENT (JAN 2006)

No contract or its provisions may be assigned, sublet, or transferred without the written consent of the Procurement

Officer. [07-7A004-1]

Notwithstanding, Office Depot, Inc. may assign its right to receive payment for products and services hereunder to its subsidiaries or affiliates without the written consent of the Procurement Officer.

8. Same Section- Contractors Liability Insurance- Page 30

CONTRACTOR'S LIABILITY INSURANCE (MAR 2013):

(a) Contractor shall procure from a company or companies lawfully authorized to do business in South Carolina and with a current A.M. Best rating of no less than A: VII, and maintain for the duration of the contract, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work and the results of that work by the contractor, his agents, representatives, employees or subcontractors. (b) Coverage shall be at least as broad as:

(1) Commercial General Liability (CGL): Insurance Services Office (ISO) Form CG 00 01 12 07 covering CGL on an "occurrence" basis, including products-completed operations, personal and advertising injury, with limits no less than \$1,000,000 per occurrence. If a general aggregate limit applies, the general aggregate limit shall be twice the required occurrence limit. This contract shall be considered to be an "insured contract" as defined in the policy.

(2) Auto Liability: ISO Form Number CA 00 01 covering any auto (Code 1), or if Contractor has no owned autos, hired, (Code 8) and non-owned autos (Code 9), with limits no less than \$1,000,000 per accident for bodily injury and property damage.

(3) Worker's Compensation: As required by the State of South Carolina, with Statutory Limits, and Employer's Liability Insurance with limit of no less than \$1,000,000 per accident for bodily injury or disease.

(b) Every applicable Using Governmental Unit, and the officers, officials, employees and volunteers of any of them, must be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of the Contractor including materials, parts or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Contractor's insurance at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10 and CG 20 37 if a later edition is used.

(c) For any claims related to this contract, the Contractor's insurance coverage shall be primary insurance as respects the State, every applicable Using Governmental Unit, and the officers, officials, employees and volunteers of any of them. Any insurance or self-insurance maintained by the State, every applicable Using Governmental Unit, or the officers, officials, employees and volunteers of any of them, shall be excess of the Contractor's insurance and shall not contribute with it.

(d) Prior to commencement of the work, the Contractor shall furnish the State with original certificates and amendatory endorsements or copies of the applicable policy language effecting coverage required by this section. All certificates are to be received and approved by the State before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive the Contractor's obligation to provide them. The State reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by this section, at any time.

(e) Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions. In addition, the Contractor shall notify the State immediately upon receiving any information that any of the coverages required by this section are or will be changed, cancelled, or replaced.

(f) Contractor hereby grants to the State and every applicable Using Governmental Unit a waiver of any right to subrogation which any insurer of said Contractor may acquire against the State or applicable Using Governmental Unit by virtue of the payment of any loss under such insurance. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not the State or Using Governmental Unit has received a waiver of subrogation endorsement from the insurer.

(g) Any deductibles or self-insured retentions must be declared to and approved by the State. The State may require the Contractor to purchase coverage with a lower deductible or retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention.

(h) The State reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances. [07-7B056-1]

OfficeMax carries insurance that is standard for our type of business. We can provide an appropriate level of insurance coverage for State of South Carolina. Currently, our insurance provider is National Union. The following is a general outline of what the intended coverage will be. At the time of finalization,

OfficeMax will provide certificates of insurance that document binding coverage for the life of the agreement.

Office Depot's insurance is as set forth in our MOI and standard insurance policies. Office Depot does have deductible and self-insured retentions. If there are minimum levels that the State requires and you can provide that information we are happy to discuss.

9. PRICE ADJUSTMENTS (JAN 2006) page 33

(1) Method of Adjustment. Any adjustment in the contract price made pursuant to a clause in this contract shall be consistent with this Contract and shall be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the Contractor (including profit, if otherwise allowed):

(a) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

(b) by unit prices specified in the Contract or subsequently agreed upon;

(c) by the costs attributable to the event or situation covered by the relevant clause, including profit if otherwise allowed, all as specified in the Contract; or subsequently agreed upon;

(d) in such other manner as the parties may mutually agree; or,

(e) in the absence of agreement by the parties, through a unilateral initial written determination by the Procurement Officer of the costs attributable to the event or situation covered by the clause, including profit if otherwise allowed, all as computed by the Procurement Officer in accordance with generally accepted accounting principles, subject to the provisions of Title 11, Chapter 35, Article 17 of the S.C. Code of Laws.

(2) Submission of Price or Cost Data. Upon request of the Procurement Officer, the contractor shall provide reasonably available factual information to substantiate that the price or cost offered, for any price adjustments is reasonable, consistent with the provisions of Section 11-35-1830.

[07-7B160-1]

For all references of Contractor's cost in the RFP, pursuant to Section 11-35-1830, as our pricing is based upon established contract pricing, Office Depot is not required to provide its cost data to the State. We hereby submit this for clarification purposes, that we will not be providing our cost data in regards to any provision hereunder. We respectfully requests that in the event of an audit, if a third party auditor is used, that Office Depot and the State mutually agree upon such third party auditor.

10. PRICING DATA -- AUDIT -- INSPECTION (JAN 2006) Page 33

[Clause Included Pursuant to Section 11-35-1830, - 2210, & -2220] (a) Cost or Pricing Data. Upon Procurement Officer's request, you shall submit cost or pricing data, as defined by 48 C.F.R. Section 2.101 (2004), prior to either (1) any award to contractor pursuant to 11-35-1530 or 11-35-1560, if the total contract price exceeds \$500,000, or (2) execution of a change order or contract modification with contractor which exceeds \$100,000. Your price, including profit or fee, shall be adjusted to exclude any significant sums by which the state finds that such price was increased because you furnished cost or pricing data that was inaccurate, incomplete, or not current as of the date agreed upon between parties. (b) Records Retention. You shall maintain your records for three years from the date of final payment, or longer if requested by the chief Procurement Officer. The state may audit your records at reasonable times and places. As used in this subparagraph (b), the term "records" means any books or records that relate to cost or pricing data submitted pursuant to this clause. In addition to the obligation stated in this subparagraph (b), you shall retain all records and allow any audits provided for by 11-35-2220(2). (c) Inspection.

At reasonable times, the state may inspect any part of your place of business which is related to performance of the work. (d) Instructions Certification. When you submit data pursuant to subparagraph (a), you shall (1) do so in accordance with the instructions appearing in Table 15-2 of 48 C.F.R. Section 15.408 (2004) (adapted as necessary for the state context), and (2) submit a Certificate of Current Cost or Pricing Data, as prescribed by 48 CFR Section 15.406-2(a) (adapted as necessary for the state context). (e) Subcontracts. You shall include the above text of this clause in all of your subcontracts. (f) Nothing in this clause limits any other rights of the state.

[07-7B185-1]

For all references of Contractor's cost in the RFP, pursuant to Section 11-35-1830, as our pricing is based upon established contract pricing, Office Depot is not required to provide its cost data to the State. We

hereby submit this for clarification purposes, that we will not be providing our cost data in regards to any provision hereunder. We respectfully requests that in the event of an audit, if a third party auditor is used, that Office Depot and the State mutually agree upon such third party auditor.

11. Section VIII page 37 and final paragraph in their offer

Language inserted on the Bidders Schedule.

*Please see following page for clarification of pricing being offered hereunder

Our pricing offered hereunder shall be in accordance with the following:

For items that are not included in the market basket, but are contained in the "OfficeMax Maxi Catalog" that is in circulation at the time of the order and are classified by OfficeMax or Office Depot as office supply items, and excepting out any excluded items under Section III(B) hereunder, such items will be priced at 60% off of list price designated in our response above, exclusive of bulk pricing discount, clearance items, promotional items or other specials. OfficeMax Maxi Catalog pricing shall be updated on an annual basis.

The "OfficeMax Maxi Catalog" is OfficeMax's full-line office products catalog which is published in hard copy form once per year.

We reserve the right to offer additional products and services to purchasers hereunder, provided such products and services are not excluded items under Section III(B) hereunder . Items that are not identified in the market basket (core items) or classified as office supplies in the OfficeMax Maxi Catalog shall not be subject to the discounts or pricing methodology otherwise set forth in the resulting agreement. Rather, prices for such items will be established by OfficeMax or Office Depot in its discretion and will be presented to the State or end user purchaser at the point of sale or otherwise at the time of order placement.

Determination:

Office Depot/Max has conditioned its offer and does not meet the requirements set forth in the original solicitation.

In accordance with Regulation 19-445.2070, A., Rejection of Individual Bids.

Any bid which fails to confirm to the essential requirements of the solicitation shall be rejected.



February 20, 2014

Theresa L. Watts, CPPB
Procurement Manager

Date