

9949

I N A S S E M B L Y

February 17, 2010

Introduced by M. of A. DESTITO -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the state finance law, in relation to procurement lobbying; and to amend chapter 1 of the laws of 2005 amending the state finance law and other laws relating to restricting contacts in the procurement process and the recording of contacts relating thereto, in relation to extending the effectiveness of certain provisions thereof

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Legislative findings and statement of intent. The legisla-
2 ture hereby finds and declares that it is important to the well-being of
3 the state and its citizens to preserve and enhance both the integrity
4 and efficiency by which New York state entities, including executive
5 agencies, public authorities, localities, the legislature, and the judi-
6 ciary procure goods and services. In order to use the revenues of the
7 state effectively and to maximize value from such procurements to the
8 residents of the state, the procurement laws of the state seek to struc-
9 ture the procurement process so that there is broad-based competition
10 for state procurements, which promotes both lower costs for necessary
11 purchases and greater value. The laws governing procurement also should
12 authorize and encourage the entities conducting procurements to use new
13 technology and practices that would allow the state to procure more
14 efficiently. At the same time, both vendors who participate in the
15 procurement process and the residents of the state should feel confident
16 that the process is fair and that decisions are made on the merits, not
17 on the basis of favoritism or past relationships. Finally, because the
18 state is a major purchaser of goods and services, it is appropriate to
19 use its purchasing power to promote the inclusion in our economy of
20 groups of people who historically have not fully participated in it,
21 including people with disabilities and minority and women-owned busi-
22 nesses, and to support the continued foundation of a healthy economy by
23 encouraging the participation in state purchasing of small businesses
24 and the wide distribution of the economic benefits of such participation
25 throughout the state.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

LBD15188-03-0

1 The legislature further finds that in 2005, the legislature responded
2 to widespread concerns that the procurement process was on occasion
3 subject to pressures that distorted the evaluation of the merits of
4 procurement bids and proposals. It enacted laws to allow anyone inter-
5 ested in a particular procurement to examine the communications between
6 vendors and their representatives, on one hand, and government officials
7 conducting the procurement on the other. The law required that once
8 written notice in any form has been issued that a procurement is planned
9 or pending, all contacts regarding that procurement that would reason-
10 ably be interpreted as an effort to influence the result of the procure-
11 ment can only be made to designated contact persons within the govern-
12 ment entity that is conducting the procurement. These designated
13 contacts are required to keep a record of these conversations and other
14 communications and these records become part of the larger procurement
15 record. Individuals and entities subject to the lobbying laws of the
16 state and who lobby regarding procurements are also required to file a
17 statement regarding the matters on which they have lobbied or intend to
18 lobby. Therefore, a public record is created of all communications
19 related to the procurement. Any communications from any party, whether
20 or not a participating vendor or registered lobbyist, should be
21 recorded, so that someone reviewing the record knows what comments and
22 information were exchanged. In addition, in 2007, statutory language was
23 added to allow a vendor that unsuccessfully bid to request and receive,
24 after the procurement is completed, a debriefing by the agency that
25 conducted the procurement. The purpose of these measures is to create a
26 process more readily understood and observed, so that vendors and the
27 public may have greater confidence in the fairness of the result.

28 The legislature further finds that the free flow of information about
29 the procurement process and about the goods and services available that
30 may meet the needs of government is crucial to the effective operation
31 of government. The laws that govern procurement are not intended to
32 encourage government personnel to terminate all communication between
33 the public and the governmental entity. Rather the communications should
34 be made to and from the appropriate designated personnel and a record
35 should be made of the subject of the call, so that anyone who has
36 concerns about a procurement can review the record and see that the
37 communications were appropriate. The intent of the statute is that any
38 entity that intends to conduct a procurement and any entity with over-
39 sight over that procurement will, simultaneously with the declaration of
40 a restricted contact period, post in a readily accessible form on its
41 website, if available, and with any other notice of the procurement, the
42 names of the designated contacts at the entity and the means of contact-
43 ing them. The designated contacts should be knowledgeable about the
44 procurement and able to answer appropriate questions or direct inquiries
45 to the correct source of information.

46 The legislature further finds that, because the intent of the statute
47 is to make the procurement process as transparent as possible to the
48 extent consistent with best procurement practices, the statute encour-
49 ages the exchange of information at public forums, rather than through
50 individual communications. Therefore, public bidders' conferences at
51 which everyone in attendance can hear both the questions and comments
52 and responses are not subject to the limitations of the restricted
53 comment period. Practices such as exchanges of questions and answers
54 through electronic mail that all interested vendors can see and a formal
55 request for information before the requests for bids or proposals are
56 issued are encouraged. Procurements that are awarded pursuant to a stat-

1 utory process for which oversight mechanisms are already in place, such
2 as awards to preferred sources pursuant to section 162 of the state
3 finance law, also are not generally subject to the limitations of the
4 restricted contact period.

5 The legislature finds that the existing statutes have been effective
6 in reducing the number of complaints about individual procurements and
7 reducing concern that the process is subject to favoritism and inequi-
8 ties. However, it further finds that there are aspects of the process
9 that need clarification, that it is desirable to reduce some of the
10 burden of duplicative requirements when it can be done without limiting
11 the effectiveness of the statutes, and that the ability of vendors to
12 obtain information necessary for them to participate in the procurement
13 process has been unnecessarily impaired. Therefore, the legislature
14 seeks by this statute to address those concerns.

15 S 2. Section 139-j of the state finance law, as added by chapter 1 of
16 the laws of 2005, paragraph f of subdivision 1 as amended by section 3
17 of part K of chapter 56 of the laws of 2006, paragraph g of subdivision
18 1 as amended by chapter 395 of the laws of 2006, and subdivision 7 as
19 amended by chapter 596 of the laws of 2005, is amended to read as
20 follows:

21 S 139-j. Restrictions on contacts during the procurement process. 1.
22 For the purposes of this section, the following terms will have the
23 following meanings unless specified otherwise.

24 a. "Governmental entity" shall mean: (1) any department, board,
25 bureau, commission, division, office, council, committee or officer of
26 the state, whether permanent or temporary; (2) each house of the state
27 legislature; (3) the unified court system; (4) any public authority,
28 public benefit corporation or commission created by or existing pursuant
29 to the public authorities law; (5) any public authority or public bene-
30 fit corporation, at least one of whose members is appointed by the
31 governor or who serves as a member by virtue of holding a civil office
32 of the state; (6) a municipal agency, as that term is defined in para-
33 graph (ii) of subdivision (s) of section one-c of the legislative law;
34 or (7) a subsidiary or affiliate of such a public authority.

35 b. "Article of procurement" shall mean a commodity, service, technolo-
36 gy, public work, construction, revenue contract, the purchase, sale or
37 lease of real property or an acquisition or granting of other interest
38 in real property, that is the subject of a governmental procurement.

39 c. "Contacts" shall mean any oral, written or electronic communication
40 with a governmental entity under circumstances where a reasonable person
41 would infer that the communication was intended to influence the GOVERN-
42 MENTAL ENTITY'S CONDUCT OR DECISION REGARDING THE governmental procure-
43 ment.

44 d. "Proposal" shall mean any bid, quotation, offer or response to a
45 governmental entity's solicitation of submissions relating to a procure-
46 ment.

47 e. "Governmental procurement" shall mean: (i) the [preparation or
48 terms] PUBLIC ANNOUNCEMENT OR COMMUNICATION TO ANY POTENTIAL VENDOR OF A
49 DETERMINATION OF A NEED FOR A PROCUREMENT, WHICH SHALL INCLUDE, BUT NOT
50 BE LIMITED TO, THE PUBLIC NOTICE of the specifications, bid documents,
51 request for proposals, or evaluation criteria for a procurement
52 contract, (ii) solicitation for a procurement contract, (iii) evaluation
53 of a procurement contract, (iv) award, approval, denial or disapproval
54 of a procurement contract, or (v) approval or denial of an assignment,
55 amendment (other than amendments that are authorized and payable under
56 the terms of the procurement contract as it was finally awarded or

1 approved by the comptroller, as applicable), renewal or extension of a
2 procurement contract, or any other material change in the procurement
3 contract resulting in a financial benefit to the offerer.

4 f. "Restricted period" shall mean the period of time commencing with
5 the earliest written notice, advertisement or solicitation of a request
6 for proposal, invitation for bids, or solicitation of proposals, or any
7 other method for soliciting a response from offerers intending to result
8 in a procurement contract with a governmental entity and ending with the
9 final contract award and approval by the governmental entity and, where
10 applicable, the state comptroller.

11 g. "Procurement contract" shall mean any contract or other agreement,
12 INCLUDING AN AMENDMENT TO OR AN EXTENSION, RENEWAL OR CHANGE ORDER TO AN
13 EXISTING CONTRACT, for an article of procurement involving an estimated
14 annualized expenditure in excess of fifteen thousand dollars. Grants,
15 article eleven-B state finance law contracts, program contracts between
16 not-for-profit organizations, as defined in article eleven-B of this
17 chapter, and the unified court system, intergovernmental agreements,
18 railroad and utility force accounts, utility relocation project agree-
19 ments or orders, CONTRACTS GOVERNING ORGAN TRANSPLANTS, CONTRACTS ALLOW-
20 ING FOR STATE PARTICIPATION IN TRADE SHOWS, and eminent domain trans-
21 actions shall not be deemed procurement contracts.

22 h. "Offerer" shall mean the individual or entity, or any employee,
23 agent or consultant or person acting on behalf of such individual or
24 entity, that contacts a governmental entity about a governmental
25 procurement during the restricted period of such governmental procure-
26 ment WHETHER OR NOT THE CALLER HAS A FINANCIAL INTEREST IN THE OUTCOME
27 OF THE PROCUREMENT; PROVIDED, HOWEVER, THAT A GOVERNMENTAL AGENCY OR ITS
28 EMPLOYEES THAT COMMUNICATES WITH THE PROCURING AGENCY REGARDING A
29 GOVERNMENTAL PROCUREMENT IN THE EXERCISE OF ITS OVERSIGHT DUTIES SHALL
30 NOT BE CONSIDERED AN OFFERER.

31 i. "Revenue contract" shall mean any written agreement between a
32 governmental entity, as that term is defined in subparagraphs one, four,
33 five, six or seven of paragraph a of this subdivision, and an offerer
34 whereby the governmental entity gives or grants a concession or a fran-
35 chise.

36 j. "Unified court system" shall, for the purposes of this section
37 only, mean the unified court system of the state of New York, or the
38 office of court administration, where appropriate, other than town and
39 village justice courts in jurisdictions with a population under fifty
40 thousand, when it acts solely in an administrative capacity to engage in
41 governmental procurements and shall not include the unified court system
42 or any court of the state judiciary when it acts to hear and decide
43 cases of original or appellate jurisdiction or otherwise acts in its
44 judicial, as opposed to administrative, capacity.

45 2. Every governmental entity that undertakes a governmental procure-
46 ment shall:

47 a. AT THE SAME TIME THAT A RESTRICTED PERIOD IS IMPOSED, designate,
48 with regard to each governmental procurement, a person or persons who
49 ARE KNOWLEDGEABLE ABOUT THE PROCUREMENT AND WHO may be contacted by
50 offerers relative to the governmental procurement;

51 b. make any determinations on any governmental procurement: (1) in a
52 manner consistent with the principles provided for under subdivision two
53 of section one hundred sixty-three of this chapter, or, if the govern-
54 mental entity is a public benefit corporation, as that term is defined
55 in section sixty-six of the general construction law, and the majority
56 of the members consist of persons either appointed by the governor or

1 who serve as members by virtue of holding a civil office of the state,
2 the procurement guidelines adopted pursuant to section twenty-eight
3 hundred seventy-nine of the public authorities law, and (2) free from
4 any conduct that would be prohibited by subdivision five of section
5 seventy-three or section seventy-four of the public officers law, or of
6 other applicable ethics code provisions that are equivalent to subdivi-
7 sion five of section seventy-three or section seventy-four of the public
8 officers law where the public officials that are involved in the govern-
9 mental procurement are not subject to subdivision five of section seven-
10 ty-three or section seventy-four of the public officers law;

11 2-A. EVERY GOVERNMENTAL ENTITY THAT IS INVOLVED IN A GOVERNMENTAL
12 PROCUREMENT BY EXERCISE OF AN OVERSIGHT FUNCTION SHALL:

13 A. AT THE SAME TIME AS A GOVERNMENTAL PROCUREMENT IS SUBMITTED TO THAT
14 ENTITY FOR THEIR REVIEW, OVERSIGHT, OR APPROVAL, DESIGNATE, WITH REGARD
15 TO EACH GOVERNMENTAL PROCUREMENT, A PERSON OR PERSONS WHO ARE KNOWLEDGE-
16 ABLE ABOUT THE OVERSIGHT OF THAT PROCUREMENT AND WHO MAY BE CONTACTED BY
17 OFFERERS RELATIVE TO THE STATUS OF THE OVERSIGHT OF THAT GOVERNMENTAL
18 PROCUREMENT; AND

19 B. MAKE ANY DETERMINATIONS ON THE STATUS OF ANY GOVERNMENTAL PROCURE-
20 MENT:

21 (I) IN A MANNER CONSISTENT WITH THE PRINCIPLES PROVIDED FOR UNDER
22 SUBDIVISION TWO OF SECTION ONE HUNDRED SIXTY-THREE OF THIS CHAPTER, OR,
23 IF THE GOVERNMENTAL ENTITY IS A PUBLIC BENEFIT CORPORATION, AS THAT TERM
24 IS DEFINED IN SECTION SIXTY-SIX OF THE GENERAL CONSTRUCTION LAW, AND THE
25 MAJORITY OF THE MEMBERS CONSIST OF PERSONS EITHER APPOINTED BY THE
26 GOVERNOR OR WHO SERVE AS MEMBERS BY VIRTUE OF HOLDING A CIVIL OFFICE OF
27 THE STATE, THE PROCUREMENT GUIDELINES ADOPTED PURSUANT TO SECTION TWEN-
28 TY-EIGHT HUNDRED SEVENTY-NINE OF THE PUBLIC AUTHORITIES LAW, AND

29 (II) FREE FROM ANY CONDUCT THAT WOULD BE PROHIBITED BY SUBDIVISION
30 FIVE OF SECTION SEVENTY-THREE OR SECTION SEVENTY-FOUR OF THE PUBLIC
31 OFFICERS LAW, OR OF OTHER APPLICABLE ETHICS CODE PROVISIONS THAT ARE
32 EQUIVALENT TO SUBDIVISION FIVE OF SECTION SEVENTY-THREE OR SECTION
33 SEVENTY-FOUR OF THE PUBLIC OFFICERS LAW WHERE THE PUBLIC OFFICIALS THAT
34 ARE INVOLVED IN THE GOVERNMENTAL PROCUREMENT ARE NOT SUBJECT TO SUBDIVI-
35 SION FIVE OF SECTION SEVENTY-THREE OR SECTION SEVENTY-FOUR OF THE PUBLIC
36 OFFICERS LAW.

37 3. Each offerer that contacts a governmental entity about a govern-
38 mental procurement shall only make permissible contacts with respect to
39 the governmental procurement, which shall mean that the offerer:

40 a. shall contact only the [persons] PERSON or persons who may be
41 contacted by offerers as designated by the governmental entity pursuant
42 to paragraph a of subdivision two of this section relative to the
43 governmental procurement, except that the following contacts are
44 exempted from the provisions of this paragraph AND DO NOT NEED TO BE
45 DIRECTED TO A DESIGNATED CONTACT PURSUANT TO SECTION ONE HUNDRED THIR-
46 TY-NINE-K OF THIS ARTICLE:

47 (1) the submission of written proposals in response to a request for
48 proposals, invitation for bids or any other method for soliciting a
49 response from offerers intending to result in a procurement contract;

50 (2) the submission of written questions to a designated contact set
51 forth in a request for proposals, or invitation for bids, or any other
52 method for soliciting a response from offerers intending to result in a
53 procurement contract, when all written questions and responses are to be
54 disseminated to all offerers who have expressed an interest in the
55 request for proposals, or invitation for bids, or any other method for

1 soliciting a response from offerers intending to result in a procurement
2 contract;

3 (3) participation in a DEMONSTRATION, conference OR OTHER MEANS FOR
4 EXCHANGE OF INFORMATION IN A SETTING OPEN TO ALL POTENTIAL BIDDERS
5 provided for in a request for proposals, invitation for bids, or any
6 other method for soliciting a response from offerers intending to result
7 in a procurement contract;

8 (4) complaints by an offerer regarding the failure of the person or
9 persons designated by the procuring governmental entity pursuant to this
10 section to respond in a timely manner to authorized offerer contacts
11 made in writing to the office of general counsel of the procuring
12 governmental entity, provided that any such written complaints shall
13 become a part of the procurement record;

14 (5) offerers who have been tentatively awarded a contract and are
15 engaged in communications with a governmental entity solely for the
16 purpose of negotiating the terms of the procurement contract after being
17 notified of tentative award;

18 (6) contacts between designated governmental entity staff of the
19 procuring governmental entity and an offerer to request the review of a
20 procurement contract award;

21 (7) (a) contacts by offerers in protests, appeals or other review
22 proceedings (including the apparent successful bidder or proposer and
23 his or her representatives) before the governmental entity conducting
24 the procurement seeking a final administrative determination, or in a
25 subsequent judicial proceeding; or

26 (b) complaints of alleged improper conduct in a governmental procure-
27 ment to the attorney general, inspector general, district attorney, or
28 court of competent jurisdiction; or

29 (c) [written] protests, appeals or complaints to the state comp-
30 troller's office during the process of contract approval, where the
31 state comptroller's approval is required [by law, and where such commu-
32 nications and any responses thereto are made in writing and], PROVIDED
33 THAT THE STATE COMPTROLLER SHALL MAKE A RECORD OF SUCH COMMUNICATIONS
34 AND ANY RESPONSE THERETO WHICH shall be entered [in] INTO the procure-
35 ment record pursuant to section one hundred sixty-three of [the state
36 finance law] THIS CHAPTER; or

37 (d) complaints of alleged improper conduct in a governmental procure-
38 ment conducted by a municipal agency or local legislative body to the
39 state comptroller's office;

40 (8) COMMUNICATIONS BETWEEN OFFERERS AND GOVERNMENTAL ENTITIES THAT
41 SOLELY ADDRESS THE STATUTORILY REQUIRED DETERMINATION OF RESPONSIBILITY
42 BY A GOVERNMENTAL ENTITY OF AN OFFERER;

43 provided, however, that nothing in this subdivision shall be construed
44 as recognizing or creating any new rights, duties or responsibilities or
45 abrogating any existing rights, duties or responsibilities of any
46 governmental entity as it pertains to implementation and enforcement of
47 article eleven of [the state finance law] THIS CHAPTER or any other
48 provision of law dealing with the governmental procurement process.

49 b. shall not attempt to influence the governmental procurement in a
50 manner that would result in a violation or an attempted violation of
51 subdivision five of section seventy-three or section seventy-four of the
52 public officers law, or of other applicable ethics code provisions that
53 are equivalent to subdivision five of section seventy-three or section
54 seventy-four of the public officers law where the public officials that
55 are involved in the governmental procurement are not subject to subdivi-

1 sion five of section seventy-three or section seventy-four of the public
2 officers law;

3 4. Violations of paragraph a of subdivision three of this section
4 shall include any contacts during the restricted period of a govern-
5 mental procurement between the offerer and any member, officer or
6 employee of any governmental entity other than the entity conducting the
7 governmental procurement; provided, however, that nothing in this
8 section shall be deemed to prohibit an offerer from communicating with a
9 member of the state legislature or legislative staff about a govern-
10 mental procurement being conducted by a governmental entity other than
11 the state legislature, or a member of the state legislature or legisla-
12 tive staff contacting a governmental entity about a governmental
13 procurement being conducted by a governmental entity other than the
14 state legislature, provided that the member of the state legislature or
15 legislative staff is acting in [their] HIS OR HER official capacity.

16 5. Governmental entity staff may consult the model guidelines that may
17 be established by the advisory council on procurement lobbying pursuant
18 to section one-t of the legislative law in implementing this section.

19 6. a. Every governmental entity shall incorporate a summary of the
20 policy and prohibitions regarding permissible contacts during a govern-
21 mental procurement pursuant to subdivision three of this section, and
22 copies of rules and regulations and applicable governmental entity
23 guidelines and procedures regarding permissible contacts during a
24 governmental procurement pursuant to subdivision three of this section
25 into their solicitation of proposals or bid documents or specifications
26 for all procurement contracts.

27 b. Every governmental entity shall seek written affirmations from all
28 offerers as to the offerer's understanding of and agreement to comply
29 with the governmental entity's procedures relating to permissible
30 contacts during a governmental procurement pursuant to subdivision three
31 of this section. SUCH A WRITTEN AFFIRMATION BY AN OFFERER SHALL BE
32 DEEMED TO APPLY TO ANY AMENDMENTS TO A PROCUREMENT SUBMITTED BY THE
33 GOVERNMENTAL ENTITY AFTER AN INITIAL AFFIRMATION IS RECEIVED WITH AN
34 INITIAL BID.

35 7. Notwithstanding any law to the contrary, prior to conducting an
36 award of a procurement contract, a governmental entity conducting a
37 governmental procurement shall make a final determination of responsi-
38 bility of the proposed awardee in accordance with paragraph f of subdivi-
39 sion nine of section one hundred sixty-three of this chapter, or, if
40 the governmental entity is a public benefit corporation, as that term is
41 defined in section sixty-six of the general construction law, and the
42 majority of the members consist of persons either appointed by the
43 governor or who serve as members by virtue of holding a civil office of
44 the state, according to the procurement guidelines adopted pursuant to
45 subparagraph (iii) of paragraph (b) of subdivision three of section
46 twenty-eight hundred seventy-nine of the public authorities law;
47 provided, however, that nothing in this subdivision shall be construed
48 as abrogating or diminishing any existing rights, duties or responsibil-
49 ities of any governmental entity as it pertains to determinations of
50 responsibility.

51 8. Any member, officer or employee of a governmental entity who
52 becomes aware that an offerer has violated the provisions of subdivision
53 three of this section with regard to permissible contacts during any
54 governmental procurement shall immediately notify the ethics officer,
55 inspector general, if any, or other official of the procuring govern-
56 mental entity responsible for reviewing or investigating such matters.

1 If an offerer violates the provisions of subdivision three of this
2 section with regard to permissible contacts at a governmental entity
3 other than the governmental entity conducting the governmental procure-
4 ment, the member, officer or employee who becomes aware of the violation
5 shall notify the ethics officer, inspector general, if any, or other
6 official of the governmental entity responsible for reviewing or inves-
7 tigating such matters where that member, officer or employee works, who
8 shall in turn notify the ethics officer, inspector general, if any, or
9 other official of the procuring governmental entity responsible for
10 reviewing or investigating such matters at the procuring governmental
11 entity.

12 9. Every governmental entity shall establish a process for review by
13 its ethics officer, inspector general, if any, or other official respon-
14 sible for reviewing or investigating any allegations of violations of
15 the provisions of subdivision three of this section with regard to
16 permissible contacts on governmental procurements, and for the imposi-
17 tion of sanctions if such violations have been found to exist.

18 10. a. Upon notification of any allegation of a violation of the
19 provisions of subdivision three of this section with regard to permissi-
20 ble contacts on governmental procurements, the governmental entity's
21 ethics officer, inspector general, if any, or other official of the
22 procuring governmental entity responsible for reviewing or investigating
23 such matters shall immediately investigate such allegation and, if
24 sufficient cause exists to believe that such allegation is true, shall
25 give the offerer reasonable notice that an investigation is ongoing and
26 an opportunity to be heard in response to the allegation.

27 b. A finding that an offerer has knowingly and willfully violated the
28 provisions of subdivision three of this section shall result in a deter-
29 mination of non-responsibility for such offerer, and such offerer and
30 its subsidiaries, and any related or successor entity with substantially
31 similar function, management, board of directors, officers and share-
32 holders (hereinafter, for the purposes of this paragraph "offerer"),
33 shall not be awarded the procurement contract, unless the governmental
34 entity finds that the award of the procurement contract to the offerer
35 is necessary to protect public property or public health or safety, and
36 that the offerer is the only source capable of supplying the required
37 article of procurement within the necessary timeframe, provided, that
38 the governmental entity shall include in the procurement record a state-
39 ment describing the basis for such a finding. Any subsequent determi-
40 nation of non-responsibility due to violation of this section within
41 four years of a determination of non-responsibility due to a violation
42 of this section shall result in the offerer being rendered ineligible to
43 submit a proposal on or be awarded any procurement contract for a period
44 of four years from the date of the second final determination. Every
45 governmental entity shall ensure that its solicitations of proposals for
46 procurement contracts require offerers to disclose findings of non-res-
47 sponsibility due to violations of the provisions of subdivision three of
48 this section within the previous four years by any governmental entity.
49 The failure of offerers to timely disclose accurate and complete infor-
50 mation or otherwise cooperate with the governmental entity in adminis-
51 tering this provision shall be considered by the governmental entity in
52 its determination of responsibility; provided, further, that the govern-
53 mental entity shall not award a contract to an offerer who fails to
54 timely disclose accurate and complete information or otherwise cooperate
55 with the governmental entity in administering this provision unless the
56 governmental entity finds that the award of the procurement contract to

1 the offerer is necessary to protect public property or public health or
2 safety, and that the offerer is the only source capable of supplying the
3 required article of procurement within the necessary timeframe,
4 provided, that the governmental entity shall include in the procurement
5 record a statement describing the basis for such a finding. Upon a
6 determination of non-responsibility or debarment due to a violation of
7 this section, the governmental entity shall notify the office of general
8 services, which shall keep a list of all offerers who have been deter-
9 mined to be nonresponsible bidders or debarred due to violations of this
10 section; the office of general services shall make publicly available
11 such list and shall publish such list on its web site.

12 c. If a violation of the provisions of subdivision three of this
13 section is found to have knowingly and willfully occurred, then the
14 ethics officer or inspector general, if any, or other official of the
15 procuring governmental entity responsible for reviewing or investigating
16 such matters shall report instances of employee violation of the guide-
17 lines and procedures regarding implementation of subdivision two of this
18 section to the governmental entity's head.

19 11. Nothing in this section shall be deemed to prevent: (a) contacts
20 by offerers in protests, appeals or other review proceedings (including
21 the apparent successful bidder or proposer and his or her represen-
22 tatives) before the governmental entity conducting the procurement seek-
23 ing a final administrative determination, or in a subsequent judicial
24 proceeding; or

25 (b) complaints of alleged improper conduct in a governmental procure-
26 ment to the attorney general, inspector general, district attorney, or
27 court of competent jurisdiction; or

28 (c) written protests, appeals or complaints to the state comptroller's
29 office during the process of contract approval, where the state comp-
30 troller's approval is required by law, and where such communications and
31 any responses thereto are made in writing and shall be entered in the
32 procurement record pursuant to section one hundred sixty-three of [the
33 state finance law] THIS CHAPTER; or

34 (d) complaints of alleged improper conduct in a governmental procure-
35 ment conducted by a municipal agency or local legislative body to the
36 state comptroller's office;

37 provided, however, that nothing in this subdivision shall be construed
38 as recognizing or creating any new rights, duties or responsibilities or
39 abrogating any existing rights, duties or responsibilities of any
40 governmental entity as it pertains to implementation and enforcement of
41 article eleven of [the state finance law] THIS CHAPTER or any other
42 provision of law dealing with the governmental procurement process.

43 S 3. Section 139-k of the state finance law, as added by chapter 1 of
44 the laws of 2005, paragraph g of subdivision 1 as amended by chapter 395
45 of the laws of 2006, is amended to read as follows:

46 S 139-k. Disclosure of contacts and responsibility of offerers. 1. For
47 purposes of this section, the following terms will have the following
48 meanings unless specified otherwise.

49 a. "Governmental entity" shall mean: (1) any department, board,
50 bureau, commission, division, office, council, committee or officer of
51 the state, whether permanent or temporary; (2) each house of the state
52 legislature; (3) the unified court system; (4) any public authority,
53 public benefit corporation or commission created by or existing pursuant
54 to the public authorities law; (5) a public authority or public benefit
55 corporation, at least one of whose members is appointed by the governor
56 or who serves as a member by virtue of holding a civil office of the

1 state; (6) municipal agency, as that term is defined in paragraph (ii)
2 of subdivision (s) of section one-c of the legislative law; or (7) a
3 subsidiary or affiliate of such a public authority.

4 b. "Article of procurement" shall mean a commodity, service, technolo-
5 gy, public work, construction, revenue contract, the purchase, sale or
6 lease of real property or an acquisition or granting of other interest
7 in real property, that is the subject of a governmental procurement.

8 c. "Contacts" shall mean any oral, written or electronic communication
9 with a governmental entity under circumstances where a reasonable person
10 would infer that the communication was intended to influence the GOVERN-
11 MENTAL ENTITY'S CONDUCT OR DECISION REGARDING THE governmental procure-
12 ment.

13 d. "Proposal" shall mean any bid, quotation, offer or response to a
14 governmental entity's solicitation of submissions relating to a procure-
15 ment.

16 e. "Governmental procurement" shall mean: (i) the [preparation or
17 terms] PUBLIC ANNOUNCEMENT OR COMMUNICATION TO ANY POTENTIAL VENDOR OF A
18 DETERMINATION OF A NEED FOR A PROCUREMENT, WHICH SHALL INCLUDE, BUT NOT
19 BE LIMITED TO, THE PUBLIC NOTICE of the specifications, bid documents,
20 request for proposals, or evaluation criteria for a procurement
21 contract, (ii) solicitation for a procurement contract, (iii) evaluation
22 of a procurement contract, (iv) award, approval, denial or disapproval
23 of a procurement contract, or (v) approval or denial of an assignment,
24 amendment (other than amendments that are authorized and payable under
25 the terms of the procurement contract as it was finally awarded or
26 approved by the comptroller, as applicable), renewal or extension of a
27 procurement contract, or any other material change in the procurement
28 contract resulting in a financial benefit to the offerer.

29 f. "Restricted period" shall mean the period of time commencing with
30 the earliest written notice, advertisement or solicitation of a request
31 for proposal, invitation for bids, or solicitation of proposals, or any
32 other method for soliciting a response from offerers intending to result
33 in a procurement contract with a governmental entity AND ENDING with the
34 final contract award and approval by the governmental entity and, where
35 applicable, the state comptroller.

36 g. "Procurement contract" shall mean any contract or other agreement,
37 INCLUDING AN AMENDMENT TO OR AN EXTENSION, RENEWAL, OR CHANGE ORDER TO
38 AN EXISTING CONTRACT, for an article of procurement involving an esti-
39 mated annualized expenditure in excess of fifteen thousand dollars.
40 Grants, article eleven-B state finance law contracts, program contracts
41 between not-for-profit organizations, as defined in article eleven-B of
42 this chapter, and the unified court system, intergovernmental agree-
43 ments, railroad and utility force accounts, utility relocation project
44 agreements or orders, CONTRACTS GOVERNING ORGAN TRANSPLANTS, CONTRACTS
45 ALLOWING FOR STATE PARTICIPATION IN A TRADE SHOW, and eminent domain
46 transactions shall not be deemed procurement contracts.

47 h. "Offerer" shall mean the individual or entity, or any employee,
48 agent or consultant or person acting on behalf of such individual or
49 entity, that contacts a governmental entity about a governmental
50 procurement during the restricted period of such governmental procure-
51 ment WHETHER OR NOT THE CALLER HAS A FINANCIAL INTEREST IN THE OUTCOME
52 OF THE PROCUREMENT; PROVIDED, HOWEVER, THAT A GOVERNMENTAL AGENCY OR ITS
53 EMPLOYEES THAT COMMUNICATES WITH THE PROCURING AGENCY REGARDING A
54 GOVERNMENTAL PROCUREMENT IN THE EXERCISE OF ITS OVERSIGHT DUTIES SHALL
55 NOT BE CONSIDERED AN OFFERER.

1 i. "Revenue contract" shall mean any written agreement between a
2 governmental entity, as that term is defined in subparagraphs one, four,
3 five, six or seven of paragraph a of this subdivision, and an offerer
4 whereby the governmental entity gives or grants a concession or a fran-
5 chise.

6 j. "Unified court system" shall, for the purposes of this section
7 only, mean the unified court system of the state of New York, or the
8 office of court administration, where appropriate, other than town and
9 village justice courts in jurisdictions with a population under fifty
10 thousand, when it acts solely in an administrative capacity to engage in
11 governmental procurements and shall not include the unified court system
12 or any court of the state judiciary when it acts to hear and decide
13 cases of original or appellate jurisdiction or otherwise acts in its
14 judicial, as opposed to administrative, capacity.

15 2. Each governmental entity shall ensure that solicitation of
16 proposals or bid documents or specifications, or contract documents, as
17 applicable, for procurement contracts shall require offerers to disclose
18 findings of non-responsibility made within the previous four years by
19 any governmental entity where such prior finding of non-responsibility
20 was due to: (a) a violation of section one hundred thirty-nine-j of this
21 article, or (b) the intentional provision of false or incomplete infor-
22 mation to a governmental entity.

23 3. The failure of an offerer to timely disclose accurate or complete
24 information to a governmental entity pursuant to subdivision two of this
25 section shall be considered by such governmental entity in its determi-
26 nation of the responsibility of such offerer. No procurement contract
27 shall be awarded to any such offerer, its subsidiaries, and any related
28 or successor entity with substantially similar function, management,
29 board of directors, officers and shareholders (hereinafter, for the
30 purposes of this subdivision, "offerer"), unless the governmental entity
31 finds that the award of the procurement contract to the offerer is
32 necessary to protect public property or public health or safety, and
33 that the offerer is the only source capable of supplying the required
34 article of procurement within the necessary timeframe, provided, that
35 the governmental entity shall include in the procurement record a state-
36 ment describing the basis for such a finding.

37 4. Upon any contact in the restricted period, the governmental entity
38 shall obtain the name, address, telephone number, place of principal
39 employment and occupation of the person or organization making the
40 contact and inquire and record whether the person or organization making
41 such contact was the offerer or was retained, employed or designated by
42 or on behalf of the offerer to appear before or contact the governmental
43 entity about the governmental procurement. All recorded contacts shall
44 be included in the procurement record for the procurement contract. ANY
45 COMMUNICATIONS WHICH ARE EXCLUDED FROM THE DEFINITION OF "CONTACT" AS
46 DEFINED IN PARAGRAPH C OF SUBDIVISION ONE OF THIS SECTION ARE NOT
47 REQUIRED TO BE DIRECTED TO A DESIGNATED CONTACT PURSUANT TO THIS SUBDI-
48 VISION.

49 5. Any procurement contract award subject to the provisions of this
50 section and section one hundred thirty-nine-j of this article shall
51 contain a certification by the offerer that all information provided to
52 the procuring governmental entity with respect to this section is
53 complete, true and accurate, and each such procurement contract shall
54 contain a provision authorizing the governmental entity to terminate
55 such contract in the event such certification is found TO be inten-
56 tionally false or intentionally incomplete. The governmental entity

1 shall include in the procurement record a statement describing the basis
2 for any action taken pursuant to such termination provision.

3 6. Any communications received by a governmental entity from members
4 of the state legislature, or legislative staffs, when acting in their
5 official capacity, shall not be considered to be a "contact" within the
6 meaning of this section and shall not be recorded by a governmental
7 entity pursuant to this section.

8 S 4. Section 16 of chapter 1 of the laws of 2005 amending the state
9 finance law and other laws relating to restricting contacts in the
10 procurement process and the recording of contacts relating thereto, as
11 amended by chapter 169 of the laws of 2009, is amended to read as
12 follows:

13 S 16. This act shall take effect immediately; provided, however, that
14 sections one, six, eight, nine, ten, eleven and fifteen of this act
15 shall take effect January 1, 2006; and provided, however, the amendments
16 to paragraph f of subdivision [nine] 9 of section 163 of the state
17 finance law made by section fifteen of this act shall not affect the
18 repeal of such section and shall be deemed repealed therewith; provided,
19 further, that the amendments to article 1-A of the legislative law, made
20 by this act, shall not affect the repeal of such article pursuant to
21 chapter 2 of the laws of 1999, as amended, and shall be deemed repealed
22 therewith; provided, further, that sections thirteen and fourteen of
23 this act shall take effect January 1, 2006 and shall be deemed repealed
24 [on March 10, 2010] JULY 31, 2014; provided, further, that effective
25 immediately, the advisory council on procurement lobbying created pursu-
26 ant to section twelve of this act shall be constituted no later than
27 sixty days following the effective date of this act, provided that
28 effective sixty days following the effective date of this act, the advi-
29 sory council on procurement lobbying shall be authorized to establish
30 model guidelines and to add, amend and/or repeal any rules or regu-
31 lations necessary for the implementation of its duties under sections
32 twelve and thirteen of this act, and the advisory council authorized to
33 make and complete such model guidelines on or before the effective date
34 of section thirteen of this act; provided, further, that procurement
35 contracts for which bid solicitations have been issued prior to the
36 effective date of this act shall be awarded pursuant to the provisions
37 of law in effect at the time of issuance.

38 S 5. This act shall take effect immediately; provided, however that
39 the amendments to sections 139-j and 139-k of the state finance law made
40 by sections two and three of this act shall not affect the repeal of
41 such sections and shall be deemed repealed therewith; provided further
42 that procurement contracts for which bid solicitations have been issued
43 prior to the effective date of this act shall be subject to the
44 provisions of law in effect at the time of issuance. Effective imme-
45 diately, the addition, amendment and/or repeal of any rule or regulation
46 necessary for the implementation of this act on its effective date are
47 authorized to be made on or before such effective date.