

This web page is not a part of the state's bidding instructions.

This web page is provided for information purposes only.

Current as of August 2002

**OVERVIEW:** Whether the solicitation you're interested in was issued by the State Procurement Office (SPO) or the Information Technology Management Office of the State CIO's Office (ITMO), the responsible office seeks to strike a proper balance between the needs of business to maintain the confidentiality of their business information, the needs of the public to have open access to governmental records, and the needs of competing vendors to access those documents necessary to facilitate a bid-protest. In order to strike that balance, the State must comply with all relevant laws, including the South Carolina Consolidated Procurement Code, the South Carolina Freedom of Information Act, and - to the extent applicable - the South Carolina Trade Secrets Act.

In an effort to reach this goal, ITMO and SPO have developed standard bidding instructions that allow vendors to identify those portions of their bids or proposals that qualify for protection. By carefully following these instructions, vendors allow ITMO and SPO to properly withhold any protected information while also complying with the statutory obligation to release public documents. In order for vendors to properly comply with these instructions, they must be familiar with both the bidding instructions and the laws mentioned above.

What follows are (1) suggestions for complying with the bidding instructions, (2) citations to the Acts mentioned above, (3) excerpts from these acts, and (4) the standard bidding instructions.

Readers are cautioned that laws are subject to amendment and the versions appearing here may not be current. Likewise, standard bidding instructions can be modified for any particular solicitation and are not binding on the state. The only bidding instructions that are binding are those that appear in the solicitation to which you respond.

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## SUGGESTIONS FOR COMPLYING WITH BIDDING INSTRUCTIONS

To the extent these suggestions are not consistent with the bidding instructions in your solicitation, you must follow the bidding instructions!

### DON'TS

- DO NOT mark the cover page with any type of buzz words.
- DO NOT put a statement on your cover page that the entire solicitation is protected - it isn't; improperly marked documents may be rejected as nonresponsive.
- DO NOT mark every page as confidential, proprietary, or protected - it isn't; improperly marked documents may be rejected as nonresponsive.
- DO NOT mark an entire page as confidential if only part of the page is confidential.

- DO NOT mark a document that is not subject to some type of protection or exemption; if you do, and we withhold it, you'll be responsible for any injury we incur as a result of your improper marking.

## DO'S

- DO make your markings conspicuous. On a quick flip through of your document, each marking should be obvious.
  - DO mark only that portion of a page - preferably the exact text - that is subject to some protection or exemption.
  - DO familiarize yourself with the definitions of Confidential and Trade Secret, provided below.
  - IF YOU don't mark something, WE WILL release it if requested under the Freedom of Information Act.
  - IF YOU don't mark something, WE ARE entitled to act as if it is not subject to an exemption or any other protection.
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## FREEDOM OF INFORMATION ACT

The South Carolina Freedom of Information Act ("FOIA") appears in Title 30, Chapter 4 of the South Carolina Code of Laws. What follows is the definition of trade secret, as defined by FOIA. Please be aware that the Trade Secrets Act and FOIA define trade secrets differently. The entire Act is available on the internet [here](#).

SECTION 30-4-40. Matters exempt from disclosure.

(a) A public body may but is not required to exempt from disclosure the following information:

(1) Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which are generally recognized as confidential; and work products, in whole or in part collected or produced for sale or resale, and paid subscriber information. Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation.

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## TRADE SECRETS ACT

The South Carolina Trade Secrets Act appears in Title 39, Chapter 8 of the South Carolina Code of Laws. What follows is the definition of trade secret, as defined by the Trade Secrets Act. Please be aware that FOIA and the Trade Secrets Act define trade secrets differently. The entire Act is available on the internet [here](#).

SECTION 39-8-20. Definitions.

As used in this chapter, unless the context requires otherwise:

(5) "Trade secret" means:

(a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

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## CONSOLIDATED PROCUREMENT CODE

The South Carolina Consolidated Procurement Code appears in Title 11, Chapter 35 of the South Carolina Code of Laws. What follows is an excerpt from the Procurement Code that directly relates to FOIA. The entire Procurement Code is available on the internet [here](#).

SECTION 11 35 410. Public access to procurement information.

(A) Procurement information must be a public record to the extent required by Chapter 4 of Title 30 (The Freedom of Information Act) with the exception that commercial or financial information obtained in response to a request for proposals or any type of bid solicitation that is privileged and confidential need not be disclosed.

(B) Privileged and confidential information is information in specific detail not customarily released to the general public, the release of which might cause harm to the competitive position of the party supplying the information. Examples of this type of information include:

(1) customer lists;

(2) design recommendations and identification of prospective problem areas under an RFP;

(3) design concepts, including methods and procedures;

(4) biographical data on key employees of the bidder.

(C) For all documents submitted in response or with regard to a solicitation or other request, the documents need not be disclosed if an award is not made.

(D) Evaluative documents predecisional in nature such as inter agency or intra agency memoranda containing technical evaluations and recommendations are exempted so long as the contract award does not expressly adopt or incorporate the inter agency or intra agency memoranda reflecting the predecisional deliberations.

**(E) For all documents submitted in response or with regard to any solicitation or other request, the person submitting the documents shall comply with instructions provided in the solicitation for marking information exempt from public disclosure. Information not marked as required by the applicable instructions may be disclosed to the public.**

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## BIDDING INSTRUCTIONS

SUBMITTING CONFIDENTIAL INFORMATION (AUG 2002): (An overview is available at [www.procurement.sc.gov](http://www.procurement.sc.gov)) For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the word "CONFIDENTIAL" every page, or portion thereof, that Offeror contends contains information that is exempt from public disclosure because it is either (a) a trade secret as defined in Section 30-4-40(a)(1), or (b) privileged and confidential, as that phrase is used in Section 11-35-410. For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the words "TRADE SECRET" every page, or portion thereof, that Offeror contends contains a trade secret as that term is defined by Section 39-8-20 of the Trade Secrets Act. For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the word "PROTECTED" every page, or portion thereof, that Offeror contends is protected by Section 11-35-1810. All markings must be conspicuous; use color, bold, underlining, or some other method in order to conspicuously distinguish the mark from the other text. Do not mark your entire response (bid, proposal, quote, etc.) as confidential, trade secret, or protected! If your response, or any part thereof, is improperly marked as confidential or trade secret or protected, the State may, in its sole discretion, determine it nonresponsive. If only portions of a page are subject to some protection, do not mark the entire page. By submitting a response to this solicitation or request, Offeror (1) agrees to the public disclosure of every page of every document regarding this solicitation or request that was submitted at any time prior to entering into a contract (including, but not limited to, documents contained in a response, documents submitted to clarify a response, and documents submitted during negotiations), unless the page is conspicuously marked "TRADE SECRET" or "CONFIDENTIAL" or "PROTECTED", (2) agrees that any information not marked, as required by these bidding instructions, as a "Trade Secret" is not a trade secret as defined by the Trade Secrets Act, and (3) agrees that, notwithstanding any claims or markings otherwise, any prices, commissions, discounts, or other financial figures used to determine the award, as well as the final contract amount, are subject to public disclosure. In determining whether to release documents, the State will detrimentally rely on Offeror's marking of documents, as required by these bidding instructions, as being either "Confidential" or "Trade Secret" or "PROTECTED". By submitting a response, Offeror agrees to defend, indemnify and hold harmless the State of South Carolina, its officers and employees, from every claim, demand, loss, expense, cost, damage or injury, including attorney's fees, arising out of or resulting from the State withholding information that Offeror marked as "confidential" or "trade secret" or "PROTECTED". (All references to S.C. Code of Laws.)

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## **Privacy Act Information**

**Section 30-2-50** of the Code of Laws of the State of South Carolina provides that no person or private entity shall knowingly obtain or use any personal information obtained from a public body for any commercial solicitation directed to a person in this State. The South Carolina Budget and Control Board, as a public entity, gives notice to you, as a requestor of records from this agency, that obtaining or using these public records for commercial solicitation is prohibited. Any person who knowingly uses public records for commercial solicitation is guilty of a misdemeanor and, upon conviction, must be fined an amount not to exceed five hundred dollars or imprisoned for a term not to exceed one year, or both. Please see S.C. Code of Laws Section 30-2-10, et. seq. for full text of Family Privacy Protection Act.