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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: OfficeMax, Inc.

File: B-299340.2

Date: July 19, 2007

Lee P. Curtis, Esq., Troy E. Hughes, Esq., and Eric A. Aaserud, Esq., Perkins Coie LLP, for the protester.

Kristen E. Ittig, Esq., Arnold & Porter LLP, for Corporate Express, an intervenor.
David K. Barnes, Esq., and Lori R. Larson, Esq., Internal Revenue Service, for the agency.

Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably determined that vendor's quotation was technically unacceptable where it failed to comply with a mandatory solicitation requirement.
 2. Protest that agency failed to provide meaningful discussions is denied where protester cannot establish prejudice because the record shows that protester's ordering systems for office supplies did not comply with a mandatory solicitation requirement, and shows that the protester did not plan to become compliant.
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DECISION

OfficeMax, Inc. protests the award of a contract to Corporate Express under request for quotations (RFQ) No. TIRNO-06-Q-00031, issued by the Internal Revenue Service (IRS) for delivery of office supplies. The protester contends that the IRS unreasonably determined that its quotation was technically unacceptable, and also failed to conduct meaningful discussions.

We deny the protest.

This office supply procurement protest involves a single issue--an RFQ requirement for an ordering management system that the IRS has termed its "fill or kill" policy, and the protester's commitment to comply with this policy in its quotation. The policy, in essence, requires the vendor to provide an order management service (in addition to providing the office supplies) that either completely "fills" each line item

of an order for office supplies, or “kills,” i.e. completely rejects, any line item that cannot be filled entirely, so that the purchasing entity can seek the supplies from another vendor. Simply put, the IRS wants no partially-filled line items. Ultimately, this decision concludes that: (1) the fill or kill policy was a material requirement of the RFQ; (2) the OfficeMax quotation was reasonably rejected for its failure to comply with this requirement; (3) the IRS did not advise OfficeMax during discussions that its failure to comply with this policy was a deficiency that would result in the disqualification of its quotation; and (4) OfficeMax was not prejudiced by the lack of discussions, since the record indicates that OfficeMax could not provide the fill or kill service the agency required.

BACKGROUND

On April 28, 2006, the IRS issued this RFQ seeking quotations to provide next-day-desktop delivery of office supplies to approximately 6,500 order points (defined in the solicitation as IRS employees authorized to place orders) at 800 IRS facilities in the 48 contiguous United States. The RFQ anticipated issuance of one or more blanket purchase agreements (BPAs) with a 1-year base term, and four 1-year options. Competition was limited to vendors who hold contracts under General Services Administration Federal Supply Schedule (FSS) contract No. 75 II A, Office Supplies Products and Equipment. The solicitation advised vendors that award of a BPA would be made to “the offeror or offerors whose quote contains the combination of technical and price features offering the best overall value to the IRS.” RFQ, Statement of Work (SOW), § 11.0.

As relevant to the protest, the SOW contained a fill or kill policy, defined as follows:

Orders faxed, placed by telephone, or transmitted electronically before 2:00 p.m., each day, for which acknowledgement from the contractor is received by the IRS, are subject to the “fill or kill” policy. “Fill” is the requirement that all supplies ordered be delivered within 24 hours of the order placement. “Kill” is the requirement that those supplies not available for next day delivery are canceled from the order. Thus, there will be no back orders on individual orders.

RFQ, SOW, § 2.0.

The RFQ identified the fill or kill policy as a “specific requirement,” and, by amendment, later clarified that vendors were prohibited from partially filling orders or backordering items:

If the initial vendor chosen by the order point cannot fill the entire quantity of a line item being ordered then that line item must be “killed.” The remainder of the order (other line items whose complete quantity can be supplied) will be filled by the initial vendor. No partial quantities of line items are to be filled. The order point may then

utilize another vendor's BPA to fulfill the requirement for the items "killed" off the initial order. This arrangement eliminates the need for backordering thus backordering will not be allowable.

RFQ amend. 8, SOW, § 3.2.

OfficeMax's initial quotation explained its approach to the fill or kill policy as follows: "[A]ll orders . . . will be 'filled' (delivered next day) or 'killed' (items not in stock or that cannot be delivered next day. These items will be canceled)." AR, Tab 9.1, OfficeMax Quotation, at 8-9. In response to a request for clarification by the agency regarding a different solicitation requirement, however, OfficeMax indicated that its ordering systems allowed partial fills of orders: "For example, if you order 10 of something and we ship 9, that entire order line is counted as not filled." AR, Tab 9.2, OfficeMax response, Sept. 6, 2006, at 2.

The IRS initially issued BPAs on December 22, 2006 to OfficeMax and Corporate Express. On January 3, 2007, Office Depot, Inc. protested the issuance of the BPAs; the agency subsequently took corrective action by canceling the BPAs and amending the solicitation, and our Office accordingly dismissed the protest. On February 9, 2007, the IRS issued solicitation amendment No. 9 to formally rescind the earlier BPA issuances and to implement the agency's corrective action in response to Office Depot's protest.

RFQ amendment No. 9 revised the technical evaluation factors. Evaluation factor 1 stated that quotations must comply with "all of the minimum requirements of the Statement of Work ("SOW")." RFQ amend. 9, SOW, § 10.1. Evaluation factor 1 was to be evaluated on a pass/fail basis, and the RFQ stated that "[f]ailure to pass this factor on the final revised quotes will result in the specific quote being considered non-responsive by the IRS. . . [and the quote] will be eliminated from further consideration and evaluation by the IRS." *Id.* The RFQ did not define the term "minimum requirements" and did not specifically identify any of the SOW requirements as "minimum requirements." All other evaluation factors—including factor 3, the fill or kill policy—were to be evaluated on a relative merit basis.

Also on February 9, the IRS provided the vendors a "Technical Evaluation Worksheet" addressing the agency's evaluation of their previously-submitted quotations. The worksheet provided to OfficeMax advised that its quotation received a "fail" rating for factor 1 because it did not comply with three "minimum requirements" under the SOW. AR, Tab 4.5, Evaluation Worksheet for OfficeMax, at 1. The IRS did not list the fill or kill policy as one of the three SOW requirements with which OfficeMax's quotation failed to comply; instead, the worksheet stated that the protester's approach to the fill or kill policy was a "weakness":

"Fill or Kill" capability in accordance with [SOW] 3.2. Score: 2

Weaknesses: Section A, page 3 -- They do not count partially filled lines. If 10 items are ordered, they will partially fill 9 but that line does not count as filled. This goes against our "Fill or Kill Policy," where the entire line is to be "Killed" if it can not be filled completely.

Id. at 3-4.

The Contracting Officer (CO) explains that at the time of the February 9 discussions, the agency considered the protester's approach to the fill or kill policy as a weakness, rather than a deficiency, because the CO did not yet understand that OfficeMax did not intend to comply with the policy, or could not do so. CO Statement at 10; Agency Memorandum of Law at 5.

In response to RFQ amendment No. 9, OfficeMax submitted a revised quotation. With regard to the fill or kill policy, the quotation explained: "Since this contract is a Fill or Kill requirement, no backorders will be allowed and all items that cannot be sourced for next day delivery will be cancelled." AR, Tab 9.3, OfficeMax revised quotation, Mar. 2, 2007, at 6. Following this response, the CO still questioned whether OfficeMax understood the fill or kill policy, CO Statement at 10, and again requested clarification:

We are seeking additional clarification as we review the wording of our "fill or kill" policy requirement and your response. . . . Your proposal wording appears to us that you are trying to assure us that all items that can't be delivered the next day, will be "killed." This still leaves the question of whether your intent for this is, for instance, if we've asked for 10 of an item and you can deliver 8 of them the next day, that you will deliver the 8 and not backorder the remaining 2. If this is the case, we haven't clearly stated our intent for the policy. In the instance given, we would want either 10 or 0, nothing in between. Will you please review your response to the weakness noted under Evaluation Factor 7, "Fill or Kill" capability in accordance with 3.2, and clarify this for us?

AR, Tab 5.2, Request for Clarifications, Mar. 29, 2007, at 1.

In response, OfficeMax stated that its ordering systems did not provide fill or kill capabilities in the manner required by the solicitation, but stated that the company would consider whether it might be able to change its systems in the future:

OfficeMax Government Solutions strives to fill all orders to the fullest extent possible before we cancel any order. This is reflected by our order fill rate which is consistently 98% or better. Our fill rate is so high because our supply chain model builds in several layers of inventory check before an item goes on backorder. Our supply systems are set up to fill all orders to the fullest extent possible.

Therefore our systems are not set up to [deleted]. Our system will check all inventory levels possible (OfficeMax distribution centers and wholesalers) and [deleted]. . . . OfficeMax Government Solutions will continue to look at this requirement and see if any changes to our systems could be accommodated. However currently our systems work as stated above.

AR, Tab 4.7, OfficeMax Response to Request for Clarifications, Apr. 2, 2007, at 1.

Upon receipt of this response, the IRS concluded that the protester's quotation was technically unacceptable. CO Statement at 10. Specifically, the agency found that the protester's quotation merited a "fail" rating under factor 1 because it did not comply with the SOW provision for the fill or kill policy. AR, Tab 10.7, OfficeMax Final Evaluation, at 1. The IRS advised OfficeMax on April 6 that its quotation had been excluded from award, and this protest followed.

DISCUSSION

OfficeMax challenges the IRS's determination that its quotation was technically unacceptable because it did not commit to comply with the fill or kill policy in the solicitation. The protester argues that the fill or kill policy was not a minimum or mandatory requirement under the solicitation, and also argues that the agency did not provide meaningful discussions regarding this matter. For the reasons set forth below, we deny the protest.

Where, as here, an agency conducts a formal competition under the FSS program for the issuance of a BPA or task order, we will review the agency's actions to ensure that the evaluation was reasonable and consistent with the solicitation and applicable procurement statutes and regulations. Worldwide Language Res., Inc., B-297210 *et al.*, Nov. 28, 2005, 2005 CPD ¶ 211 at 3; COMARK Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5. In reviewing an agency's evaluation, we will not reevaluate vendors' quotations, and an protester's mere disagreement with the agency's evaluation is not sufficient to render the evaluation reasonable. Advanced Tech. Sys., Inc., B-296493.5, Sept. 26, 2006, 2006 CPD ¶ 147 at 5.

Compliance with the Fill or Kill Policy was Mandatory

OfficeMax first argues that the fill or kill policy of the RFQ was not a minimum or mandatory solicitation requirement, and that the IRS erred when it decided to reject its quotation for failing to comply with this requirement. The protester primarily argues that the RFQ stated that only technical evaluation factor 1, regarding minimum SOW requirements, would be evaluated on a pass/fail basis and that, in contrast, all others evaluation factors, including the fill or kill policy, were to be evaluated on the basis of relative merit. Thus, the protester contends that its failure to comply with the fill or kill policy could not provide a basis for determining that a

quotation was technically unacceptable. We disagree with the protester's interpretation of the solicitation.

The protester's argument confuses the issue of whether a solicitation identifies a requirement as mandatory with the issue of how that requirement will be evaluated. A solicitation need not state that a requirement will be evaluated on a pass/fail basis in order for that requirement to be mandatory. See AT&T, B-250516, Mar. 30, 1993, 93-1 CPD ¶ 276 at 7 (agency unreasonably interpreted solicitation provision that was to be evaluated on relative, rather than a pass/fail basis, as non-mandatory where solicitation clearly indicates that offerors were required to demonstrate compliance with the provision). Put differently, the fact that a solicitation states that certain mandatory requirements will be evaluated on a pass/fail basis does not mean that a vendor cannot be found technically unacceptable for failing to comply with mandatory requirements that are not the subject of pass/fail evaluations. See id.

As noted above, the solicitation stated that offerors would be evaluated as to whether they met all "minimum requirements" of the SOW, but did not define which SOW requirements were minimum or mandatory. The SOW identified the fill or kill policy as a "specific requirement," and explained that orders must be completed in full or cancelled entirely. RFQ amend. 8, SOW, § 3.2. Specifically, the RFQ stated that "[i]f the initial vendor chosen by the order point cannot fill the entire quantity of a line item being ordered then that line item must be 'killed,'" and further that "[n]o partial quantities of line items are to be filled." Id. On this record, we conclude that the RFQ clearly advised vendors that the fill or kill policy was a mandatory requirement because the solicitation cannot be reasonably interpreted to allow a vendor whose quotation did not commit to comply with the policy to receive a BPA.

We further conclude that the IRS reasonably determined that OfficeMax did not comply with this requirement. The agency stated that it did not understand, based on the protester's initial quotation and its September 26, 2006 clarification response, that OfficeMax could not comply with the fill or kill requirement. In its April 2, 2007 clarification response, however, the protester stated, as discussed above, that its "systems are not set up to [deleted]. AR, Tab 4.7, OfficeMax Response to Request for Clarifications, Apr. 2, 2007, at 1. Based on this final round of clarifications, the IRS understood that OfficeMax's approach did not comply with the fill or kill requirement. AR, Tab 10.7, OfficeMax Final Evaluation, at 1. We agree with the agency's ultimate conclusion that OfficeMax was not offering to comply with the RFQ's fill or kill requirement because OfficeMax clearly advised that its systems could not kill orders where some inventory was on hand, and would instead [deleted].

Discussions Regarding Fill or Kill Requirement

OfficeMax next argues that the IRS never advised the company that its approach to the fill or kill requirement was unacceptable. As discussed below, we agree. To the extent the protester argues that it did not receive meaningful discussions on this issue, however, we think the protester cannot show that it was prejudiced in this regard because, despite numerous indications that the IRS was concerned about this issue, OfficeMax advised that it did not have the service that the agency required. Additionally, the protester has never clearly stated that it could or would have revised its quotation had it been advised of this issue.

Federal Acquisition Regulation (FAR) § 15.306 describes a spectrum of exchanges that may take place between an agency and an offeror during negotiated procurements.¹ Clarifications are “limited exchanges” between the agency and offerors that may allow offerors to clarify certain aspects of proposals or quotations or to resolve minor or clerical mistakes. FAR § 15.306(a)(2). Discussions, on the other hand, occur when an agency indicates to an offeror significant weaknesses, deficiencies, and other aspects of its proposal or quotation that could be altered or explained to materially enhance the proposal or quotation’s potential for award. FAR § 15.306(d)(3). When an agency engages in discussions with an offeror, the discussions must be meaningful, *i.e.*, they must reasonably lead an offeror into the areas of its proposal or quotation requiring correction or amplification. Metro Mach. Corp., B-295744, B-295744.2, Apr. 21, 2005, 2005 CPD ¶ 112 at 19.

In the February 9 discussions with vendors in conjunction with RFQ amendment No. 9, the IRS advised OfficeMax that its approach to the fill or kill requirement “goes against” the solicitation requirement. In the protester’s view, this admonition fell short of advising that the quotation was fatally flawed for two reasons. First, as the protester notes, OfficeMax’s rating under factor 1 clearly stated that its quotation failed to comply with three minimum SOW requirements, but did not identify the fill or kill policy as one of those requirements; rather, the protester’s approach to the fill or kill requirement was described as a “weakness.” Second, as the IRS acknowledges, the CO did not yet understand at the time of the February 9 discussions that OfficeMax’s quotation did not comply with the fill or kill requirement, and thus had no basis to communicate to the protester that it was at risk of being found technically unacceptable. CO Statement at 10; Agency

¹ This procurement was conducted under the FSS provisions of FAR subpart 8.4, and thus the negotiated procurement provisions of FAR part 15 do not directly apply. However, our Office has held that where agencies use the negotiated procurement techniques of FAR part 15 in FSS buys, such as discussions, we will review the agency’s actions under the standards of negotiated procurements to ensure that offerors are treated reasonably and fairly. Digital Sys. Group, Inc., B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD ¶ 50 at 6.

Memorandum of Law at 5, 7. On this record, we agree with the protester's assertion that it was never advised explicitly during discussions that its quotation was viewed as unacceptable for its failure to comply with the fill or kill requirement.

The subsequent exchanges with OfficeMax on March 29 were expressly limited by the IRS to "clarifications," i.e. an opportunity to address minor issues. By definition, these exchanges were not discussions because the protester was not allowed to materially revise its quotation. FAR § 15.306(d)(3); see National Beef Packing Co., B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 11.

It was only after the protester's April 2 response to the March 29 clarification request that the IRS first concluded that OfficeMax's quotation was technically unacceptable for not complying with the fill or kill requirement. AR, Tab 10.7, OfficeMax Final Evaluation, at 1. Hence, OfficeMax never had an opportunity to revise its quotation after the agency concluded that its fill or kill approach did not comply with the solicitation requirement. As set forth below, however, we need not address, whether the protester was entitled to receive an opportunity to revise its quotation at this point in the procurement.

As the IRS and intervenor both argue, even if the protester was entitled to receive an opportunity to revise its quotation following its April 2 response, the protester cannot demonstrate prejudice because it did not have--and was not offering--the required service. We agree. In this regard, our Office will not sustain a protest absent a reasonable showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1681 (Fed. Cir. 1996).

Here, the contemporaneous record does not indicate that, if the IRS had given OfficeMax the opportunity to revise its quotation following the April 2 clarifications, the protester would have changed its ordering systems to comply with the fill or kill requirement--in fact, the record suggests just the opposite. The protester's response to the agency's request for clarification clearly stated that its systems "are not set up to [deleted]" and that the systems would, contrary to the fill or kill requirement, [deleted]." AR, Tab 4.7, OfficeMax Response to Request for Clarifications, Apr. 2, 2007, at 1. Moreover, the protester stated that it "will continue to look at this requirement and see if any changes to our systems could be accommodated. However currently our systems work as stated above." Id. In fact, despite repeated inquiries about whether the protester could comply with the requirement--albeit, inquiries that did not expressly advise that the protester was at risk of being found unacceptable--the protester never advised that it could, or would, comply. At best, OfficeMax offered to explore modifications to its ordering systems at some later date.

Even during the course of this protest, OfficeMax has not clearly indicated that if it had received an opportunity to revise its quotation following its April 2 clarifications

response, it would have modified its ordering systems to comply with the fill or kill requirement. In its initial protest, OfficeMax stated, consistent with its response to the IRS's request for clarifications, that its "current process is set up to [deleted]." Protest at 7. In its comments, OfficeMax finally stated that it "can modify its current process in order to avoid the partial fulfillment of an order." Protester's Response to Motion to Dismiss, at 4. This statement, however, falls well short of establishing that OfficeMax could or would have complied with the fill or kill requirement during the course of the procurement.² On this record, we conclude that although the IRS never clearly advised OfficeMax that its failure to comply with this mandatory solicitation requirement would result in rejection of its quotation, the protester suffered no prejudice as a result. See CRAssociates, Inc., B-297686, Mar. 7, 2006, 2006 CPD ¶ 61 (protest denied where record shows that protester could not remedy deficiencies in its proposal had it been given opportunity for discussions).

The protest is denied.

Gary L. Kepplinger
General Counsel

² For purposes of determining prejudice, we assume that any requirement to conduct discussions would have been first triggered when the IRS realized, as a result of OfficeMax's April 2 clarifications response, that the protester could not comply with the fill or kill requirement.