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August 2, 2018

Via Electronic Mail

John Hughes
US Educational Technology Purchasing Alliance
1829 E Franklin St, Suite 800E
Chapel Hill, NC 27514

Re: South Carolina Legal Opinion on USETPA Group Purchasing Program

John,

You asked our firm to review South Carolina law to render an opinion about whether South Carolina governmental entities may utilize the US Educational Technology Purchasing Alliance ("USETPA"). In our opinion, participation in USETPA is permissible under State law.

I. USETPA

The USETPA, a North Carolina non-profit, is a "purchasing cooperative." Purchasing cooperatives operate by aggregating demand among various purchasers to get special rates from selected suppliers. Any public entity may join USETPA at no cost.

USETPA, on behalf of its members, created a series of master convenience contracts with various vendors for technology goods and services. Its members can select from these vendors without engaging in the request for proposal process. Each master convenience contract contains terms that, once accepted by the vendor, become the contract between the purchasing member and the vendor.

II. Procurement Code and Information Technology

The South Carolina Procurement Code ("Code") governs every procurement or expenditure of funds under contract by any South Carolina governmental body, including the purchase of information technology services, goods, and equipment. S.C. Code Ann. §§ 11-35-40(2), 11-35-

820; S.C. Code Ann. Regs. 19-445.2115(A). South Carolina procurement officials have advised that information technology is not subject to any special treatment under the procurement code and is regulated in the same manner as all other goods and services.¹

III. Cooperative Purchasing

USETPA's prospective South Carolina members include local political bodies, special purpose districts, and school districts. Each of these is considered a public procurement unit. S.C. Code Ann. §§ 11-35-4610(3) and (5). Public procurement units may purchase through South Carolina default statewide contracts where available. S.C. Code Ann. § 11-35-4820. Individual entities may also conduct their own sealed bid process. S.C. Code Ann. §§ 11-35-1510, 11-35-4820.

As an alternative to purchasing through state contracts or conducting their own sealed bid process, South Carolina public procurement units may engage in cooperative purchasing. S.C. Code Ann. § 11-35-4810. Any public procurement unit "may participate in . . . a cooperative purchasing agreement. . . with one or more public procurement units or external procurement activities. . . ." S.C. Code Ann. § 11-35-4810. According to South Carolina procurement officials there are no specific regulations or statutes specifically targeting information technology.

Cooperative purchasing is procurement conducted [1] "by, or **on behalf of**, more than one public procurement unit" or [2]"by a public procurement unit with an external procurement activity." S.C. Code Ann. § 11-35-4610(1) (emphasis added). USETPA, while not itself a public procurement unit, facilitates the cooperative purchasing on behalf of more than one public procurement unit. Accordingly, participation in contracts facilitated by USETPA should qualify as permissible cooperative purchasing under South Carolina law because, inter alia, USETPA facilitates procurement on behalf of multiple public procurement units or external procurement activities.

IV. Limitations on Cooperative Purchasing

a. Mandatory Opting

The Board may restrict the right of public procurement units to individually contract and may require purchases of a particular good or service to be through the state contract. S.C. Code Ann. § 11-35-4820. Use of this provision is not common, however. At this time we are not aware of any mandatory state term contracts that would conflict with the master convenience contracts for technology goods and services negotiated by USETPA.

¹ South Carolina State Budget and Control Board ("Board") Regulations appear to require every public procurement unit to develop a master plan for information technology procurements. S.C. Code Ann. Regs. 19-445.2115(A).

b. Central Advertising and Distribution

USETPA will be responsible for ensuring compliance with any general procurement requirements under the Code or Board Regulations. For example, thirty days' notice through "central advertising" would be required for any multi-state solicitation issued by USETPA. S.C. Code Ann. § 11-35-4810. Central advertising typically means South Carolina Business Opportunities (SCBO), a live online database of the state's purchasing needs. S.C. Code Ann. § 11-35-1520(3). Likewise, contracts "may be only awarded to manufacturers who will be distributing the products to South Carolina governmental bodies through South Carolina vendors." S.C. Code Ann. § 11-35-4810. USETPA's compliance efforts satisfy the general procurement requirements for each participating member. S.C. Code Ann. § 11-35-4880 ("Where the public procurement unit or external procurement activity administering a cooperative purchase complies with the requirements of this code, any public procurement unit participating in such a purchase shall be deemed to have complied with this code.").

V. Conclusion and Scope of Review

A South Carolina public procurement unit which is a USETPA member can purchase through agreements negotiated by USETPA unless: (1) the Board has required the purchasing unit to "opt out" or "opt in" to a specific contract encompassing the goods or services the member seeks to purchase through USETPA, (2) the purchasing unit is subject to entity specific laws or regulations, or (3) USETPA fails to comply with the central advertising and distribution requirements. S.C. Code Ann. §§ 11-35-4810, 11-35-4820.

This opinion is based on information you provided regarding USETPA and our interpretation of South Carolina law. Our review was limited to State law and did not include all potentially applicable local or agency specific laws or regulations (i.e., the statutes and ordinances, the administrative decisions, and the rules and regulations of counties, towns, municipalities and special political subdivisions or judicial decisions interpreting such provisions). Furthermore, we express no opinion with regard to the laws of any jurisdiction other than South Carolina.

The South Carolina Attorney General's office, upon request, issues opinions about its construction of state law. Over the last forty years no fewer than five opinions have addressed cooperative purchasing inquiries. These opinions are not binding law and do not constitute precedential authority. All appear to be distinguishable from the arrangement discussed in this opinion letter. Nevertheless, these opinions demonstrate that state procurement officials "ha[ve] in the past been liberal in interpreting definitions, etc., to encourage cooperative purchasing." (S.C.A.G. Op. Dec. 11, 1990 at n.1.)

The foregoing is not a recommendation for or endorsement of the any products or services offered through USETPA. This opinion is rendered as of the date hereof for your benefit and may not be relied upon by any third party. We undertake no obligation to advise of any changes in

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the applicable law or our interpretation of the law, but would be happy to assist you in updating the opinion upon mutual agreement in the future.

Very truly yours,

A handwritten signature in cursive script, appearing to read "R. S. Stilwell".

Rivers S. Stilwell