

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

6924--A

I N S E N A T E

February 25, 2010

Introduced by Sen. KRUGER -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the legislative law and 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.

18 The legislature further finds that in 2005, the legislature responded
19 to widespread concerns that the procurement process was on occasion
20 subject to pressures that distorted the evaluation of the merits of
21 procurement bids and proposals. It enacted laws to allow anyone inter-
22 ested in a particular procurement to examine the communications between

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

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1 vendors and their representatives, on one hand, and government officials
2 conducting the procurement on the other. The law required that once
3 written notice in any form has been issued that a procurement is planned
4 or pending, all contacts regarding that procurement that would reason-
5 ably be interpreted as an effort to influence the result of the procure-
6 ment can only be made to designated contact persons within the govern-
7 ment entity that is conducting the procurement. These designated
8 contacts are required to keep a record of these conversations and other
9 communications and these records become part of the larger procurement
10 record. Individuals and entities subject to the lobbying laws of the
11 state and who lobby regarding procurements are also required to file a
12 statement regarding the matters on which they have lobbied or intend to
13 lobby. Therefore, a public record is created of all communications
14 related to the procurement. Any communications from any party, whether
15 or not a participating vendor or registered lobbyist, should be
16 recorded, so that someone reviewing the record knows what comments and
17 information were exchanged. In addition, in 2008, statutory language was
18 added to allow a vendor that unsuccessfully bid to request and receive,
19 after the procurement is completed, a debriefing by the agency that
20 conducted the procurement. The purpose of these measures is to create a
21 process more readily understood and observed, so that vendors and the
22 public may have greater confidence in the fairness of the result.

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

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

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

11 S 2. Subdivisions (p), (q), and (r) of section 1-c of the legislative
12 law, subdivisions (p) and (q) as added by chapter 1 of the laws of 2005
13 and subdivision (r) as amended by chapter 395 of the laws of 2006, are
14 amended to read as follows:

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

29 (q) The term "offerer" shall mean the individual or entity, or any
30 employee, agent or consultant of such individual or entity, that
31 contacts a state agency, either house of the state legislature, the
32 unified court system, a municipal agency or local legislative body about
33 a governmental procurement PROVIDED, HOWEVER, THAT A GOVERNMENTAL AGENCY
34 OR ITS EMPLOYEES THAT COMMUNICATE WITH THE PROCURING AGENCY REGARDING A
35 GOVERNMENTAL PROCUREMENT IN THE EXERCISE OF ITS OVERSIGHT DUTIES SHALL
36 NOT BE CONSIDERED AN OFFERER.

37 (r) The term "procurement contract" shall mean any contract or other
38 agreement, INCLUDING AN AMENDMENT, EXTENSION, RENEWAL, OR CHANGE ORDER
39 TO AN EXISTING CONTRACT (OTHER THAN AMENDMENTS, EXTENSIONS, RENEWALS, OR
40 CHANGE ORDERS THAT ARE AUTHORIZED AND PAYABLE UNDER THE TERMS OF THE
41 CONTRACT AS IT WAS FINALLY AWARDED OR APPROVED BY THE COMPTROLLER, AS
42 APPLICABLE), for an article of procurement involving an estimated annu-
43 alized expenditure in excess of fifteen thousand dollars. Grants, arti-
44 cle XI-B state finance law contracts, program contracts between not-for-
45 profit organizations, as defined in article XI-B of the state finance
46 law, and the unified court system, intergovernmental agreements, rail-
47 road and utility force accounts, utility relocation project agreements
48 or orders, CONTRACTS GOVERNING ORGAN TRANSPLANTS, CONTRACTS ALLOWING FOR
49 STATE PARTICIPATION IN TRADE SHOWS, and eminent domain transactions
50 shall not be deemed procurement contracts.

51 S 3. Section 139-j of the state finance law, as added by chapter 1 of
52 the laws of 2005, paragraph f of subdivision 1 as amended by section 3
53 of part K of chapter 56 of the laws of 2006, paragraph g of subdivision
54 1 as amended by chapter 395 of the laws of 2006, and subdivision 7 as
55 amended by chapter 596 of the laws of 2005, is amended to read as
56 follows:

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

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

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

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

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

27 e. "Governmental procurement" shall mean: (i) the [preparation or
28 terms] PUBLIC ANNOUNCEMENT, PUBLIC NOTICE, OR PUBLIC COMMUNICATION TO
29 ANY POTENTIAL VENDOR OF A DETERMINATION OF A NEED FOR A PROCUREMENT,
30 WHICH SHALL INCLUDE, BUT NOT BE LIMITED TO, THE PUBLIC NOTIFICATION of
31 the specifications, bid documents, request for proposals, or evaluation
32 criteria for a procurement contract, (ii) solicitation for a procurement
33 contract, (iii) evaluation of a procurement contract, (iv) award,
34 approval, denial or disapproval of a procurement contract, or (v)
35 approval or denial of an assignment, amendment (other than amendments
36 that are authorized and payable under the terms of the procurement
37 contract as it was finally awarded or approved by the comptroller, as
38 applicable), renewal or extension of a procurement contract, or any
39 other material change in the procurement contract resulting in a finan-
40 cial benefit to the offerer.

41 f. "Restricted period" shall mean the period of time commencing with
42 the earliest written notice, advertisement or solicitation of a request
43 for proposal, invitation for bids, or solicitation of proposals, or any
44 other method for soliciting a response from offerers intending to result
45 in a procurement contract with a governmental entity and ending with the
46 final contract award and approval by the governmental entity and, where
47 applicable, the state comptroller.

48 g. "Procurement contract" shall mean any contract or other agreement,
49 INCLUDING AN AMENDMENT, EXTENSION, RENEWAL OR CHANGE ORDER TO AN EXIST-
50 ING CONTRACT (OTHER THAN AMENDMENTS, EXTENSIONS, RENEWALS, OR CHANGE
51 ORDERS THAT ARE AUTHORIZED AND PAYABLE UNDER THE TERMS OF THE CONTRACT
52 AS IT WAS FINALLY AWARDED OR APPROVED BY THE COMPTROLLER, AS APPLICA-
53 BLE), for an article of procurement involving an estimated annualized
54 expenditure in excess of fifteen thousand dollars. Grants, article
55 eleven-B state finance law contracts, program contracts between not-for-
56 profit organizations, as defined in article eleven-B of this chapter,

1 and the unified court system, intergovernmental agreements, railroad and
2 utility force accounts, utility relocation project agreements or orders,
3 CONTRACTS GOVERNING ORGAN TRANSPLANTS, CONTRACTS ALLOWING FOR STATE
4 PARTICIPATION IN TRADE SHOWS, and eminent domain transactions shall not
5 be deemed procurement contracts.

6 h. "Offerer" shall mean the individual or entity, or any employee,
7 agent or consultant or person acting on behalf of such individual or
8 entity, that contacts a governmental entity about a governmental
9 procurement during the restricted period of such governmental procure-
10 ment WHETHER OR NOT THE CALLER HAS A FINANCIAL INTEREST IN THE OUTCOME
11 OF THE PROCUREMENT; PROVIDED, HOWEVER, THAT A GOVERNMENTAL AGENCY OR ITS
12 EMPLOYEES THAT COMMUNICATES WITH THE PROCURING AGENCY REGARDING A
13 GOVERNMENTAL PROCUREMENT IN THE EXERCISE OF ITS OVERSIGHT DUTIES SHALL
14 NOT BE CONSIDERED AN OFFERER.

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

20 j. "Unified court system" shall, for the purposes of this section
21 only, mean the unified court system of the state of New York, or the
22 office of court administration, where appropriate, other than town and
23 village justice courts in jurisdictions with a population under fifty
24 thousand, when it acts solely in an administrative capacity to engage in
25 governmental procurements and shall not include the unified court system
26 or any court of the state judiciary when it acts to hear and decide
27 cases of original or appellate jurisdiction or otherwise acts in its
28 judicial, as opposed to administrative, capacity.

29 2. Every governmental entity that undertakes a governmental procure-
30 ment shall:

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

35 b. make any determinations on any governmental procurement: (1) in a
36 manner consistent with the principles provided for under subdivision two
37 of section one hundred sixty-three of this chapter, or, if the govern-
38 mental entity is a public benefit corporation, as that term is defined
39 in section sixty-six of the general construction law, and the majority
40 of the members consist of persons either appointed by the governor or
41 who serve as members by virtue of holding a civil office of the state,
42 the procurement guidelines adopted pursuant to section twenty-eight
43 hundred seventy-nine of the public authorities law, and (2) free from
44 any conduct that would be prohibited by subdivision five of section
45 seventy-three or section seventy-four of the public officers law, or of
46 other applicable ethics code provisions that are equivalent to subdivi-
47 sion five of section seventy-three or section seventy-four of the public
48 officers law where the public officials that are involved in the govern-
49 mental procurement are not subject to subdivision five of section seven-
50 ty-three or section seventy-four of the public officers law;

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

54 a. shall contact only the [persons] PERSON or persons who may be
55 contacted by offerers as designated by the governmental entity pursuant
56 to paragraph a of subdivision two of this section relative to the

1 governmental procurement, except that the following contacts are
2 exempted from the provisions of this paragraph AND DO NOT NEED TO BE
3 DIRECTED TO A DESIGNATED CONTACT PURSUANT TO SECTION ONE HUNDRED THIR-
4 TY-NINE-K OF THIS ARTICLE:

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

8 (2) the submission of written questions [to a designated contact] BY A
9 METHOD set forth in a request for proposals, or invitation for bids, or
10 any other method for soliciting a response from offerers intending to
11 result in a procurement contract, when all written questions and
12 responses are to be disseminated to all offerers who have expressed an
13 interest in the request for proposals, or invitation for bids, or any
14 other method for soliciting a response from offerers intending to result
15 in a procurement contract;

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

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

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

31 (6) contacts between designated governmental entity staff of the
32 procuring governmental entity and an offerer to request the review of a
33 procurement contract award;

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

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

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

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

53 (8) COMMUNICATIONS BETWEEN OFFERERS AND GOVERNMENTAL ENTITIES THAT
54 SOLELY ADDRESS THE DETERMINATION OF RESPONSIBILITY BY A GOVERNMENTAL
55 ENTITY OF AN OFFERER;

1 (9) ANY COMMUNICATIONS RELATING TO A GOVERNMENTAL PROCUREMENT MADE
2 UNDER SECTION ONE HUNDRED SIXTY-TWO OF THIS CHAPTER UNDERTAKEN BY (I)
3 THE NON-PROFIT-MAKING AGENCIES APPOINTED PURSUANT TO PARAGRAPH E OF
4 SUBDIVISION SIX OF SECTION ONE HUNDRED SIXTY-TWO OF THIS CHAPTER BY THE
5 COMMISSIONER OF THE OFFICE OF CHILDREN AND FAMILY SERVICES, THE COMMIS-
6 SION FOR THE BLIND AND VISUALLY HANDICAPPED, OR THE COMMISSIONER OF
7 EDUCATION, AND (II) THE QUALIFIED CHARITABLE NON-PROFIT-MAKING AGENCIES
8 FOR THE BLIND, AND QUALIFIED CHARITABLE NON-PROFIT-MAKING AGENCIES FOR
9 OTHER SEVERELY DISABLED PERSONS AS IDENTIFIED IN SUBDIVISION TWO OF
10 SECTION ONE HUNDRED SIXTY-TWO OF THIS CHAPTER; PROVIDED, HOWEVER, THAT
11 ANY COMMUNICATIONS WHICH ATTEMPT TO INFLUENCE THE ISSUANCE OR TERMS OF
12 THE SPECIFICATIONS THAT SERVE AS THE BASIS FOR BID DOCUMENTS, REQUESTS
13 FOR PROPOSALS, INVITATIONS FOR BIDS, OR SOLICITATIONS OF PROPOSALS, OR
14 ANY OTHER METHOD FOR SOLICITING A RESPONSE FROM OFFERERS INTENDING TO
15 RESULT IN A PROCUREMENT CONTRACT WITH A STATE AGENCY, THE STATE LEGISLA-
16 TURE, THE UNIFIED COURT SYSTEM, A MUNICIPAL AGENCY OR LOCAL LEGISLATIVE
17 BODY SHALL NOT BE EXEMPT FROM THE PROVISIONS OF THIS PARAGRAPH;

18 provided, however, that nothing in this subdivision shall be construed
19 as recognizing or creating any new rights, duties or responsibilities or
20 abrogating any existing rights, duties or responsibilities of any
21 governmental entity as it pertains to implementation and enforcement of
22 article eleven of [the state finance law] THIS CHAPTER or any other
23 provision of law dealing with the governmental procurement process, AND
24 THAT NOTHING IN THIS SUBDIVISION SHALL BE INTERPRETED TO LIMIT THE
25 AUTHORITY OF A GOVERNMENTAL ENTITY INVOLVED IN A GOVERNMENT PROCUREMENT
26 BY EXERCISE OF AN OVERSIGHT FUNCTION FROM PROVIDING INFORMATION TO
27 OFFERERS REGARDING THE STATUS OF THE REVIEW, OVERSIGHT, OR APPROVAL OF A
28 GOVERNMENTAL PROCUREMENT THAT HAS BEEN SUBMITTED TO OR IS UNDER REVIEW
29 BY THAT GOVERNMENTAL ENTITY.

30 b. shall not attempt to influence the governmental procurement in a
31 manner that would result in a violation or an attempted violation of
32 subdivision five of section seventy-three or section seventy-four of the
33 public officers law, or of other applicable ethics code provisions that
34 are equivalent to subdivision five of section seventy-three or section
35 seventy-four of the public officers law where the public officials that
36 are involved in the governmental procurement are not subject to subdivi-
37 sion five of section seventy-three or section seventy-four of the public
38 officers law;

39 4. Violations of paragraph a of subdivision three of this section
40 shall include any contacts during the restricted period of a govern-
41 mental procurement between the offerer and any member, officer or
42 employee of any governmental entity other than the entity conducting the
43 governmental procurement; provided, however, that nothing in this
44 section shall be deemed to prohibit an offerer from communicating with a
45 member of the state legislature or legislative staff about a govern-
46 mental procurement being conducted by a governmental entity other than
47 the state legislature, or a member of the state legislature or legisla-
48 tive staff contacting a governmental entity about a governmental
49 procurement being conducted by a governmental entity other than the
50 state legislature, provided that the member of the state legislature or
51 legislative staff is acting in [their] HIS OR HER official capacity.

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

55 6. a. Every governmental entity shall incorporate a summary of the
56 policy and prohibitions regarding permissible contacts during a govern-

1 mental procurement pursuant to subdivision three of this section, and
2 copies of rules and regulations and applicable governmental entity
3 guidelines and procedures regarding permissible contacts during a
4 governmental procurement pursuant to subdivision three of this section
5 into their solicitation of proposals or bid documents or specifications
6 for all procurement contracts.

7 b. Every governmental entity shall seek written affirmations from all
8 offerers as to the offerer's understanding of and agreement to comply
9 with the governmental entity's procedures relating to permissible
10 contacts during a governmental procurement pursuant to subdivision three
11 of this section. SUCH A WRITTEN AFFIRMATION BY AN OFFERER SHALL BE
12 DEEMED TO APPLY TO ANY AMENDMENTS TO A PROCUREMENT SUBMITTED BY THE
13 GOVERNMENTAL ENTITY AFTER AN INITIAL AFFIRMATION IS RECEIVED WITH AN
14 INITIAL BID.

15 7. Notwithstanding any law to the contrary, prior to conducting an
16 award of a procurement contract, a governmental entity conducting a
17 governmental procurement shall make a final determination of responsi-
18 bility of the proposed awardee in accordance with paragraph f of subdivi-
19 sion nine of section one hundred sixty-three of this chapter, or, if
20 the governmental entity is a public benefit corporation, as that term is
21 defined in section sixty-six of the general construction law, and the
22 majority of the members consist of persons either appointed by the
23 governor or who serve as members by virtue of holding a civil office of
24 the state, according to the procurement guidelines adopted pursuant to
25 subparagraph (iii) of paragraph (b) of subdivision three of section
26 twenty-eight hundred seventy-nine of the public authorities law;
27 provided, however, that nothing in this subdivision shall be construed
28 as abrogating or diminishing any existing rights, duties or responsibil-
29 ities of any governmental entity as it pertains to determinations of
30 responsibility.

31 8. Any member, officer or employee of a governmental entity who
32 becomes aware that an offerer has violated the provisions of subdivision
33 three of this section with regard to permissible contacts during any
34 governmental procurement shall immediately notify the ethics officer,
35 inspector general, if any, or other official of the procuring govern-
36 mental entity responsible for reviewing or investigating such matters.
37 If an offerer violates the provisions of subdivision three of this
38 section with regard to permissible contacts at a governmental entity
39 other than the governmental entity conducting the governmental procure-
40 ment, the member, officer or employee who becomes aware of the violation
41 shall notify the ethics officer, inspector general, if any, or other
42 official of the governmental entity responsible for reviewing or inves-
43 tigating such matters where that member, officer or employee works, who
44 shall in turn notify the ethics officer, inspector general, if any, or
45 other official of the procuring governmental entity responsible for
46 reviewing or investigating such matters at the procuring governmental
47 entity.

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

54 10. a. Upon notification of any allegation of a violation of the
55 provisions of subdivision three of this section with regard to permissi-
56 ble contacts on governmental procurements, the governmental entity's

1 ethics officer, inspector general, if any, or other official of the
2 procuring governmental entity responsible for reviewing or investigating
3 such matters shall immediately investigate such allegation and, if
4 sufficient cause exists to believe that such allegation is true, shall
5 give the offerer reasonable notice that an investigation is ongoing and
6 an opportunity to be heard in response to the allegation.

7 b. A finding that an offerer has knowingly and willfully violated the
8 provisions of subdivision three of this section shall result in a deter-
9 mination of non-responsibility for such offerer, and such offerer and
10 its subsidiaries, and any related or successor entity with substantially
11 similar function, management, board of directors, officers and share-
12 holders (hereinafter, for the purposes of this paragraph "offerer"),
13 shall not be awarded the procurement contract, unless the governmental
14 entity finds that the award of the procurement contract to the offerer
15 is necessary to protect public property or public health or safety, and
16 that the offerer is the only source capable of supplying the required
17 article of procurement within the necessary timeframe, provided, that
18 the governmental entity shall include in the procurement record a state-
19 ment describing the basis for such a finding. Any subsequent determi-
20 nation of non-responsibility due to violation of this section within
21 four years of a determination of non-responsibility due to a violation
22 of this section shall result in the offerer being rendered ineligible to
23 submit a proposal on or be awarded any procurement contract for a period
24 of four years from the date of the second final determination. Every
25 governmental entity shall ensure that its solicitations of proposals for
26 procurement contracts require offerers to disclose findings of non-res-
27 ponsibility due to violations of the provisions of subdivision three of
28 this section within the previous four years by any governmental entity.
29 The failure of offerers to timely disclose accurate and complete infor-
30 mation or otherwise cooperate with the governmental entity in adminis-
31 tering this provision shall be considered by the governmental entity in
32 its determination of responsibility; provided, further, that the govern-
33 mental entity shall not award a contract to an offerer who fails to
34 timely disclose accurate and complete information or otherwise cooperate
35 with the governmental entity in administering this provision unless the
36 governmental entity finds that the award of the procurement contract to
37 the offerer is necessary to protect public property or public health or
38 safety, and that the offerer is the only source capable of supplying the
39 required article of procurement within the necessary timeframe,
40 provided, that the governmental entity shall include in the procurement
41 record a statement describing the basis for such a finding. Upon a
42 determination of non-responsibility or debarment due to a violation of
43 this section, the governmental entity shall notify the office of general
44 services, which shall keep a list of all offerers who have been deter-
45 mined to be nonresponsible bidders or debarred due to violations of this
46 section; the office of general services shall make publicly available
47 such list and shall publish such list on its web site.

48 c. If a violation of the provisions of subdivision three of this
49 section is found to have knowingly and willfully occurred, then the
50 ethics officer or inspector general, if any, or other official of the
51 procuring governmental entity responsible for reviewing or investigating
52 such matters shall report instances of employee violation of the guide-
53 lines and procedures regarding implementation of subdivision two of this
54 section to the governmental entity's head.

55 11. Nothing in this section shall be deemed to prevent: (a) contacts
56 by offerers in protests, appeals or other review proceedings (including

1 the apparent successful bidder or proposer and his or her represen-
2 tatives) before the governmental entity conducting the procurement seek-
3 ing a final administrative determination, or in a subsequent judicial
4 proceeding; or

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

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

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

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

23 S 4. Section 139-k of the state finance law, as added by chapter 1 of
24 the laws of 2005 and paragraph g of subdivision 1 as amended by chapter
25 395 of the laws of 2006, is amended to read as follows:

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

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

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

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

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

52 e. "Governmental procurement" shall mean: (i) the [preparation or
53 terms] PUBLIC ANNOUNCEMENT, PUBLIC NOTICE, OR PUBLIC COMMUNICATION TO
54 ANY POTENTIAL VENDOR OF A DETERMINATION OF A NEED FOR A PROCUREMENT,
55 WHICH SHALL INCLUDE, BUT NOT BE LIMITED TO, THE PUBLIC NOTIFICATION of
56 the specifications, bid documents, request for proposals, or evaluation

1 criteria for a procurement contract, (ii) solicitation for a procurement
2 contract, (iii) evaluation of a procurement contract, (iv) award,
3 approval, denial or disapproval of a procurement contract, or (v)
4 approval or denial of an assignment, amendment (other than amendments
5 that are authorized and payable under the terms of the procurement
6 contract as it was finally awarded or approved by the comptroller, as
7 applicable), renewal or extension of a procurement contract, or any
8 other material change in the procurement contract resulting in a finan-
9 cial benefit to the offerer.

10 f. "Restricted period" shall mean the period of time commencing with
11 the earliest written notice, advertisement or solicitation of a request
12 for proposal, invitation for bids, or solicitation of proposals, or any
13 other method for soliciting a response from offerers intending to result
14 in a procurement contract with a governmental entity AND ENDING with the
15 final contract award and approval by the governmental entity and, where
16 applicable, the state comptroller.

17 g. "Procurement contract" shall mean any contract or other agreement,
18 INCLUDING AN AMENDMENT, EXTENSION, RENEWAL, OR CHANGE ORDER TO AN EXIST-
19 ING CONTRACT (OTHER THAN AMENDMENTS, EXTENSIONS, RENEWALS, OR CHANGE
20 ORDERS THAT ARE AUTHORIZED AND PAYABLE UNDER THE TERMS OF THE CONTRACT
21 AS IT WAS FINALLY AWARDED OR APPROVED BY THE COMPTROLLER, AS APPLICA-
22 BLE), for an article of procurement involving an estimated annualized
23 expenditure in excess of fifteen thousand dollars. Grants, article
24 eleven-B state finance law contracts, program contracts between not-for-
25 profit organizations, as defined in article eleven-B of this chapter,
26 and the unified court system, intergovernmental agreements, railroad and
27 utility force accounts, utility relocation project agreements or orders,
28 CONTRACTS GOVERNING ORGAN TRANSPLANTS, CONTRACTS ALLOWING FOR STATE
29 PARTICIPATION IN A TRADE SHOW, and eminent domain transactions shall not
30 be deemed procurement contracts.

31 h. "Offerer" shall mean the individual or entity, or any employee,
32 agent or consultant or person acting on behalf of such individual or
33 entity, that contacts a governmental entity about a governmental
34 procurement during the restricted period of such governmental procure-
35 ment WHETHER OR NOT THE CALLER HAS A FINANCIAL INTEREST IN THE OUTCOME
36 OF THE PROCUREMENT; PROVIDED, HOWEVER, THAT A GOVERNMENTAL AGENCY OR ITS
37 EMPLOYEES THAT COMMUNICATES WITH THE PROCURING AGENCY REGARDING A
38 GOVERNMENTAL PROCUREMENT IN THE EXERCISE OF ITS OVERSIGHT DUTIES SHALL
39 NOT BE CONSIDERED AN OFFERER.

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

45 j. "Unified court system" shall, for the purposes of this section
46 only, mean the unified court system of the state of New York, or the
47 office of court administration, where appropriate, other than town and
48 village justice courts in jurisdictions with a population under fifty
49 thousand, when it acts solely in an administrative capacity to engage in
50 governmental procurements and shall not include the unified court system
51 or any court of the state judiciary when it acts to hear and decide
52 cases of original or appellate jurisdiction or otherwise acts in its
53 judicial, as opposed to administrative, capacity.

54 2. Each governmental entity shall ensure that solicitation of
55 proposals or bid documents or specifications, or contract documents, as
56 applicable, for procurement contracts shall require offerers to disclose

1 findings of non-responsibility made within the previous four years by
2 any governmental entity where such prior finding of non-responsibility
3 was due to: (a) a violation of section one hundred thirty-nine-j of this
4 article, or (b) the intentional provision of false or incomplete infor-
5 mation to a governmental entity.

6 3. The failure of an offerer to timely disclose accurate or complete
7 information to a governmental entity pursuant to subdivision two of this
8 section shall be considered by such governmental entity in its determi-
9 nation of the responsibility of such offerer. No procurement contract
10 shall be awarded to any such offerer, its subsidiaries, and any related
11 or successor entity with substantially similar function, management,
12 board of directors, officers and shareholders (hereinafter, for the
13 purposes of this subdivision, "offerer"), unless the governmental entity
14 finds that the award of the procurement contract to the offerer is
15 necessary to protect public property or public health or safety, and
16 that the offerer is the only source capable of supplying the required
17 article of procurement within the necessary timeframe, provided, that
18 the governmental entity shall include in the procurement record a state-
19 ment describing the basis for such a finding.

20 4. Upon any contact in the restricted period, the governmental entity
21 shall obtain the name, address, telephone number, place of principal
22 employment and occupation of the person or organization making the
23 contact and inquire and record whether the person or organization making
24 such contact was the offerer or was retained, employed or designated by
25 or on behalf of the offerer to appear before or contact the governmental
26 entity about the governmental procurement. All recorded contacts shall
27 be included in the procurement record for the procurement contract.

28 5. Any procurement contract award subject to the provisions of this
29 section and section one hundred thirty-nine-j of this article shall
30 contain a certification by the offerer that all information provided to
31 the procuring governmental entity with respect to this section is
32 complete, true and accurate, and each such procurement contract shall
33 contain a provision authorizing the governmental entity to terminate
34 such contract in the event such certification is found to be inten-
35 tionally false or intentionally incomplete. The governmental entity
36 shall include in the procurement record a statement describing the basis
37 for any action taken pursuant to such termination provision.

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

43 S 5. Section 16 of chapter 1 of the laws of 2005 amending the state
44 finance law and other laws relating to restricting contacts in the
45 procurement process and the recording of contacts relating thereto, as
46 amended by chapter 169 of the laws of 2009, is amended to read as
47 follows:

48 S 16. This act shall take effect immediately; provided, however, that
49 sections one, six, eight, nine, ten, eleven and fifteen of this act
50 shall take effect January 1, 2006; and provided, however, the amendments
51 to paragraph f of subdivision [nine] 9 of section 163 of the state
52 finance law made by section fifteen of this act shall not affect the
53 repeal of such section and shall be deemed repealed therewith; provided,
54 further, that the amendments to article 1-A of the legislative law, made
55 by this act, shall not affect the repeal of such article pursuant to
56 chapter 2 of the laws of 1999, as amended, and shall be deemed repealed

1 therewith; provided, further, that sections thirteen and fourteen of
2 this act shall take effect January 1, 2006 and shall be deemed repealed
3 [on March 10, 2010] JULY 31, 2014; provided, further, that effective
4 immediately, the advisory council on procurement lobbying created pursu-
5 ant to section twelve of this act shall be constituted no later than
6 sixty days following the effective date of this act, provided that
7 effective sixty days following the effective date of this act, the advi-
8 sory council on procurement lobbying shall be authorized to establish
9 model guidelines and to add, amend and/or repeal any rules or regu-
10 lations necessary for the implementation of its duties under sections
11 twelve and thirteen of this act, and the advisory council authorized to
12 make and complete such model guidelines on or before the effective date
13 of section thirteen of this act; provided, further, that procurement
14 contracts for which bid solicitations have been issued prior to the
15 effective date of this act shall be awarded pursuant to the provisions
16 of law in effect at the time of issuance.

17 S 6. This act shall take effect immediately; provided, however that:

18 (a) the amendments to sections 139-j and 139-k of the state finance
19 law made by sections three and four of this act shall not affect the
20 repeal of such sections and shall be deemed repealed therewith;

21 (b) procurement contracts for which bid solicitations have been issued
22 prior to the effective date of this act shall be subject to the
23 provisions of law in effect at the time of issuance; and

24 (c) effective immediately, the addition, amendment and/or repeal of
25 any rule or regulation necessary for the implementation of this act on
26 its effective date are authorized to be made on or before such effective
27 date.