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Protest Decision

Matter of: TSI, Inc.

Case No.: 2016-212

Posting Date: June 2, 2016

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400008056

Description: Statewide – IT Temporary Services

DIGEST

Protest purportedly challenging Amendment 10 to a solicitation is denied as untimely filed, where no allegations of protest letter pertain to the amendment.

AUTHORITY

The Chief Procurement Officer conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on the evidence and applicable law and precedents.

BACKGROUND

ITMO issued this Fixed Price Bid on September 2, 2015. The solicitation is designed to allow a Using Governmental Unit (UGU) to augment its information technology staff.

<i>Event</i>	<i>Date</i>
Solicitation Issued	09/02/2015
Solicitation Published in SCBO	09/02/2015
Amendment One Issued	09/17/2015
Modified solicitation and answered bidder questions.	
Protest by TSI, Inc. Received	10/01/2015
Amendment Two Issued	10/02/2015
Extended bid opening date.	
Amendment Three Issued	10/14/2015
Clarified late payment provisions.	
Amendment Four Issued	10/16/2015
Extended bid opening date.	
TSI protest denied for vagueness, untimeliness, and/ or failure to state a claim for relief	10/29/2015
Amendment Five Issued	10/30/2015
Extended bid opening date.	
Decision appealed to Procurement Review Panel	11/09/2015
Amendment Six Issued	11/23/2015
Extended bid opening date.	
Appeal rejected by Panel for lack of filing fee	11/25/2015
Amendment Seven Issued	12/01/2015
Set new bid opening date.	
Protest by J-Kell, Inc. Received	12/17/2015
Amendment Eight Issued	12/18/2015
Modified solicitation requirement for Supplier Personnel	
Amendment Nine Issued	12/21/2015
Suspended solicitation	
J-Kell protest denied as untimely	02/04/2016
Decision appealed to Procurement Review Panel	02/12/2016
Appeal denied by Panel as untimely	04/11/2016
Amendment 10 Issued	05/17/2016
Protest by TSI, Inc. Received	05/31/2016
Solicitation suspended	06/01/2016

TSI protested Amendment 10 to the solicitation, alleging violations of the South Carolina Consolidated Procurement Code with regard to the purposes and policies of the Code, the obligation of good faith, the application of the Code, the formation of advisory committees, the Chief Procurement Officer's relationship with using agencies, the solicitation and award of the contract, the failure to apply small and minority business preferences, unlawful delegation of authority of the post award administration of the resulting contracts, failure to report anti-

competitive practices, restrictive specifications, failure to guarantee full participation by minority and other economically disadvantaged groups, failure to assist minority businesses with the procurement procedures, and failure to follow internal procedures, and violation of state insurance laws. TSI's protest letter is included by reference. [Attachment 1]

This solicitation was originally issued on September 2, 2015. Amendment 1 was issued on September 17, 2015, and TSI filed a protest on October 1, 2015. TSI's original protest included eleven numbered grounds. All pertained to the original solicitation. The CPO dismissed that protest as untimely.¹ These same issues appear in TSI's current protest.² TSI's original protest also included a number of questions about the procurement without actually stating a claim. The subject matter raised in these questions now appear as protest issues in TSI's current letter of protest. TSI's original letter of protest also claimed a failure of ITMO to assist small and minority businesses as required by the Code. This issue is also raised in TSI's current letter of protest. TSI's original protest was dismissed on October 29, 2015, for vagueness, untimeliness and/ or failure to state a claim for relief. These same issues and more now appear in TSI's current letter of protest claiming to be timely based on the issuance of Amendment 10 on May 17, 2016.

ANALYSIS

TSI, Inc. (TSI), protests as follows:

¹ The CPO's decision in Case No. 2016-203 may be viewed or downloaded at: <http://procurement.sc.gov/PS/legal/decisions/Decision%20No.%202016-203.pdf> (last viewed June 1, 2016). The Panel declined to accept TSI's appeal because the filing fee was not paid.

² A copy of the October 2015, protest letter is attached to the CPO's decision referred to in the previous note. It included eleven numbered grounds (no. 10 was a "placeholder" for later-discovered issues). The 2015 protest ground 1 has been cut and pasted into the current protest as paragraph 9. 2015 paragraph 2 corresponds to "new" paragraph 12. "Old" paragraph 3 is recast as new paragraphs 16 and 17. Old paragraph 4 has been renumbered as new paragraph 19; old paragraph 5 as new paragraph 21; old paragraph 6 as new paragraph 24; old paragraph 7 as new paragraphs 23 and 25. Old no. 8 has been split into pieces and appears in the current protest as paragraphs 1 through 3 and 5 through 7. Paragraph 9 of the 2015 claim finds new life as paragraph 8, and the claims in 2015 paragraph 11 are reborn as paragraph 28. The protest ground based on cyber-liability insurance is identical to that raised by J-Kell, Inc., and dismissed by the Panel in Case No. 2016-2.

I am respectfully advising you of Technology Solutions, Inc.'s Protest of Solicitation number 5400008056, IT Temporary Services, Amendment 10 and the underlying solicitation and remaining amendments (incorporated here as if attached). According to the date of the Amendment, it was issued on May 17, 2016. Pursuant to S.C. Code of Laws, my calculations make the notification of protest due on or before June 1, 2016. Please consider this our notice of protest.

The Code grants prospective bidders the right to protest the solicitation of a contract:

A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(a) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An Invitation for Bids or Request for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this code.

S.C. Code Ann. § 11-35-4210(1)(a) (emphasis supplied). The Panel specifically addressed when an amendment is at issue in *Mechanical Contractors Ass'n of S.C.*, Panel Case No. 1995-12:

The Panel finds that an amendment would only be "at issue" if it provided new or different information than the solicitation documents. Otherwise, the fifteen days for protesting the solicitation would be extended by any amendment issued. In this case, the issue of protest is based on the language in the solicitation document that "those with G.C. license whose primary function is that of mechanical & electrical contracting shall not be considered." The amendment does not alter the exemption in the solicitation, but merely confirms it. The protested issue concerns information clearly contained in the Invitation For Bids (IFB), which is not altered by the addendum. Thus, in this case, the time to file a protest begins with the issuance of the solicitation and not the amendment. The protest letter of September 15, 1995, was filed more than fifteen days from the August 28, 1995, date of publication of the IFB, and therefore the protestant is not timely filed. The Panel does not have jurisdiction to hear the merits of the protest.

It repeated that ruling in *S.C. Ass'n of the Deaf*, Panel Case No. 2008-2:

SCAD's insistence that its protest was filed within one day of the issuance of Amendment 2 is unavailing. First, its original protest grounds all refer to Amendment 1, not Amendment 2. As noted above, the deadline for filing a protest of Amendment 1 was February 12, 2008, and SCAD's protest was not filed until

February 13, 2008. Therefore, by the very terms of its stated protest grounds, SCAD's protest is untimely.

Moreover, a close reading of SCAD's follow-up questions to Amendment 1 and its protest grounds reveals that the questions that the State did not answer in Amendment 2 all related to the original IFB specifications, not to new information contained in Amendment 1. Finally, the fact that the State did answer two questions in Amendment 2 that related to new information contained in Amendment 1 did not extend the time for protest of the remaining questions because those questions all related to the original IFB specifications. Therefore, the Panel finds that SCAD's explanations are an impermissible attempt to extend the applicable protest period by claiming that its protest relates to an amendment and not the original IFB specifications.

The Panel reaffirmed this recently in *In Re: Appeal by J-Kell, Inc.*, Panel Case 2016-2:

In order to protest the solicitation of a contract or an amendment thereto, an aggrieved prospective bidder must file its protest within fifteen days of the issuance of the solicitation documents, "or any amendment to it, if the amendment is at issue." S.C. Code Ann. § 11-35-4210(1)(a) (2011). The Panel has consistently held that the time limit for filing set by the statute is jurisdictional and cannot be extended. *In re: Protest by First Sun EAP Alliance, Inc.*, Panel Case No. 1994-11. In addition, the Panel has held that an amendment is "at issue" only when "it provide[s] new or different information than the solicitation documents." *In re: Protest of Mechanical Contractors Ass'n of SC.*, Panel Case No. 1995-12 at 1.

The "cyber liability" insurance requirement was included in the solicitation documents issued on September 2, 2015, and was modified by Amendment #1, which was issued on September 17, 2015. Even using the later September date, J-Kell's protest, which was not filed until December 17, 2015, is clearly untimely. Moreover, its reliance on the issuance of Amendment #8 on December 8, 2015, to make its protest timely is misplaced because the protest letter does not raise any issue in connection with the specification modified in Amendment #8. *See In re: Protest of South Carolina Ass'n of the Deaf*, Panel Case No. 2008-2 (wherein the Panel noted that a protest filed within fifteen days of an irrelevant amendment "[was] an impermissible attempt to extend the applicable protest period" where the issues raised by the protest were all related to provisions in the original IFB specifications).

The only change published in Amendment 10 is as follows:

1. Section III. SCOPE OF WORK/SPECIFICATIONS, page 25, #33, is modified as follows:

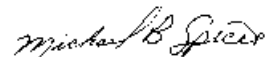
Current Suppliers with Consultants on Assignment(s): If you currently have a Consultant on an assignment or if a Consultant is on-boarded prior to the current contract expiring they will continue on that assignment until that assignment expires. ~~No extensions will be given for current placements. Job Extensions and Length of Assignment shall be in accordance with the requirements of this solicitation.~~ In addition, only those candidates submitted after the effective award date as indicated on the Intent to Award relevant to this solicitation, will be considered for the Supplier Performance Criteria below.

[Amendment 10, Page 3 (redlining in original)] TSI's current letter of protest does not address this issue.

DECISION

The issues giving rise to TSI's protests were first published in the original solicitation on September 2, 2015 and Amendments 1 -9 with Amendment 9 published on December 21, 2015. TSI did not file its protest until May 30, 2016. TSI's protest was not timely filed and the Chief Procurement Officer lacks jurisdiction to consider this matter. The protest of TSI, Inc. is dismissed.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

TSI

Technology Solutions, Inc.

May 31, 2016

Mike Spicer, Chief Procurement Officer
SFAA, Div. of Procurement Services, ITMO
1201 Main Street, Suite 601
Columbia, SC 29201

RE: Protest of Solicitation and amendments 5400008056, IT Temporary Services

Dear Mr. Spicer:

I am respectfully advising you of Technology Solutions, Inc.'s Protest of Solicitation number 5400008056, IT Temporary Services, Amendment 10 and the underlying solicitation and remaining amendments (incorporated here as if attached). According to the date of the Amendment, it was issued on May 17, 2016. Pursuant to S.C. Code of Laws, my calculations make the notification of protest due on or before June 1, 2016. Please consider this our notice of protest.

History:

This vendor, as well as others, has made every effort to correct the obvious errors in the current solicitation and amendments that will limit competition and restrict small and minority businesses from participating. We have received assurances that the solicitation and amendments would be revisited to take into consideration the numerous (and fatal to small and minority businesses) restrictive terms, with the intention of eliminating those restrictions. However, with the current Amendment, none of those problems have been addressed or alleviated, leaving a protest our only option to try to remain a participant in a contract that is the only means by which business with the State of South Carolina in our chosen professional field of IT consulting services, can be won.

The solicitation and amendments, as written, is fatal to small and minority businesses, as none would be able to meet the new requirements, and very damaging to the using agencies, due to the nature of the terms that ensures their talent pools would constantly be drained away, after they have already invested time and resources to train this talent in the specific IT systems at the various using agencies. This will, no doubt, result in using agencies missing important deadlines, both state- and federally-imposed, causing the using agencies to be sanctioned and fined. The solicitation and amendments, as written, is detrimental to the State of South Carolina.

Protest:

I. Insurance requirement is non-compliant with SC law

The insurance requirement in the solicitation is not legal under South Carolina Law. A requirement of insurance law in South Carolina is that the purchaser of insurance must have an insurable interest. *American Mutual Ins. Co. v. Passmore* 274 S.E.2d 216, 275 S.C. 618 (1981). In the case at hand, IT staffing vendors supply employees to South Carolina State Agencies. These employees

work at the direction and under the control of the using agency and its personnel, not the IT staffing vendor.

The insurance requested is for liability of employees under the IT vendor's direction and control working on computer systems, databases or software development. Because the IT Vendor does not have direction or control of the employee and because the IT Vendor is not the one suffering a loss due to the misconduct or malpractice of the employee, there is no insurable interest. Without an insurable interest, the requested insurance is not available to IT vendors under this state term contract.

Sale of insurance to the IT vendor for the State's loss or liability caused by employees that are under the direction, oversight and control of the State is non-compliant with South Carolina Insurance Law. The IT vendor does not have the necessary insurable interest to purchase insurance. In order to purchase said insurance the IT staffing vendor would either have to have liability through direction, oversight and control of the employees or own the computer system, database or software the employees are working on. Neither of those scenarios are the case with a contract that would result from this solicitation. Without an insurable interest, an insurance company would never pay a claim to an IT staffing vendor. It would be unconscionable for an insurance company to sell a policy to an IT staffing vendor under which there is no possible valid claim for the loss of an insurable interest. To sell a policy under which there is no possible claim and no possible insurable loss would be unconscionable on the part of the insurance company.

Even large and well-funded vendors who already possess this type of insurance because they provide turn-key IT work where they do directly supervise, direct and control their employees on their customer sites, would still provide no benefit to the state by having this insurance. The work performed would never result in a claimable event under the contract this solicitation may bring about. This solicitation (and historic usage of IT Temporary Services by the State of SC) requires that the vendors do not directly supervise, direct and control their employees assigned to the using agencies, so having the insurance would also not result in insurable interest for vendors who already have this coverage for other purposes. However, since it is required to have this insurance by this solicitation, those vendors who can get such a policy (even though the insurance would not and could not apply under this contract vehicle) would simply pass the extravagant costs of that insurance on to the State, driving up costs and unnecessarily inflating rates charged, without providing a benefit to the State. However, the continued requirement to have this insurance in place unnecessarily and unreasonably restricts many vendors from participation in the solicitation and resulting contract. People will become unemployed, agencies will lose talent, companies will close, and the public interest will be damaged as a result of this illegal requirement and it cannot be allowed to stand.

II. Solicitation violates procurement code in many ways

The remainder of our protest includes, but is not limited to, the following violations of Title 11 – Public Finance, Chapter 34, South Carolina Consolidated Procurement Code:

1. Section 11-35-20 (a): This solicitation and amendments will restrict competition and force vendors who now directly provide services under the contract this solicitation will replace, to provide their services under lower-paid subcontract agreements with larger vendors. This will drive up costs for using agencies and result in abuse of the funds provided for the purpose of achieving successful Information Technology projects in the State of SC. This is

unfair and damaging to vendors that have relied on the business provided by this contract and its predecessors for over 20 years, and is also unfair and damaging to the using agencies who have a broader and more diverse selection of talent at competitive rates by leaving existing vendors in place.

2. Section 11-35-20 (b): This solicitation and amendments unnecessarily and unfairly restricts competition within the free enterprise system by implementing restrictive specifications, terms and conditions that cannot be met by small and diverse vendors. These terms are not only unnecessarily restrictive, but provide no benefits to the State, as many, such as the insurance requirements, do not apply to the type of work performed under the contract that would result from this solicitation. Refer to section I. and number 25 of this section for details.
3. Section 11-35-20 (c): This solicitation and amendments will provide a much smaller and less diverse pool of vendors from which to select IT talent, thereby making the contract resulting from this solicitation fail to be responsive to appropriate user needs.
4. Section 11-35-20 (d): This solicitation and amendments and any contract resulting from it represents a step backward in procurements in SC, rather than promoting modernization.
5. Section 11-35-20 (e): This solicitation and amendments restricts competition to only large businesses, and is not authorized by the SC Procurement Code.
6. Section 11-35-20 (f): This solicitation and amendments is unfair to vendors who have relied upon the business won from the contract this seeks to replace for over 20 years, and is not equitable in that the specifications, terms and conditions are restrictive to small and diverse businesses. Implementing this contract will cause a loss of public confidence, as this business, worth over \$55 million of combined state and federal tax dollars, will now all go to larger companies, many of them located out-of-state, who have long participated in the "pay to play" procurement processes that have been allowed to go unchecked in SC. By weeding out small and diverse businesses, costs will rise, local businesses will be forced out of business, and the public good will suffer.
7. Section 11-35-20 (g): This solicitation and amendments does nothing to improve the quality and integrity of existing processes on the contract this will replace, and does nothing to eradicate the unethical practices ("pay to play") that have existed for years in the procurement of IT temporary personnel. In fact, the new and restrictive specifications, terms and conditions of this solicitation and amendments only serve to further encourage the "pay to play" practices that have been allowed to flourish under existing contracts, and will remain unchecked and get progressively worse due to the lack of small and diverse businesses in the population of participation in the new contract that will result from this solicitation.
8. Section 11-35-20 (h): This solicitation and amendments appears to violate the strict rules regarding the delegation of roles and responsibilities, in that it assigns to a third-party – not a government procurement officer – the primary responsibilities that can only be authorized by a government procurement officer. Prior contracts, such as the one this solicitation will replace, have also been allowed to operate while violating this delegation of roles and

responsibilities, and the award of this new contract would only continue that violation of the Procurement Code.

9. Any contract that might result from this solicitation and amendments may not be authorized by State Procurement Law. This solicitation and Amendments will result in a Fixed Price contract, for which the law is specific in how it should be administered and used. Section 11-35-1525 (7) indicates that award must be made to all responsive and responsible bidders. Item (8) of this same section states that any bidder that subsequently furnishes evidence of responsibility and responsiveness (using the same criteria as being awarded a place on the list of vendors in the first place) must be added to the award. There is no legal citation for subjecting awardees to any participation or other criteria AFTER award, and no legal basis for any vendor to ever be removed from participation, or for the contract award list to be limited in any manner.
10. Section 11-35-30: This solicitation and amendments violates the state's obligation of good faith by failing to utilize specifications, terms and conditions that are fair to all available (and currently successfully participating) vendors who may wish to participate in the resulting contract. Hundreds of vendors who have successfully participated and provided these services in the past and have come to rely upon the revenues from contracts this solicitation will replace, will no longer be able to qualify, because of restrictive specifications, terms and conditions. Prior contracts for these services have caused small and local businesses to rely upon this business for their survival, and now the State attempts to "pull out the rug" causing many of these businesses to lay off employees and close because they can no longer meet unnecessary and restrictive specifications, terms and conditions of this solicitation. The unnecessarily restrictive specifications, terms and conditions violate the "observance of reasonable commercial standards of fair dealing."
11. Section 11-35-40 (2): This solicitation and amendments, and any resulting contract represents the only way for vendors to gain business for providing IT temporary personnel or IT services in the way of on-site consultants to the state of SC. By restricting the participation to only large, well-funded companies, the State violates its obligation of good faith and fair dealing, as well as its obligation to foster broad-based competition within the free enterprise system and to support small, local and diverse businesses.
12. Section 11-35-45: This solicitation and amendments provides that vendors do not have control over what is printed on the invoices the agencies receive from the Vendor Manager (Tapfin Process Solutions) and are, therefore, being forced to waive the late penalty fee without providing consent to do so.
13. Section 11-35-530: The CPO is well aware of problems with the contracts this solicitation will replace, and formed advisory committees at the expense of the State, under this section of the Procurement Code in what appeared to be an attempt to overcome those problems. The resulting findings informed State Procurement of the issues that needed to be corrected or "tweaked" to lessen the "pay to play" nature of the contracts, to ensure fairness across the board to all participating vendors and to eliminate quantity-based scoring and elimination criteria to any vendor that has qualified to be on the contract. However, committee findings and commitments made to vendors have been completely ignored by this new solicitation and amendments. Instead of discouraging "pay to play," it has completely replaced the competitive field with only those firms who can afford to participate in the "pay to play"

practices that have long been going on under these contracts. The elimination criteria that were found to be unlawful in a protest in 2013, have been added in again. Not only does this eliminate competition from small, local and diverse businesses, but it rewards those who have acquired business unfairly in the past, using anti-competitive tactics, and puts many ethical companies who currently provide these services to using agencies, out of business and puts unrealistic requirements of participation on small businesses without large staffs to manage high numbers of submissions to the process. It completely eliminates the chance for specialty firms to gain state business in this area.

14. Section 11-35-840: The CPO may delegate authority to designees or to any department, agency or official. This does not appear to include a third-party, non-official of the State of SC, to whom this solicitation and previous contracts this solicitation will replace, has designated authority.
15. Section 11-35-1010: The CPO has apparently ignored this requirement in the code, as the specifications, terms and conditions of this solicitation and amendments will not be in the best interest of using agencies, in that they will lose valuable IT talent at critical points in their projects, after those personnel have been with a particular agency long enough to be fully trained on their internal policies and procedures, as well as the specifics of the IT projects to which they are assigned. This solicitation appears to be beneficial to no one, except perhaps the large companies for which it is designed to eliminate their local, small and diverse competition, and perhaps individuals who may be illegally profiting from such companies in the current "pay to play" scheme.
16. Section 11-35-1520(9) and (10): The design of this solicitation and its amendments indicates that criteria other than price will be used to determine not only vendor selection, but final candidate selections under the resulting contract. This section of the code is violated in both instances, in that pricing alone is not used to determine these awards, and this solicitation states blatantly on its first few pages that it will not adhere to any preferences for SC based, small and/or minority firms that are required by our laws. Part (10) of this law is violated as the determination of award is not based on price alone.
17. Section 11-35-1524: This solicitation and amendments has included language on page 2 of the solicitation indicating that these "Preferences do not apply," thereby eliminating any benefits of such preferences to our State and taxpayers. This solicitation is not in the best interest of the State. There does not appear to be any reference in the law allowing a solicitation to "opt out" of adherence to this section.
18. Section 11-35-1525: This solicitation and amendments is offered under the terms outlined in "Competitive fixed price bidding." As such, there is (1) no competitive sealed bidding, and (2) the purpose is to "provide multiple sources of supply for information technology based on a preset maximum price which the State will pay for such information technology." (7) "Award must be made to all responsive and responsible bidders to the state's request for competitive fixed price bidding." Many small, local and diverse vendors have long met the requirements of responsiveness and responsibility and have successfully participated and continue to successfully participate in contracts to provide IT Temporary Services or IT Consulting Services to the State. However, this solicitation has gone to great lengths to make the specifications, terms and conditions unduly restrictive so as to eliminate the possibility of small, local and diverse vendors being deemed "responsive and responsible"

for the new contract. Terms and conditions such as the insurance requirement cannot be met by anyone but the largest, most well-funded vendors that have an additional business line in turn-key IT projects, and other specifications are also unduly restrictive and do not match industry standards for these services.

19. Section 11-35-2420: Historically with contracts this solicitation and amendments seeks to replace, there has been acknowledged (by ITMO) anti-competitive practices. Yet never have those practices been reported as required by this section of the Procurement Code. The current solicitation does nothing to discourage these anti-competitive practices, and does nothing to emphasize that there are penalties for such. In fact, eliminating small, local and diverse businesses appears to be awarding the larger companies that have participated in these anti-competitive practices in the past, an even better opportunity to continue those practices by limiting the competition by ethical vendors. ITMO has admitted violations of Title 8 – Chapter 13, but has done nothing by way of this new solicitation or other means, to lessen or eliminate the potential of continuing violations.
20. Section 11-35-2730: This section requires assuring competition and that “All specifications shall be drafted so as to assure cost effective procurement of the state’s actual needs and shall not be unduly restrictive.” This solicitation and amendments, and its specifications, terms and conditions are unduly restrictive to small, local and diverse businesses and does not meet this requirement.
21. Section 11-35-3410: This section provides for modifications and terminations of contracts for supplies and services (including Information Technology). Nowhere in this section is there mention of vendors being terminated or suspended from an awarded contract list based on quotas or any other criteria such as those listed in the solicitation and amendments. Any attempt to limit bidders who have met the responsiveness and responsibility criteria must be eliminated, regardless of any vendor’s level of participation. Perhaps if ITMO would work to eliminate the blatant anti-competitive practices that exist under the predecessors to any contract this solicitation might replace, vendor participation would improve as there would be a reasonable ROI for the time, trouble and expense to participate in this unwieldy process that was not designed to be used for the services for which it is being used.
22. Section 11-35-4310: Because of violations listed here and others, any award made as a result of this solicitation and amendments would be in violation of the law. If proven to violate the law prior to award, it would therefore, have to be (a) cancelled; (b) revised to comply with the law and rebid; or (c) awarded in a manner that complies with the provisions of this code. It seems to be in the best interest of the state to correct these problems prior to accepting bids.
23. Section 11-35-5210: CPOs must implement the policy outlined in this section that guarantees full participation by minority and other economically disadvantaged groups. This solicitation indicates that it will not adhere to this section of the code and the specifications, terms and conditions are unduly restrictive against minority businesses. There does not appear to be any reference in the law allowing a solicitation to “opt out” of adherence to this section, as was boldly attempted on page 2 of the solicitation. Therefore, this solicitation is unlawful and cannot be allowed to proceed.

24. Section 11-35-5220: CPOs “shall provide appropriate staffs to assist minority businesses with the procurement procedures developed pursuant to this code.” This section was violated when the procurement officer assigned to manage this solicitation, refused to assist my company with additional questions and concerns after the introduction of Amendment 1 which introduced even more restrictive and illegal specifications, terms and conditions than had been included in the original solicitation document. ITMO continued to shirk this responsibility by refusing to answer follow-up questions sent by email. Refer to Exhibit A for examples.
25. Additionally, certain requirements place restrictions that small businesses cannot, based on their position-based cost models, meet. Among these is the requirement that all consultants placed as a result of successful participation in the resulting contract make available their employees to be hired by the State in 90 days. Small businesses cannot comply with that requirement unless they add a substantial upcharge to their normal hourly rates to cover their recruiting, hiring, relocation and onboarding costs. This upcharge will likely prevent them from bidding or being awarded positions that larger companies can price more competitively. This term is also not in the best interest of the state, as has been pointed out in my follow-up questions to Amendment 1 (that ITMO refused to answer and indicated so by email), and an email defining how this term will result in the agencies paying artificially inflated rates, even when they do not choose to exercise the 90 day hire option. Those documents are incorporated here as Exhibit A.

Additional requirements, such as the implementation of a 1 week “trial period” for consultants are also restrictive to small and diverse businesses, and not in the best interest of anyone participating in this contract. Vendors have long witnessed the lackadaisical manner in which these position postings have been handled by using agency personnel. They open positions and withdraw them a few days later, after vendors have already invested significant time, money and energy into locating suitable candidates. They “sit on” submissions for weeks, even months, before starting to interview or screen further. Agencies have failed to develop scoring criteria for resumes and interviews that would provide them ample opportunity for the due diligence required to bring in a new consultant. This problem would exist with the currently proposed 36-month limit for consultants to be assigned to any one agency. Many of us, when we propose individuals to the using agencies to work under this contract, are hiring an individual away from a full-time job elsewhere. Not too many already employed people would be attracted to a position that could find them, a week after starting the new position, unemployed, simply because the agency personnel did not ask the right questions of them. They would similarly not leave a long-term, full-time job if they knew the most they could work, regardless of their value to the project, was a 3 year term. This will not only penalize ethical companies who seek the best candidates for the using agencies, but it will severely limit the hiring pool to unemployed individuals who are not always the most skilled. Small companies cannot absorb personnel, their salaries and benefits just because a using agency failed to perform its due diligence in selecting the right candidate for their need, or because ITMO has misunderstood some language in employment laws to think they are protecting themselves by imposing a 3-year limitation. This contract will ruin lives if allowed to proceed in the manner in which the solicitation is written.

26. This solicitation and amendments has not been managed by ITMO in accordance with the letter and intent of the law to provide assistance to vendors. ITMO has refused to answer

questions and requests related to response criteria and procedures, thereby potentially damaging and prejudicing vendors' ability to compete for this award. ITMO has introduced new terms in amendments and then refused to allow vendor response or questions related to the new terms. This blatant ignoring of vendor concerns indicates that perhaps other vendors have an "inside track" for award in this case, thereby perpetuating the current "pay to play" system and using it to eliminate competition by vendors not on this "inside track."

In 2012, State IT Procurement Officer Norma Hall gave a presentation entitled "Protests: Should What Happens in South Carolina Stay in South Carolina?" to the South Carolina Association of Governmental Purchasing Officials (SCAGPO) at its annual meeting. Exhibit B contains excerpted slides from this presentation that indicate that not only is ITMO not managing this procurement in accordance with law, but it is not being managed even by internal ITMO standards. Slide 5 indicates that Purchasing Officials can take steps to protect themselves from Protests. Those steps include: "Select the appropriate solicitation type; Make sure your specifications are non-restrictive; Ensure your solicitation processes promote fair and open competition; and Follow your laws, regulations and procedures." Clearly, this solicitation does not follow these steps, as all four of these points are violated. Similarly, slide 33 reiterates these concepts, and lists the following advice for procurement officers to help them avoid protests: "Make sure your specifications are not restrictive; Make sure no one has an unfair advantage; Use fair and open competition; Follow proper procedures; Select the appropriate solicitation type." This solicitation violates all of these points of advice.

Slide 6 offers steps for "Protecting Yourself." Those include "Allow appropriate time for Questions and Answers prior to closing an RFP/opening an IFB." There was one Q&A session offered by ITMO, and even though the Amendment that was issued in response to those questions by the vendor community contained new specifications, terms and conditions that drastically impacted the ability of small businesses to qualify to respond to the solicitation, further questions were not allowed and any submitted were ignored by ITMO.

Slides 7, 8 and 9 provide steps to follow when a protest is filed. Among those is talking with the complainant, and discussing why decisions were made, providing data to support those positions. This vendor and others have already protested this solicitation at least once, and no attempt was made by ITMO to discuss the restrictive specifications, terms and conditions that brought about the protests. Even the formal protest responses provided none of these answers to support why it would be in the best interest of the state to eliminate the participation of vendors who have successfully participated before and who have active consultants that will be unemployed as a result of this solicitation going forward as written. There has also been no explanation as to how the using agencies are to replace talent they have worked to train for their specific projects for years (most current consultants work under non-compete contracts with their respective vendor employees, and would not be available to them by a different vendor). The specifications, terms and conditions of the current solicitation will damage these agencies as well, by forcing them to release talented IT professionals that are critical to the success of their projects and is not in the best interest of the State.

27. The State's obvious endeavor to eliminate from the contract that might result from this solicitation and amendments, the numerous small businesses that have relied upon this

contract vehicle for over 20 years as their only means by which to do business with the State is representative of bad faith and unfair dealings by the State. This solicitation and amendments, as written, eliminates and likely puts out of business, many of the companies upon which the using agencies have relied for years for these services. It fails to abide by the laws as regards small business preferences, minority preferences, and introduces new and unnecessary and restrictive terms that no small business can meet, such as unrealistic insurance, hiring and guarantee period requirements.

28. In a multi-vendor protest of the contract this solicitation and amendments attempts to replace, there were several unresolved issues. ITMO's CPO issued a commitment to those vendors that it would address and correct certain problems with this process, that would result in a more business-friendly and logical approach by the time the new solicitation was issued. That commitment was offered in exchange for the vendors withdrawing the protest. The vendors withdrew their protest based on this promise by the CPO (an oral contract that resulted in compliance by the vendors), yet this solicitation and amendments resolves none of the problems addressed by the protest, does nothing to meet the commitments made by the CPO, and places ITMO out of compliance with the oral contract. This solicitation and amendments actually backtracks on some of the logical and business-friendly decisions that arose out of that prior protest. Exhibit C is the final memorandum illustrating the agreements made to correct many of these issues, most of which were never implemented, and were certainly not passed along to this new solicitation. Among those issues:

- Eliminating quantitative scoring and elimination criteria for vendors who have met responsiveness and responsibility requirements of the solicitation;
- Enforcing late payment penalties with agencies, and requiring TAPFIN's assistance in this since they are responsible for all invoicing;
- A plan going forward that ensures this contract, if a fixed price contract, be awarded based on the laws regarding fixed price contracts – i.e. that price be the sole determining factor. The law appears to state that there can be no other criteria for awards in fixed price contracts other than lowest price, and further that local and minority certification preferences be adhered to;
- The historical failure of ITMO or TAPFIN to take measures to prevent anti-competitive practices such as favoritism and “insider knowledge” leading to a “pay to play” scheme that appears to be encouraged by, or at the very least, being allowed to happen untended, by TAPFIN and ITMO;
- The failure of ITMO to protect diversity;
- The failure of ITMO to construct a contract that is in the best interest of the state;
- Improper delegation of authority from ITMO to TAPFIN;
- Other issues regarding performance reporting, timely processing of candidates, etc.

This solicitation and amendments does not appear to have addressed any of these concerns that were committed to by ITMO to have the vendors withdraw their protest.

As a result of these broken promises, vendors have lost confidence that any of their concerns will ever be addressed, and many have chosen not to even attempt participating in this new solicitation as a result of the unfairness, chilling of competition and anti-competitive practices that are allowed to flourish, and the fact that ITMO always reneges on its promises. It is ITMO's responsibility to encourage vendors to participate and to create a level playing field where all vendors who provide

Mr. Spicer
Page 10

services in a responsible and cost-effective manner, be allowed to compete for state tax dollars. This solicitation and amendments does not meet the letter or intent of the laws in SC, and must be cancelled until a solicitation that does meet the letter and intent of the laws can be written.

Remedies Requested:

1. Cancel Solicitation and amendments 5400008056, as allowed by §11-35-4310(a), and convene an advisory committee to rewrite a solicitation that eliminates restrictive terms and conditions in the current solicitation and amendments that would repeat the problems (anti-competitive practices, chilling of competition, bad faith and unfair dealings, etc.) small, minority and ethical businesses have experienced in the past.
2. Demand a report to the Attorney General and a request for an investigation into possible anti-competitive practices taking place under Contract 5400001342. Use that investigation to inform the implementation of a new and improved contract vehicle for the procurement of IT Temporary Services.
3. Ensure that the new solicitation and any resulting contract is dictated by state statutes that give preferences for SC based, Certified as Small and Minority firms that are given preferences in pricing and other criteria allowed by law.
4. Change the type of solicitation to reflect the RFP-like criteria used in the selection of candidates for open positions. Then, scored criteria would have to be divulged to vendors, better informing our selection process, using agencies would have to score resumes appropriately based on the firm criteria, and scores would be available to vendors to assist them in future business decisions regarding selection of candidates for submission.

Thank you for your assistance in this matter. It is the sincere goal of TSI to work with ITMO to resolve these issues so that business can continue as usual. However, historically there has been little, if any, movement to improve the administration and practices of this contract vehicle, therefore this protest was necessitated. The same VMS that is in use now has been selected for the new process, and business is currently continuing as usual. Therefore we rely on the auto stay guaranteed by § 11-34-4210(7). There is no compelling reason to rush the award of a new contract, as it is in the best interest of the state to review this process more thoroughly before launching another five-year period of anti-competitive practices and bad faith on the part of the State.

Respectfully submitted,



Cathy G. Lanier
President

Cc: Geoffrey Chambers, Attorney at Law



EXHIBIT A

September 23, 2015

Johanne M. Sullivan, CPPB
SFAA, Div. of Procurement Services, ITMO
1201 Main Street, Suite 601
Columbia, SC 29201

Delivered via email

Dear Ms. Sullivan:

We appreciate this opportunity to get clarification on several issues raised in Amendment 1 to the solicitation for IT Temporary Staff Augmentation Services, 5400008056. Please contact me if any questions are unclear, or require additional information.

Please note: My question number 1 in section 2 requests an extension in opening date to allow us time to receive FOIA information to be requested later today, in order to determine if a protest of this solicitation is appropriate. Please indicate as soon as possible whether or not this extension will be granted.

Questions based on Amendment 1 changes to original solicitation:

1. Item 4, regarding ACORD: Does this mean we are now to submit our ACORD listing the State of SC as an "other insured," or would it list Tapfin as the "other insured?"
2. Item 6, regarding the "Not interested" button: In the past, there have been far more than 20% of positions posted that indicated a pre-selection had been made, or they were from an agency that had historically "blackballed" certain vendors. May this section be changed to indicate that a vendor who selects "not interested" is counted 100% of the time as having an interest in presenting qualified resources for consideration, but was not able to because of one of the reasons listed for selection? It is not the fault of vendors if there are political reasons it would be a waste of time for them to source for candidates for certain agencies, nor is it fair to make all vendors expend time and resources to source for candidates when the posting clearly indicates a pre-selection.

The following questions are a follow-up to the vendor questions submitted:

1. Question 5: This vendor will prepare and submit an FOIA in response to the answer for this question, and respectfully requests that the opening date of this solicitation be pushed out to accommodate receiving this information before being forced to prepare a solicitation when it may choose not to participate after further review of the details surrounding the selection of the VMS. This vendor also reserves the right to file a protest to this solicitation based on information received from the FOIA, as well as other concerns that ITMO has not cured any of the problems pointed out in a previous protest, all of which ITMO committed to correct.

This vendor's protest rights will be violated if the opening date is not extended to accommodate this additional information, and we respectfully request an extension of the opening date of the underlying solicitation.

2. Questions 6, 7 and 9, 15, 28, 32 and 35: Please outline the specific process by which vendors can document and report ethics violations or violations of the prohibited communications terms, and the procedure that will be used by ITMO to investigate and correct these violations. Please also detail the penalties that will be assessed on UGUs or vendors if these violations are discovered.
3. Question 12: Will ITMO consider requiring all UGUs to have standard policies so that all agencies are working from the same set of rules to ensure vendors are adhering to this contract's policies. It does not seem to be conducive to this type of contract for each UGU to be able to have individual policies and ways of doing things, and increases the opportunity for vendors to be downgraded due to policies over which they have no control.
4. Question 14: Why will ITMO not consider a true blinding of resumes? In their commitments to protested items, they ensured vendors there would be a better method of protecting vendors from pre-selected candidates and bias. A true blinding process would assist in that effort.
5. Question 16: If this is truly an issue such that a third-party cannot bill for expenses, will ITMO ensure that each UGU implement a standard process by which vendors can get paid for these expenses? As it stands now, we have to fight for our money with certain agencies that do not understand they must pay for our consultants to travel if they require it.
6. Question 17: Several vendors will immediately be in violation of the consultant job limitations at the start of this contract. Why is ITMO refusing to accommodate the current and normal usage of this contract?
7. Question 18: What is the procedure for renewals past this limitation? The current contract usage indicates that consultants are often needed for more than this limited time period, and it would be ludicrous for an agency to have to replace a seasoned, experienced and agency-specific knowledgeable consultant with a new one in mid-project. Certainly this is in no one's best interest, with the agencies suffering the most.
8. Question 20: What processes will be put in place to ensure that UGUs will move quicker through the selection and on-boarding process so that this time limitation will work? It typically takes far longer than 30 days for this process to complete, and failure to be able to show the resumes of consultants finishing projects for more than 30 days almost guarantees that vendors will have to retain their employees "on the bench" without billable time to offset this burden. This is an expense that will ultimately be passed on to the UGUs. Why not allow at least double this time to try to curtail this problem?
9. Question 26: Is it correct to assume that this is the complete liability required, and there is no E&O coverage required?
10. Question 29: Please provide the last approved rate schedule under the existing schedule, so that we may compare it with the proposed one in this solicitation.
11. Question 30: The position of Technical Writer has been used as a substitute for other positions for many years. Will ITMO please consider adding this position now? There are others, but that one has been used so many times, it should be showing up in historical data.
12. Question 37: Will ITMO consider implementing a resume scoring system to be used by UGUs, much the same as RFP processes have to use weighted criteria for scoring proposals? Each resume submission is, in effect, a separate proposal, and vendors deserve a standardized, unbiased scoring methodology to ensure the best candidate is selected.

Ms. Sullivan

Page 3

Vendors also deserve to know the weighted criteria to be used for each resume submitted. Will ITMO consider implementing such a methodology?

13. Question 41: What processes and procedures are in place to ensure the type of communications described are not continuing to take place under this contract?
14. Question 45: We request that this answer be reevaluated, as it will result in nothing more than rate increases to accommodate the possibility of this early hire that may not occur. The state will pay inflated rates because vendors must account for the potential of this early hire in the initial rate. If that hire does not take place, the state would still be liable to pay that inflated rate. Please adjust the time frame, or devise another method that would make more sense in the industry.

Thank you for your assistance with these questions.

Sincerely,

Cathy G Lanier

Cathy G. Lanier
President

Cathy Lanier

From: Cathy Lanier
Sent: Friday, September 25, 2015 2:12 PM
To: jmsullivan@mmo.sc.gov
Cc: Spicer, Michael
Subject: IT Temp Services

Ms. Sullivan,

Can you tell me when the new questions posed will be answered? There is very little time between now and the bid due date, so will the amendment extend the opening time to provide us at least a week to deal with the new amendment?

One of the major concerns is the 90 day hire option. I'm not sure I did a good job of explaining why that is not in the best interest of the state, but let me provide an example. Most businesses in our industry, especially small companies like ours, treat each consultant on assignment as a separate cost center. Therefore, the rate charged for each consultant is based on the costs to source, recruit and hire that individual, as well as his salary and benefits costs. The sourcing and hiring costs must be spread out over the anticipated hours on the contract, and the fewer there are, the higher the rate must be. For instance, if it cost us \$1200 to source and hire the person (which is about the minimum we can estimate, and that means there's no relocation costs or anything of that nature involved), then we would normally assume we will employ that person and have him assigned to a contract for a minimum of 12 months before he can be hired by the client. So, the monthly cost to be covered in the hourly rate we must charge, would be \$100 in that example. There are typically 160 hours in a month, so that results in an hourly rate upcharge of only \$0.626, which is negligible. However, if we can only count on getting 3 months of assignment out of that person, then the \$1200 must be recovered in only 3 months' time, making the monthly cost go up to \$400, translating to a rate add-on of \$2.50 – quite a difference, and sometimes the difference in being able to provide a consultant or not comes down to a dollar or two in rate.

The real problem is that, because this is a contractually agreed upon policy, we would have to add on that \$2.50 (or more, as I've used a very conservative hire cost) for every consultant, regardless of the stated length of assignment, simply because the contract provides the UGUs the ability to hire our people so quickly. So if that consultant does not get hired in the 90 days, and remains on assignment for 2 years, the state has paid an inflated rate. In this example, that inflated rate would be \$2.50 - \$0.626 or \$1.88. Over a 2 year contract, that additional amount would add up to \$7,219.20. That's quite a lot for an agency to have to pay extra just because the contract was not written to realistically accommodate the typical hiring practices in our industry.

I hope the other questions were clear, but please consider altering that 90 day hire to something a bit more reasonable, considering how we price our consultants.

Thanks,

Cathy



Cathy Lanier

President

(803) 359-6079 Work

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cathy@tsisc.com

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WBENC Certification #: 2005108890

Cathy Lanier

From: Cathy Lanier
Sent: Friday, October 02, 2015 8:13 AM
To: Sullivan, Johanne
Cc: Spicer, Michael
Subject: RE: Follow up questions for Amendment 1

Ms. Sullivan,

Some of my questions pertain to procedures to be responsive in my bid response. I do not believe you can pick and choose what you can answer, as your role is to ensure fair competition and full information to vendors. I will be forwarding my protest letter to Mr. Spicer shortly.

Thanks,

Cathy

From: Sullivan, Johanne [<mailto:jmsullivan@mmo.sc.gov>]
Sent: Tuesday, September 29, 2015 12:51 PM
To: Cathy Lanier <Cathy@tsisc.com>
Subject: RE: Follow up questions for Amendment 1

Thank you for your questions. The state is not anticipating any changes to this solicitation, therefore an amendment will not be issued.

Thanks,
Jo



Johanne "Jo" Sullivan, CPPB | Procurement Manager
Division of Procurement Services | SC State Fiscal Accountability Authority
1201 Main Street, Suite 600 | Columbia, SC 29201 | Office: (803) 737-3416 | jmsullivan@mmo.sc.gov

NOTE: Act 121 of 2014 (SC Restructuring Act of 2014) abolished the Budget and Control Board. Effective July 1, 2015, the Division of Procurement Services has been transferred to the State Fiscal Accountability Authority. Please update your contact information.

From: Cathy Lanier [<mailto:Cathy@tsisc.com>]
Sent: Wednesday, September 23, 2015 12:55 PM
To: Sullivan, Johanne
Subject: Follow up questions for Amendment 1

Ms. Sullivan,

Please see attached follow-up questions generated by the contents of Amendment 1 to the IT Temp Services solicitation.

Thank you for your attention to this matter.

Cathy Lanier



Cathy Lanier

President

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Is There Anything You Can do To Protect Yourself?

- Select the appropriate solicitation type – prepare *appropriate* justifications; i.e. RFP, FPB, BVB
- Make sure your specifications are non-restrictive
- Ensure your solicitation processes promote fair and open competition
- Follow your laws, regulations and procedures



SLIDE 5

Now That I'm Disillusioned, Depressed, and Disgusted... What Will Help Me?

As Stephen Covey says, "Begin with the end in mind"

- Make sure your specifications are not restrictive
- Make sure no one has an unfair advantage
- Use fair and open competition
- Follow proper procedures
- Select the appropriate solicitation type
- Prepare adequate justifications
- Always be cordial and pleasant
- When warranted conduct pre-proposal conferences/site visits



SLIDE 33

Protecting Yourself

- Conduct Pre-proposal conferences or site visits
- Allow appropriate time for Questions and Answers prior to closing an RFP/opening an IFB
- After making an award for complex solicitations offer to debrief those not receiving the award
- When asked, willingly share information you are allowed to *after an award is made*



SLIDE 6

So, What Happens If Someone Does Protest?

- Everything Grinds to a Halt
- The procurement award is suspended
- First action should be to talk with the complainant - and actively listen
 - Find out what they are unhappy about
 - Make sure they know all the facts



SLIDE 7

Initial Response to a Protest

- Be Cordial
- Remember, the protestant has a right to protest - we might not like it
- Listen to what their concerns are – see if there is merit to their protest



SLIDE 8

Initial Response to a Protest

- Discuss why decisions were made
- Have all the data to back up your position
- You may be successful and they will withdraw the protest
- If they are not satisfied, the formal process must be followed



SLIDE 9

EXHIBIT C

MEMORANDUM

TO: Mike Spicer, Chief Procurement Officer
FROM: Vendor Group, Norma Hall
DATE: December 12, 2013
SUBJECT: Resolutions Agreed upon at Procurement Contract Controversy Hearing held on November 20, 2013

Vendor Group Topic 1: Disqualifying Vendors based on the Supplier Performance Criteria

- Cancel Contract Modification. **ITMO has drafted a new Contract Modification that cancels out Contract Modification 1 in its entirety.**
- Issue a new Contract Modification that states that the selection of the “Not Interested” option on a position posting counts as a submission for the purpose of meeting the Supplier Performance Criteria on page 24 of the Contract. **ITMO has drafted Contract Modification that has included this language.**

Vendor Group Topic 2: Lack of Control over Invoicing/Forced to Waive Late Penalty Fees/ Lack of Feedback from Agencies

- Appropriate verbiage according to the Prompt Payment Act will be added to invoices going from Tapfin to State Agencies, effective for November service dates’ invoice. **ITMO has worked with Vendor Manager to implement this change to the invoicing process. Beeline did not have sufficient time to make changes by November service date invoices and the change will be made for invoice service dates starting in December.**
- Vendor Manager is researching reporting options to allow Vendors a report that shows the dates invoices are dispersed from VM to Agencies effective by December 2013 billing if possible. **Vendor Manager has agreed to a reporting option to allow Vendors to view a report that shows the dates their invoices are disbursed from VM to Agencies. Effective by December 2013 billing if possible. This report will be available to upon request from the Vendors.**
- Provide a means of feedback, on candidates selected for interview but not hired, to their sponsoring Vendors. **This will include a standardized report that includes interview results. Vendor Manager has agreed to this solution however, we are waiting upon a date that Beeline can complete the request by. Once date is received Vendor Group will be contacted with date of implementation.**
- Work toward developing a more objective scoring process that allows Vendors to compare the scores from their submitted resumes with others, so they may be able to do a better job in the future. **The current system (Beeline) does not have the capacity to score resume’s as they are submitted. To be considered on new Vendor Management Services and IT Temporary Services solicitation(s)/contract(s).**

Vendor Group Topic 3: Pricing Alone Must Determine Award; Special Consideration for Small and Minority and SC-Based Businesses

- Currently the subject contract requires award of business to lowest priced qualified candidate/vendor. The contract also states that if an exception is chosen, it must be supported by written justification. ITMO should review these justifications for possible anti-competitive practices. **The Vendor Manager has agreed to wait until the full seven (7) days have passed before giving any resume's to the agencies and will list them in ranking order by lowest priced, qualified candidate. They will remind the agency that they must give a written justification as to why a selection is made that is not the lowest priced, qualified candidate. ITMO will review these comments. Information will be going out to all Hiring Managers to remind them of this requirement. This will be required prior to on-boarding the selected candidate.**
- Research other methods of procurement that allow for additional criteria other than price to be utilized, and implement this for the next contract period in August of 2014. **ITMO is currently researching other procurement methods and award of contracts by other states to determine the best model to follow. ITMO will also allow the Vendor Community and the Agencies to give their recommendations regarding the upcoming solicitation and development of the new contract.**

Vendor Group Topic 4: Anti-Competitive Practices/Chilling of Competition

- Immediately stop promoting to Vendors that they are expected to "market their services" to agencies. **ITMO will issue a written communication to agencies regarding inappropriate behavior regarding contact with vendors during the hiring process. They will be reminded that any violations to the contract terms and conditions will not be tolerated and will result in Agencies losing their ability to use this contract for IT Staffing. ITMO will also contact the Vendor community with the same message.**
- Devise a method whereby specific criteria with point assignments are issued at posting, and require that each agency employ a committee that scores each resume according to the criteria point system. Post the scores as a means to provide feedback to vendors. **ITMO is developing the new VMS solicitation and we have inserted in the scope of work for all offerors to identify how their system can accomplish scoring and/or ranking of resumes.**
- Implement a method that removes total control over selection from agencies. Have Vendor Manager (or ITMO) retain cost scores, and possibly candidate reference scores to add to resume scores and make selections according to best score. **The hiring decision must remain at the agency level. Agency hiring managers are more equipped to determine the candidate(s) that are the best fit to meet their needs based upon their qualifications, the work environment, and the candidate's interview process. ITMO**

should not take the hiring responsibility away from the agencies. Will consider for future contracts

- Consider lengthening deadlines for submission to a minimum of ten (10) to fourteen (14) days to allow smaller companies to adequately compete with large companies with more resources and multiple recruiters. **Due to agency specific specialty requirements, the proposed 10 to 14 day waiting period could impact the availability of those candidates due to their high demand and minimum supply. Taking into consideration that we've received feedback from many agencies and vendors that the current 7 day waiting period is too long, the proposed extension would not be in the best interest of the State or the vendor community.**
- Research the feasibility of imposing a time limit on vendors with agency contact from participating in postings. **The current contract states "You may (emphasis added) have contact with the governmental entities; however the discussion must be limited to Company Information and background and previous company experiences. Absolutely no discussion about upcoming jobs, possible jobs, about candidates that Supplier has that could provide service. ITMO will reinforce this to all contract vendors and let them know that any infraction of this requirement could mean that their contract would be terminated for breach.**
- "No Contact, ever" policy - The blind method needs to be the goal for the new contract. A strict "no contact, ever" policy between vendors and agencies. **ITMO will consider the No Contact policy in the new contract after allowing both the vendor community and the agencies to have input into recommendations.**
- Require agencies to meet the contractual requirement of interviewing at least three (3) candidates before making a decision. **ITMO currently has reinforced this with the Vendor Manager. ITMO will monitor the next two hires for the three agencies reporting the greatest usage of the contract for compliance. ITMO will also ask the Vendor Manager to supply a report quarterly that shows this requirement is being met.**
- Only release resumes to scoring committee after deadline for submission has passed. **ITMO is requiring the Vendor Manager to wait until the full seven (7) days have expired before any resumes are released to the Agency. All resumes will be listed from lowest priced qualified candidates to maximum priced qualified candidates. All exceptions for hiring other than the lowest priced qualified candidate will require written justification prior to onboarding.**
- Report perceived anticompetitive practices to Attorney General and Inspector General for possible investigation. **ITMO will comply with §11-35-2420 which states: "When any information or allegations concerning anticompetitive practices among any bidders or offerors, come to the attention of any employee of the state, immediate notice of the relevant facts (emphasis added) shall be transmitted to the Attorney General.**

- A strongly worded email from ITMO will go to agencies reminding them that they are not allowed to utilize contractors for interviewing and selection of candidates for positions under this process.

Vendor Group Topic 5: Failure to Protect Best Interests of the State

- Ensure goals match those of agencies and that vendors can support these same goals. It is in the best interest of the state for vendors to screen for only the best qualified candidates for submission. **ITMO is addressing this through the re-instatement of the “Not Interested” selection counting towards the 40%.**

Vendor Group Topic 6: Unlawful/Improper Delegation

- Ensure that Vendor Manager is making only appropriate determinations on behalf of the State. **ITMO has addressed this with the Vendor Manager and has outlined their responsibilities and is monitoring the activities of the Vendor Manager.**
- Review procedures with Vendor Manager to ensure that qualifications are checked against the specifications given by agencies and resumes are not passed on that do not meet the minimum qualifications. **ITMO reviewed the procedures with Vendor Manager and reminded them of the critical nature of ensuring an adequate scope of work is received from agencies, and if not to work with them until this is accomplished. The scope of work must contain information regarding the activities that will be required of the candidate. ITMO discussed the need to continually update the Job Descriptions to ensure that they are current with industry standards. The rates are to be reviewed semi-annually to determine if they are in line with industry standards. ITMO discussed with the Vendor Manager the need to ensure that all candidates meet the minimum requirements.**

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised September 2015)

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 111.1 of the 2015 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 209, 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.