~~Indicates Matter Stricken~~

Indicates New Matter

AMENDED

April 24, 2012

**H. 4640**

Introduced by Reps. Anthony, Bingham, Ott, Harrell, White, Bowers, Whipper and R.L. Brown

S. Printed 4/25/12--H.

Read the first time January 19, 2012.

**STATEMENT OF ESTIMATED FISCAL IMPACT**

ESTIMATED FISCAL IMPACT ON GENERAL FUND EXPENDITURES:

See Below

ESTIMATED FISCAL IMPACT ON FEDERAL & OTHER FUND EXPENDITURES:

See Below

**EXPLANATION OF IMPACT:**

State Budget and Control Board

The board indicates the fiscal impact of the legislation cannot be determined. A review of all bids submitted for each solicitation would be needed. However, data from unsuccessful bids is not retained.

However, the board reports that, of the contracts awarded during fiscal year 2011, it is estimated at least 688 would have been affected by the vendor preferences offered in the legislation. These contracts have a total potential value of $134,726,602. However, not all of these contracts would have been affected. Factors that must be considered in order to make this determination include:

1. Were there any in-state bidders?

2. Did in-state bidders propose a bid that was within nine-percent of the lowest bid?

3. Was the price the driving factor in vendor selection?

Price is important because there are alternative procurement vehicles authorized by current law when factors other than price are of high importance that must be taken into consideration. With all factors considered, it cannot be assumed that all 688 contracts would have been awarded to in-state bidders had this legislation been in place.

**SPECIAL NOTES:**

The board notes this analysis does not include higher education institutions nor does it include contracts awarded by agencies within their certification authority.

*Approved By:*

Brenda Hart

Office of State Budget

**A** **BILL**

TO AMEND SECTION 11‑35‑1524, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO RESIDENT VENDOR PREFERENCES UNDER THE CONSOLIDATED PROCUREMENT CODE, SO AS TO REVISE THE RESIDENT VENDOR PREFERENCES AND THE MANNER AND PROCEDURES UNDER WHICH THEY ARE COMPUTED.

Amend Title To Conform

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 11‑35‑1524 of the 1976 Code is amended to read:

“Section 11‑35‑1524. (A) For purposes of this section:

(1) ‘End product’ means the tangible product described in the solicitation including all component parts and in final form and ready for the state’s intended use.

(2) ‘Grown’ means to produce, cultivate, raise, or harvest timber, agricultural produce, or livestock on the land, or to cultivate, raise, catch, or harvest products or food from the water which results in an end product that is locally derived from the product cultivated, raised, caught, or harvested.

(3) ‘Labor cost’ means salary and fringe benefits.

(4) ‘Made’ means to assemble, fabricate, or process component parts into an end product, the value of which, assembly, fabrication, or processing is a substantial portion of the price of the end product.

(5) ‘Manufactured’ means to make or process raw materials into an end product.

(6) ‘Office’ means a nonmobile place for the regular transaction of business or performance of a particular service which has been operated as such by the bidder for at least one year before the bid opening and during that year the place has been staffed for at least fifty weeks by at least two employees for at least thirty‑five hours a week each.

(7) ‘Services’ means services as defined by Section 11‑35‑310(29) and also includes services as defined in Section 11‑35‑310(1)(d).

~~(8)~~ ~~‘South Carolina end product’ means an end product made, manufactured, or grown in South Carolina.~~

~~(9)~~ ~~‘United States end product’ means an end product made, manufactured, or grown in the United States of America.~~

(B)~~(1)~~ ~~When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease by seven percent the price of any offer for a South Carolina end product.~~

~~(2)~~ ~~When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease by two percent the price of any offer for a United States end product. This preference does not apply to an item to which the South Carolina end product preference has been applied.~~

~~(3)~~ ~~Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of end product. A preference must not be applied to an item for which a bidder does not qualify.~~

~~(4)~~ ~~If a contract is awarded to a bidder that received the award as a result of the South Carolina end product or United States end product preference, the contractor may not substitute a nonqualifying end product for a qualified end product. A substitution in violation of this item is grounds for debarment pursuant to Section 11‑35‑4220. If a contractor violates this provision, the State may terminate the contract for cause and, in addition, the contractor shall pay to the State an amount equal to twice the difference between the price paid by the State and the bidder’s evaluated price for a substituted item.~~

~~(5)~~ ~~If a bidder is requesting this preference, the bidder, upon request of the procurement officer, must provide documentation that establishes the bidder’s qualifications for the preference. Bidder’s failure to provide this information promptly is grounds to deny the preference and for enforcement pursuant to subsection (E)(6).~~ Reserved.

(C)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder’s price by ~~seven~~ nine percent if the bidder maintains an office in this State and either (i) maintains at a location in South Carolina at the time of the bid an inventory of expendable items which are representative of the general type of commodities on which the award will be made and which have a minimum total value, based on the bid price, equal to the lesser of fifty thousand dollars or the annual amount of the contract; (ii) is a manufacturer headquartered and having an annual payroll of at least one million dollars in South Carolina and the end product is made or processed from raw materials into a finished end product by that manufacturer or its affiliate (as defined in Section 1563 of the Internal Revenue Code); or (iii) at the time of bidding, directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to bidder for those individuals to provide those services exceeds fifty percent of the bidder’s total bid price.

(2) ~~Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of end product or work, as applicable. A preference must not be applied to an item for which a bidder does not qualify.~~

~~(3)~~ If a bidder is requesting this preference, the bidder, upon request by the procurement officer, must provide documentation that establishes the bidder’s qualifications for the preference and, for the preference claimed pursuant to subsection (C)(1)(iii), must identify the persons domiciled in South Carolina that will perform the services involved in the procurement upon which bidder relies in qualifying for the preference, the services those individuals are to perform, and documentation of the bidder’s labor cost for each person identified. Bidder’s failure to provide this information promptly is grounds to deny the preference and for enforcement under subsection (E)~~(6)~~(4) below.

(D)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder’s price by two percent if:

(a) the bidder has a documented commitment from a single proposed first‑tier subcontractor to perform some portion of the services expressly required by the solicitation; and

(b) at the time of the bidding, the subcontractor directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to the subcontractor for those individuals to provide those services exceeds twenty percent of bidder’s total bid price.

(2) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder’s price by four percent if:

(a) the bidder has a documented commitment from a single proposed first‑tier subcontractor to perform some portion of the services expressly required by the solicitation; and

(b) at the time of the bidding, the subcontractor directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to the subcontractor for those individuals to provide those services exceeds forty percent of bidder’s total bid price.

(3) ~~Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of work. A preference must not be applied to an item for which a bidder does not qualify.~~

~~(4)~~ Subject to other limits in this section, an offeror may benefit from applying for more than one of, or from multiple applications of, the preferences allowed by items (1) and (2).

~~(5)~~(4)(a) In its bid, a bidder requesting any of the preferences allowed by items (1) and (2) must identify the subcontractor to perform the work, the work the subcontractor is to perform, and the bidder’s factual basis for concluding that the subcontractor’s work constitutes the required percentage of the work to be performed in the procurement.

(b) If a bidder is requesting a preference allowed by items (1) or (2), upon request by the procurement officer, the bidder shall identify the persons domiciled in South Carolina that are to perform the services involved in the procurement upon which the bidder relies in qualifying for the preference, the services those individuals are to perform, the employer of those persons, the bidder’s relationship with the employer, and documentation of the subcontractor’s labor cost for each person identified. Bidder’s failure to provide this information promptly will be grounds to deny the preference and for enforcement pursuant to subsection (E)~~(6)~~(4) below.

(c) If a contract is awarded to a bidder that received the award as a result of a preference allowed by items (1) or (2), the contractor may not substitute any business for the subcontractor on which the bidder relied to qualify for the preference, unless first approved in writing by the procurement officer. A substitution in violation of this subitem is grounds for debarment pursuant to Section 11‑35‑4220. If a contractor violates this provision, the procurement officer may terminate the contract for cause. If the contract is not terminated, the procurement officer may require the contractor to pay the State an amount equal to twice the difference between the price paid by the State and the price offered by the next lowest bidder, unless the substituted subcontractor qualifies for the preference.

(E)(1) A business is not entitled to any preferences unless the business, to the extent required by law, has:

(a) paid all taxes assessed by the State; and

(b) registered with the South Carolina Secretary of State and the South Carolina Department of Revenue.

(2) ~~The preferences provided in subsections (B) and (C)(1)(i) and (ii) do not apply to a single unit of an item with a price in excess of fifty thousand dollars or a single award with a total potential value in excess of five hundred thousand dollars.~~

~~(3)~~ ~~The preferences provided in subsections (C)(1)(iii) and (D) do not apply to a bid for an item of work by the bidder if the annual price of the bidder’s work exceeds fifty thousand dollars or the total potential price of the bidder’s work exceeds five hundred thousand dollars.~~

~~(4)~~ A solicitation must provide potential bidders an opportunity to request the preferences that apply to a procurement. By submitting a bid and requesting that a preference be applied to that bid, a business certifies that its bid qualifies for the preference for that procurement. For purposes of applying this section, a bidder is not qualified for a preference unless the bidder makes a request for the preference as required in the solicitation. If a solicitation specifies which preferences, if any, apply to a procurement, the applicability of preferences to that procurement is conclusively determined by the solicitation unless the solicitation document is timely protested as provided in Section 11‑35‑4210. If two or more bidders are tied after the application of the preferences allowed by this section, the tie must be resolved as provided in Section 11‑35‑1520(9). Price adjustments required by this section for purposes of evaluation and application of the preferences do not change the actual price offered by the bidder.

~~(5)~~(3) This section does not apply to an acquisition of motor vehicles as defined in Section 56‑15‑10 or an acquisition of supplies or services relating to construction. This section does not apply to a procurement conducted pursuant to Section 11‑35‑1550(2)(a) or (b), Section 11‑35‑1530, or Article 9, Chapter 35.

~~(6)~~(4) Pursuant to Section 11‑35‑4220, a business may be debarred if (i) the business certified that it qualified for a preference, (ii) the business is not qualified for the preference claimed, and (iii) the certification was made in bad faith or under false pretenses. If a contractor has invalidly certified that a preference is applicable, the chief procurement officer may terminate the contract for cause, and the chief procurement officer may require the contractor to pay the State an amount equal to twice the difference between the price paid by the State and the price offered by the next lowest bidder.

~~(7)~~(5) The sum of all preferences allowed by items (D)(1) and (D)(2)~~, when applied to the price of a line item of work,~~ may not exceed six percent unless the bidder maintains an office in this State. Under no circumstances may the cumulative preferences applied to any bidder’s ~~the~~ price ~~of a line item~~ exceed ten percent. The cumulative value of the adjustments to a bidder’s price for all applicable preferences may not exceed fifty thousand dollars.

~~(8)~~(6) As used in items (C)(1)(iii), (D)(1)(b), and (D)(2)(b), the term ‘documented commitment’ means a written commitment by the bidder to employ directly an individual, and by the individual to be employed by the bidder, both contingent on the bidder receiving the award.

~~(9)~~(7) The remedies available in this section are cumulative of and in addition to all other remedies available at law and equity.

(F) Subject to the preference limits contained in this section, the preference for all applicable preferences shall be applied to the total value of the contract price for the solicitation and not to incremental portions thereof.”

SECTION 2. This act takes effect upon approval by the Governor.

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