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## Protest Decision

**Matter of:** Clemson Tiger Sports Properties, LLC

**Case No.:** 2016-141

**Posting Date:** May 31, 2016

**Contracting Entity:** Clemson University

**Solicitation No.:** 68301548

**Description:** Clemson Total Campus Marketing

### DIGEST

Protest of award alleging the award creates a breach of an existing contract and that the protester submitted the clearly superior bid, is denied.

### AUTHORITY

The Chief Procurement Officer<sup>1</sup> 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.

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<sup>1</sup> The Interim Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

## DISCUSSION

Clemson Tiger Sports Properties, LLC (“CTSP”), protests the award to JMI Sports, Inc. (JMI) for Clemson Total Campus Marketing alleging (1) the award creates a breach of an existing contract; (2) the panel erroneously evaluated certain aspects of the proposals; and (3) “CTSP submitted the clearly superior bid.” CTSP’s letter of protest and amendments are included by reference. [Attachments 1, 2, and 3]

## BACKGROUND

Clemson University (CU) issued this Request For Proposals under a delegation by the Chief Procurement Officer. The RFP seeks an experienced marketing firm to provide the University and its Athletic Department a comprehensive and exciting program with national marketing, creative opportunities at all levels of marketing rights and sponsorships in a variety of opportunities for the University campus wide component, as well as the athletic programs. JMI submitted a proposal determined most advantageous to the University and an Intent to Award was issued to JMI on March 30, 2016. CTSP filed its initial protest on March 31, 2016, and amended its protest on April 12th and 14th.

Solicitation Issued	January 29, 2016
Amendment 1 Issued	February 17, 2016
Amendment 2 Issued	February 25, 2016
Award Issued	March 30, 2016
Protest Received	March 31, 2016
Award Suspended	March 31, 2016
Protest Amended	April 12, 2016
Second Protest Amendment	April 14, 2016

## ANALYSIS

CTSP’s first issue of protest is as follows:

CTSP Owns the Exclusive Rights to Clemson Athletics’ Multi-Media Content through June 30, 2020. The University’s intent to award an RFP that includes the athletic rights, together with other multi-media rights, directly interferes with CTSP’s *exclusive rights* under the Agreement with the University entered into

less than three years ago. ... An award of these rights to another party, therefore, will constitute a material breach of CTSP's *exclusive* Agreement with the University.

The solicitation was issued on January 29, 2016, and clearly stated that the Athletics Multi-Media Content would be included in any contract awarded through this solicitation.

Clemson currently has an athletic only media rights contract with Tiger Sports Property, Clemson would replace with the consolidated, campus-wide marketing rights contract sought through this RFP.

[Scope of Work, Page 1]

Section 11-35-4210(1)(b) grants any actual bidder, offeror, contractor, or subcontractor the right to protest the award or intended award of a contract as follows:

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)This issue could have been raised as a protest of the solicitation. The CPO lacks jurisdiction to consider this issue as a protest of the award. This issue of protest is denied.

CTSP's second issue of protest

CTSP Has Already Performed In Anticipation of the Future Athletic Seasons  
CTSP made significant long-term guarantee commitments and an upfront capital subsidy payment in reliance on the commitment in the Agreement that its exclusive rights would continue through June 30, 2020 absent termination as a result of an uncured material breach. ... If the University continues with this proposed course of action, it will put CTSP in significant legal peril. CTSP will be forced to default on broadcast station, sponsor and similar agreements that represent millions of dollars to CTSP, and CTSP will face the prospect of significant financial damages.

The inclusion of the athletics media rights in this solicitation was known at the time the solicitation was issued and this issue could have been raised as a protest of the solicitation and cannot be raised as a protest of the award. The CPO lacks jurisdiction to consider this issue as a protest of the award. This issue of protest is denied.

CTSP's next issue of protest

An award to JMI Sports would represent an award to a patently non-compliant bid. The University's new RFP included the requirement that bidders "produce annually a comparison of its top 5 (by revenue) collegiate marketing contracts for review and comparison." JMI Sports has multi-media rights at only one university. ... JMI Sports simply did not - and could not - provide the relevant experience. ... Further, JMI Sports's submission failed to properly disclose that the remainder of its purported experience is not remotely comparable to the contract at issue. ... Therefore, based on JMI Sports's own submission and admissions, JMI Sports plainly lacks the requisite experience to perform the work required under the proposed contract, and thus fails to meet the University's stated criteria for the award.

The requirement is found in the solicitation as follows:

Clemson believes the financial value of this contract should remain in the top five of similar scope contracts in place at its peer institutions. Therefore, Clemson requests the Contractor produce annually a comparison of its top 5 (by revenue) collegiate marketing contracts for review and comparison.

[Scope of Work, Page 12] (emphasis added)

The requirement cited by CTSP is not a requirement at all, but a request for the successful contractor to produce an annual report. CTSP tries to infer a requirement that offerors must have the multi-media rights to no less than five peer institutions. However, the solicitation does not require the bidder have five contracts of similar size and scope. The solicitation requirements for experience are as follows:

Your proposal must be submitted in two parts: 1) a technical/business proposal addressing your plan and approach for managing the scope of this contract as defined by this document to include your plan for CTCMI, organization structure

and proposed staffing and details of experience in similar contractual arrangements

[Scope of Work, Page 1]

The Contractor shall provide a description of its experience relevant to a Total Campus Marketing Initiative (University wide including Athletics) and a description of how its marketing plan will maximize revenue, enhance exposure, create positive public relations and describe any other benefits to be derived by Clemson. Please include your firm's marketing strengths in the local, regional and national advertising markets. Provide a description of capability, facilities and other resources of your firm's as they relate to the sale of the Clemson advertising, marketing and sponsorship opportunities.

[Scope of Work, Page 2]

The solicitation does not ask the bidder for a five year history of its top 5 collegiate marketing contracts. JMI's proposal included a section titled "Experience & References" and is responsive to the solicitation requirement. This issue of protest is denied.

In protest amendment one, CTSP's first issue of protest is a duplication of its initial protest issue related to exclusive rights to media content and is addressed above. The second issue of protest is in multiple parts alleging that the evaluators erred in comparing the financial proposals, improperly accepted inflated revenue projections, overlooked evaluator mistakes in comparing the financial proposals, improperly changed the total campus revenue projections for purposes of evaluation, improperly amended the solicitation during negotiations, and failed to accurately assess the offerors' qualifications and proposed marketing plans, organizational structure and staffing.

CTSP's allegation of evaluator errors in comparing the financial proposals is based on two proposed compensation models. Initially the solicitation required offerors provide responses to four financial models:

Contractor is required to provide the following financial opportunities to Clemson. The minimum guarantee is set at \$ 5,274,304 in annual compensation

for the 2016-17 year. If Trade/In Kind is in excess of the minimum set forth in this RFP, please describe in response.

Guarantee, along with signing bonus;  
Guarantee, along with Revenue Share and signing bonus;  
Revenue Share, along with signing bonus;  
Guarantee, along with Revenue Share after 15 months, and a signing bonus.<sup>2</sup>

In Amendment #1, the requirement was modified as follows:

Q27. The RFP, provides four different compensation models in the Bidding Schedule (Page 14).

Must the Contractor submit offers for each of the four listed compensation models or may the Contractor choose the models they feel are more financially advantageous to the University? May the Contractor propose a different financial compensation model that is not included in the RFP either in addition to one or more of the stipulated compensation models or in lieu of any of the four compensation models included in the RFP?

**A27. Please submit the one that is most advantageous to the University; however, it would be the Contractor's best interest to submit for all so it will allow the evaluators opportunity to compare each submitted bid.**

CTSP submitted offers for two of the four requested options: "Greater of Minimum Guarantee of Share" and a straight Revenue Share. JMI submitted offers for all four options. For the first option, "Greater of Minimum Guarantee of Share," JMI proposed a minimum guarantee of \$57,178,278 and 50% of all Athletics MMR Revenues above annual thresholds and for the Campus Marketing Annual Revenue Share; up to \$2.5 million @ 33%, between \$2.5 million and \$5 million @ 50%, above \$5 million @ 67% and a signing bonus of \$3,000,000. The solicitation required all offerors include \$400,000 per year of in-kind products/services and/or commercial/promotional broadcast time. JMI also included estimated revenue above the minimum of \$6,721,773 for athletics marketing and \$18,458,342 for other campus marketing.

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<sup>2</sup> All four options called for the offeror to include a signing bonus to be paid to Clemson at one time or in equal installments over the course of the contract. The solicitation also required the contractor to pay Clemson additional performance payments based upon certain achievements by Clemson athletic teams which achievements the Parties believe will enhance future sales and provide \$400,000 .per year in trade or in-kind products and/or services.

JMI included the \$2,800,000 in-kind value in its presentation raising the total value of offer to \$88,158,394.

CTSP proposed a minimum guarantee for each year of the seven year contract that totaled \$54,250,000 or 65% of the Adjusted Gross Revenue (AGR) in any year if that percentage was greater than the minimum guarantee and CTSP included a signing bonus of \$2,000,000. CTSP did not differentiate between athletics revenue and revenue from other campus marketing, did not project any revenue above the minimums, and did not include the required \$2,800,000 of in-kind services in its \$56,250,000 total for this option.

The minimum guarantee from JMI was \$57,178,278 and 50% of all Athletics MMR Revenues above annual thresholds. The minimum guarantee from CTSP was \$54,250,000 or 65% of the Adjusted Gross Revenue (AGR). In his Determinations and Findings, the procurement officer acknowledged the differences in these two offers:

JMI Sports offered a slightly higher guarantee up front with a lower revenue share on all models, however, JMI Sports also approached the contract financially as two different contracts focusing on the athletic and non-athletic revenues separately. Each of their options was detailed out with specific year by year projections. CTSP took a simpler approach and while not offering as high a guarantee, they did offer higher percentage of revenue share. The panel consensus at the meeting was that JMI Sports had a stronger financial proposal, ...

CTSP protests that it offered the proposal that provided the highest return to the University and consequently should have been received the most points for the financial evaluation. In making its argument CTSP suggests that had the evaluators taken its minimum guarantees and percentage and applied them to JMI's revenue projections they would have clearly seen that CTSP's financial proposal was most advantageous:

“Employing JMI Sports's revenue assumptions as set forth in its own submissions through CTSP's formula for its model, the University would receive \$7,084,000 more from CTSP over the course of the RFP term, i.e., \$92,442,000 from CTSP versus \$85,358,000 from JMI Sports.”

However, CTSP's argument assumes that the evaluation of the financial proposals was to be a simple comparison of the numbers. The solicitation allowed for four different financial options and it is not unreasonable to assume that the best financial offer from one bidder might be different from that of another bidder. The University acknowledged that possibility as the procurement officer explained in the Determinations and Findings:

As the financial proposal had almost endless variables and possibilities, it was determined in advance that the evaluation of financial proposals would be handled subjectively.

This approach was accurately reflected in the evaluator scoring with JMI receiving scores of 50, 47, 45, and 50, while CTSP received scores of 34, 39, 35, and 43. The evaluators commented that JMI's financial proposal had "fantastic detail in all options," "a very detailed breakdown of revenue," "It was clear that the investment made on the University was detailed." Comments about CTSP's financial proposal included: "Learfield has a strong history of Athletic sales, but I was expecting a much more detailed explanation of the University side of the business. Overall felt it was a generic Learfield proposal that they would send to anyone. Very little meat to the bone. No details;" "Their signing bonus was \$1M < JMI's;" "Lower guarantees / more limited recognition of revenue, lower overall return to Clemson." These comments evidence the evaluators' consideration of each proposal and reflect the judgment the evaluators exercised when scoring the business proposals.

The standard of review of the evaluation and ranking of proposals is set in Section 11-34-2410(A) as follows:

The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law: ... Section 11 35 1530(7) (Competitive Sealed Proposals, Selection and Ranking of Prospective Offerors).

There is no indication that the evaluations were clearly erroneous, arbitrary, or capricious. In addition, it is reasonable to assume that JMI based its minimum guarantees, percentages, and estimated revenue it could generate on its own projections of the value of the University's assets and its ability to maximize revenue from marketing those assets. To assume for evaluation

purposes that CTSP would generate the same amount of revenue might not accurately reflect CTSP's capabilities and reflect an inaccurate evaluation. CTSP had the same opportunity to estimate revenue above the minimums and choose not to do so. The University was evaluating the strength of the financial proposals as opposed to the proposal that would yield the greatest return. This aspect of the protest is denied.

In responding to the "Revenue Share Alone" option, CTSP proposed 70% of AGR up to \$7,500,000 and 75% above \$7,500,000. JMI proposed 65% up to \$10,000,000; 70% between \$10,000,000 and \$15,000,000; and 75% above \$15,000,000. Again, JMI's proposal segregated athletics and campus revenue sources, included projected revenue, and applied the proposed percentages to arrive at a projected value of the contract. Again, CTSP suggests that if the evaluators had applied CTSP's percentages to JMI's revenue projections, CTSP's proposal would eclipse JMI's proposal by \$16,837,000. There was no requirement or intention to evaluate the financial proposals on the numbers alone. There is no evidence that the evaluators were arbitrary or capricious in their evaluations. This aspect of the protest is denied.

After suggesting that the evaluators should have applied CTSP's guarantees and percentages JMI's revenue projections to determine the most advantageous offer, CTSP protests that "JMI Sports's revenue projections were so inflated as to be effectively meaningless, and should have been evaluated as constituting an inferior financial offering in the Determinations and Findings." CTSP argues that the University accepted JMI's revenue projections for campus revenue without any guarantees which allowed JMI to artificially inflate its projected total value to the University by proffering unsupported guesswork as to those revenue figures without having to stand behind them in the form of a guarantee.

JMI choose to separate the athletic revenue from possible revenue from other campus assets and offered estimates of the potential revenue above the minimums. CTSP did not choose to structure its financial proposal in this manner. JMI was clear that the revenue share above the minimum guarantees was projected. There was no requirement for offerors to make guarantees of revenue above the minimums. It is up to the evaluators to determine whether these revenue projections

are reasonable or simply marketing and what weight to give them, if any. CTSP provides no evidence that the evaluators misinterpreted JMI's proposal or were arbitrary or capricious in their evaluations. This aspect of the protest is denied.

CTSP also argues that:

Additionally, in evaluating JMI Sports's revenue projections, the University apparently did not account for the fact that JMI Sports would have no existing sponsorship agreements, because all current sponsorship agreements are with CTSP. It will take significant time and effort for JMI Sports to get the property back to the current (2015-16) revenue level, let alone realize the incremental revenue growth that would be required to meet the value projections set forth in their RFP response.

CTSP offers no evidence or proof to support its assumption that the University did not consider current sponsorship agreements. This aspect of the protest is denied.

CTSP protests that the Determinations and Findings were based on flawed evaluations and offered the following:

Evaluator Graham Neff compared the bidders' financial offerings using only that portion of CTSP's offer constituting the guaranteed amount but compared it to JMI Sports's guaranteed amount plus its other projected revenue share, resulting in an apples-to-oranges evaluation that incorrectly inflated the scoring on behalf of JMI Sports.

CTSP proposed two of the four financial scenarios set forth in the solicitation. CTSP's Option 1 was actually solicitation Option 2. The evaluator appears to have compared CTSP's option 1 (solicitation option 2) guarantee amount of \$56,250,000 to JMI's Option 1 (solicitation Option 1) total revenue projection of \$84,264,413 in determining the number of points to award to CTSP. However, had the evaluator used only JMI's Athletics minimum guarantee of \$57,178,278, JMI still would have received the highest score. The evaluators award CTSP a total of 151 points for the Financial Offering while JMI received a total of 192 points. This evaluator assigned CTSP 34 points for this criterion. Assuming the perceived mistake by this evaluator in assigning points for the Financials Offering, CTSP would have received the maximum points available (50) for an additional 16 points and a total from all evaluators of 167. In addition, all four evaluators scored

JMI the highest. Consequently, the mistake makes no difference in the outcome. This issue of protest is denied.

CTSP recognizes another error in the notations of evaluator Neff in that:

Also, he indicated that JMI Sports's offer was \$84 million "and 50% share above minimum," but the \$84 million already includes the share above minimum. Mr. Neff also did not compare CTSP's "option 2" with JMI Sports's "Option 2."

As stated above, had CTSP received the maximum available points from this evaluator, the result would not change. This issue of protest is denied.

CTSP protests that the University improperly changed the total campus revenue projections for purposes of evaluation as follows:

In addition, the Determinations and Findings fundamentally contradict the revenue assumptions set forth in the RFP. In explaining the need for a "total campus" marketing approach, the RFP states that "this field of marketing is relatively new, [such that] opportunities in this area will be identified at any time *during* the term of this contract. A true University inventory of opportunities is fluid *and not something that would be possible to easily identify prior to the contract.*" Yet, the Determinations and Findings make the irreconcilable claim that the University had recognized a "total campus" revenue target for purposes of evaluating bids, stating that "the \$5-6M that is being generated for Athletics could easily double when you consider the entire University Inventory." Accordingly, the framework under which the University selected JMI Sports contravened the fundamental revenue assumptions giving rise to a "total campus" marketing approach.

(emphasis in original)

The Scope of Work is one of a series of documents that comprise the contract resulting from the solicitation. As such, there must be a degree of certainty when the State includes assertions about the value of these assets lest reality reveal a contrary valuation and the University find itself defending a claim that it misled potential bidders.

Clemson University recognizes that the Contractor will be developing and marketing various Total Campus Marketing Initiatives on behalf of Clemson. Further, we understand this field of marketing is relatively new, dynamic and

evolving, and that opportunities in this area will be identified at any time during the term of this contract. A true University inventory of opportunities is fluid and not something that would be possible to easily identify prior to a contract. In reality, a key part of the initial contract will be for a partner to help identify opportunities.

[Scope of Work, Page 10]

In the Determinations and Findings, which is not part of the contract, the procurement officer explains that the University's research indicated that the media rights for the entire campus could result in doubling the revenue currently received from athletics marketing and with such a large change in the scope of the contract, modifying or renegotiating the existing contract was not appropriate. Since this information was only being used to support a decision to issue the solicitation it need not be as accurate as information that might be contractually binding.

Clemson requires a new contract to manage the marketing of the total university branding and multimedia rights. Currently, Clemson has a contract with Clemson Tiger Sports Properties (CTSP) for a multi-media rights contract specific to the athletic rights of the University. This contract creates about \$5-6M of revenue per year for the University. However, Clemson has struggled recently managing and valuating the similar rights for the rest of the University, and recently several other universities have entered into contracts for a "total campus" approach to market the rights across the entire school. As Clemson explored this, it became apparent that by seeking a contract for the entire University rights, the \$5-6M that is being generated for Athletics could easily double when you consider the entire University inventory. We explored options to modify or renegotiate our current contract with CTSP without rebidding, but it became clear that the change in scope and value of the contract greatly outweighed a simple change to the Athletic-specific contract and that a new contract was going to be required.

[Determinations and Findings, Page 1]

This issue of protest is denied.

Also as part of its protest of the Financial Offering evaluation, CTSP alleges a violation of the Code concerning a provision added to the contract during negotiations:

Moreover, the University has added a "look-in" period to its proposed award to JMI Sports, which allows both the University and JMI Sports to reassess the

contract after 24 months. This additional provision limits the University and JMI Sports's obligations under the RFP to a 24-month, rather than the seven (7) year term otherwise proposed in the RFP. The "look-in" also enabled JMI Sports to submit a more aggressive bid, knowing that it had the ability to submit a new proposal in two years if it was unable to fulfill its aggressive projections. Further, no such right was offered to CTSP, in clear violation of S.C. Code Ann. § 11-35-1520(2), which requires an "invitation for bids [to] ... include specifications and all contractual terms and conditions applicable to the procurement."

First, this solicitation was issued under Section 11-35-1530, not Section 11-35-1520. Section 11-35-1530(8) provides that:

Whether price was an evaluation factor or not, the procurement officer, in his sole discretion and not subject to review under Article 17, may proceed in any of the manners indicated below, except that in no case may confidential information derived from proposals and negotiations submitted by competing offerors be disclosed:

(a) negotiate with the highest ranking offeror on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both.

The record of Negotiations introduced the following in the contract:

At conclusion of the initial 24 month period of the contract, both parties will conduct a "look-in" at the contract financial terms to determine if changes need to be made to the financial model that is the basis for revenue commitment to the University. Should any changes need to be made, the changes will need to be mutually agreed to by both parties. The intent of this requirement is to require this review and allow for an opportunity to address any unknowns or changes that might take place during the initial phase of this contract.

Negotiations occurred after the determination of the highest ranked offeror. There is no requirement that the State negotiate with any offeror. JMI had to submit its proposal assuming that the contract would be awarded without negotiation. If the State decides to conduct negotiations, it can negotiate matters affecting price and / or the scope of the contract so long as the general scope of the contract is not changed. This provision does not change the general scope of the request for proposals. There is no statutory requirement that the State make every

negotiated change to a contract available to every other offeror. There is no violation of the Code or Regulations. This issue of protest is denied.

Concerning the second evaluation criteria, Marketing and execution plan for Total Campus Marketing Initiative (University campus wide including Athletics), CTSP protests that:

JMI Sports's submissions failed to identify specific plans sufficient to qualify it for the award. ...

JMI Sports vaguely claimed that a leadership transition from CTSP (and CTSP's existing exclusive rights) would "most[ly]" occur within the first six weeks, without laying out any integration timeline with concrete steps. ...

Also, while JMI Sports frequently referenced its interest in expanding the University's social media presence, it did not identify any resources to achieve this goal. ...

And, while JMI Sports attaches as exhibits lists of the largest South Carolina companies and agencies with a pledge to approach these entities with the University's sponsorship opportunities, it provided neither substance nor evidence of a plan to execute that pledge or evidence that it has relationships with any of these companies. ...

The JMI Sports proposal provides no concrete details on long-term staffing other than the inclusion of a sample organizational chart devoid of named individuals.

On this ground as well, CTSP clearly submitted the superior bid. ...

On this point, CTSP's proposal was the demonstrably better choice.

The evaluation committee reviewed each proposal and scored each proposal against each evaluation criteria. The Panel established the standard for review in these situations. In *In re: Protest of First Sun EAP Alliance, Inc.; Appeal by First Sun EAP Alliance, Inc.*, Case 1994-11, the Procurement Review Panel reaffirmed the standard of review of claims that errors were made by evaluators as follows:

S. C. Code Ann. Section 11-35-2410 provides for the finality of determinations under the RFP process unless "clearly erroneous, arbitrary, capricious, or contrary to law." First Sun argues that the ratings for the first three award criteria are arbitrary, capricious, and clearly erroneous. First Sun has the burden to prove its

issue by a preponderance of the evidence. As the Panel had stated in previous cases, the Panel will not substitute its judgment for the judgment of the evaluators, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased.

The Panel went on in *In re: Protest of Coastal Rapid Public Transit Authority*, Case No. 1992-16 to state that:

The Panel will not substitute its judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased.

All four evaluators ranked JMI's proposal superior to CTSP's proposal. One evaluator commented that CTSP's proposal was "very broad, not a deep dive" while commenting that JMI's proposal was "well thought out & conceived, carried out the understanding of campus + academic + athletic parts of the marketing portfolio, well detailed." Another evaluator commented that CTSP's proposal was "very weak overall proposal – general sales pitch with very limited specificity or detail." The same evaluator commented that JMI's proposal was "very strong, well organized;" "Detailed and effective plan for marketing and Execution of a TCM initiative." CTSP provides no evidence that the evaluations were arbitrary or capricious. The Chief Procurement Officer will not substitute his judgement for the judgement of the evaluators. This issue of protest is denied.

Concerning the third evaluation criteria, Organizational Structure and Proposed Staffing, CTSP alleges that it submitted the best organizational structure and staffing plan while observing that:

JMI Sports, however, provided biographies for some officers and executives, with no indication that all or even some of these individuals will remain with and spend a majority of time servicing the University (and indeed the proposal appears to indicate that JMI Sports would use personnel currently servicing the University of Kentucky to split time and also service the University). And, while the Determinations and Findings weighed this criterion in favor of JMI Sports because JMI Sports purported that it would staff ten employees, while CTSP would staff five employees, the University overlooked that JMI Sports made no actual commitment to employ ten employees dedicated to the University, nor

what the qualifications of those ten employees would be. Thus, on this ground as well, CTSP's submission is far superior.

The comments in the Determinations and Findings and the evaluator comments indicate that the evaluators fairly considered both proposals and were not arbitrary or capricious in their deliberations. The CPO will not substitute his judgement for that of the evaluators. This issue of protest is denied.

Concerning the fourth evaluation criteria, Evidence of Successful Past Performance and Implementation, CTSP alleges that JMI Sports simply did not - and could not - provide the relevant experience.

JMI Sports's submission makes clear that the only school for whom JMI Sports manages multi-media rights is the University of Kentucky. Even as to its contract with the University of Kentucky, JMI Sports submitted no factual evidence of actual financial success in its implementation of that contract.

Further, JMI Sports's submission failed to properly disclose that the remainder of its purported experience is not remotely comparable to the contract at issue.

The requirement in the solicitation is as follows:

Your proposal must be submitted in two parts: 1) a technical/business proposal addressing your plan and approach for managing the scope of this contract as defined by this document to include your plan for CTCMI, organization structure and proposed staffing and details of experience in similar contractual arrangements and 2) a financial proposal that at a minimum details the information listed in the sections entitled Financial Offer and Bidding Schedule following in this document. These two parts should be submitted as two separate .pdf files titled accordingly.

[Scope of Work, Page 1]

The Contractor shall provide a description of its experience relevant to a Total Campus Marketing Initiative (University wide including Athletics) and a description of how its marketing plan will maximize revenue, enhance exposure, create positive public relations and describe any other benefits to be derived by Clemson. Please include your firm's marketing strengths in the local, regional and national advertising markets. Provide a description of capability, facilities and

other resources of your firm's as they relate to the sale of the Clemson advertising, marketing and sponsorship opportunities.

[Scope of Work, Page 2]

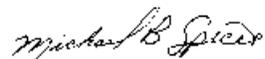
There is no requirement for a minimum level of experience, only that the offeror describe its experience. JMI's technical proposal included an Experience & References section. CTSP offers no evidence to support its claim that JMI failed to properly disclose that some of its experience was not comparable to this contract. There is no indication that the evaluators failed to consider JMI's experience or were arbitrary or capricious in their evaluation. This issue of protest is denied.

CTSP's second amendment notified the CPO of its belief that the University had failed to comply with requests for information under the Freedom of Information Act and added 10 exhibits to the record. The CPO takes judicial notice of CTSP's FOIA complaint.

## **DECISION**

For the reasons stated above, the protest is denied.

For the Materials Management Office



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Michael B. Spicer  
Chief Procurement Officer

# Attachment 1

D. Reece Williams, III – Member  
Ph: 803-404-6900  
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[ReeceWilliams@CallisonTighe.com](mailto:ReeceWilliams@CallisonTighe.com)



March 31, 2016

**Via USPS, e-mail to [protest-mmo@mmo.state.sc.us](mailto:protest-mmo@mmo.state.sc.us),  
and hand-delivery**

Michael B. Spicer  
Chief Procurement Officer  
State of South Carolina  
Procurement Services Division  
Materials Management Office  
1201 Main Street, Suite 600  
Columbia, SC 29201

**RE: Clemson RFP Award Protest, Bid No. 68301548  
CTR File No: 6538.001**

Dear Mr. Spicer:

Clemson Tiger Sports Properties, LLC ("CTSP") respectfully submits this Protest, pursuant to S.C. Code Ann. § 11-35-4210(1)(b), in response to Clemson University's (the "University") notice of intent to issue an award in response to its Request for Proposal ("RFP") for certain of its enumerated multi-media rights. CTSP issued a conforming bid on March 1, 2016. The University announced its intent to issue an award (the "Award") to JMI Sports on March 30, 2016, thereby rejecting CTSP's bid for these rights.

For the reasons set forth below, the University's Award to JMI Sports should be rescinded and CTSP should be awarded the contract at issue. CTSP objects to the University's award on three grounds: (1) CTSP has **exclusive ownership** of the rights to Clemson Athletics' multi-media content, which were incorporated into the RFP; (2) CTSP has already spent a significant amount of funds over the course of nearly three years in reliance on its **exclusive rights** to the University's multi-media content, which rights are ongoing under the governing contract between CTSP and the University; and (3) JMI Sports does not meet the University's own required qualifications for receipt of the award.

### **Automatic Stay of Procurement During Protests**

S.C. Code Ann. § 11-35-4210(7) provides for an automatic stay of the award of the contract while the procurement proceeding, including any appeals to the Procurement Review Panel, is underway. Accordingly, the Award is stayed pending final resolution of this protest after appeals.

### **Protest Grounds**

#### 1. CTSP Owns the Exclusive Rights to Clemson Athletics' Multi-Media Content

On July 1, 2013, the University and CTSP entered into the Multi-Media Rights Agreement ("Agreement"), granting CTSP the **exclusive rights** to Clemson Athletics' multi-media content

through June 30, 2020. The University's intent to award an RFP that includes the athletic rights, together with other multi-media rights, directly interferes with CTSP's **exclusive rights** under the Agreement with the University entered into less than three years ago.

The Agreement grants CTSP the following **exclusive rights** with respect to Clemson Athletics' multi-media content: radio play-by-play broadcasts; radio coaches shows; radio daily shows; sale of inventory from radio broadcasts; television coaches shows; sale of inventory from television coaches shows; highlight videos; Memorial Stadium signage/PawVision; Clemson Athletics inventory (venue signage, sponsor promotions, event promotions, corporate marketing, and other inventory); consultation regarding new facilities; print (including but not limited to: football game-day programs, schedule cards, posters, ticket backs, mailing inserts, team rosters, parking passes, roster cards, media guides, ticket applications, ticket envelopes, sports calendars, fan guides, trading cards, donor publications, and any other print sponsorship items); programs; four public address announcements; internet sponsorships; social media; stadium seating; displays; backdrops; new inventory (which may include, but is not limited to: field goal nets, foul pole signage, basketball profile signage, sponsored entertainment, branded vending sponsorship, fireworks displays, special presentations, special performances, corporate hospitality, halftime events, spring football game, team banquets, and golf tournaments); access to the Memorial Stadium Suite for all regular season home football games; right to purchase other tickets; other Clemson Athletics accommodations; parking access; and satellite radio.

The Agreement provides, in Section 5.4, that the University, through Clemson Athletics, may terminate its RFP with CTSP "for cause upon ninety (90) days written notice if Contractor fails to comply with any material term or condition of this Request for Proposal, becomes insolvent or files for bankruptcy protection." Section 5.4 also says that "Clemson Athletics must state with particularity the specific matters of Contractor's non-compliance" and even then "Contractor shall have sixty (60) days to cure such matters or such longer period if Contractor is diligently pursuing a cure." Moreover, Section 1 of the Agreement states that "[t]he contract resulting from this Request for Proposal shall cover the period which begins on July 1, 2013 and run until June 30, 2020, unless the contract has been terminated prior because of a breach by either party." It is undisputed that none of the express, required conditions for termination has occurred.

Despite this clear language, the University has asserted, in communications with CTSP, that its Standard Terms of Purchase permit it to terminate the Agreement with CTSP "for convenience." However, such a right is incompatible with the text of both the Standard Terms of Purchase and the Agreement itself, which contains the unequivocal conditions for termination in Sections 1 and 5.4. The Standard Terms of Purchase explicitly state, in the introductory paragraph, that "[i]n case of conflict between terms of a specific solicitation and this document, the terms of the specific solicitation take precedence." Further, the Order of Precedence contained in Section 5.1 of the Agreement ranks the Agreement and the Standard Terms of Purchase at the same level of priority. The language of both the Standard Terms of Purchase

and the Agreement therefore can only be read to require that termination of the Agreement take place only subject to the conditions set forth in Section 5.4 of the Agreement, and not for any purported "convenience." There is no permissible reading of the documents under which the Standard Terms of Purchase alters the bargain struck by the parties with respect to termination rights under Section 5.4. Again, the parties clearly contemplated that Agreement could be terminated solely due to a breach of its terms (set forth exclusively in Section 5.4), and not for convenience. Additionally, the inclusion of a cure period in Section 5.4 is entirely inconsistent with termination for convenience, as a cure period can prevent termination even in the event of a material breach.

An award of these rights to another party, therefore, will constitute a material breach of CTSP's **exclusive** Agreement with the University. See Agreement §§ 2, 3, 13. In the event that the award is accepted by JMI Sports, CTSP reserves its rights to file, *inter alia*: (1) a breach of contract action against the University pursuant to S.C. Code Ann. § 11-35-4230 or by other means, (2) a claim for tortious interference with contract against JMI Sports, and (3) a claim against JMI Sports under South Carolina's Unfair Trade Practices Act.

## 2. CTSP Has Already Performed In Anticipation of the Future Athletic Seasons

CTSP entered into the Agreement with the University on July 1, 2013 with the reasonable expectation based on the express terms of the Agreement that the contract would remain in effect through June 30, 2020. Indeed, CTSP made significant long-term guarantee commitments and an upfront capital subsidy payment in reliance on the commitment in the Agreement that its exclusive rights would continue through June 30, 2020 absent termination as a result of an uncured material breach. The shorter contractual period now proposed by the University is not what was bargained for, and would have resulted in very different bid from CTSP in 2013, commensurate with the more limited value that the University's purported right to terminate for convenience and Award, if allowed to stand, would introduce.

Additionally, CTSP has already spent significant time and resources selling media for the University's 2016-2017 athletic season because the CTSP owns the **exclusive rights** to the upcoming season. In fact, at this point in the year, CTSP is 60-70% through the selling season for the entire year of July 1, 2016 – June 30, 2017. If the University is permitted to award the new bid to another party and rescind the grant of rights to CTSP, CTSP will be unable to recognize the fruits of its marketing and selling efforts, unjustly enriching both the University and JMI Sports.

If the University continues with this proposed course of action, it will put CTSP in significant legal peril. CTSP will be forced to default on broadcast station, sponsor and similar agreements that represent millions of dollars to CTSP, and CTSP will face the prospect of significant financial damages.

## 3. Purported Winning Bidder Fails to Meet the University's Own Bid Prerequisites

Even assuming the University has the right to terminate the Agreement (which it does not), an award to JMI Sports would represent an award to a patently non-compliant bid. The University's new RFP included the requirement that bidders "produce annually a comparison of its top 5 (by revenue) collegiate marketing contracts for review and comparison." By necessity, therefore, to be a compliant bid, the bidder must have the multi-media rights at no less than five "peer institutions." The University emphasized this requirement in Addendum #1, and even

Michael B. Spicer  
March 31, 2016  
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provided an illustrative list of "peer institutions." To the best of our knowledge, JMI Sports has multi-media rights at only one university. In fact, of the bidders who submitted responses to the University's new RFP, CTSP was **the only** bidder who could satisfy the University's required condition.

Further, based on the information available, CTSP was in fact the bidder with the most advantageous financial offering, as its financial offer in response to the RFP was superior to the estimated \$60,000,000 contract award set forth in the intent to award. And on information and belief, CTSP was also (or should have been) the superior bidder on each of the other evaluation factors set forth in the award criteria in the RFP. For example, one of the listed criteria is "Evidence of Successful Past Performance and Implementation." JMI is the multi-media rights holder at only one university, and has been the rights holder at that university for less than two years. It simply does not have a track record of successful performance or implementation. CTSP, through its members and their affiliates, has been in the multi-media rights business for more than 30 years and is the multi-media rights holder at close to two hundred different colleges and universities. In short, on information and belief, CTSP was the most responsive bidder, and should have received the award.

**Relief Requested**

CTSP respectfully requests that the Chief Procurement Officer, following his duty to attempt to settle protests pursuant to S.C. Code Ann. § 11-35-4210(3), determine that the University's award of the bid to JMI Sports be promptly overturned and the new RFP be awarded to CTSP.

**Reservation of Rights to Supplement Protest**

CTSP's investigation into the circumstances of this award is ongoing. CTSP therefore reserves its rights to supplement and/or submit additional grounds for this Protest, and/or to pursue other legal claims. See S.C. Code Ann. § 11-35-4210(2)(b); Agreement § 5.3.

Sincerely,



D. Reece Williams, III

cc: Kathleen McDaniel, Esq.  
Yehudah Buchweitz, Esq., Weil, Gotshal & Manges LLP  
Jessie Mishkin, Esq., Weil, Gotshal & Manges LLP  
John Raleigh  
Rivers Stilwell, Esq., Nelson Mullins Riley & Scarborough LLP

## Attachment 2

D. Reece Williams, III – Member  
Ph: 803-404-6900  
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[ReeceWilliams@CallisonTighe.com](mailto:ReeceWilliams@CallisonTighe.com)



April 12, 2016

**Via e-mail to protest-mmo@mmo.state.sc.us and hand delivery**

Michael B. Spicer  
Chief Procurement Officer  
State of South Carolina  
Procurement Services Division  
Materials Management Office  
1201 Main Street, Suite 600  
Columbia, SC 29201  
[protest-mmo@mmo.state.sc.us](mailto:protest-mmo@mmo.state.sc.us)

**RE: Amended Clemson RFP Award Protest, Bid No. 68301548  
CTR File No.: 6538.001**

Dear Mr. Spicer:

Clemson Tiger Sports Properties, LLC ("CTSP") respectfully submits this amendment to its Protest dated March 31, 2016, pursuant to S.C. Code Ann. § 11-35-4210(2)(b), in response to Clemson University's (the "University") notice of intent to issue an award in response to its Request for Proposal ("RFP") for certain of its enumerated multi-media rights. On April 5, 2016, CTSP received certain information from the University regarding the award to JMI Sports LLC ("JMI Sports"), including materials formally submitted by JMI Sports and documents reflecting the University's evaluation of bids submitted by both JMI Sports and CTSP. This amendment is to provide additional information in connection with our March 31, 2016 protest and should be considered in conjunction with the information previously provided.

The information obtained to date further supports CTSP's assertion that the University's intent to award to JMI Sports be promptly overturned and the new RFP be awarded to CTSP. Specifically, the documentation indicates that: (1) the University has no right to terminate CTSP's **exclusive rights** to Clemson Athletics' multi-media content; and (2) JMI Sports failed to meet the University's own required qualifications for receipt of the award and comparison of the bids reveals that CTSP submitted the superior bid, which the evaluators either ignored or misconstrued in favor of JMI Sports.

**Additional Protest Grounds**

1. CTSP Owns the Exclusive Rights to Clemson Athletics' Multi-Media Content

The University states in its Determinations and Findings that it has "determined that the termination for convenience clause would enable [the University] to terminate [the CTSP] contract after successful completion of an award for a new contract following a public RFP."<sup>1</sup> As

<sup>1</sup> The University's Determinations and Findings, dated March 25, 2016, are attached hereto as Exhibit A, at pg. 1.

discussed in detail in CTSP's Protest submitted on March 31, 2016, the University's alleged right to terminate "for convenience" is entirely inconsistent with the language of the Standard Terms of Purchase, the very document cited as support for having this supposed right, and the Agreement itself, which sets forth the notice and cure period procedure that must be followed prior to termination.<sup>2</sup> It is impossible to reconcile the "termination for convenience" provision with the contract as a whole.

2. JMI Sports cannot meet the requirements of the RFP, and in any event, CTSP submitted the clearly superior bid

Upon review of the bid documentation submitted by JMI Sports, it is clear that JMI Sports is not a qualified bidder, as it lacks the qualifications delineated in the RFP as necessary to provide the services required by the University under this contract.

The University used the following evaluation criteria to assess the bids submitted in response to its RFP:

- a. Financial Offering (maximum of 50 points)
- b. Marketing and Execution Plan (maximum of 20 points)
- c. Organizational Structure and Proposed Staffing (maximum of 20 points)
- d. Evidence of Successful Past Performance and Implementation (maximum of 10 points)

Each of these factors should have been evaluated in favor of CTSP.

**a. Financial Offering (50 Points): The bidders' financial offerings were evaluated incorrectly, and in any event, CTSP submitted the more advantageous financial offering**

The Determinations and Findings state that JMI Sports submitted the preferred financial offering because (i) it offered higher guaranteed revenues despite lower revenue sharing, and (ii) its proposal projected revenue into athletic and non-athletic streams.<sup>3</sup> However, the Determinations and Findings rested on incorrect evaluations of the bidders' financial offerings, while also ignoring the fact that JMI Sports's proposal consisted of purely unsupported, ahistorical revenue projections largely divested from any guarantee for the University, rendering the purported total gross revenue submitted by JMI Sports totally illusory.

First, on its face and under all objective criteria, CTSP submitted the more advantageous financial offering, based on two proposed compensation models. The first alternate was a "Greater of Minimum Guarantee or Share" model, whereby CTSP guaranteed the University certain revenue payments in each contract year of the term (each a "Baseline"), unless 65% of

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<sup>2</sup> The July 1, 2013, Multi-Media Rights Agreement between CTSP and the University ("Agreement") is attached hereto as Exhibit B. The University's Standard Terms of Purchase, dated April 1, 2011, are attached hereto as Exhibit C.

<sup>3</sup> Ex. A (Determinations and Findings) at pg. 3.

Adjusted Gross Revenue ("AGR") from multimedia rights ("MMR") sales in any contract year exceeded the Baseline, in which case the University would receive 65% of AGR for the applicable contract year. Employing JMI Sports's revenue assumptions as set forth in its own submissions through CTSP's formula for its "Greater of Minimum Guarantee of Share" model, the University would receive \$7,084,000 more from CTSP over the course of the RFP term, *i.e.*, \$92,442,000 from CTSP versus \$85,358,000 from JMI Sports.

The second alternate was a pure revenue sharing model (*i.e.*, no guaranteed payments), whereby the University would receive, in any contract year, 70% of AGR on MMR sales from \$0 to \$7,500,000, and 75% of AGR on MMR sales from \$7,500,001 and above in each contract year. Neither the RFP nor either addendum requested the bidders to submit revenue projections over the term, and for this reason, CTSP's financial proposal submitted compensation models without projections or estimates on total compensation due to the University (except for the guaranteed payments, which totaled \$56,250,000). Employing JMI Sports's own revenue assumptions in the context of a pure revenue sharing model, the University would receive \$16,837,000 more from CTSP over the course of the RFP, *i.e.*, \$102,195,000 from CTSP versus \$85,358,000 from JMI Sports.<sup>4</sup> A chart demonstrating the year-by-year difference in financial offerings – demonstrating a superior offering from CTSP as compared to JMI Sports in every year except the first year of the award, under either model – is attached hereto as Appendix 1. Therefore, JMI Sports's own assumptions make clear that CTSP offered the University greater upside over the term of the contract.

Second, JMI Sports's revenue projections were so inflated as to be effectively meaningless, and should have been evaluated as constituting an inferior financial offering in the Determinations and Findings. For example, in its "Offer 2," which the University accepted, JMI Sports submitted projected revenue without a minimum guarantee with respect to campus marketing revenue. This allowed JMI Sports to artificially inflate its projected total value to the University by proffering unsupported guesswork as to those revenue figures without having to stand behind them in the form of a guarantee. And, to the extent the University believes that there will be significant campus revenue, CTSP's offer is clearly superior – offering the University 65% of such revenue, versus JMI Sports's graduated scale that is as low as 33% for the first \$2.5 million in any year. Additionally, in evaluating JMI Sports's revenue projections, the University apparently did not account for the fact that JMI Sports would have no existing sponsorship agreements, because all current sponsorship agreements are with CTSP. It will take significant time and effort for JMI Sports to get the property back to the current (2015-16) revenue level, let alone realize the incremental revenue growth that would be required to meet the value projections set forth in their RFP response.

Third, the Determinations and Findings were based on flawed evaluations. For example, evaluator Graham Neff compared the bidders' financial offerings using only that portion of CTSP's offer constituting the guaranteed amount but compared it to JMI Sports's guaranteed amount plus its other projected revenue share, resulting in an apples-to-oranges evaluation that incorrectly inflated the scoring on behalf of JMI Sports. Also, he indicated that JMI Sports's offer was \$84 million "and 50% share above minimum," but the \$84 million already *includes* the share

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<sup>4</sup> Note that these figures eliminate JMI Sports's trade value assumption of \$400,000 per contract year, which assumption would be constant across bidders and compensation models, and therefore have no effect on a comparison between bidders.

above minimum.<sup>5</sup> Mr. Neff also did not compare CTSP's "option 2" with JMI Sports's "Option 2."<sup>6</sup> The Determinations and Findings make no correction for this mistaken scoring sheet. Additionally, the University admits that it did not "hammer" JMI Sports "to improve [its] offer."<sup>7</sup> The University justifies this by claiming that JMI Sports's offer was "about \$20M more over seven years than our current contract" with CTSP.<sup>8</sup> The economics behind this reasoning are flawed for one of two reasons: either (1) the University compared seven years of the contract pursuant to the RFP to the four years that remain on CTSP's Agreement; or (2) the University compared the first four years of JMI Sports's proposal to last four years remaining on CTSP's Agreement, but compared only CTSP's minimum guarantee under the current agreement to JMI Sports's guarantee plus share using JMI Sports's unsupported revenue assumptions. In either case, this is yet another flawed assumption.

In addition, the Determinations and Findings fundamentally contradict the revenue assumptions set forth in the RFP. In explaining the need for a "total campus" marketing approach, the RFP states that "this field of marketing is relatively new, [such that] opportunities in this area will be identified at any time *during* the term of this contract. A true University inventory of opportunities is fluid *and not something that would be possible to easily identify prior to the contract.*"<sup>9</sup> Yet, the Determinations and Findings make the irreconcilable claim that the University had recognized a "total campus" revenue target for purposes of evaluating bids, stating that "the \$5-6M that is being generated for Athletics could easily double when you consider the entire University Inventory."<sup>10</sup> Accordingly, the framework under which the University selected JMI Sports contravened the fundamental revenue assumptions giving rise to a "total campus" marketing approach.

Moreover, the University has added a "look-in" period to its proposed award to JMI Sports, which allows both the University and JMI Sports to reassess the contract after 24 months.<sup>11</sup> This additional provision limits the University and JMI Sports's obligations under the RFP to a 24-month, rather than the seven (7) year term otherwise proposed in the RFP. The "look-in" also enabled JMI Sports to submit a more aggressive bid, knowing that it had the ability to submit a new proposal in two years if it was unable to fulfill its aggressive projections. Further, no such right was offered to CTSP, in clear violation of S.C. Code Ann. § 11-35-1520(2), which requires an "invitation for bids [to] . . . include specifications and all contractual terms and conditions applicable to the procurement."

In sum, judged properly, CTSP's bid was clearly more advantageous to the University and the contract should be awarded to CTSP.

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<sup>5</sup> The Evaluation Panel Briefing and Instructions, dated March 7, 2016, are attached hereto as Exhibit D, at pg. 6. (emphasis added)

<sup>6</sup> *See id.*

<sup>7</sup> Ex. A, (Determinations and Findings) at pg. 4.

<sup>8</sup> *Id.*

<sup>9</sup> Clemson Total Campus Marketing – Scope of Work, is attached hereto as Exhibit E, at pg. 10 (emphasis added).

<sup>10</sup> Ex. A (Determinations and Findings) at pg. 1.

<sup>11</sup> *Id.* at 4.

**b. Marketing and Execution Plan (20 Points): CTSP submitted a superior marketing and execution plan for the Total Campus Marketing Initiative**

Despite the University's admonition that overall marketing and execution plan, along with experience, are "what will actually deliver value to the University,"<sup>12</sup> JMI Sports's submissions failed to identify specific plans sufficient to qualify it for the award. For example, JMI Sports vaguely claimed that a leadership transition from CTSP (and CTSP's existing exclusive rights) would "most[ly]" occur within the first six weeks, without laying out any integration timeline with concrete steps.<sup>13</sup>

Also, while JMI Sports frequently referenced its interest in expanding the University's social media presence, it did not identify any resources to achieve this goal. And, while JMI Sports attaches as exhibits lists of the largest South Carolina companies and agencies with a pledge to approach these entities with the University's sponsorship opportunities, it provided neither substance nor evidence of a plan to execute that pledge or evidence that it has relationships with any of these companies. In fact, JMI Sports has never operated in South Carolina in any capacity. It is clear that JMI Sports's representations in this regard were nothing more than baseless aspirations.

Similarly, while the Determinations and Findings concluded that "JMI Sports specifically addressed people they would propose to place to support the contract,"<sup>14</sup> JMI Sports presented a list of senior executives, who at most, would be a temporary team to assist in transitioning JMI Sports into the role currently occupied by CTSP. In fact, JMI Sports specifically disclaims that these executives will continue to participate in University activity once transition is complete.<sup>15</sup> The JMI Sports proposal provides no concrete details on long-term staffing other than the inclusion of a sample organizational chart devoid of named individuals.<sup>16</sup>

On this ground as well, CTSP clearly submitted the superior bid. Unlike JMI Sports's vague integration "plan," CTSP's submission contained a concrete 12-month implementation plan for "total campus" integration.<sup>17</sup> Likewise, in contrast to JMI Sports's nebulous plan for social marketing, CTSP specifically set forth its targeted marketing platform capabilities, including Think Social, an in-house targeted viral marketing platform that is unique in the industry and which has created large social media campaigns for sponsors, professional teams, and collegiate powerhouses such as Oregon, Oklahoma State and others.<sup>18</sup> JMI Sports has no similar resource.

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<sup>12</sup> Justification for Competitive Sealed Bid, dated January 17, 2016, is attached hereto as Exhibit F, at pg. 1.

<sup>13</sup> JMI Sports Technical Business Proposal, dated March 1, 2016, is attached hereto as Exhibit G, at pg. 18.

<sup>14</sup> Ex. A (Determinations and Findings) at pg. 2.

<sup>15</sup> Ex. G (JMI Sports Technical Business Proposal) at pg. 18.

<sup>16</sup> *Id.* at 17. Paradoxically, the Determinations and Findings criticize CTSP's inclusion of precisely the same chart, but appear to laud such chart vis-à-vis JMI Sports. See Ex. A (Determinations and Findings) at pg. 2.

<sup>17</sup> The Learfield Technical Business Proposal is attached hereto as Exhibit H, at pg. 7.

<sup>18</sup> *Id.* at 12; see <http://thinksocial.com/our-work/>.

Furthermore, the University noted in its Determinations and Findings that a smooth transition “was more critical and essential for success than the numbers themselves.”<sup>19</sup> On this point, CTSP’s proposal was the demonstrably better choice. CTSP has already devoted significant efforts to selling for the upcoming football season. Switching to a new multi-media rights holder at this point will cause the University to lose all of its current sponsorships and opportunities to secure new ones. Also, a transition at this time will cause the University to lose the employees who are knowledgeable about its business. Plainly, such conduct is not in the interests of a streamlined or economical transition.

***c. Organizational Structure and Proposed Staffing (20 Points): CTSP submitted an organizational structure and staffing plan that directly responded to the University’s needs, which should have been evaluated in favor of CTSP and not JMI Sports***

CTSP submitted an organizational structure and proposed staffing plan that built-out the existing staffing structure based on feedback received from the University. CTSP’s plan incorporated the following clearly defined, key personnel: Senior Vice President, Vice President, Senior Vice President of Strategic Partnerships and Campus Connection Team, Executive Director, Director of Campus Total Partnerships, Director of Sales, Manager of Business Development, Marketing Coordinator, and Fulfillment Coordinator.<sup>20</sup> Based on CTSP’s experience, it understands that these are the roles and functions the University needs to fulfill its goals. The University knows the employees currently staffed on behalf of the University, and that they are fully dedicated to the property. JMI Sports, however, provided biographies for some officers and executives, with no indication that all or even some of these individuals will remain with and spend a majority of time servicing the University (and indeed the proposal appears to indicate that JMI Sports would use personnel currently servicing the University of Kentucky to split time and also service the University).<sup>21</sup> And, while the Determinations and Findings weighed this criterion in favor of JMI Sports because JMI Sports purported that it would staff ten employees, while CTSP would staff five employees, the University overlooked that JMI Sports made no actual commitment to employ ten employees dedicated to the University, nor what the qualifications of those ten employees would be.<sup>22</sup> Thus, on this ground as well, CTSP’s submission is far superior.

***d. Evidence of Successful Past Performance and Implementation (10 Points): JMI Sports’s bid materials demonstrate that JMI Sports fails to meet the University’s requirement that bidders “produce annually a comparison of its top 5 (by revenue) collegiate marketing contracts for review and comparison.”***

The University made clear that evidence of successful past performance and implementation was critical to the award, as “anyone can come up with a plan and commit to do this work, [but] there will be varying degrees of confidence that [the University] would have in them actually meeting their commitment based on evidence of past success or failure.”<sup>23</sup> JMI Sports simply

<sup>19</sup> Ex. A (Determinations and Findings) at pg. 4.

<sup>20</sup> Ex. H (Learfield Technical Business Proposal) at pg. 6.

<sup>21</sup> Ex. G (JMI Sports Technical Business Proposal) at pgs. 5-11.

<sup>22</sup> *Id.* at 16.

<sup>23</sup> Ex. F (Justification for Competitive Sealed Bid) at pg. 1.

did not – and could not – provide the relevant experience.<sup>24</sup> JMI Sports's submission makes clear that the only school for whom JMI Sports manages multi-media rights is the University of Kentucky.<sup>25</sup> Even as to its contract with the University of Kentucky, JMI Sports submitted no factual evidence of actual financial success in its implementation of that contract.

Further, JMI Sports's submission failed to properly disclose that the remainder of its purported experience is not remotely comparable to the contract at issue. For example, contrary to the implication in its submission, JMI Sports does not hold exclusive multi-media rights for Arizona State University, a fact which JMI Sports concedes *on its own website*.<sup>26</sup> Even with the limited campus rights JMI Sports has at Arizona State, upon information and belief, JMI Sports has not sold a single sponsorship on behalf of Arizona State. JMI Sports also cited its contract with the Ivy League as relevant experience. Not only is the Ivy League not a comparable athletic market to the University, but the Ivy League itself has made clear that: "media rights are not included in the agreement" with JMI Sports, who "will collaborate with the League and its media partners to activate assets."<sup>27</sup> And, upon information and belief, JMI Sports has not yet begun the performance of any agreement with the Ivy League, as the first year of that contract is for 2016-2017 (*i.e.*, commencing July 1, 2016). The balance of JMI Sports's purported "relevant experience" appears limited to consulting roles, not multi-media rights contracts.<sup>28</sup> Indeed, JMI Sports's President's biography, submitted in connection with its bid, admits that JMI Sports has no multi-media rights agreements beyond the University of Kentucky and the limited agreement with Arizona State: "Leading the firm's multi-media rights efforts, he directly oversees the operations of its two multi-media rights properties: UK Sports & Campus Marketing and ASU Campus Alliances & Sponsorships."<sup>29</sup> Therefore, based on JMI Sports's own submission and admissions, JMI Sports plainly lacks the requisite experience to perform the work required under the proposed contract, and thus fails to meet the University's stated criteria for the award.

In contrast, CTSP identified (complete with client testimonials) that, on its own and through its members and their affiliates, it has more than the requisite number of comparable collegiate marketing contracts – including with Colorado State University, Texas A&M University, University of Wisconsin, and University of Louisville, as well as its longstanding 20-year multi-media rights management relationship with the University itself. In fact, CTSP, on its own and through its members and their affiliates, has the exclusive multi-media rights at approximately 200 colleges and universities. And CTSP has successfully implemented and monetized a total

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<sup>24</sup> Ex. G (JMI Sports Technical Business Proposal) at pgs. 5, 13-15.

<sup>25</sup> *Id.* at 14.

<sup>26</sup> See "Pac-12 Presents New Model to ADs," posted May 18, 2015, attached hereto as Exhibit I. The article notes, two paragraphs down, that "[o]nly Arizona State and Michigan State...manage their rights in-house. The rest outsource to an agency such as IMG College or Learfield Sports."

<sup>27</sup> See "The Ivy League Names JMI Sports Official Marketing Rights Agency," posted January 19, 2016, attached hereto as Exhibit J.

<sup>28</sup> See Ex. G (JMI Sports Technical Business Proposal) at pgs. 14-15. Even JMI Sports's purported consulting experience failed to properly disclose its lack of successful implementation; for example, while JMI Sports identified its consulting relationship with the PAC-12 conference related to the PAC-12 conference's effort to centralize its members' multi-media rights, it failed to disclose that this project has been wholly unsuccessful, as, upon information and belief, not a single member school has agreed to sign on to such plan.

<sup>29</sup> *Id.* at 7.

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Page 8

campus approach comprising athletic and campus-based multi-media rights management at multiple colleges and universities.<sup>30</sup> As its partner Colorado State University recognized, CTSP, through Learfield, has created what is "truly a campus wide relationship" with "expertise in building Strategic Partnerships that extend outside of athletics and cover multiple contact points on campus" in a way that is "invaluable."<sup>31</sup>

Therefore, on the measure of past experience and successful implementation, not only is JMI Sports non-compliant, but CTSP is superior in any event.<sup>32</sup>

#### **Relief Requested**

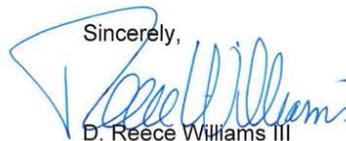
For all the reasons set forth above and in its March 31, 2016 Protest letter, CTSP is entitled to the relief set forth herein. CTSP's completely compliant bid was the most advantageous to the University, while JMI Sports could not meet the required standards and thus failed to provide a compliant, qualified proposal, and its bid should have been disregarded. CTSP respectfully requests that the Chief Procurement Officer determine that the University's intent to award to JMI Sports be promptly overturned and the new RFP be awarded to CTSP.

CTSP also hereby requests a hearing to resolve this Protest, pursuant to S.C. Code Ann. § 11-35-4210.

#### **Reservation of Rights to Supplement Protest**

CTSP's investigation into the circumstances of this award is ongoing. CTSP therefore reserves its rights to supplement and/or submit additional grounds for this Protest, at least up and until April 14, 2016, or later, and/or to pursue other legal claims. See S.C. Code Ann. § 11-35-4210(2)(b); § 11-35-4230; Agreement § 5.3.

Sincerely,



D. Reece Williams III

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<sup>30</sup> Learfield Technical Business Proposal, attached hereto as Exhibit F, at pg. 17-18. The Determinations and Findings incorrectly stated that CTSP was able to reference only one school (Texas A&M) where it had a total campus contract approach.

<sup>31</sup> *Id.* at 17.

<sup>32</sup> The University also clearly and improperly considered criteria not set forth in the RFP. For example, the Determinations and Findings make clear that Mr. Nebesky disfavored CTSP's submission because of certain redactions CTSP initially made to its financial proposals and efforts to resolve what Mr. Nebesky saw as over-redactions. See Ex. A (Determinations and Findings) at pg. 2. This was contrary to S.C. Code Ann. § 11-35-1520(6), which provides that: "The invitation for bids must set forth the evaluation criteria to be used. Criteria must not be used in bid evaluation that are not in the invitation for bids. Bids must be evaluated based on the requirements in the invitation for bids and in accordance with the regulations of the board."

Michael B. Spicer  
April 12, 2016  
Page 9

cc: Kathleen McDaniel (via email only)  
Yehudah Buchweitz, Weil, Gotshal & Manges LLP (via email only)  
Jessie Mishkin, Weil, Gotshal & Manges LLP (via email only)  
John Raleigh (via email only)  
Rivers Stillwell, Nelson Mullins Riley & Scarborough LLP (via U.S. Mail and email)

**APPENDIX 1**

<b>Option 1: Greater of Minimum Guarantee or Share (in thousands)</b>						
<b>Year</b>	<b>Rights Fee Guarantee</b>	<b>65% Share Above Guarantee</b>	<b>Capital Subsidy</b>	<b>Amount to University under CTSP Model</b>	<b>Amount to University under JMI Model</b>	<b>Difference</b>
2016-17	6,500	0	1,000	7,500	9,040	(1,540)
2017-18	7,000	1,794	1,000	9,794	9,718	75
2018-19	7,750	3,682	-	11,432	9,761	1,671
2019-20	7,950	5,883	-	13,833	12,049	1,784
2020-21	8,150	7,282	-	15,432	13,697	1,735
2021-22	8,350	8,406	-	16,756	15,062	1,694
2022-23	8,550	9,146	-	17,696	16,031	1,665
	<b>\$54,250</b>	<b>\$36,192</b>	<b>\$2,000</b>	<b>\$92,442</b>	<b>\$85,358</b>	<b>\$7,084</b>

<b>Option 2: Revenue Share (in thousands)</b>						
<b>Year</b>	<b>Rights Fee Guarantee</b>	<b>70% - 75% Share</b>	<b>Capital Subsidy</b>	<b>Amount to University under Learfield Model</b>	<b>Amount to University under JMI Model</b>	<b>Difference</b>
2016-17	-	6,651	1,000	7,651	9,040	(1,389)
2017-18	-	9,595	1,000	10,595	9,718	877
2018-19	-	12,639	-	12,639	9,761	2,878
2019-20	-	15,409	-	15,409	12,049	3,360
2020-21	-	17,254	-	17,254	13,697	3,557
2021-22	-	18,782	-	18,782	15,062	3,720
2022-23	-	19,866	-	19,866	16,031	3,835
	<b>\$0</b>	<b>\$100,195</b>	<b>\$2,000</b>	<b>\$102,195</b>	<b>\$85,358</b>	<b>\$16,837</b>

## Attachment 3



D. Reece Williams, III – Member  
Ph: 803-404-6900  
Fax: 803-404-9602  
[ReeceWilliams@CallisonTighe.com](mailto:ReeceWilliams@CallisonTighe.com)

April 14, 2016

**Via Email & Hand Delivery**  
*([protest-mmo@mmo.state.sc.us](mailto:protest-mmo@mmo.state.sc.us))*

Michael B. Spicer  
Chief Procurement Officer  
State of South Carolina  
Procurement Services Division  
Materials Management Office  
1201 Main Street, Suite 600  
Columbia, SC 29201

**Re: Second Amendment to Clemson RFP Award Protest, Bid No. 68301548  
CTR File No.: 6538.001**

Dear Mr. Spicer:

Clemson Tiger Sports Properties, LLC ("CTSP") respectfully submits this second amendment to its protest, dated March 31, 2016, as first amended April 12, 2016 (collectively the "Protest"), pursuant to S.C. Code Ann. §11-35-4210(2)(b). In addition to the bases for challenge previously submitted, CTSP wishes to highlight the University's deficient response to CTSP's FOIA Request, dated March 31, 2016 (annexed as Exhibit K, the "Request"), seeking "any and all documents in [the University's] possession or control" regarding its procurement activity and intent to issue an award in response to Bid No. 68301548 (Ex. K at p. 1). The University's failure to timely and meaningfully respond to the Request has denied CTSP relevant evidence and thereby stripped CTSP of its due process right to assert all bases for challenge in its Protest.

Despite CTSP's explicit instructions that the University construe the Request broadly – i.e. "all documents directly related to this procurement activity not otherwise exempt from disclosure" (Ex. K at p. 1) – on April 5, 2016, the University produced the following limited documents through its counsel, Rivers Stilwell, Esq. (certain of which are attached hereto to further supplement the record on this Protest): (i) JMI Sports Financial Proposal (annexed as Exhibit L), (ii) Clemson Procurement Supplier Response from JMI Sports (annexed as Exhibit M), (iii) JMI Technical Proposal (previously attached as Exhibit G), (iv) Determination Prior to Use of a Multi-Term Contract (annexed as Exhibit N), (v) Justification for Competitive Sealed Proposal (previously attached as Exhibit F), (vi) Record of Negotiations with JMI Sports (annexed as Exhibit O), (vii) Determination & Findings (previously attached as Exhibit A), (viii) Evaluation File and Site Visit Sign-In (previously attached as Exhibit D), (ix) RFP Calculation File (annexed as Exhibit P), (x) Addendum #1 to RFP (annexed as Exhibit Q), and (ix) Addendum #2 to RFP (annexed as Exhibit R) (collectively the "Initial Responses").

The deadline to fully respond to CTSP's Request was April 11, 2016. See S.C. Code Ann. Regs. §19-445.2010. After CTSP contacted Mr. Stilwell to advise that the University had failed to complete its production, on April 13, 2016, Mr. Stilwell advised that he would not be able to provide further non-privileged documents responsive to the Request, including emails, prior to the deadline to supplement the Protest, although he had directed the University to begin compiling responsive emails. He further advised that the University took the position that it has produced everything responsive to S.C. Code Ann. § 19-445.2010 and that emails, correspondence, and internal communications, are not "directly related to the intent to award," despite the fact that both the Request and the relevant regulation state that the University should produce all documents "directly related to the procurement activity." S.C. Code Ann. § 19-445.2010(A).

Based on CTSP's review of the Initial Responses and Mr. Stilwell's communications, it is clear that the University possesses additional documents directly responsive to CTSP's Request, and that such documents are not exempt from disclosure. By way of example, Addendum #1 lists questions posed by bidders and answered by University personnel; however, the Initial Responses do not reveal the source of these questions nor provide communications to or from the University (whether with bidders or between University personnel) relating to such questions. Additionally, the Determinations and Findings specifically refer to correspondence between Michael Nebesky, University Director of Procurement Services, and JMI Sports representatives, none of which the Initial Responses include. We further note that the University's Evaluation File did not contain minutes of meetings between RFP evaluators despite reference to such meetings in the Determinations and Findings. To be clear, the University has not suggested that these undisclosed documents are exempt from disclosure.

The University's failure to produce all relevant documents by April 11, 2016 (a violation of S.C. Code Ann. Regs. § 19-445.2010) has prejudiced CTSP's ability to fully supplement its protest with all relevant evidence prior to the April 14, 2016 protest deadline.<sup>1</sup> CTSP submits that there may be grounds for challenge that it cannot assert unless and until CTSP reviews the undisclosed documents which the University has failed to produce. Moreover, should the University produce the undisclosed documents after the protest deadline, the University could argue that CTSP should be precluded from relying on them as additional grounds for challenge despite CTSP's documented efforts to assert all additional grounds. CTSP submits that the University's prejudicial actions amount to a violation of CTSP's substantive and procedural due process rights. Accordingly, CTSP hereby includes these due process violations an additional basis for challenging the award to JMI Sports, and also respectfully seeks to reserve its rights to further supplement this Protest based on arguments that may be discovered based on later-produced documents.<sup>2</sup>

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<sup>1</sup> CTSP also attaches as Exhibit S its Financial Proposal in the interest of providing as complete a record to the procurement office as is possible at this time.

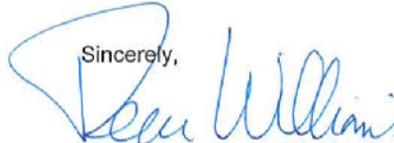
<sup>2</sup> The Chief Procurement Officer is authorized to issue a protective order allowing access to responsive information, even if not customarily subject to disclosure under FOIA, where the protective order "serves to facilitate the pursuit of a protest." See S.C. Code of State Regulations, Reg. 19-445.2220(A). Accordingly, CTSP also respectfully requests that the Chief Procurement Officer issues an order allowing CTSP access to the non-privileged documents responsive to the Request that are currently being withheld by the University.

Michael B. Spicer  
April 14, 2016  
Page 3

For all of the reasons set forth above and in CTSP's prior submissions, CTSP respectfully requests that the Chief Procurement Officer (i) order a hearing, pursuant to S.C. Code Ann. §11-35-4210, to resolve this Protest, (ii) promptly overturn the University's intent to award to JMI Sports and award the new RFP to CTSP, and (iii) grant CTSP such other and further relief as the Chief Procurement Officer deems just and proper.

CTSP's investigation into the circumstances of this award is ongoing. CTSP therefore reserves its rights to supplement and/or submit additional grounds for this Protest, and/or to pursue other legal claims. See S.C. Code Ann. §11-35-4210(2)(b); §11-35-4230; Sec. 3, Multi-Media Rights Agreement (Ex. B to Amended Clemson RFP Award Protest, dated April 12, 2016).

Sincerely,



D. Reece Williams III

cc: Kathleen McDaniel (via email)  
Yehudah L. Buchweitz (via email)  
Jessie Mishkin (via email)  
John Raleigh (via email)  
Rivers Stilwell (via email)

## 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**

---

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

---

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.**