

## **CLAUSES FOR USE IN CONSTRUCTION MANAGEMENT AT-RISK RFQ**

1. **Disclosure of Conflicts of Interest or Unfair Competitive Advantage** : You warrant and represent that your offer identifies and explains any unfair competitive advantage you may have in competing for the proposed contract and any actual or potential conflicts of interest that may arise from your participation in this competition or your receipt of an award. Without limitation, an unfair competitive advantage exists where a contractor competing for award possesses either proprietary information that was obtained from a government official without proper authorization or source selection information (as defined in Regulation 19-445.2010(C)) that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract. If you have an unfair competitive advantage or a conflict of interest, the state may withhold award. Before withholding award on these grounds, an Offeror will be notified of the concerns and provided a reasonable opportunity to respond. Efforts to avoid or mitigate such concerns, including restrictions on future activities, may be considered.
2. **CERTIFICATION OF INDEPENDENT PRICE DETERMINATION: GIVING FALSE, MISLEADING, OR INCOMPLETE INFORMATION ON THIS CERTIFICATION MAY RENDER YOU SUBJECT TO PROSECUTION UNDER SECTION 16-9-10 OF THE SOUTH CAROLINA CODE OF LAWS AND OTHER APPLICABLE LAWS.**
  - a. By submitting an offer, the Offeror certifies that—
    - 1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other Offeror or competitor relating to—
      - (a) Those prices;
      - (b) The intention to submit an offer; or
      - (c) The methods or factors used to calculate the prices offered.
    - 2) The prices in this offer have not been and will not be knowingly disclosed by the Offeror, directly or indirectly, to any other Offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and
    - 3) No attempt has been made or will be made by the Offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.
  - b. Each signature on the offer is considered to be a certification by the signatory that the signatory—
    - 1) Is the person in the Offeror's organization responsible for determining the prices being offered in this offer, and that the signatory has not participated and will not participate in any action contrary to paragraphs 2.a(1) through 2.a(3) of this certification; or
    - 2) (a) Has been authorized, in writing, to act as agent for the Offeror's principals in certifying that those principals have not participated, and will not participate in any action contrary to paragraphs 2.a(1) through 2.a(3) of this certification [As used in this subdivision 2.b(2)(a), the term "principals" means the person(s) in the Offeror's organization responsible for determining the prices offered in this bid];
      - (b) As an authorized agent, does certify that the principals referenced in subdivision 2.b(2)(a) of this certification have not participated, and will not participate, in any action contrary to paragraphs 2.a(1) through 2.a(3) of this certification; and
      - (c) As an agent, has not personally participated, and will not participate, in any action contrary to paragraphs 2.a(1) through 2.a(3) of this certification.
  - c. If the Offeror deletes or modifies paragraph 2.a(2) of this certification, the Offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure.
3. **CERTIFICATION REGARDING DEBARMENT AND OTHER RESPONSIBILITY MATTERS:**
  - a. By submitting an offer, Offeror certifies, to the best of its knowledge and belief, that-
    - 1) Offeror and/or any of its Principals-
      - (a) Are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any state or federal agency;
      - (b) Have not, within a three-year period preceding this bid, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of bids; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; and

- (c) Are not presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in paragraph 3.a(1)(b) of this provision.
- 2) Offeror has not, within a three-year period preceding this bid, had one or more contracts terminated for default by any public (Federal, state, or local) entity.
- b. "Principals," for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).
- c. Offeror shall provide immediate written notice to the Procurement Officer if, at any time prior to contract award, Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
- d. If Offeror is unable to certify the representations stated in paragraphs 3.a, Offeror must submit a written explanation regarding its inability to make the certification. The certification will be considered in connection with a review of the Offeror's responsibility. Failure of the Offeror to furnish additional information as requested by the Procurement Officer may render the Offeror nonresponsible.
- e. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by paragraph 3.a of this provision. The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
- f. The certification in paragraph 3.a of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly or in bad faith rendered an erroneous certification, in addition to other remedies available to the State, the Procurement Officer may terminate the contract resulting from this solicitation for default.
4. **ETHICS CERTIFICATE:** By submitting an offer, the Offeror certifies that the Offeror has and will comply with, and has not, and will not, induce a person to violate Title 8, Chapter 13 of the South Carolina Code of Laws, as amended (ethics act). The following statutes require special attention: SC Code § 8-13-700, regarding use of official position for financial gain; SC Code § 8-13-705, regarding gifts to influence action of public official; SC Code § 8-13-720, regarding offering money for advice or assistance of public official; SC Code §§ 8-13-755 and 8-13-760, regarding restrictions on employment by former public official; Section 8-13-775, prohibiting public official with economic interests from acting on contracts; SC Code § 8-13-790, regarding recovery of kickbacks; SC Code § 8-13-1150, regarding statements to be filed by consultants; and SC Code § 8-13-1342, regarding restrictions on contributions by contractor to candidate who participated in awarding of contract. The state may rescind any contract and recover all amounts expended as a result of any action taken in violation of this provision. If contractor participates, directly or indirectly, in the evaluation or award of public contracts, including without limitation, change orders or task orders regarding a public contract, contractor shall, if required by law to file such a statement, provide the statement required by SC Code § 8-13-1150 to the procurement officer at the same time the law requires the statement to be filed.
5. **RESTRICTIONS APPLICABLE TO OFFERORS & GIFTS:** Violation of these restrictions may result in disqualification of your bid, suspension or debarment, and may constitute a violation of the state Ethics Act.
- a. After issuance of the solicitation, ***Offeror agrees not to discuss this procurement activity in any way with the Owner or its employees, agents or officials.*** All communications must be solely with the Procurement Officer. This restriction may be lifted by express written permission from the Procurement Officer. This restriction expires once a contract has been formed.
- b. Unless otherwise approved in writing by the Procurement Officer, ***Offeror agrees not to give anything to the Owner, any affiliated organizations, or the employees, agents or officials of either, prior to award.***
- c. Offeror acknowledges that the policy of the State is that a governmental body should not accept or solicit a gift, directly or indirectly, from a donor if the governmental body has reason to believe the donor has or is seeking to obtain contractual or other business or financial relationships with the governmental body. SC Regulation 19-445.2165(C) broadly defines the term donor.
6. **NONRESIDENT TAXPAYER REGISTRATION AFFIDAVIT INCOME TAX WITHHOLDING (IMPORTANT TAX NOTICE - NONRESIDENTS ONLY):**
- a. Withholding Requirements for Payments to Nonresidents: SC Code § 12-8-550 requires persons hiring or contracting with a nonresident conducting a business or performing personal services of a temporary nature within South Carolina to withhold 2% of each payment made to the nonresident.
- b. The withholding requirement does not apply to:
- 1) payments on purchase orders for tangible personal property when the payments are not accompanied by services to be performed in South Carolina,
  - 2) nonresidents who are not conducting business in South Carolina,
  - 3) nonresidents for contracts that do not exceed \$10,000 in a calendar year, or

- 4) payments to a nonresident who
  - (a) registers with either the S.C. Department of Revenue or the S.C. Secretary of State and
  - (b) submits a Nonresident Taxpayer Registration Affidavit - Income Tax Withholding, Form I-312 to the person letting the contract.
- c. For information about other withholding requirements (e.g., employee withholding), contact the Withholding Section at the South Carolina Department of Revenue at 803-898-5383 or visit the Department's website at: [www.sctax.org](http://www.sctax.org).
- d. This notice is for informational purposes only. This Owner does not administer and has no authority over tax issues. All registration questions should be directed to the License and Registration Section at 803-898-5872 or to the South Carolina Department of Revenue, Registration Unit, Columbia, S.C. 29214-0140. All withholding questions should be directed to the Withholding Section at 803-898- 5383.
- e. Please see the "NONRESIDENT TAXPAYER REGISTRATION AFFIDAVIT INCOME TAX WITHHOLDING" form (Form Number I-312) located at: <http://www.sctax.org/forms/withholding/i-312-form>.

7. SUBMITTING CONFIDENTIAL INFORMATION:

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

8. SOLICITATION INFORMATION FROM SOURCES OTHER THAN OFFICIAL SOURCE: South Carolina Business Opportunities (SCBO) is the official state government publication for State of South Carolina solicitations. Any information on State agency solicitations obtained from any other source is unofficial and any reliance placed on such information is at the Offeror's sole risk and is without recourse under the South Carolina Consolidated Procurement Code.

9. **TAX CREDIT FOR SUBCONTRACTING WITH MINORITY FIRMS:** Pursuant to SC Code § 12-6-3350, taxpayers, who utilize certified minority subcontractors, may take a tax credit equal to 4% of the payments they make to said subcontractors. The payments claimed must be based on work performed directly for a South Carolina state contract. The credit is limited to a maximum of fifty thousand dollars annually. The taxpayer is eligible to claim the credit for 10 consecutive taxable years beginning with the taxable year in which the first payment is made to the subcontractor that qualifies for the credit. After the above ten consecutive taxable years, the taxpayer is no longer eligible for the credit. The credit may be claimed on Form TC-2, "Minority Business Credit." A copy of the subcontractor's certificate from the Governor's Office of Small and Minority Business (OSMBA) is to be attached to the contractor's income tax return. Taxpayers must maintain evidence of work performed for a State contract by the minority subcontractor. Questions regarding the tax credit and how to file are to be referred to: SC Department of Revenue, Research and Review, Phone: (803) 898-5786, Fax: (803) 898-5888. The subcontractor must be certified as to the criteria of a "Minority Firm" by the Governor's Office of Small and Minority Business Assistance (OSMBA). Certificates are issued to subcontractors upon successful completion of the certification process. Questions regarding subcontractor certification are to be referred to: Governor's Office of Small and Minority Business Assistance, Phone: (803) 734-0657, Fax: (803) 734-2498. Reference: SC Code § 11-35-5010 – Definition for Minority Subcontractor & SC Code § 11-35-5230 (B) – Regulations for Negotiating with State Minority Firms.
10. **CLARIFICATION (NOV 2007):** Pursuant to SC Code § 11-35-1520(8), the Procurement Officer may elect to communicate with you after opening for the purpose of clarifying either your offer or the requirements of the solicitation. Such communications may be conducted only with Offerors who have submitted an offer which obviously conforms in all material aspects to the solicitation. Clarification of an offer must be documented in writing and included with the offer. Clarifications may not be used to revise an offer or the solicitation. [SC Code § 11-35-1520(8); SC Reg.19-445.2080]
11. **DISCUSSIONS & NEGOTIATIONS (NOV 2007):** Submit your best terms from a cost or price and from a technical standpoint. Your proposal may be evaluated, and your offer accepted without any discussions, negotiations, or prior notice. Ordinarily, nonresponsive proposals will be rejected outright. Nevertheless, the State may elect to conduct discussions, including the possibility of limited proposal revisions, but only for those proposals reasonably susceptible of being selected for award. If improper revisions are submitted, the State may elect to consider only your unrevised initial proposal. [SC Code § 11-35-1530(6); SC Reg 19-445.2095(I)] The State may also elect to conduct negotiations, beginning with the highest ranked Offeror, or seek best and final offers, as provided in SC Code § 11-35-1530(8). If negotiations are conducted, the State may elect to disregard the negotiations and accept your original proposal.
12. **OPEN TRADE REPRESENTATION (JUN 2015):** By submitting an offer, Offeror represents that Offeror is not currently engaged 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.