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## Protest Decision

**Matter of:** J-Kell, Incorporated

**Case No.:** 2016-205

**Posting Date:** February 4, 2016

**Contracting Entity:** Information Technology Management Office

**Solicitation No.:** 5400008056

**Description:** State Term Contract for IT Temporary Services

### DIGEST

Protest alleging inadequate notice of solicitation and insurance requirement is denied where notice was published as provided by law and protest of solicitation requirement was untimely.

### 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.

### DISCUSSION

J-Kell, Inc. (J-Kell) protests certain requirements of a solicitation for State Term Contract for IT Temporary Services. [Attachment 1] For the following reasons the protest is denied.

## **BACKGROUND**

This solicitation was issued on September 2, 2015, to establish fixed price state term contracts for IT Temporary Staff Augmentation Services to replace contracts reaching statutory term limits. The solicitation put incumbent suppliers on notice that they had to submit a bid response to this solicitation and be awarded a new contract to be able to provide IT Temporary Staff Augmentation Services in the future.

Solicitation Issued	09/02/2015
Solicitation Published in SCBO	09/02/2015
Amendment One Issued	09/17/2015
Modified solicitation and answered bidder questions.	
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.	
Amendment Five Issued	10/30/2015
Extended bid opening date.	
Amendment Six Issued	11/23/2015
Extended bid opening date.	
Amendment Seven Issued	12/01/2015
Set new bid opening date.	
Protest Received	12/17/2015
Amendment Eight Issued	12/18/2015
Modified solicitation requirement for Supplier Personnel	
Amendment Nine Issued	12/21/2015
Suspended solicitation	

## **ANALYSIS**

J-Kell's first issue of protest is that, as an incumbent contractor, the State failed to notify it of the release of this solicitation thereby depriving it of the opportunity to raise its concerns during the question and answer period provided for in the solicitation. This solicitation was issued under Section 11-35-1525 which requires notice of the issuance of the solicitation in accordance with Section 11-35-1520(3) as follows:

(3) Notice. Adequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids. The notice must include publications in 'South Carolina Business Opportunities' or a means of central electronic advertising as approved by the designated board office.

This solicitation was posted on the Internet on September 2, 2015 and advertised in South Carolina Business Opportunities on the same day. There is no statutory requirement to notify incumbent contractors, who should already know when their existing contracts expire, of the State's intention to resolicit the existing requirement. This solicitation was issued and advertised in accordance with the Code and this issue of protest is denied.

J-Kell alleges that a solicitation requirement for Contractor's Liability Insurance - Information Security and Privacy and other terms that it did not specifically identify appear to limit participation by small businesses. Section 11-35-4210(1)(a) grants the right to protest to any prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract as follows:

(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.

The solicitation was issued on September 2, 2015, and the only amendment addressing these issues was published on September 17, 2015. J-Kell did not file its protest until December 17, 2015. Since the issue of the Security and Privacy insurance<sup>1</sup> and the other non-specified terms

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<sup>1</sup> J-Kell alleges that the information security and privacy insurance requirement does not apply to the work to be performed, would only apply if J-Kell provided personnel were in charge of the state's systems, or providing a software package that could damage internal systems. J-Kell fails to understand the risks the State is attempting to mitigate. These contracts are for temporary personnel to augment existing agency information technology staff. These temporary personnel would potentially have access to the same non-public information and data as employees of the agency. In light of the recent history of data breaches in South Carolina and nationally, the fact that data security and privacy insurance is cost prohibitive for some businesses does not make this requirement unreasonable.

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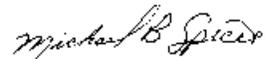
February 4, 2016

were not raised within 15 days of the issuance of the solicitation or any amendment addressing these issues, the CPO lacks jurisdiction to address J-Kell's concerns.

## **DECISION**

For the reasons stated above the protest is denied.

For the Information Technology Management Office



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Michael B. Spicer  
Chief Procurement Officer

Attachment 1



December 17, 2015

Mike Spicer, Chief Procurement Officer  
Information Technology Management Office  
1201 Main Street, Suite 601, Columbia, SC 29201

RE: Protest of Solicitation 5400008056, IT Temporary Services

Dear Mr. Spicer:

I am respectfully advising you of J-Kell, Inc.'s Protest of Solicitation number 5400008056, IT Temporary Services, Amendment 8 that sets an opening date for less than three weeks from today. According to my records, the Amendment was issued on December 8, 2015. Pursuant to S.C. Code of Laws, my calculations make the notification of protest due on or before December 18, 2015.

In general, the nature of our protest includes the following:

1. Why my firm, as an active participant in the contract this solicitation seeks to replace, was not notified of the solicitation via the email list used to notify contract participants of other contract-related correspondence? I learned about this solicitation only on Monday, December 14, by communicating with another vendor. When I inquired of ITMO as to why I was not notified, I was told I had not signed up for the right commodity code on the SCEIS system to receive notification. The notification code used by ITMO for this IT-related procurement was the general code for "Temporary Services" even though there are numerous IT-related commodity codes that are more appropriate for this solicitation. It is clear that many, if not most of the vendors impacted by this new solicitation were likely signed up under the IT-specific commodity codes, and would not have been signed up under the general code for temporary services, since that is not what we do. Unless this was purely an oversight, it appears ITMO may be attempting to limit participation to only "preferred vendors" who happened to know that the solicitation would be issued under a very general code that typically would not apply to IT procurements. As a result of not being notified of the solicitation, I have not had the opportunity to participate in questions and discussions of the terms and conditions of the new contract that will replace the one under which my firm currently works. This has prejudiced me to a great extent, and limited my ability to participate in an adequate response to the solicitation.
2. My firm, as well as many others, will be directly affected by the award of the new contract this solicitation seeks to award, and the ramifications of freezing out many small businesses will have a far greater impact. From a purely logical and ethical perspective, the state has a duty to inform all active participants of the existence of a new solicitation that will eliminate and/or replace the one under which those participants now work. Unless vendors working

under the current contract can become approved for the new contract, many vendors will lose their contracts and all their employees working under their current contracts will have to be terminated. This will not only affect those employees and vendor revenues, but will impact the agencies to which they are assigned as well. These agencies have invested time and resources in training vendor employees on their systems and procedures, only to have them have to leave because the solicitation was not handled appropriately by ITMO. Many vendors' employees work under non-compete contracts, and would not be available to another vendor to place back into the same agencies, so everyone loses. This solicitation does not appear to serve the public interest.

3. In my brief review of the new contract terms, there are many areas that do not coincide with commitments made by ITMO to improve the fairness of this contract in the future. Among those terms is an insurance requirement that does not apply to the work performed under the contract, because these awards are not for turn-key software applications. All our employees work under the direct supervision and management of state agency personnel, and as such, the work is directed by the state, not we vendors. The type and level of insurance required would only apply if we were in charge of the state's systems, or providing a software package that could damage internal systems. This type and level of insurance is only available to the largest corporations, and would result in many of the vendors who now work under the contract this one seeks to replace, being deemed not qualified for the new contract. This will result in the same scenario described in item 2, with agencies losing valuable personnel due to an unreasonable and unobtainable level of insurance coverage required by ITMO that serves absolutely no purpose to the state, as it does not apply to the work described and performed under this contract. This insurance is completely inappropriate for this type of contract, and unobtainable by the small businesses now working under the contract the new solicitation seeks to replace.
4. There are other terms that also appear to limit participation by small businesses, and I will require additional time to review the ramifications of those.

Remedies Requested:

1. Reissue the solicitation, using the email list of current participating vendors in the contract this solicitation seeks to replace, as well as using a more appropriate, IT-related commodity code in the SCEIS system.
2. As a result of reissuing the solicitation and appropriately notifying all vendors impacted, all vendors will have equal opportunity to ask questions and engage in discussions regarding terms and conditions that are anti-competitive, or that limit the procurement such that only the largest corporations would qualify. As written, the procurement discriminates against small companies and that is strictly prohibited by the SC Procurement Code. My requested remedy is to bring the solicitation into line with the letter and intent of the Procurement Code as regards anti-competitive practices and discrimination against certain classes of businesses.

Michael B. Spicer, CPO  
ITMO, State of SC  
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Thank you for your assistance in this matter. It is the sincere goal of J-Kell 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 practices of this contract vehicle. I am open to discussing other options to correct these matters without continuing to pursue the protest, but if that is not possible or preferred by ITMO, please accept this as my protest of the current solicitation and all amendments.

Respectfully submitted,



Owen S. Okel, President  
J-Kell, Incorporated  
340 Brookshire Drive  
Columbia, SC 29210  
803-798-1031  
803-528-0085  
[owenokel@att.net](mailto:owenokel@att.net)

**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.

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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>

**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**

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\_\_\_\_\_  
Name of Requestor

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

\_\_\_\_\_  
Business Phone

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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.**