

Guidance & Best Practices
for
Permissible Communications in a Competitive Sealed Proposal
After Opening but Prior to Award

State Procurement Office / Information Technology Management Office / State Engineer's Office

Version Date: November 26, 2007

Restrictions: As expressly provided by law in R.19-445.2095(I)(4), the discussions allowed in paragraph (b) may be conducted only by procurement officers authorized in writing by the appropriate chief procurement officer.

Notes: (1) Regulation 19-445.2095(G) provides that "[t]he appropriate Chief Procurement Officer may develop and issue procedures which shall be followed by all agencies using the competitive sealed proposal method of acquisition." This guidance, not including the commentary, is issued pursuant to this Regulation. (2) Paragraph (B) is taken verbatim from R. 19-445.2095(I), except for the commentary. Paragraph (E)(5) is adapted from R. 19-445.2010(C). (3) For any given procurement, the term "procurement officer" is defined, for purposes of this document, as the person, or his successor, identified as such in the solicitation.

(A) Communications After Opening, Prior to Award - Not Including Discussions [11-35-1530(6)] or Negotiations [11-35-1530(8)]. The Code and Regulations authorize the following communications after opening, prior to award. Unless the law reflects otherwise, such communications may take place at any time between opening and posting of the award notice, consistent with the underlying enabling authority.

(1) Opening. Very limited communications, if any, can take place during opening. [11-35-1530(3); R.19-445.2010(D); R.19-445.2095(C)(1)]

(2) Acceptance Period Extensions. The procurement officer may exchange information in writing with an offeror regarding a request that an offeror extend its offer acceptance period. [R.19-445.2097(C)]

(3) Minor Informalities. The procurement officer may exchange information in writing with an offeror to allow the offeror to cure, or the state to waive, any deficiency resulting from a minor informality or irregularity. [11-35-1520(8),(13); R.19-445.2095(E)]

(4) Corrections & Withdrawals. The procurement officer may exchange information in writing with an offeror regarding an offeror's request to correct or withdraw its offer. [R.19-445.2085(A)&(B); R.19-445.2095(H)(4)]

[Commentary: See commentary to item (B)(2)(d).]

(5) Questions & Answers. Most solicitations provide an opportunity for offerors to submit written questions and for the state to respond in a written amendment to the solicitation.

[Commentary: In a solicitation amendment that responds to vendor questions, the amendment should not (i) reveal the identity of any offerors,¹ or (ii) provide information not necessary for bidders to submit offerors. The solicitation amendment forms part of the contract documents. Draft amendments accordingly.]

(6) Clarifications. Clarifications are an exchange of information conducted to facilitate the State's understanding of a proposal - as originally submitted - by resolving substantial ambiguities in the proposal. [11-35-1520(8);² R.19-445.2080, -445.2095(E)]

(a) Clarifications may be conducted *only* to clarify an ambiguity in a proposal.

[Commentary: (1) Exchange sufficient information with the vendor to resolve the ambiguity. (2) The procurement officer is charged with limiting such exchanges to only the information necessary to determine how to read language *already existing* in the proposal. (3) A proposal is ambiguous if open to more than one reasonable interpretation or obscure in meaning, through indefiniteness of expression.³ Silence is not an ambiguity. (4) Clarifications *cannot* involve an opportunity for proposal revisions. Accordingly, clarifications must be limited to determining which reasonable interpretation was intended and should *not* include new information or revisions to existing information. Identifying the correct interpretation of language requires only a limited amount of information.]

(b) Clarifications may be conducted only with offerors who have submitted proposals that are obviously responsive to the solicitation's material requirements. [R.19-445.2080] A proposal is not obviously responsive if the determination of responsiveness is dependent on the vendor's resolution of an ambiguity in its proposal.⁴

[Commentary: (1) Allowing the clarification of an ambiguity under Section 11-35-1520 to determine whether an offer is responsive is fundamentally inconsistent with the competitive bidding process, around which Section 11-35-1520 is written.⁵ (2) In determining responsiveness, only the face of the proposal may be considered.⁶]

(c) Clarifications must be conducted with *all* obviously responsive offerors, but only substantial ambiguities need be clarified.

¹ R.19-445.2010(D).

² Because Section 11-35-1520 governs competitive sealed bidding, the guidance has been drafted to apply equally to IFBs. As a practical matter, the authority to seek clarifications pursuant to Section 11-35-1520 has a very narrow application in the context of competitive sealed bidding.

³ Penton v. J.F. Cleckley & Co., 486 S.E.2d 742 (S.C. 1997) ("An ambiguous contract is one capable of being understood in more ways than just one or one unclear in meaning because it expresses its purpose in an indefinite manner."), Southern Atlantic Financial Services, Inc. v. Middleton, 562 S.E.2d 482, 484 (S.C. Ct. App. 2002) ("Mere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity. A contract is ambiguous when its terms are reasonably susceptible of more than one interpretation.") (citations omitted).

⁴ See, generally, Protest of Cannon Associates, Inc., Case No. 2000-13 ("The Panel has decided in several cases that contacting a bidder to seek clarification of substantive portions of his bid injects the potential for abuse into the procurement process. The Panel has stated that once bids are opened and it becomes clear that a certain bidder is the winner but for an ambiguous provision in his bid, clarification would allow that bidder to manipulate his bid to insure that he receives award of the contract.").

⁵ Protest of Abbott Laboratories, Case No. 1997-4 ("Because Ross wrote its request [for mutual termination-for-convenience rights] expressly in the bid, the MMO was compelled to interpret its meaning. The Panel has ruled repeatedly that State procurement officials cannot contact a bidder for clarification."), Protest of Two State Construction Co., Case No. 1996-2 ("The procuring agency cannot seek bid clarification on which it intends to base its decision of responsiveness. . . . The procuring agency may not seek clarification before making a determination of responsiveness, but must find a bid nonresponsive if it feels clarification of the bid is needed."), Protest of United Testing Systems, Inc., Case No. 1991-20 ("Once bids are opened and it becomes clear that a certain bidder is the winner but for an ambiguous provision in his bid, clarification would allow that bidder to manipulate his bid to insure that he receives the award of the contract."), Protest of Value Options, Case No. 2001-7 (concerning an RFP) ("[T]his clarification was clearly in violation of the Code because Magellan was not yet deemed an apparent responsive offeror as is required for Discussion with Offerors under 11-35-1530 of the Code."). See, generally, John Cibinic, Jr. and Ralph C. Nash, Jr., Formation of Government Contracts 569 (George Washington University 3d ed. 1998) ("Bids that are indefinite, uncertain, or ambiguous are normally rejected as nonresponsive.").

⁶ Protest of Two State Construction Co., Case No. 1996-2 ("The Panel agrees with Two State that a bid must be found responsive on its face . . ."). See also Blount, Inc. v. United States, 22 Cl.Ct. 221, 226 (Cl. Ct. 1979) ("Matters of bid responsiveness must be discerned solely by reference to the materials submitted with the bid and facts available to the government at the time of bid opening.") and Southern Foods Group, L.P. v. State, Dept. of Educ., 974 P.2d 1033, 1047 (Haw. 1999) ("Responsiveness is determined by reference to when they are opened and not by reference to subsequent changes in a bid.") (quoting R. Nash & J. Cibinic, Federal Procurement law, 260 (3d ed.1977)).

[Commentary: Section 11-35-1520(8) mandates that *all* offers *needing* clarification must be accorded that opportunity; however, no clarification is needed if an offer contains no substantial ambiguities. The statute affords the procurement officer considerable judgment regarding whether or not an ambiguity needs clarification.]

(d) Clarifications must be conducted only by the procurement officer. Most communications should be in writing.

(e) Clarifications must be documented in writing by the procurement officer and must be included with the proposal. *Clarifications may not result in proposal revisions, only a proper interpretation of the proposal as submitted.*

[Commentary: The statute does not require the procurement officer to include with the proposal all communications exchanged for the purpose of clarifying an ambiguity. Rather, the statute requires that the clarification "must be documented in writing by the procurement officer and included with the [proposal]." This distinction recognizes that clarifications under Section 11-35-1520 do *not* involve proposal revisions. Obviously, the procurement officer cannot legitimately include text in a proposal not agreed to by the offeror. Likewise, the procurement officer cannot - as part of clarifications under 11-35-1520 - include text in a proposal that is unnecessary to resolve the ambiguity. Because the communications exchanged during clarifications can result in receiving information unnecessary to resolving the ambiguity, the procurement officer should document and include in the proposal only that text agreed to by the offeror that is necessary to resolve the ambiguity. Because clarifications do not involve an opportunity for proposal revisions, clarifications *must* be limited to determining which reasonable interpretation of existing proposal text was intended and *cannot* include new information or revisions to existing information.]

(7) Responsibility. The procurement officer may exchange information in writing with an offeror regarding its responsibility.

(a) Such information may be requested at any time prior to award. [11-35-1580; R. 19-445.2125(B)]

[Commentary: While responsibility can be determined earlier in the process, responsibility is often determined only for the apparent successful offeror, after evaluation and shortly before award. If special standards of responsibility have been established, the procurement officer may find it more efficient to identify which offerors meet the special standards early in the process. Exchanges to acquire this information are allowed after opening and prior to award. Most RFPs include one or more evaluation criteria that contemplate an offeror's capabilities. Adding such additional information to the proposal would provide that offeror an unfair opportunity to enhance its proposal.]

(b) Information gathered after opening to determine responsibility - either generally or regarding special standards of responsibility - cannot be added to the documents to be evaluated and ranked, i.e., the proposal.

[Commentary: Most RFPs include one or more evaluation criteria that contemplate an offeror's capabilities. Adding such additional information to the proposal would provide that offeror an unfair opportunity to enhance its proposal.]

(8) Oral Presentations / Demonstrations. Oral presentations and demonstrations may not be conducted except as part of the evaluation process.

(a) Oral presentations are used only for understanding an offeror's proposal in order to facilitate evaluation. Demonstrations involve an evaluation of an offeror's product.

Presentations and demonstrations must be consistent with and limited to the equipment, supplies, services, information technology, pricing, terms, and conditions provided in the offeror's proposal.

(b) Under the control of the procurement officer, people directly involved in evaluating proposals may attend, participate, and ask questions of offerors during an oral presentation or demonstration. Such communications may not (i) communicate demands or weaknesses or deficiencies to an offeror, (ii) include or take place during negotiations, or (iii) result in proposal revisions.

(c) People participating or attending an oral presentation or demonstration must agree to the same limitations applicable to those with access to proposals - R. 19-334.2010(d) & (e).

(9) Cost / Pricing Data. If allowed by law, the procurement officer may exchange information with an offeror regarding its cost or pricing data. [11-35-1830; R.19-445.2120] Generally, the procurement officer will request cost or pricing data only in conjunction with negotiations or prior to making an award without negotiations to the highest ranked offeror.

(B) Discussions with Offerors⁷

Special Restrictions: Do not conduct discussions under this paragraph (B):
(1) unless you have been authorized under R.19-445.2095(I)(4),
(2) for procurements with an expected value below \$500,000,
(3) for solicitations issued prior to September 3, 2007.

[Commentary: Paragraph (B) is taken verbatim from R. 19-445.2095(I), except for the commentary.]

(1) Classifying Proposals. For the purpose of conducting discussions under Section 11-35-1530(6) and item (2) below, proposals shall be initially classified in writing as:
(a) acceptable (i.e., reasonably susceptible of being selected for award);
(b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or
(c) unacceptable.

[Commentary: Please see related training materials for illustrations.]

(2) Conduct of Discussions. If discussions are conducted, the procurement officer shall exchange information with all offerors who submit proposals classified as acceptable or potentially acceptable. The content and extent of each exchange is a matter of the

⁷ The communications addressed in R.19-445.2095(I) are authorized by the following statute:

Discussion with Offerors. As provided in the request for proposals, and under regulations, discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award *for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements.* All offerors whose proposals, in the procurement officer's sole judgment, need clarification must be accorded that opportunity.

S.C. Code Ann. § 11-35-1530(6) (emphasis added).

procurement officer's judgment, based on the particular facts of each acquisition. In conducting discussions, the procurement officer shall:

(a) Control all exchanges;

[Please see attached Form Letter for Discussions with Offerors.]

(b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;

[Commentary: R.19-445.2095(J) identifies the basic reasons for rejecting an individual proposal.⁸]

(c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;

[Commentary: (1) Unlike clarifications conducted under Section 11-35-1520, discussions conducted under Section 11-35-1530 expressly include proposal revisions. While discussions are not designed to generate unrestrained enhancements to or further development of proposals, they are conducted for the purpose of clarification and should provide all offerors an opportunity to clarify significant ambiguities in their proposals. (2) Language can be ambiguous either because it can be fairly understood in more than one way or because it expresses its purpose in an indefinite manner.⁹ (3) Because discussions do involve an opportunity for proposal revisions, discussions may include new information or revisions to existing information. However, discussions are not designed to allow unrestrained enhancements to or further development of proposals. Accordingly, the extent that new information or revisions to existing information is allowed should be limited to addressing the ambiguity. The procurement officer can exercise some control by carefully phrasing any questions sent to an offeror.]

(d) Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.

[Commentary: (1) Discussions are conducted for the purpose of clarification, not to allow enhancements to or further development of a proposal. Accordingly, mistakes only include unintended errors, defects, or omissions that the procurement officer has reason to suspect based solely on examining the proposal document.¹⁰ Examples include apparent clerical errors, suspected errors in pricing, inadvertent omissions (e.g., perhaps a missing numbered page). The opportunity to identify mistakes must not be used to identify areas an agency may want an offeror to improve or further develop. (2) Discussions to correct mistakes

⁸ Formerly, rejection of individual proposals was governed by R. 19-445.2070. Under the revised (2007) regulations, rejection is governed by R. 19-445.2095(J), which reads as follows:

J. Rejection of Individual Proposals.

(1) Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

- (a) the business that submitted the proposal is nonresponsible as determined under Section 11-35-1810;
- (b) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect; or
- (c) the proposed price is clearly unreasonable.

(2) The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

S.C. Code Ann. Regs. § 19-445.2095(J).

⁹ *Penton v. J.F. Cleckley & Co.*, 486 S.E.2d 742 (S.C. 1997) ("An ambiguous contract is one capable of being understood in more ways than just one or one unclear in meaning because it expresses its purpose in an indefinite manner.").

¹⁰ Mistakes evident on the face of an offer can be corrected under R.19-445.2085; however, the scope of corrections allowed under that regulation is much narrower than what is correctable under R. 19-445.2095. E.g., *Protest of Millers of Columbia, Inc.*, Case No. 1989-3 ("Although it was evident on the face of the bid that a mistake had been made, that mistake could not be corrected from the information available.") and *Protest by Ohmeda Company*, Case No. 1987-5.

should not be used to alter elements of a proposal that were intended by the offeror but later found to be disadvantageous because, in that situation, there was no mistake. (3) Communications regarding mistakes should identify the suspected mistake and the reason for the suspicion,¹¹ but should not suggest correct answers, solutions, or improvements.]

(e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.

[Commentary: (1) No "discussions" are conducted with any offeror whose proposal is classified as unacceptable. (2) Under Section 11-35-1530(6), discussions are conducted only "for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements." Discussions are not conducted to coach offerors regarding how to enhance or further develop their proposals. Likewise, discussions do not involve either negotiations or revisions to the solicitation. (3) Except as required in Paragraph (2)(b) - (e), discussions need not be in writing. Discussions may include communications to assure an offeror's full understanding of the solicitation requirements,¹² but all offerors must be accorded fair and equal treatment. (4) When communicating to an offeror the information required by items (2)(b) through (2)(d) above, do not share one offeror's communications with another offeror. (5) After opening, you must not allow proposal revisions except in conjunction with, and in accordance with, discussions conducted pursuant to this paragraph. Paragraph (2)(e) strictly limits the type of proposal revisions allowed. Revisions beyond those allowed may result in rejection of a proposal. If an offeror submits revisions beyond those allowed, the procurement officer has two choices. First, as noted in the form letter, the procurement officer may reject the revisions and consider only the initial proposal (which may be non-responsive). The regulation requires only "a reasonable opportunity to submit any . . . revisions." Second, the procurement officer may conduct further discussions, i.e., advise the offeror in writing of the deficiency and provide an opportunity to cure with proposal revisions.]

(3) Limitations. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. Ordinarily, discussions are conducted prior to final ranking. Discussions may not be conducted unless the solicitation alerts offerors to the possibility of such an exchange, including the possibility of limited proposal revisions for those proposals reasonably susceptible of being selected for award.

[Commentary: (1) With one exception, discussions are conducted prior to final ranking because (i) discussions are used to facilitate responsiveness, and section 11-35-1530(7) allows only responsive offers to be ranked, and (ii) discussions lead to proposal revisions, and evaluations must consider the entire proposal. Discussions can occur after best and final offers have been solicited and received. (2) Multiple rounds of discussions may be conducted, subject to all other applicable rules, especially the regarding fair and equal treatment of all offerors.]

(4) Communications authorized by Section 11-35-1530(6) and items (1) through (3) above may be conducted only by procurement officers authorized by the appropriate chief procurement officer.

[Commentary: Selected procurement officers will be authorized individually, in writing, by the appropriate CPO.]

¹¹ The suspected error could relate to an offeror's pricing. You may suspect a defective price based on how the offeror's price compares with other prices. When communicating to the offeror the reason for the suspicion, do not indicate how the offeror's price compares with any other offeror's pricing.

¹² S.C. Code Ann. § 11-35-1530(6) (Authorizing discussions "for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements."); R. 19-445.2095(J)(1) ("[T]o the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted."). Discussions conducted to clarify the state's requirements may not involve amending the solicitation. As with pre-opening conferences, the state's requirements may not be changed by such discussions. See R. 19-445.2042 ("Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment.").

(C) Negotiations. Negotiation is an exchange between the State and an offeror undertaken with the intent of allowing the offeror to revise its proposal. Negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. Negotiated proposal revisions may affect the scope of the proposed contract, so long as the changes are within the general scope of the request for proposals.

(1) Negotiations are optional.¹³

(2) Negotiations must be controlled by the procurement officer.

[Commentary: Manage vendor expectations by conveying the following rules to the vendor in writing: (i) the potential for submitting cost and pricing data, (ii) the potential for a BAFO process, (iii) the absence of any obligation to provide formal notice that negotiations have been terminated with an individual offeror, (iv) the restrictions imposed by the solicitation on communications by the offeror.]

(3) The primary objective of negotiations is to maximize the State's ability to obtain best value, based on the requirements and the evaluation factors set forth in the solicitation. [11-35-310(28); 11-35-1530(9)]

(4) Negotiations are tailored to each offeror's proposal.

(5) Negotiations must be meaningful. The procurement officer is encouraged to discuss those aspects of an offeror's proposal that could, in the opinion of the procurement officer, be altered or explained to enhance materially the proposal's potential for award. However, the procurement officer is not required to discuss every area where the proposal could be improved. The scope and extent of negotiations are a matter of procurement officer judgment. Negotiations must be conducted in good faith.

[Commentary: (1) Negotiations present an opportunity for offerors to expand, strengthen, enlarge, enhance, or further develop their proposals, so long as the changes are (i) within the general scope of the request for proposals and (ii) do not involve a significant revision to the solicitation's mandatory requirements. The Procurement Officer can facilitate such improvements by identifying concerns with an offeror's proposal, including significant deficiencies, weaknesses, excesses, ambiguities, uncertainties, omissions, errors or mistakes. Concerns may involve any aspect of an offeror's proposal, including price, past performance, references, technical approach, and any matter evaluated. As an example, the procurement officer could identify excesses or "gold plating" that could be eliminated along with a price concession. (2) Issues raised during the evaluation process may provide valuable information for negotiations. (3) As noted in the limits on exchanges - item (e) below, a procurement officer should avoid engaging in unfair negotiation practices, such as providing one firm's innovative technical solution to another offeror or aggressively identifying concerns in negotiations with one offeror while failing to undertake any such effort in negotiations with another offeror.]

¹³ Award may be made to the highest ranking offeror without conducting negotiations. Section 11-35-1530(9) provides that "the procurement officer, in his sole discretion and not subject to review under Article 17, may proceed in any of the manners" allowed in subparagraphs (a) through (c). As used in that sentence, the term "sole discretion" applies to the decision whether or not to negotiate at all, i.e., whether to make an award to the highest ranked offeror without negotiations or to conduct negotiations. Section 11-35-1530(9)(a) provides that "negotiations may be conducted, in the sole discretion of the procurement officer, with the second, and then the third, and so on, ranked offerors to the level of ranking determined by the procurement officer in his sole discretion." As used in this sentence, the term "sole discretion" applies to the decision whether - in the face of an unsuccessful negotiation - to move down to the next highest ranked vendor, to re-negotiate with a higher ranked vendor, or to request best and final offers. The conclusion that negotiations were unsuccessful is *not* a matter of the procurement officer's sole discretion, but it is final unless arbitrary or capricious.

(6) Negotiations should not involve a significant change to the solicitation. If the procurement officer makes changes to the solicitation's mandatory requirements or general scope, the procurement officer must request best and final offers pursuant to paragraph (d) below.

(7) Once negotiations with a vendor begin, the procurement officer must attempt, in good faith, to successfully negotiate a "satisfactory contract" - without regard to any other proposals received. (Negotiations are not an opportunity to re-evaluate one offeror against another. That step took place during the evaluation and ranking.) If the procurement officer concludes that a satisfactory contract cannot be negotiated, the procurement officer may then proceed as allowed by section 11-35-1530(8). In evaluating whether or not a contract is satisfactory, the stated evaluation factors must form the ultimate basis of your decision.

(8) Under 11-35-1530(9), the contract file must contain the basis on which the award is made. Under 11-35-310(28), the award of the contract must be made on the basis of the evaluation factors stated in the solicitation. If award is made to the highest ranked offeror without negotiations, the basis for award should appear in the written determination explaining the evaluation and ranking. If award is made after negotiations, the basis for award must also explain (i) the results of any negotiations, and (ii) the reasons any negotiations were unsuccessful, i.e., why a satisfactory contract could not be negotiated with an offeror.

(9) If an offeror's initial price is considered unacceptable, make a determination of price unreasonableness under R. 19-445.2095(J)(1)(c) prior to ranking. Negotiations are not a mechanism to price shop. If a price reduction cannot be negotiated, the BAFO process may be appropriate.

(D) Best and final offers (BAFO)

(1) Best and final offers may be requested only after evaluation and final ranking pursuant to Section 11-35-1530(7). Best and final offers may be sought before, after, or without negotiations. If negotiations are started, those negotiations must be concluded before the procurement officer may seek best and final offers.

(2) In conducting a BAFO, the procurement officer should (i) make changes to the solicitation's required scope of work, as long as the changes are within the general scope of the request for proposals, and (ii) provide all responsive offerors an opportunity to submit their best and final offers.

[Commentary: BAFOs are most commonly used to achieve price reductions that could not be achieved through negotiations, typically because the price reduction requires a reduction in the scope of work required by the solicitation that cannot be achieved properly in negotiations.]

(3) A request for best and final offers must be issued as an amendment to the request for proposals. The request shall include:

- (a) Any changes to the request for proposals allowed by Section 11-35-1530(8)(c);
- (b) Notice that negotiations are concluded, if applicable;

- (c) Notice that this is the opportunity to submit a best and final offer;
- (d) A common cutoff date and time that allows a reasonable opportunity for submission of written best and final offers; and
- (e) Notice that if any best and final offer is submitted, it must be received by the date and time specified and is subject to the rules governing submission of proposals.

[Commentary: (1) Amendments for purposes of a BAFO are not posted to the internet. Rather, they are sent only to actual offerors. (2) Best and final offers should be submitted as proposal revisions. Include appropriate instructions in your request for BAFOs.]

(4) Following receipt of best and final offers, all responsive offerors must be evaluated and ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the request for proposals. Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State. [11-35-310(28); 11-35-1530(9)] After conducting a BAFO, the procurement officer may not conduct successive rounds of best and final offers.

(5) Do not disclose confidential information derived from proposals submitted by or negotiations conducted with competing offerors. [11-35-1530(8)]

(6) If, in the judgment of the procurement officer, based on market research or otherwise, a solicitation amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, such that additional sources likely would have submitted offers had the substance of the amendment been known to them, the procurement officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition.

(E) Limits on exchanges. Prior to the issuance of an award or notification of intent to award, whichever is earlier, state personnel involved in an acquisition shall not engage in conduct that—

[[Commentary: (1) Limitations outlined in Paragraph (E) apply to all types of communications addressed in this guidance. (2) Prior to posting an award, or intent to award, regulation 19-445.2010(D) prohibits anyone from disclosing either the number of offerors or their identity unless required to do so by law. (3) Regulation 19-445.2010(c) allows the responsible procurement officer to authorize certain disclosures in writing.]]

- (1) Favors one offeror over another;
- (2) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;
- (3) Reveals an offeror's price without that offeror's permission. However, the procurement officer may inform an offeror that its price is considered by the State to be too high, or too low;
- (4) Reveals the names of individuals providing reference information about an offeror's past performance; or

(5) Knowingly furnishes source selection information to anyone other than the responsible procurement officer. "Source selection information" means any of the following information that is related to or involved in the evaluation of an offer (e.g., bid or proposal) to enter into a procurement contract, if that information has not been previously made available to the public or disclosed publicly: (a) proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices, (b) source selection plans, (c) technical evaluation plans, (d) technical evaluations of proposals, (e) cost or price evaluations of proposals, (f) information regarding which proposals are determined to be reasonably susceptible of being selected for award, (g) rankings of responses, proposals, or competitors, (h) reports, evaluations of source selection panels or evaluation panels, (i) other information based on a case-by-case determination by the procurement officer that its disclosure would jeopardize the integrity or successful completion of the procurement to which the information relates.

-end-

Form Letter - Discussions with Offerors

[Date]

TRANSMITTED VIA FACSIMILE: (999) 999-9999
CERTIFIED U.S. MAIL # (*insert certified mail number*) [if applicable¹]

[*send to offeror at address appearing on cover page*]

Re: URGENT NOTICE - **Response Due by [date]**
Request for Proposal Revisions
RFP # x

Dear [*person signing proposal cover page*]:

As the procurement officer for the above referenced RFP, I am writing to conduct discussions regarding your business' proposal. As contemplated in the Request for Proposals, the State has elected to conduct discussions pursuant to South Carolina Code Section 11-35-1530(6) and Regulation 19-445.2095(I). Under these laws, discussions are conducted with all offerors submitting proposals initially classified, for discussion purposes, as either acceptable or potentially acceptable. Your proposal has been classified as [acceptable / potentially acceptable].

The authority to conduct discussions is strictly limited. First, discussions involve only a limited exchange of information. They are not and cannot constitute negotiations.

Second, all discussions must be controlled by the procurement officer. Accordingly, please do not communicate with any other state employees regarding these discussions without my express prior approval and my direct participation.

Third, these discussions involve an opportunity for you to submit cost or price, technical, or other revisions to your proposal. However, the law allows such revisions "*only to the extent such revisions are necessary to resolve any matter raised in writing by the procurement officer during discussions.*" Accordingly, you must ensure that any revisions submitted are strictly limited to only those revisions necessary to resolve the concerns raised in this letter. Please see the attached list of concerns. Unauthorized revisions or additional unsolicited responses may result in rejection of your revisions and consideration of only your initial proposal.

Fourth, revisions must be timely received. **Any revisions must be received by me no later than [date]. Late proposal revisions will not be considered.**

Please contact me if you have any questions.

Sincerely,

[name]

Procurement Officer

[*Instructions to Procurement Officer: If a proposal is acceptable, you may have no need to send any letter. A letter is not needed unless you intend to authorize a proposal revision.*]

¹ For very large or very high profile procurements, the added security of sending your letter certified mail may be worth the cost. Ordinarily, the expense is not needed. If you elect to use email, *make sure* you have proof of receipt. Unlike mail deposited with the U.S. Post Office, the law does not include a presumption that email is properly delivered.

Matters for Discussion

[*date / same as letter*]

RFP # [*number*]

Concerns regarding Proposal of [*name of offeror*]

A. We have identified the following deficiencies in your proposal that will result in rejection as non-responsive unless corrected. You may address these deficiencies by submitting revisions to any aspect of your proposal, but only to the extent such revisions are *necessary* to resolve the deficiency identified.

1. x

2. x

B. We have identified the following uncertainties in your proposal that could render your proposal non-responsive. You may address these uncertainties by submitting revisions to any aspect of your proposal, but only to the extent such revisions are *necessary* to resolve the uncertainty identified.

1. x

2. x

C. We suspect that your proposal includes the following mistakes. If a mistake was made, you may correct the mistake by submitting revisions to any aspect of your proposal, but only to the extent such revisions are *necessary* to resolve the mistake identified. If no mistake was made, please confirm that no mistake was made.

1. x

2. x

[*Instructions to Procurement Officer:*

1. *For any area with no concerns, state "None".*

2. *For each item, identify the exact language in the proposal to which the concern is addressed.*

3. *For items identified as uncertainties, explain the reason for the uncertainty.*

3. *For items identified as mistakes, identify the language in the proposal that lead someone to suspect a mistake and why.]*

FOR IFBs & RFPs

CLARIFICATION (NOV 2007): Pursuant to Section 11-35-1520(8), the Procurement Officer may elect to communicate with you after opening for the purpose of clarifying either your offer or the requirements of the solicitation. Such communications may be conducted only with offerors who have submitted an offer which obviously conforms in all material aspects to the solicitation. Clarification of an offer must be documented in writing and included with the offer. Clarifications may not be used to revise an offer or the solicitation. [Section 11-35-1520(8); R.19-445.2080]

FOR RFPs Only

DISCUSSIONS & NEGOTIATIONS (NOV 2007): Submit your best terms from a cost or price and from a technical standpoint. Your proposal may be evaluated and your offer accepted without any discussions, negotiations, or prior notice. Ordinarily, nonresponsive proposals will be rejected outright. Nevertheless, the State may elect to conduct discussions, including the possibility of limited proposal revisions, but only for those proposals reasonably susceptible of being selected for award. If improper revisions are submitted, the State may elect to consider only your unrevised initial proposal. [11-35-1530(6); R.19-445.2095(I)] The State may also elect to conduct negotiations, beginning with the highest ranked offeror, or seek best and final offers, as provided in Section 11-35-1530(8). If negotiations are conducted, the State may elect to disregard the negotiations and accept your original proposal.