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**A72, R55, S116**

**STATUS INFORMATION**

General Bill

Sponsors: Senators Knotts and McConnell

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Companion/Similar bill(s): 335, 3043, 3051, 3057, 3077

Introduced in the Senate on January 13, 2009

Introduced in the House on April 2, 2009

Last Amended on May 21, 2009

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Governor's Action: June 2, 2009, Vetoed

Legislative veto action(s): Veto overridden

Summary: Consolidated Procurement Code

**HISTORY OF LEGISLATIVE ACTIONS**

Date	Body	Action Description with journal page number
12/10/2008	Senate	Prefiled
12/10/2008	Senate	Referred to Committee on <b>Finance</b>
1/13/2009	Senate	Introduced and read first time SJ-124
1/13/2009	Senate	Referred to Committee on <b>Finance</b> SJ-124
3/25/2009	Senate	Committee report: Favorable with amendment <b>Finance</b> SJ-2
3/31/2009	Senate	Committee Amendment Adopted SJ-22
3/31/2009	Senate	Read second time SJ-22
4/1/2009	Senate	Read third time and sent to House SJ-19
4/2/2009	House	Introduced and read first time HJ-5
4/2/2009	House	Referred to Committee on <b>Ways and Means</b> HJ-5
5/12/2009	House	Recalled from Committee on <b>Ways and Means</b> HJ-58
5/14/2009	House	Amended HJ-38
5/14/2009	House	Read second time HJ-42
5/14/2009	House	Unanimous consent for third reading on next legislative day HJ-42
5/15/2009	House	Read third time and returned to Senate with amendments HJ-1
5/18/2009		Scrivener's error corrected
5/20/2009	Senate	Non-concurrence in House amendment SJ-50
5/20/2009	House	House insists upon amendment and conference committee appointed Reps. Toole, White, and Neilson HJ-259
5/21/2009	Senate	Conference committee appointed O'Dell, McGill, and Shoopman SJ-138
5/21/2009	House	Conference report received and adopted HJ-12812
5/21/2009	House	Roll call Yeas-110 Nays-0 HJ-128
5/21/2009	Senate	Conference report adopted SJ-139
5/21/2009	Senate	Ordered enrolled for ratification SJ-151
5/27/2009		Ratified R 55
6/2/2009		Vetoed by Governor
6/16/2009	Senate	Veto overridden by originating body Yeas-33 Nays-10
6/16/2009	House	Veto overridden Yeas-88 Nays-15 HJ-125
6/22/2009		Effective date See Act for Effective Date

6/24/2009

Act No. 72

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**VERSIONS OF THIS BILL**

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(A72, R55, S116)

**AN ACT TO AMEND SECTION 11-35-310, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO DEFINITIONS FOR PURPOSES OF THE CONSOLIDATED PROCUREMENT CODE, SO AS TO DELETE THE DEFINITION FOR “OFFICE”; TO AMEND SECTION 11-35-1524, AS AMENDED, RELATING TO VENDOR PREFERENCES, SO AS TO PROVIDE FOR PREFERENCES FOR END PRODUCTS FROM SOUTH CAROLINA AND FROM THE UNITED STATES AND FOR CONTRACTORS AND SUBCONTRACTORS WHO EMPLOY INDIVIDUALS DOMICILED IN SOUTH CAROLINA, TO DEFINE CERTAIN TERMS, PROVIDE FOR ELIGIBILITY REQUIREMENTS FOR THE PREFERENCES, PROVIDE FOR APPLICATION FOR THE PREFERENCES AND PENALTIES FOR FALSE APPLICATION, AND TO MAKE EXCEPTIONS TO THE PREFERENCES; TO AMEND SECTION 11-35-40, AS AMENDED, RELATING TO COMPLIANCE WITH FEDERAL REQUIREMENTS, SO AS TO PROVIDE FOR COMPLIANCE WITH THE CONSOLIDATED PROCUREMENT CODE; TO AMEND SECTION 11-35-3215, RELATING TO CONTRACTS FOR DESIGN SERVICES, SO AS TO PROVIDE FOR A RESIDENT PREFERENCE; AND TO REPEAL SECTION 11-35-3025 RELATING TO APPROVAL OF CHANGE ORDERS IN CONNECTION WITH CERTAIN CONTRACTS.**

Whereas, the General Assembly finds that the economic crisis plaguing our nation and this State, particularly the exceptionally high rate of unemployment in our State, requires action; and

Whereas, the General Assembly finds that it is crucial to this state’s economic recovery to purchase goods manufactured and produced in the State, maintain the circulation of the funds of the citizens of this State within this State, and encourage and facilitate job development and economic growth by providing both assistance and opportunity to this state’s small businesses to participate as providers and vendors of goods and services to the State; and

Whereas, the General Assembly determines that various preferences should be accorded to residents both for the purpose of employment and business development when the State expends funds in the manner provided in this act. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

### **Definitions**

SECTION 1. Section 11-35-310(22) of the 1976 Code, as added by Act 153 of 1997, is amended to read:

“(22) Reserved.”

### **Resident vendor preference**

SECTION 2. Section 11-35-1524 of the 1976 Code, as last amended by Act 333 of 2002, is further amended to read:

“Section 11-35-1524. (A) For purposes of this section:

(1) ‘End product’ means the tangible product described in the solicitation including all component parts and in final form and ready for the state’s intended use.

(2) ‘Grown’ means to produce, cultivate, raise, or harvest timber, agricultural produce, or livestock on the land, or to cultivate, raise, catch, or harvest products or food from the water which results in an end product that is locally derived from the product cultivated, raised, caught, or harvested.

(3) ‘Labor cost’ means salary and fringe benefits.

(4) ‘Made’ means to assemble, fabricate, or process component parts into an end product, the value of which, assembly, fabrication, or processing is a substantial portion of the price of the end product.

(5) ‘Manufactured’ means to make or process raw materials into an end product.

(6) ‘Office’ means a nonmobile place for the regular transaction of business or performance of a particular service which has been operated as such by the bidder for at least one year before the bid opening and during that year the place has been staffed for at least fifty weeks by at least two employees for at least thirty-five hours a week each.

(7) ‘Services’ means services as defined by Section 11-35-310(29) and also includes services as defined in Section 11-35-310(1)(d).

(8) ‘South Carolina end product’ means an end product made, manufactured, or grown in South Carolina.

(9) ‘United States end product’ means an end product made, manufactured, or grown in the United States of America.

(B)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease by seven percent the price of any offer for a South Carolina end product.

(2) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease by two percent the price of any offer for a United States end product. This preference does not apply to an item to which the South Carolina end product preference has been applied.

(3) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of end product. A preference must not be applied to an item for which a bidder does not qualify.

(4) If a contract is awarded to a bidder that received the award as a result of the South Carolina end product or United States end product preference, the contractor may not substitute a nonqualifying end product for a qualified end product. A substitution in violation of this item is grounds for debarment pursuant to Section 11-35-4220. If a contractor violates this provision, the State may terminate the contract for cause and, in addition, the contractor shall pay to the State an amount equal to twice the difference between the price paid by the State and the bidder's evaluated price for a substituted item.

(5) If a bidder is requesting this preference, the bidder, upon request of the procurement officer, must provide documentation that establishes the bidder's qualifications for the preference. Bidder's failure to provide this information promptly is grounds to deny the preference and for enforcement pursuant to subsection (E)(6).

(C)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by seven percent if the bidder maintains an office in this State and either: (i) maintains at a location in South Carolina at the time of the bid an inventory of expendable items which are representative of the general type of commodities on which the award will be made and which have a minimum total value, based on the bid price, equal to the lesser of fifty thousand dollars or the annual amount of the contract; (ii) is a manufacturer headquartered and having an annual payroll of at least one million dollars in South Carolina and the end product is made or processed from raw materials into a finished end product by that manufacturer or its affiliate (as defined in Section 1563 of the Internal Revenue Code); or (iii) at the time of bidding, directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to bidder for those individuals to provide those services exceeds fifty percent of the bidder's total bid price.

(2) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of end product or work, as applicable. A preference must not be applied to an item for which a bidder does not qualify.

(3) If a bidder is requesting this preference, the bidder, upon request by the procurement officer, must provide documentation that establishes the bidder's qualifications for the preference and, for the preference claimed pursuant to subsection (C)(1)(iii), must identify the persons domiciled in South Carolina that will perform the services involved in the procurement upon which bidder relies in qualifying for the preference, the services those individuals are to perform, and documentation of the bidder's labor cost for each person identified. Bidder's failure to provide this information promptly is grounds to deny the preference and for enforcement under subsection (E)(6) below.

(D)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by two percent if:

(a) the bidder has a documented commitment from a single proposed first-tier subcontractor to perform some portion of the services expressly required by the solicitation; and

(b) at the time of the bidding, the subcontractor directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to the subcontractor for those individuals to provide those services exceeds twenty percent of bidder's total bid price.

(2) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by four percent if:

(a) the bidder has a documented commitment from a single proposed first-tier subcontractor to perform some portion of the services expressly required by the solicitation; and

(b) at the time of the bidding, the subcontractor directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to the subcontractor for those individuals to provide those services exceeds forty percent of bidder's total bid price.

(3) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of work. A preference must not be applied to an item for which a bidder does not qualify.

(4) Subject to other limits in this section, an offeror may benefit from applying for more than one of, or from multiple applications of, the preferences allowed by items (1) and (2).

(5)(a) In its bid, a bidder requesting any of the preferences allowed by items (1) and (2) must identify the subcontractor to perform the work, the work the subcontractor is to perform, and the bidder's factual basis for concluding that the subcontractor's work constitutes the required percentage of the work to be performed in the procurement.

(b) If a bidder is requesting a preference allowed by items (1) or (2), upon request by the procurement officer, the bidder shall identify the persons domiciled in South Carolina that are to perform the services involved in the procurement upon which the bidder relies in qualifying for the preference, the services those individuals are to perform, the employer of those persons, the bidder's relationship with the employer, and documentation of the subcontractor's labor cost for each person identified. Bidder's failure to provide this information promptly will be grounds to deny the preference and for enforcement pursuant to subsection (E)(6) below.

(c) If a contract is awarded to a bidder that received the award as a result of a preference allowed by items (1) or (2), the contractor may not substitute any business for the subcontractor on which the bidder relied to qualify for the preference, unless first approved in writing by the procurement officer. A substitution in violation of this subitem is grounds for debarment pursuant to Section 11-35-4220. If a contractor violates this provision, the procurement officer may terminate the contract for cause. If the contract is not terminated, the procurement officer may require the contractor to pay the State an amount equal to twice the difference between the price paid by the State and the price offered by the next lowest bidder, unless the substituted subcontractor qualifies for the preference.

(E)(1) A business is not entitled to any preferences unless the business, to the extent required by law, has:

(a) paid all taxes assessed by the State; and

(b) registered with the South Carolina Secretary of State and the South Carolina Department of Revenue.

(2) The preferences provided in subsections (B) and (C)(1)(i) and (ii) do not apply to a single unit of an item with a price in excess of fifty thousand dollars or a single award with a total potential value in excess of five hundred thousand dollars.

(3) The preferences provided in subsections (C)(1)(iii) and (D) do not apply to a bid for an item of work by the bidder if the annual price of the bidder's work exceeds fifty thousand dollars or the total

potential price of the bidder's work exceeds five hundred thousand dollars.

(4) A solicitation must provide potential bidders an opportunity to request the preferences that apply to a procurement. By submitting a bid and requesting that a preference be applied to that bid, a business certifies that its bid qualifies for the preference for that procurement. For purposes of applying this section, a bidder is not qualified for a preference unless the bidder makes a request for the preference as required in the solicitation. If a solicitation specifies which preferences, if any, apply to a procurement, the applicability of preferences to that procurement is conclusively determined by the solicitation unless the solicitation document is timely protested as provided in Section 11-35-4210. If two or more bidders are tied after the application of the preferences allowed by this section, the tie must be resolved as provided in Section 11-35-1520(9). Price adjustments required by this section for purposes of evaluation and application of the preferences do not change the actual price offered by the bidder.

(5) This section does not apply to an acquisition of motor vehicles as defined in Section 56-15-10 or an acquisition of supplies or services relating to construction. This section does not apply to a procurement conducted pursuant to Section 11-35-1550(2)(a) or (b), Section 11-35-1530, or Article 9, Chapter 35.

(6) Pursuant to Section 11-35-4220, a business may be debarred if: (i) the business certified that it qualified for a preference, (ii) the business is not qualified for the preference claimed, and (iii) the certification was made in bad faith or under false pretenses. If a contractor has invalidly certified that a preference is applicable, the chief procurement officer may terminate the contract for cause, and the chief procurement officer may require the contractor to pay the State an amount equal to twice the difference between the price paid by the State and the price offered by the next lowest bidder.

(7) The sum of all preferences allowed by items (D)(1) and (D)(2), when applied to the price of a line item of work, may not exceed six percent unless the bidder maintains an office in this State. Under no circumstances may the cumulative preferences applied to the price of a line item exceed ten percent.

(8) As used in items (C)(1)(iii), (D)(1)(b), and (D)(2)(b), the term 'documented commitment' means a written commitment by the bidder to employ directly an individual, and by the individual to be employed by the bidder, both contingent on the bidder receiving the award.

(9) The remedies available in this section are cumulative of and in addition to all other remedies available at law and equity."



## **Application of the Consolidated Procurement Code**

SECTION 3. Section 11-35-40(3) of the 1976 Code, as last amended by Act 153 of 1997, is further amended to read:

“(3) Compliance with Federal Requirements. Where a procurement involves the expenditure of federal assistance, grant, or contract funds, the governmental body also shall comply with federal laws (including authorized regulations) as are mandatorily applicable and which are not presently reflected in this code. Notwithstanding, where federal assistance, grant, or contract funds are used in a procurement by a governmental body as defined in Section 11-35-310(18), this code, including any requirements that are more restrictive than federal requirements, must be followed, except to the extent such action would render the governmental body ineligible to receive federal funds whose receipt is conditioned on compliance with mandatorily applicable federal law. In those circumstances, the solicitation must identify and explain the impact of such federal laws on the procurement process, including any required deviation from this code.”

## **Preference for resident design service**

SECTION 4. Section 11-35-3215 of the 1976 Code, as added by Act 375 of 2006, is amended to read:

“Section 11-35-3215. (A) As used in this section:

(1) ‘Design services’ means architect-engineer, construction management, or land surveying services as defined in Section 11-35-2910 and awarded pursuant to Section 11-35-3220.

(2) ‘Resident’ means a business that employs, either directly or through consultants, an adequate number of persons domiciled in South Carolina to perform a majority of the design services involved in the procurement.

(B) A business responding to an invitation involving design services shall submit a certification with its response stating whether the business is a resident for purposes of the procurement. Submission of a certification under false pretenses is grounds for suspension or debarment.

(C) An award to a nonresident of a contract involving design services must be supported by a written determination explaining why the award was made to the selected firm.

(D) In an evaluation conducted pursuant to Section 11-35-3220, a resident firm must be ranked higher than a nonresident firm if the

agency selection committee finds the two firms otherwise equally qualified.

(E) This section does not apply to a procurement if either the procurement does not involve construction or the design services are a minor accompaniment to a contract for nondesign services.”

### **Repeal**

SECTION 5. Section 11-35-3025 of the 1976 Code is repealed.

### **Time effective**

SECTION 6. This act takes effect upon approval by the Governor and applies to solicitations issued after that date; except that Sections 1, 2, and 4 of this act take effect upon and apply to solicitations issued after the first Monday in September following approval by the Governor.

Ratified the 27<sup>th</sup> day of May, 2009.

Vetoed by the Governor -- 6/2/09.

Veto overridden by Senate -- 6/16/09.

Veto overridden by House -- 6/16/09.

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