S T A T E O F N E W Y O R K

3362

2009-2010 Regular Sessions

I N S E N A T E

March 17, 2009

Introduced by Sen. KRUGER -- (at request of the Office of General Services) -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

AN ACT to amend the state finance law, in relation to restricting contacts in the procurement process and the recording of contacts relating thereto

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

Section 1. Paragraph c of subdivision 1 of section 139-j of the state finance law, as added by chapter 1 of the laws of 2005, is amended to read as follows:

c. "Contacts" shall mean any oral, written or electronic communication with a governmental entity under circumstances where a reasonable person would infer that the communication was intended to influence THE GOVERNMENTAL ENTITY REGARDING the governmental procurement.

S 2. Subparagraph (i) of paragraph e of subdivision 1 of section 139-j of the state finance law, as added by chapter 1 of the laws of 2005, is amended to read as follows:

(i) [the preparation or terms of] the specifications, bid documents, request for proposals, or evaluation criteria for a procurement contract,

S 3. Paragraph g of subdivision 1 of section 139-j of the state finance law, as amended by chapter 395 of the laws of 2006, is amended to read as follows:

g. "Procurement contract" shall mean any contract or other agreement for an article of procurement MADE BY ANY GOVERNMENTAL ENTITY involving an estimated annualized expenditure in excess of [fifteen thousand dollars. Grants,] THE GREATEST AMOUNT, AS APPLICABLE FOR SUCH GOVERNMENTAL ENTITY, SET FORTH IN SUBDIVISION TWO OF SECTION ONE HUNDRED TWELVE OF THIS CHAPTER, PARAGRAPH B OF SUBDIVISION SIXTEEN OF SECTION THREE HUNDRED FIFTY-FIVE AND SUBDIVISION A OF SECTION SIXTY-TWO HUNDRED

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

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EIGHTEEN OF THE EDUCATION LAW AND/OR SUBDIVISIONS SEVEN AND EIGHT OF SECTION TWELVE HUNDRED NINE, SUBDIVISIONS TWO AND THREE OF SECTION TWELVE HUNDRED SIXTY-FIVE-A AND SECTION TWENTY-EIGHT HUNDRED SEVENTY-NINE OF THE PUBLIC AUTHORITIES LAW. THE FOLLOWING TRANSACTIONS SHALL NOT BE DEEMED PROCUREMENT CONTRACTS: GRANTS; article eleven-B state finance law contracts[,]; program contracts between not-for-profit organizations, as defined in article eleven-B of this chapter, and the unified court system[,]; intergovernmental agreements[,]; railroad and utility force accounts[,]; utility relocation project agreements or orders [and]; eminent domain transactions [shall not be deemed procurement contracts]; EMERGENCY CONTRACTS; SOLE SOURCE CONTRACTS; THE ACQUISITION OF COMMODITIES AND SERVICES UNDER THE PREFERRED SOURCE PROGRAM; CONTRACTS GOVERNING ORGAN TRANSPLANTS; AND CONTRACTS ALLOWING FOR STATE PARTICIPATION IN A TRADE SHOW.

S 4. Paragraph h of subdivision 1 of section 139-j of the state finance law, as added by chapter 1 of the laws of 2005, is amended to read as follows:

h. "Offerer" shall mean the individual or entity, or any employee, agent [or], consultant or person acting on behalf of such individual or entity, that contacts a governmental entity about a governmental procurement during the restricted period of such governmental procurement, PROVIDED THAT NO PERSON OR ENTITY SHALL BE CONSIDERED AN "OFFERER" IF HE, SHE OR IT, AND/OR ANY PERSON OR ENTITY FOR WHOSE BENEFIT SUCH CONTACT IS MADE, IS NOT REASONABLY LIKELY TO RECEIVE, EITHER DIRECTLY OR INDIRECTLY, IN KIND, OR OTHERWISE, A FINANCIAL OR PERSONAL BENEFIT FROM SUCH GOVERNMENTAL PROCUREMENT.

S 5. Paragraph a of subdivision 3 of section 139-j of the state finance law, as added by chapter 1 of the laws of 2005, is amended to read as follows:

a. shall contact only the [persons] PERSON or persons who may be contacted by offerers as designated by the governmental entity pursuant to paragraph a of subdivision two of this section relative to the governmental procurement, except that the following contacts are exempted from the provisions of this paragraph:

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

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

(3) ANY ORAL, WRITTEN OR ELECTRONIC COMMUNICATIONS BETWEEN THE PROCURING GOVERNMENTAL ENTITY AND AN OFFERER WHO HAS SUBMITTED A BID OR RESPONDED TO A SOLICITATION, THAT IS IN RESPONSE TO THE REQUEST OF A GOVERNMENTAL ENTITY AND THAT PERTAINS SOLELY TO AN EVALUATION OF THAT OFFERER'S BID OR RESPONSE MADE PRIOR TO AN AWARD OF A PROCUREMENT CONTRACT.

(4) participation in a DEMONSTRATION, INTERVIEW, conference OR OTHER MEANS FOR EXCHANGE OF INFORMATION provided for in a request for proposals, invitation for bids, or any other method for soliciting a response from offerers intending to result in a procurement contract;

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

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

[(6)] (7) contacts between designated governmental entity staff of the procuring governmental entity and an offerer to request the review of a procurement contract award;

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

(b) complaints of alleged improper conduct in a governmental procurement to the attorney general, inspector general, district attorney, or court of competent jurisdiction; or

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

(d) complaints of alleged improper conduct in a governmental procurement conducted by a municipal agency or local legislative body to the state comptroller's office;

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

S 6. Paragraph c of subdivision 1 of section 139-k of the state finance law, as added by chapter 1 of the laws of 2005, is amended to read as follows:

c. "Contacts" shall mean any oral, written or electronic communication with a governmental entity under circumstances where a reasonable person would infer that the communication was intended to influence THE GOVERNMENTAL ENTITY REGARDING the governmental procurement.

S 7. Subparagraph (i) of paragraph e of subdivision 1 of section 139-k of the state finance law, as added by chapter 1 of the laws of 2005, is amended to read as follows:

(i) [the preparation or terms of] the specifications, bid documents, request for proposals, or evaluation criteria for a procurement contract,

S 8. Paragraph g of subdivision 1 of section 139-k of the state finance law, as amended by chapter 395 of the laws of 2006, is amended to read as follows:

g. "Procurement contract" shall mean any contract or other agreement for an article of procurement MADE BY ANY GOVERNMENTAL ENTITY involving an estimated annualized expenditure in excess of [fifteen thousand dollars] THE AMOUNTS SET FORTH IN SUBDIVISION TWO OF SECTION ONE HUNDRED

TWELVE OF THE STATE FINANCE LAW, PARAGRAPH B OF SUBDIVISION SIXTEEN OF SECTION THREE HUNDRED FIFTY-FIVE AND SUBDIVISION A OF SECTION SIXTY-TWO HUNDRED EIGHTEEN OF THE EDUCATION LAW AND/OR SUBDIVISIONS SEVEN AND EIGHT OF SECTION TWELVE HUNDRED NINE, SUBDIVISIONS TWO AND THREE OF SECTION TWELVE HUNDRED SIXTY-FIVE-A AND SECTION TWENTY-EIGHT HUNDRED SEVENTY-NINE OF THE PUBLIC AUTHORITIES LAW. THE FOLLOWING TRANSACTIONS SHALL NOT BE DEEMED PROCUREMENT CONTRACTS: [Grants,] GRANTS; article eleven-B state finance law contracts[,]; program contracts between not-for-profit organizations, as defined in article eleven-B of this chapter, and the unified court system[,]; intergovernmental agreements[,]; railroad and utility force accounts[,]; utility relocation project agreements or orders [and]; eminent domain transactions [shall not be deemed procurement contracts] ; EMERGENCY CONTRACTS; SOLE SOURCE CONTRACTS; THE ACQUISITION OF COMMODITIES AND SERVICES UNDER THE PREFERRED SOURCE PROGRAM; CONTRACTS GOVERNING ORGAN TRANSPLANTS; AND CONTRACTS ALLOWING FOR PARTICIPATION IN A TRADE SHOW.

S 9. Paragraph h of subdivision 1 of section 139-k of the state finance law, as added by chapter 1 of the laws of 2005, is amended to read as follows:

h. "Offerer" shall mean the individual or entity, or any employee, agent [or], consultant or person acting on behalf of such individual or entity, that contacts a governmental entity about a governmental procurement during the restricted period of such governmental procurement, PROVIDED THAT NO PERSON OR ENTITY SHALL BE CONSIDERED AN "OFFERER" IF HE, SHE OR IT, AND/OR ANY PERSON OR ENTITY FOR WHOSE BENEFIT SUCH CONTACT IS MADE, IS NOT REASONABLY LIKELY TO RECEIVE, EITHER DIRECTLY OR INDIRECTLY, IN KIND, OR OTHERWISE, A FINANCIAL OR PERSONAL BENEFIT FROM SUCH GOVERNMENTAL PROCUREMENT.

S 10. Subdivision 4 of section 139-k of the state finance law, as added by chapter 1 of the laws of 2005, is amended to read as follows:

4. Upon any contact BY AN OFFERER in the restricted period, the governmental entity shall MAKE A REASONABLE ATTEMPT TO obtain the name, address, telephone number, place of principal employment and occupation of the person or organization making the contact and inquire and record whether the person or organization making such contact was [the offerer or was] retained, employed or designated by or on behalf of [the offerer] AN INDIVIDUAL OR ENTITY to appear before or contact the governmental entity about the governmental procurement. All recorded contacts shall be included in the procurement record for the procurement contract.

S 11. This act shall take effect on the ninetieth day after it shall have become a law; provided, that:

a. procurement contracts for which bid solicitations have been issued prior to the effective date of this act shall be subject to the provisions of law in effect at the time of issuance;

b. the amendments to section 139-j of the state finance law made by sections one through five of this act shall not affect the repeal of such section and shall be deemed repealed therewith; and

c. the amendments to section 139-k of the state finance law made by sections six through ten of this act shall not affect the repeal of such section and shall be deemed repealed therewith.