

CLAUSES FOR USE IN DESIGN-BUILD CONTRACTS

1. Economic Conflict of Interest (2011): A contractor shall not have or exercise any official responsibility regarding a public contract in which the contractor, or a business with which he is associated, has an economic interest. A person working for contractor shall not have or exercise any official responsibility regarding a public contract in which the person, an individual with whom he is associated, or his family members have an economic interest. If contractor is asked by any person to violate, or does violate, either of these restrictions, contractor shall immediately communicate such information to the procurement officer. The state may rescind, and recover any amount expended as a result of, any action taken or contract entered in violation of this provision. The terms "business with which he is associated," "economic interest," "family member," "immediate family," "individual with whom he is associated," "official responsibility" and "person" have the meanings provided in Section 8-13-100.
2. ILLEGAL IMMIGRATION:
 - a. Contractor certifies and agrees that it will comply with the applicable requirements of Title 8, Chapter 14 of the South Carolina Code of Laws and agrees to provide to the State upon request any documentation required to establish either that:
 - 1) Title 8, Chapter 14 is inapplicable both to Contractor and its subcontractors or sub-subcontractors; or
 - 2) Contractor and its subcontractors or sub-subcontractors are in compliance with Title 8, Chapter 14. Pursuant to SC Code § 8-14-60, "A person who knowingly makes or files any false, fictitious, or fraudulent document, statement, or report pursuant to this chapter is guilty of a felony and, upon conviction, must be fined within the discretion of the court or imprisoned for not more than five years, or both."
 - b. Contractor agrees to include in any contracts with its subcontractors language requiring its subcontractors to
 - 1) comply with the applicable requirements of Title 8, Chapter 14, and
 - 2) include in their contracts with the sub-subcontractors language requiring the sub-subcontractors to comply with the applicable requirements of Title 8, Chapter 14. (An overview is available at www.procurement.sc.gov)
3. DRUG-FREE WORKPLACE: The Contractor certifies to the Owner that Contractor will provide a Drug-Free Workplace, as required by Title 44, Chapter 107 of the South Carolina Code of Laws, as amended.
4. FALSE CLAIMS: According to the SC Code § 16-13-240, "a person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty" of a crime.
5. NON-INDEMNIFICATION: Any term or condition is void to the extent it requires the State to indemnify anyone. It is unlawful for a person charged with disbursements of state funds appropriated by the General Assembly to exceed the amounts and purposes stated in the appropriations. (SC Code § 11-9-20) It is unlawful for an authorized public officer to enter into a contract for a purpose in which the sum is in excess of the amount appropriated for that purpose. It is unlawful for an authorized public officer to divert or appropriate the funds arising from any tax levied and collected for any one fiscal year to the payment of an indebtedness contracted or incurred for a previous year. (SC Code § 11-1-40)
6. CLAIMS AND DISPUTE RESOLUTION
 - a. **Duty of Cooperation**:
 - 1) Contractor and Owner are fully committed to working with each other throughout the Project to avoid or minimize claims. To further this goal, Contractor and Owner agree to communicate regularly with each other at all times notifying one another as soon as reasonably possible of any issue that if not addressed may cause loss, delay, and/or disruption of the Work. If claims do arise, Contractor and Owner each commit to resolving such claims in an amicable, professional, and expeditious manner to avoid unnecessary losses, delays, and disruptions to the Work.
 - 2) In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.
 - b. **Resolution of Disputes**:
 - 1) If a claim is not resolved pursuant to Section 1 above to the satisfaction of either party, both parties shall attempt to resolve the dispute at the field level through discussions between Contractor's Representative and Owner's Representative. If a dispute cannot be resolved through Contractor's Representative and Owner's Representative, then the Contractor's Senior Representative and the Owner's Senior Representative, upon the request of either party, shall meet as soon as conveniently possible, but in no case later than twenty-one days after such a request is made, to attempt to resolve such dispute. Prior to any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving their dispute. The meetings required by this Section are a condition precedent to resolution pursuant to Section 2.b.

- 2) If after meeting in accordance with the provisions of Section 2.a., the Senior Representatives determine that the dispute cannot be resolved on terms satisfactory to both the Contractor and the Owner, then either party may submit the dispute by written request to South Carolina's Chief Procurement Officer for Construction (CPOC). Except as otherwise provided in this Article, all claims or controversies relating to the Contract shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for or a federal court located in, Richland County, State of South Carolina. Contractor agrees that any act by the State regarding the Contract is not a waiver of either the State's sovereign immunity or the State's immunity under the Eleventh Amendment of the United State's Constitution.
- 3) If any party seeks resolution to a dispute pursuant to Section 2.b., the parties shall participate in non-binding mediation to resolve the claim. If the claim is governed by Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws as amended and the amount in controversy is \$100,000.00 or less, the CPOC shall appoint a mediator, otherwise, the mediation shall be conducted by an impartial mediator selected by mutual agreement of the parties, or if the parties cannot so agree, a mediator designated by the American Arbitration Association ("AAA") pursuant to its Construction Industry Mediation Rules. The mediation will be governed by and conducted pursuant to a mediation agreement negotiated by the parties or, if the parties cannot so agree, by procedures established by the mediator.
- 4) Without relieving any party from the other requirements of this Article, either party may initiate proceedings in the appropriate forum prior to initiating or completing the procedures required by Sections (a) and (b)(1) if such action is necessary to preserve a claim by avoiding the application of any applicable statutory period of limitation or repose.
- 5) **SERVICE OF PROCESS** - Contractor consents that any papers, notices, or process necessary or proper for the initiation or continuation of any claims, claims, or controversies relating to the Contract; for any court action in connection therewith; or for the entry of judgment on any award made, may be served on Contractor by certified mail (return receipt requested) addressed to Contractor at the address provided for the Contractor's Senior Representative or by personal service or by any other manner that is permitted by law, in or outside South Carolina. Notice by certified mail is deemed duly given upon deposit in the United States mail.

7. PRICING DATA AND AUDIT:

- a. **Cost or Pricing Data** - Upon request of the Owner, Contractor shall submit cost or pricing data prior to execution of a Modification which exceeds \$100,000. Contractor shall certify that, to the best of its knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of a mutually determined specified date prior to the date of pricing the Modification. Contractor's price, including profit, shall be adjusted to exclude any significant sums by which such price was increased because Contractor furnished cost or pricing data that was inaccurate, incomplete, or not current as of the date specified by the parties. Notwithstanding Subparagraph 9.10.4, such adjustments may be made after final payment to the Contractor.
- b. **Cost or pricing data** means all facts that, as of the date specified by the parties, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.
- c. **Records Retention** - The term "records" means any books or records that relate to cost or pricing data that Contractor is required to submit pursuant to SC Code § 7.6.1. Contractor shall maintain records for three years from the date of final payment, or longer if requested by the chief procurement officer. The Owner may audit Contractor's records at reasonable times and places.

8. INTELLECTUAL PROPERTY INDEMNITY:

- a. Without limitation and notwithstanding any other provision in this agreement, Design-Builder shall, upon receipt of notification, defend and indemnify the Indemnitees against all actions, proceedings or claims of any nature (and for all damages, settlement payments, attorneys' fees, costs, expenses, losses or liabilities attributable thereto) by any third party asserting or involving Intellectual Property (IP) rights related to the Instruments of Service. Design-Builder's obligations under this paragraph do not apply to a claim to the extent that:
 - 1) the claim is caused by Design-Builder's compliance with a detailed, exact statement of particulars (such as a statement prescribing materials, dimensions, and quality of work) furnished by the State unless Design-Builder knew its compliance with the State's specifications would infringe an IP right, or

- 2) the claim is caused by Design-Builder's compliance with a detailed, exact statement of particulars furnished by the State if the State knowingly relied on a third party's IP right to develop the specifications provided to Design-Builder and failed to identify such product to Design-Builder.
 - b. The State must reasonably cooperate with Design-Builder's defense of such claims or suits and, subject to Title 1, Chapter 7 of the South Carolina Code of Laws, may allow Design-Builder sole control of the defense, so long as the defense is diligently and capably prosecuted. The State may participate in the defense of any action.
 - c. Design-Builder's obligations under this clause shall survive the termination, cancellation, rejection, or expiration of this Agreement.
 - d. "IP rights" means any rights protected by the laws governing patents, copyrights, trademarks, trade secrets, or any other proprietary rights. As used in this paragraph, "Indemnitees" means the State (including its instrumentalities, agencies, departments, boards, and political subdivisions), the contractor, the subcontractors at all tiers, and the officers, agents and employees of all the forgoing.
9. **OPEN TRADE (JUN 2015):** During the contract term, including any renewals or extensions, Contractor will not engage in the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in SC Code § 11-35-5300.