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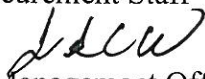
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MEMORANDUM

TO: Agency Finance Directors, Procurement Directors, Facility
Managers, and Procurement Staff

FROM: John St.C. White 
Interim Materials Management Officer and State Engineer

RE: Act No. 63 of 2015

DATE: February 3, 2016

On August 24, 2015, I distributed a memorandum describing new Code Section 11-35-5300 and solicitation clauses we developed for compliance with the law. The memo required adding Clause No. 7A053 to “**all** existing contracts.” Another section of the memo required the clause to be added “to any current contracts *that have renewable option terms remaining.*” (emphasis supplied) We no longer recommend adding the clause to contracts awarded before June 4, 2015.

We borrowed heavily from our announcement of the Iran Divestment Act clauses when drafting the August memo. The Iran Act specifically applies to contract renewals and assignments. S.C. Code Ann. § 11-57-330(A) (Supp. 2015). The open trade statute (S.C. Code Ann. § 11-35-5300 (Supp. 2015)) includes no similar language. Furthermore, Section 5 of Act No. 63 provides that it does not apply to contracts entered into before its effective date (June 4, 2015). Accordingly, we now view Section 11-35-5300 to apply only at the time the contract is formed, and not to option or renewal terms provided for in contracts awarded prior to its passage.

Clause No. 7A053 should be part of all contracts awarded after June 4, 2015, with a total potential value of \$10,000 or more.¹ You should review those contracts for compliance. You do not need to modify any contracts awarded prior to that date.

¹ The SCEIS dialog has automatically inserted both Clauses 2A083 and 7A053 in solicitations created after August 24, 2015. SCEIS users should only be concerned with solicitations created using Document Builder between June 4 and August 24, 2015; and contracts awarded after June 4, 2015, where the solicitation did not include the new clauses.

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MEMORANDUM

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FROM: John St.C. White
Interim Materials Management Officer and State Engineer

RE: Act No. 63 of 2015

DATE: August 24, 2015

This is to alert you to the requirements of Act No. 63 of 2015. Effective June 4, 2015, it revises the Iran Divestment Act and creates Article 23 of the Consolidated Procurement Code.

The Iran Divestment Act certification is now required only for contracts over \$10,000. The new law includes exceptions for inter-governmental contracts and cooperative purchasing agreements sponsored by public procurement units. It also makes clear that failure to comply with the Iran Divestment Act is not grounds for a protest.

New Code Section 11-35-5300 prohibits contracting with discriminatory businesses. It requires a pre-award representation from a contractor that the business is not currently engaged in, and an agreement that the business will not engage in, the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in the statute. It does not apply to contracts under \$10,000, nor to inter-governmental contracts or cooperative purchasing agreements sponsored by public procurement units. Failure to comply with Section 11-35-5300 is not grounds for a protest.

We have developed two new solicitation clauses in response to Section 11-35-5300.

The first new clause is the bidder's representation she is not engaged in a prohibited boycott. It is part of the instructions to offerors and should be added by amendment to Section IIA in all solicitations that have not yet been opened. The clause reads:

OPEN TRADE REPRESENTATION (JUN 2015): By submitting an Offer, Offeror represents that Offeror is not currently engaged in the boycott of a person or an entity based in or doing business with a jurisdiction with whom South

Carolina can enjoy open trade, as defined in SC Code Section 11-35-5300. [02-2A083-1]

The second new clause is the contractor's agreement not to engage in a prohibited boycott during the term of the contract. It must be added to all open solicitations by amendment; and to solicitations that have been opened but have not yet been awarded and to any current contracts that have renewable option terms remaining, by change order or directive. It is part of the performance requirements of the contract, and appears in Section VIIA. The clause reads:

OPEN TRADE (JUN 2015): During the contract term, including any renewals or extensions, Contractor will not engage in the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in SC Code Section 11-35-5300. [07-7A053-1]

We have also revised the guidance for our Iran Divestment Act clauses to reflect their application only to contracts over \$10,000.

Recapping:

- For **all** solicitations **that have not been opened**, add clause 2A083-1 by amendment
- For **all** solicitations **that have been opened but not yet awarded**:
 - Require contractor to execute the attached certification prior to award
 - Add clause 7A053-1 by change order or directive immediately upon award
- For contracts **awarded on or after June 4, 2015**, where the solicitation did not include clause 2A083-1, require contractor to execute the attached certification
- For **all** existing contracts, add clause 7A053-1 by change order or directive

The SCEIS dialog has been modified to insert these clauses automatically. For state agencies that do not use SCEIS, they should be manually inserted as described above. OSE forms have been modified to include analogous provisions for design and construction solicitations and contracts.

Act No. 63 has similar but not identical restrictions for political subdivisions. **These clauses may not reflect the Act's requirements for counties, municipalities, school districts, etc.** We will be working with representatives of the Municipal Association, the Association of Counties, and the School Boards Association in the coming days to provide appropriate language for statewide term contracts that will make their use by political subdivisions in compliance with the Act.