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GRANT GILLESPIE  
EXECUTIVE DIRECTOR

THE DIVISION OF PROCUREMENT SERVICES

DELBERT H. SINGLETON, JR.  
DIVISION DIRECTOR  
(803) 734-8018

MICHAEL B. SPICER  
INFORMATION TECHNOLOGY MANAGEMENT OFFICER  
(803) 737-0600  
FAX: (803) 737-0639

## Protest Decision

**Matter of:** Technology Solutions Inc.

**Case No.:** 2020-215

**Posting Date:** June 15, 2020

**Contracting Entity:** State Fiscal Accountability Authority

**Solicitation No.:** 5400008056

**Description:** IT Temporary Services

### DIGEST

Protest of solicitation and award is dismissed. The amended protest letter of Technology Solutions, Inc. (TSI) is included by reference. (Attachment 1)

### AUTHORITY

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

## BACKGROUND

Solicitation Issued	09/02/2015
Amendment One Issued	09/17/2015
Amendment Two Issued	10/02/2015
Amendment Three Issued	10/14/2015
Amendment Four Issued	10/16/2015
Amendment Five Issued	10/30/2015
Amendment Six Issued	11/23/2015
Amendment Seven Issued	12/01/2015
Amendment Eight Issued	12/18/2015
Amendment Nine Issued	12/21/2015
Amendment 10 Issued	05/17/2016
Amendment 11 suspended solicitation	06/01/2016
Amendment 12 Restarted Procurement	06/15/2016
Intents to Award Posted	08/26/2016
Protest Received	04/24/2020
Amended Protest Received	05/08/2020

The South Carolina State Fiscal Accountability Authority (SFAA) issued this Fixed Price Bid on September 2, 2015, to acquire technologists to augment an agency's information technology staffing. After numerous protests and appeals, initial awards were posted on August 26, 2016. As with all fixed price bids, the State sets the maximum price it is willing to pay for a specific skill set, and any bidder willing to participate at or below that price is awarded a contract. When an agency has need for a technology-related skill set, it makes all participating contractors aware of that need through the Managed Service Provider (MSP). The contractors provide resumes of potential candidates. The agency must select at least three candidates for interview, and the agency determines which candidate is best suited for the position. The candidates must be employed by the contractor submitting their resume. If a project lasts more than three years, the agency must confirm the continuing need and open the position for new candidates.

On April 24, 2020, TSI simultaneously filed this protest and a contract controversy alleging that notification of an available position at the South Carolina Department of Health and Human Services (HHS), position number 9287-1, "has been posted in direct conflict with the letter and intent of the terms and procedures of the underlying contract, with an intention to allow another vendor, already working with and in direct contact (and potentially in a collusory relationship)

with the UGU<sup>1</sup>, to pirate my employee and deny TSI the opportunity to continue this contractual relationship.”

Mr. Michael Burke, until recently a TSI employee, has been in a position at HHS for at least the previous three years requiring HHS to review the continuing need for Mr. Burke’s skill set and open the position up for new candidates. According to the letter of protest, on April 20, 2020, Mr. Burke advised TSI that he had received a better offer from another company and requested a pay raise from TSI. TSI declined. Mr. Burke submitted his letter of resignation on April 21, 2020.

TSI alleges that “DHHS is now attempting to remove TSI’s association, and allow a ‘favored’ and pre-selected vendor to reap the benefits, and it appears, based on the stated maximum rate in the posting, to be coming along with the rate increase, and then some, promised to TSI years ago, so the pre-selected vendor would have the advantage of being able to offer TSI’s employee a raise to lure him from our employment.”

In support of its allegation, TSI suggests following:

The referenced position appears to be the position in which a vendor selected in advance of the posting, plans to, or based on the “On hold” status of the position currently, has already, submitted TSI’s current employee for which this position has been created. This represents advance planning between parties that represents prohibited contact about the status of the position Mr. Burke occupies, and likely indicates a collusory relationship between the pre-selected vendor and the UGU. This is clear because these precluded communications had to have already happened prior to the posting, because this pre-selected vendor had already tendered an offer to TSI’s employee, influencing him to try to extort TSI out of more money, and then tender a notice of resignation to TSI because he was assured he would be placed back into the same position, well before the position was posted on the Beeline application.

TSI amended its protest on May 8, 2020, to include seven other positions posted by HHS, or any other positions posted by HHS or other agencies that could be used to pirate Mr. Burke from TSI:

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<sup>1</sup> Using Governmental Unit (UGU) is also referred to as an agency.

In addition to the most suspicious posted position, there are several other positions that have been posted recently by the UGU in question (Department of Health & Human Services), which might also be construed to “fit” my employee, so positions numbered 9086-1, 9255-1, 9260-1, 9260-1, 9268-1, 9275-1, 9289-1, as well as any submitted past this date, for this UGU or others, should also be watched for activity involving TSI’s current employee, Michael Burke, and included in this protest and investigation by reference.

TSI also alleges that the MSP is complicit in this conspiracy by failing to monitor and prevent precluded communications between vendors and UGUs.

TSI asserts that these actions and omissions violate the Purpose and Policies of the Code as set forth in Section 11-35-20 paragraphs (b), (e), (f), and (g), the Obligation of Good Faith set forth in Section 11-35-20, and constitute anticompetitive practices that must be reported to the Attorney General under Section 11-35-2420. The letter of protest also includes alleged contract violations.

This decision only addresses the protest. The contract controversy will be addressed in a separate posting.

## **ANALYSIS**

TSI’s letter of protest indicates that it is protesting the solicitation, amendments to the solicitation, and post award opportunity notifications:

I am respectfully advising you that Position number 9287-1, recently posted and now reported as “oh hold” on the Beeline application with a “Desired start date” of 5/15/2020, under Solicitation \$5400008056, has been posted in direct conflict with the letter and intent of the terms and procedures of the underlying contract, with an intention to allow another vendor, already working with and in direct contact (and potentially in a collusory relationship) with the UGU, to pirate my employee and deny TSI the opportunity to continue this contractual relationship.

This protest is related to Solicitation number 5400008056, IT Temporary Services, Amendment 1 and the underlying solicitation and remaining amendments (incorporated here as if attached). According to the date of the posting of the position, it was issued on April 18, 2020, indicating that our protest is timely. Please consider this our notice of protest, and a formal, more refined protest document will be provided within the ten (10) days allowed by the SC Code.

In addition to the most suspicious posted position, there are several other positions that have been posted recently by the UGU in question (Department of Health & Human Services), which might also be construed to “fit” my employee, so positions numbered 9086-1, 9255-1, 9260-1, 9260-1, 9268-1, 9275-1, 9289-1, as well as any submitted past this date, for this UGU or others, should also be watched for activity involving TSI’s current employee, Michael Burke, and included in this protest and investigation by reference.

The Code grants prospective bidders, offerors, contractors, or subcontractors the right to protest a solicitation or amendments to the solicitation within certain time limits. Section 11-35-4210(1)(a)<sup>2</sup> provides:

(a) 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.

Solicitation number 5400008056 was issued on September 2, 2015. Amendment 1 was issued on September 19, 2015. The last amendment to the solicitation was issued on June 15, 2016. Clearly the fifteen days from the issuance of the solicitation and its amendments has lapsed.

Section 11-35-4210(1)(b) provides for the protest of awards, except that issues that could have been raised as a protest of the solicitation or amendments cannot be raised as a protest of the award.

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(emphasis added)

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<sup>2</sup> Act 41 of 2019 amended Section 11-35-4210, but those amendments apply only to solicitations issued after its effective date. In any event, the analysis is the same under both versions of Section 11-35-4210.

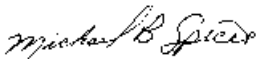
The IT Temporary Services contracts were awarded on August 26, 2016.

The IT Temporary Services contract is a multiple-award mandatory state term contract. If this were a single award state term contract, for goods or services an agency could simply place an order with the awarded contractor. The agency also has the option to ask the contractor for an additional discount prior to placing an order. The decision to order from the state term contract vendor is not protestable. If this were a multiple award contract for goods, the agency would have the option to purchase from any of the awarded contractors or request quotations from one or more of the awarded contractors and order from the contractor providing the best quote below the awarded price. Again, the decision to purchase from a particular contractor is not protestable. If the contract is a fixed price state term contract, the Code states that failure to receive orders cannot be the subject of a contract controversy. S.C. Code § 11-35-1525(9) (2006). The IT Temporary Services is a fixed price state term contract that requires agencies to notify interested contractors of available opportunities through the MSP, receive resumes, conduct at least three interviews, and select the candidate the agency determines most appropriate. This is a contractual performance obligation, not a solicitation subject to protest under Section 11-35-4210.

## **DECISION**

For the reasons stated above, the protest of Technology Solutions, Inc. is dismissed.

For the Information Technology Management Office



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Michael B. Spicer  
Chief Procurement Officer

Attachment 1



May 8, 2020

Michael Spicer  
Chief Procurement Officer  
SFAA Procurement Services  
1201 Main Street, Suite 600  
Columbia, SC 29201

RE: Technology Solutions, Inc. Protest

Dear Mr. Spicer,

I am respectfully advising you that Position number 9287-1, recently posted and now reported as "oh hold" on the Beeline application with a "Desired start date" of 5/15/2020, under Solicitation \$5400008056, has been posted in direct conflict with the letter and intent of the terms and procedures of the underlying contract, with an intention to allow another vendor, already working with and in direct contact (and potentially in a collusory relationship) with the UGU, to pirate my employee and deny TSI the opportunity to continue this contractual relationship.

This protest is related to Solicitation number 5400008056, IT Temporary Services, Amendment 1 and the underlying solicitation and remaining amendments (incorporated here as if attached). According to the date of the posting of the position, it was issued on April 18, 2020, and our notice of protest was filed on April 24, 2020, indicating that our protest is timely.

In addition to the most suspicious posted position, there are several other positions that have been posted recently by the UGU in question (Department of Health & Human Services), which might also be construed to "fit" my employee, so positions numbered 9086-1, 9255-1, 9260-1, 9260-1, 9268-1, 9275-1, 9289-1, as well as any submitted past this date, for this UGU or others, should also be watched for activity involving TSI's current employee, Michael Burke, and included in this protest and investigation by reference.

It is also important to note that even the simplest of reports that can be pulled from the Beeline application in seconds, still have not been forwarded to me since my request. Had I been able to correctly match ONLY the positions that are relative to Mr. Burke, those could be the sole focus of this protest. I would also know the name of the pre-selected vendor who has submitted Mr. Burke on the Beeline application for consideration, as the position I feel is most likely the one earmarked for him, is showing as "on hold" as of now. It is a bit unfair to expect a vendor to be able to file a concise and accurate protest without the ability to obtain even the most basic of information necessary to narrow it down.

Regardless of these unfair and restrictive conditions, please consider this our final notice of protest within the deadlines afforded by the SC Code.

**History:**

TSI has borne the risk and expense of employment of a legitimately W2 salaried, individual, Michael Burke, with the benefits that accompany that, for the life of a position assigned to SC DHHS, and now is being deprived of the right to receive anything for those efforts. TSI is responsible for introducing this employee to DHHS, and even took measures to retain him (i.e. giving him a substantial raise in pay), per DHHS' request, when another company outside the state tried to hire him away a few years ago. Commitments were made by DHHS to adjust his bill rate to cover that large cost increase to TSI, but that was only partially fulfilled (pennies on the dollar against what was promised), restricting TSI's ability to keep pace with the inflated rates being offered by vendors who pay no benefits and offer only hourly positions, masquerading as W2 arrangements, when they are clearly a 1099 relationship, by any definition.

On or about April 10, 2020, it came to TSI's attention, by way of a phone call from Mr. Burke demanding more money, that there was something going on behind the scenes regarding the new position to which he would likely be placed into at SC DHHS. He referred to "another vendor" who could "pay him a higher hourly rate." TSI responded to Mr. Burke with a detailed accounting showing him what all of his vacation pay, holiday pay, benefits, and required taxes paid on his behalf, were worth, since he is a bona-fide, W2 and salaried employee of TSI, and even gave him the option to become hourly paid, but informed him there were some costs TSI still had to bear since he was not allowed to work as a 1099 employee under this contract. His response, without benefit of further discussion between us, indicating he was being coached to not respond, was in the form of a termination letter emailed by Mr. Burke on April 21, 2020. It was clear to TSI that Mr. Burke had been pirated by another vendor due to communications precluded under the current solicitation, and a collusive and conspiratorial sequence of events had unfolded with the sole purpose to cut TSI out of the deal, and rob us of an important contract position.

TSI believes Mr. Burke may also be in danger of being taken advantage of, as it appears he is being offered an hourly rate, without any of the "frills" he has enjoyed for 6 years with TSI, and he may be misinformed as to how much of that newfound "wealth" he may have to send out to meet taxation obligations and other expenses that will now become his responsibility alone. But DHHS is now attempting to remove TSI's association, and allow a "favored" and pre-selected vendor to reap the benefits, and it appears, based on the stated maximum rate in the posting, to be coming along with the rate increase, and then some, promised to TSI years ago, so the pre-selected vendor would have the advantage of being able to offer TSI's employee a raise to lure him from our employment.

It is apparent to us and anyone else working under the afore-mentioned contract, that there is no monitoring by the MSP or the individual UGUs to prevent precluded communications between vendors and UGUs. In fact, they have admitted, in regards to TSI's FOIA request, that they do not monitor such interactions, as they are bound to do as per the contract between them and the State. In the case of the position specified here (or any other that may be substituted for it for the purpose of keeping TSI's employee, Mr. Burke, in his current position with SC DHHS), Mr. Burke has occupied that position since we placed him into it during the 5-year contract period prior to the current one. As the time for its natural expiration approached, TSI made numerous attempts to learn the status and plans for this position so that we could prepare Mr. Burke's resume and market him to other opportunities, in the event SC DHHS did not plan to repost and refill the position with Mr. Burke.

Michael Spicer

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TSI's inquiries were met with no response, which has been an issue throughout the life of the contract, and quite unfairly applied, as other vendors seem to be "in and out" of the agency all the time, and have no trouble gaining an audience with the UGU managers. Although the contract allows contact between the vendor that placed an individual with a UGU and that UGU, for the purpose of managing and evaluating its employees on assignment, and checking status of the position occupied by them, during the entire tenure of Mr. Burke's employment and placement at SC DHHS, the communications from TSI that received a response over those many years can be counted on less than one hand. Not only does that prevent TSI from monitoring and evaluating its own employees, but is in direct violation of the treatment of contractors assigned to companies, as confirmed in lawsuits dating back to the Microsoft case years ago, and many since, placing liability for employee benefits, retirement benefits, etc., squarely with the hiring company (in this case, SC DHHS), and no one else. In this particular case, it was apparent that "other arrangements" with a pre-selected vendor (one of those that is afforded the ability to remain in constant contact with the agency) to keep Mr. Burke in his position working for SC DHHS, had been made. Communications between the UGU and any other vendor for the purpose of soliciting a different vendor to take over the position at the time of the new posting, had to have occurred, and TSI was, unfortunately, unprofessionally, without reason, and illegally, the last to hear about it, as the pre-selected vendor and the UGU managers plotted together to pirate TSI's employee.

TSI also believes your MSP has culpability in this, as they are responsible for ensuring that relationships such as that between the pirating vendor and UGU management are not established and allowed to continue, as this one has for the life of this contract and before.

Beyond the clear matter of TSI's employee being pirated by an existing vendor with SC DHHS, by communicating with and colluding with the UGU supervising manager for this position (or the specific one used for this purpose if not the one referenced), the referenced position description is a direct reflection of my employee's resume and prior experience at SC DHHS under TSI's contract. The position description also contains statements and specificity that would tend to preclude any candidates OTHER THAN my employee, thereby chilling competition overall. Additionally, the position appears to allow a billing rate increase to support the offending vendor's being able to lure my employee with a higher pay rate than TSI could afford under the old rate. TSI has attempted, for the life of the contract after the first year, as specified in the contract, to obtain a rate increase to be able to adjust its employee's pay, but with the exception of a few dollars' increase (after promising much more) offered a few years back, after TSI gave this employee a raise to retain him at DHHS' request, has been denied a rate increase. Due to that earlier incident, TSI has been working at a less than ideal profit margin for this position, because of the raise given to Mr. Burke, for which TSI was promised an offsetting bill rate increase if we would "do what we had to do" to keep him for DHHS' use. So now, a new vendor that has not had to bear the additional expense of this unsupported pay raise, gets to come in, get the increase in bill rate promised to TSI, and likely more, and enjoy full profitability for the employee we recruited and introduced to the agency. It appears this current activity violates the contractual terms regarding UGU behavior, and the overall Code of Ethics for treating vendors equally and fairly for this contract as well.

The referenced position appears to be the position in which a vendor selected in advance of the posting, plans to, or based on the "On hold" status of the position currently, has already, submitted TSI's current employee for which this position has been created. This represents advance planning between parties that represents prohibited contact about the status of the position Mr. Burke occupies, and likely indicates a collusory relationship between the pre-selected vendor and the

UGU. This is clear because these precluded communications had to have already happened prior to the posting, because this pre-selected vendor had already tendered an offer to TSI's employee, influencing him to try to extort TSI out of more money, and then tender a notice of resignation to TSI because he was assured he would be placed back into the same position, well before the position was posted on the Beeline application. This violates the underlying contract to the extent that the offending vendor should be removed from participating in the contract, according to the terms of the contract.

While TSI is the primary victim in this unethical plot, as referenced above, there is reason to believe that Mr. Burke may also be an unwitting victim. He is somewhat naïve in the ways in which vendors manipulate facts, and we have reason to believe that he is not actually receiving a boost in pay, as when the total of his salary, plus leave time, plus holiday pay, plus statutory contributions by an employer of a legitimate W2 employee, plus benefits is totaled, it will likely match or even surpass the hourly rate he is currently being offered that appears to afford NONE of those additional items. Mr Burke brought to our attention years ago, the relationship the vendor that now appears poised to pirate him, has with the UGU managers. He indicated that at one point, all those managers were given expensive iPhones as "gifts" by this vendor, and he, himself was offered one. After I told him how illegal it would be for him or the UGU managers to accept such a gift, he changed the subject, but I've always assumed he actually took the phone, as he had commented on his "new phone" during the same time we had that discussion. It is our belief that we are now seeing the other side of the "quid pro quo" attached to that gift given many years ago. Regardless, it is clear that unethical and illegal activities are continuing to define the manner in which IT procurements in this state are run, and now they are so bold as to actually collude to put TSI out of business.

**Protest:**

Violations of the SC Consolidated Procurement Code:

1. The contract and referenced position(s) violate **§11-35-20 (b)**

This section outlines the purpose and policies of the SC Procurement Code, and indicates that it must "Foster effective broad-based competition for public procurement within the free enterprise system." The manner in which the referenced contract is run, and the specific nature of activities surrounding the referenced position(s) that has resulted in the attempted (or actual) piracy of TSI's long-time employee, does not support that mission, and chills competition for all but a very few vendors that have attained "favored" status.

2. The contract and referenced position(s) violate **§11-35-20 (e)**

This section requires the "adoption of competitive procurement laws and practices by units of state and local governments." The Procurement Code and the officers or their agents who are bound to enforce it, provide no oversight to ensure that the units of state and local governments are operating in a competitive manner. This is illustrated by the current violations surrounding the referenced contract and position(s) that are being allowed to progress.

3. The contract and referenced position(s) violate **§11-35-20 (f)**

It is the duty of the officers enforcing the Procurement Code “to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement.” Clearly, as illustrated by the actions that have taken place in the referenced situation, there is no consideration to the fair and equitable treatment of vendors who participate in this contract.

4. The contract and referenced position(s) violate **§11-35-20 (g)**

It is the responsibility of those enforcing the Procurement Code “to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process.” With no clear rules, no monitoring by procurement officers or their agents, TSI has been treated unethically in this matter and it must not be allowed to stand.

5. The contract and referenced position(s) violate **§11-35-30**

The manner in which this contract has been and is currently being run, and well-illustrated by the current matter, indicates that the state has violated their obligation of good faith in “its negotiation, performance or enforcement. ‘Good faith’ means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.” Clearly, there are no reasonable standards of honesty or fair dealing that would allow the collusion of an UGU and pre-selected “favored” vendor, to pirate another vendor’s employee(s), while that vendor is operating in good faith, and is not allowed to be privy to any discussions regarding its work, status of its employee, or future plans for that employee.

6. The contract and referenced position(s) violate **§11-35-410**

This section of the Code allows public access to procurement information, yet even by request, this vendor has been unable to obtain reports and information that was long ago promised to be readily available via the Beeline application, in order to further and support this protest. TSI’s FOIA has been ignored, even as to very simple reports that anyone with access to the Beeline application, could have produced in minutes and forwarded to TSI by email, specific, at the very least, to the name of the vendor attempting to pirate TSI’s employee, and the position number associated.

7. The contract and referenced position(s), pursuant to **§11-35-2420**, requires action by employees of the state to which this evidence of anticompetitive practices has been reported.

TSI has clearly presented information and allegations concerning anticompetitive practices among “any bidders or offerors.” Therefore, “immediate notice of the relevant facts shall be transmitted to the Office of the Attorney General.” To our knowledge, this has never been done.

Violations of the pertinent contract’s terms and conditions:

8. The behavior of the pre-selected vendor has violated the terms of the contract, specifically Section III, items 2, 4, 17 and 15, as well as the section entitled “Supplier contracts may be suspended or terminated for reasons to include, but not be limited to the following: Any direct marketing of Candidates by Supplier to a Business Unit Manager outside of the parameters set forth in the State Term Contract”).

Clearly, these precluded communications had to take place to pre-plan and pirate TSI's employee, and work with the UGU to submit our employee to the position created to replace the expiring one. As a result, the offending vendor must be removed from the contract immediately.

9. There also appear to be violations of the section entitled "Additional Information," which outlines the Responsibilities of Using Governmental Units (UGUs).

According to the section entitled Responsibilities of UGUs, "Position requirements received directly from a UGU Manager are not to be considered valid and approved." In order for the pre-planning to have occurred, the pre-selected vendor must have been given the position requirements in advance of their posting, and rate discussions had to have occurred as well, as the position was posted AFTER Mr. Burke was influenced by what he perceived as an increase in pay, a guarantee of continued employment with the same tasks and responsibilities with DHHS, and acted upon that influence to proffer a letter of termination to TSI.

See following specific contract terms violated:

#### Section III. Scope of Work

##### **SUPPLIER REQUIREMENTS**

1. **Contact with UGUs:** Except as otherwise requested or directed by the MSP, Supplier will work directly and exclusively with the MSP with respect to Supplier's services hereunder and with respect to Supplier Personnel and will not communicate directly with the UGU regarding such. The parties agree that this restriction is not intended to restrict or prohibit necessary day-to-day communication between Supplier Personnel and UGU with regard to services being performed. MSP will assist Supplier in resolving any time reporting and billing issues and Supplier agrees that in no event will it contact or communicate with UGU regarding same.
  - a. UGU Managers are not permitted to distribute position requirements directly to Supplier. Position requirements received directly from a UGU Manager are not to be considered valid and approved. In the event Supplier receives a call from a UGU Manager to discuss a position requirement, Supplier must advise the UGU Manager to contact the appropriate MSP/VMS Program Office representative(s).
  - b. Suppliers may only have contact with the UGUs for the following reasons:
    - i. To discuss current, on-boarded staff
    - ii. To discuss a current posting through a pre-arranged, MSP managed phone conference with other interested suppliers. Basic ground rules will be established by the MSP but at a minimum neither names of Consultants nor names of Supplier companies will be mentioned during calls.
4. **Supplier's Personnel:** Supplier Personnel provided hereunder must be W2-hourly employees of the Supplier and not 1099 employees. **It is understood and agreed that any Consultant assigned to the UGU is an employee of the Supplier and Supplier warrants that Supplier bears the sole responsibility for payment of compensation to Supplier Personnel including, but not limited to, salary, wages, vacation/holiday pay, insurance, benefits, contributions, and taxes relating to their employment.** Supplier agrees that supplier personnel provided hereunder are W2 employees of Supplier and in no event shall

be considered employees of MSP, UGU or the state of South Carolina. Supplier acknowledges that Supplier Personnel are not entitled to any rights, benefits or privileges provided by MSP, UGU or the state of South Carolina to their own employees, and Supplier warrants that this information has been communicated to Supplier Personnel prior to the provision of services under the contract. Depending on the UGU, the temporary personnel may be asked to sign additional information security documents, confidentiality documents, acceptable use policies, and access agreements. This does not construe any employment agreement.

- 17. Conflict of Interest:** Consultants may not approve any timesheets or hours worked. Only Full-Time Equivalent (FTE) Employees of the UGU may approve hours worked and timesheets.

**Temporary IT Consultants must not be involved in the approval process for hiring any Temporary IT Consultants and may not be allowed to be a delegate of any UGU employee. Hiring decisions must be made by a FTE Employee of the UGU. Active Consultants may review resumes and provide input, but the complete and final decision must be that of the UGU.**

- 25. Candidate Submittal While On Assignment:** Candidates who are on a State of SC UGU assignment can only be submitted for other UGU assignments within thirty (30) days of current assignment expiration date identified within the VMS tool, so long as there is no action by the UGU on the current assignment to extend the Contractor beyond that end date. Furthermore, once an extension request has been issued for the Contractor and accepted on their behalf by the Supplier, the Candidate must be withdrawn by its representing Supplier immediately from all current job postings within the VMS tool.

**Supplier contracts may be suspended or terminated for reasons to include, but not be limited to the following:**

- Any direct marketing of Candidates by Supplier to a Business Unit Manager outside of the parameters set forth in the State Term Contract

**ADDITIONAL INFORMATION**

**Responsibilities of Using Governmental Units (UGUs):**

4. In adherence to Supplier neutral/Supplier fair program, UGU's are prohibited from discussing current or future IT Temp contingent workforce opportunities directly with individual Suppliers. All discussions regarding such opportunities must be facilitated through the MSP which will coordinate the necessary Supplier calls to discuss such opportunities. Pre-Identified candidates to fulfill an IT Temp contingent workforce posting is prohibited. The Supplier neutral/Supplier fair process via the VMS tool adhering to a Supplier neutral/Supplier fair process must be followed. The marketing of Candidates must be processed through the VMS tool and cannot be managed outside of the established process. UGU Managers are not permitted to distribute position requirements directly to Supplier. Position requirements received directly from a UGU Manager are not to be considered valid and approved.

5. **Candidate Submission Feedback Requirements:** After UGU review of candidate qualifications, should the candidate be identified as not meeting the UGU's need to perform the required tasks and duties outlined in the job posting, UGU should reject the candidate providing a brief commentary on how the resume did not meet the managers needs and/or qualifications. Any request to the MSP by the UGU to reopen a job posting to obtain additional resumes for consideration will first require the UGU to address all existing Candidate submissions and update the submission status. (Complete all interview performance ratings where applicable; reject Candidates no longer in consideration, request interviews or follow-up interviews, etc.) Additionally UGU should provide the MSP overall Candidate feedback in writing that will be provided to the Supplier community in order to ensure areas of focus are determined.

**Summary:**

- There has been ongoing communication, precluded by the contract, between vendor management and UGU management to collude to pirate my employee and award the position for the SAME WORK, to another vendor. This is in direct violation of Section III, items 2, 4, 17 and 25 of the solicitation.
- It is stated in that same section III, under the heading "Supplier contracts may be suspended or terminated for reasons to include, but not be limited to the following: Any direct marketing of Candidates by Supplier to a Business Unit Manager outside of the parameters set forth in the State Term Contract." I believe the offending vendor must be removed from the contract immediately, based on these obvious communications.
- Due to the communications clearly evidenced by the advanced planning required to influence my employee to tender his resignation, concurrent with the dates required to finish the contract with TSI, and to be able to start the new contract from the same chair, the following business day after the TSI contract termination date, with the offending vendor, it is clear that violations of the section entitled "Additional Information," which outlines the Responsibilities of Using Governmental Units (UGUs), have also occurred.
- The sum of these violations and infractions amount to several violations of the SC Procurement Code as regards ethics, anticompetitive practices, fair and equitable treatment, and good faith, to mention a few.
- The State's MSP vendor also has culpability in this activity, as it is their responsibility for ensuring that relationships such as that between the pirating vendor and UGU management are not established and allowed to continue, as this one has for the life of the contract and before. While, to a large vendor, adding or losing a single contract assignment means nothing to their overall bottom line, to a small company such as TSI, with very limited opportunity to work under this contract due to the precluded communications that continue to happen (pre-selected candidates, etc. as we've discussed before), that has also been allowed to continue under this MSP's tenure, losing a contract assignment can well mean having to close TSI after nearly 31 years in operation. Additionally, it appears that many vendors, including the one attempting to pirate my employee, are claiming to be employing their staff as W2 employees, but there is no evidence to suggest these staff are anything other than 1099 employees. That, too, is the

responsibility of the MSP to ascertain and manage to keep this in compliance with the terms of the contract that specifically precludes the use of 1099 employees.

- Amendment 1 to this solicitation, specifically Page 4, questions 6, 7, 9 and 10, has indicated that all such claims regarding precluded communications, ethical considerations, and management of UGU activities, among other things, must be investigated by the Procurement office, and that if such communications have occurred, the offending vendor must be removed from this contract.

**Remedies:**

- Assist TSI in identifying the vendor, or vendors, operating in violation of the communications terms and conditions, and using this precluded communication to pre-plan the activities necessary or them to pirate our employee.
- Release the offending vendor(s) from the contract, requiring all positions awarded to them to be rebid, including the one being reserved for Mr. Burke, and prevent another vendor from being able to submit Mr. Burke into another position under this contract, unless he has been officially released, in writing, by TSI. Although the release of offending vendors is required by the contract, an alternative to this drastic measure would be to require the offending vendor(s) that are pirating Mr. Burke from TSI, to pay TSI a finder's fee equivalent to 60% of his new salary (or translated hourly rate), but not less than the current salary plus benefits, he is being paid by TSI. Alternatively, TSI may be open to negotiating a portion of the hourly rate received by the offending vendor, with certain protections in place to ensure an adequate fee is paid to TSI for releasing its employee prematurely. We would also consider a sub-contracting arrangement, again, with certain protective terms and restrictions to ensure TSI is adequately compensated.
- Rewrite the contract when it comes up for rebid in 2021 to specifically prohibit the pirating of one vendors' employees by other vendors, for the purpose of placement on this same contract, without the specific authorization and approval of the first vendor, or after a specified waiting period of at least 180 days.
- Report this activity to the Attorney General and request an investigation into possible anti-competitive practices taking place under Contract 5400001342. Use that investigation to release vendors out of compliance with the existing contract and to inform the implementation of a new and improved contract vehicle for the procurement of IT Temporary Services.

Please see associated contract controversy filed in accordance with the SC Procurement Code, related to the overall contract, as well as the position referenced here, or any others into which Mr. Burke has been, or may be, submitted into, and selected for and/or onboarded by the Beeline/VMS system.

Respectfully submitted,



Cathy G. Lanier  
President

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

### *Protest Appeal Notice (Revised June 2019)*

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.

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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>

**FILING FEE:** Pursuant to Proviso 111.1 of the 2019 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**  
**1205 Pendleton Street, Suite 367, Columbia, SC 29201**

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\_\_\_\_\_  
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: \_\_\_\_\_

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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.**