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Open Letter to Agencies and Vendors

Re: Proposed Procurement Regulations
Document # 4861 – Consolidated Procurement Code

Last Fall, we widely publicized notice of our intent to draft changes to the procurement regulations and circulated a draft to agency staff for comments. We recently have received questions regarding the effect of these proposed regulations and in particular their impact on the vendor community. There is nothing like reviewing the proposed regulations for yourself, and you can see them at any of the places below:

- Information published in the “Green Agenda” for the October 23, 2018 State Fiscal Accountability Authority (SFAA) Meeting (https://www.sfaa.sc.gov/files/mtgs/1023SFAA_Meeting_Agenda.pdf, Green Agenda Item 3, page 267 – 287 of the PDF document)
- Volume 42, Issue 11, page 30 of the November 23, 2018, *South Carolina State Register* (See link for 2018-2019 Index for State Register Volume 42, November 23, https://www.scstatehouse.gov/state_register.php)
- Procurement Services website (<https://procurement.sc.gov/review-period-draft/>)

For your convenience, here is a brief response to some of the misunderstandings we have heard.

One question and concern has been how will these changes impact businesses trying to work with the State. There is much to recommend in these regulations to the business community, such as an emphasis on government communicating directly with businesses when conducting market research. Other changes have little or no impact on either agencies or vendors, as they are primarily technical changes which clean-up existing language.

There are three areas that have received the most attention. In their order of appearance in the proposed regulations, they are:

- 19-445-2015. Unauthorized or Illegal Procurements
- 19-445-2017. Pre-Solicitation Procedures
- 19-445-2122. Price Reasonableness

Each of these are directed at what the government must do in certain situations, not vendors. Without exception they describe best practices that most of you are already doing. They should not pose any additional burden to the government or vendors.

Unauthorized or Illegal Procurements

According to our courts, contracts entered in violation of the procurement laws are void. The results of this rule can be very harsh. This regulation is designed to avoid the worst results. The changes are designed to clarify this regulation and delegate more authority (not less) to agencies than they have under current Regulation 19-445.2015.

Presolicitation Procedures

This proposed regulation, which is new, requires the government to do acquisition planning and market research commensurate with the value and complexity of the acquisition before asking vendors to bid. As part of market research it makes clear that government can and should exchange information with the vendor community. Closer cooperation with the private sector should better align the State's needs with commercially available products and services provided by the vendor community.

We understand that some have raised a concern that this proposed regulation places too much authority in the hands of the Division on matters regarding acquisition planning and market research. Actually, the proposed regulation places primary responsibility on the using agency. The Division is involved only for acquisitions it conducts on behalf of another agency. It grants no new authority to the Division and it does not dictate how any agency determines what it needs.

Price Reasonableness

Under current law, the procurement officer must determine the contract price is fair and reasonable before awarding a contract. This proposed regulation establishes general criteria and describes analytical methods for determining price reasonableness. It does no more than make clear that the applicable procurement officer bears the responsibility to make the determination, and provides guidance on doing so.

Some concern has been raised that this proposed regulation places too much authority to determine price reasonableness in the hands of the Division. In fact, nothing changes who makes this determination: it has been and remains the responsible procurement officer. Depending on who conducts the procurement—the agency, under its own authority, or Procurement Services, on the agency's behalf—the responsible procurement officer may be an agency employee or a Division procurement manager. Under S.C. Code Ann. § 11-35-1210 and R. 19-445.2020, the SFAA board certifies how much purchasing authority each agency shall have. The Division conducts solicitations for agencies only when the expected contract value exceeds the amount authorized by the board. By limiting certification, the board, consistent with the Code and regulations, has limited the using agency's independence in contracting. Only in those cases will a Division employee determine price reasonableness.