

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:

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

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

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

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

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

17 g. "Procurement contract" shall mean any contract or other agreement
18 for an article of procurement MADE BY ANY GOVERNMENTAL ENTITY involving
19 an estimated annualized expenditure in excess of [fifteen thousand
20 dollars. Grants,] THE GREATEST AMOUNT, AS APPLICABLE FOR SUCH GOVERN-
21 MENTAL ENTITY, SET FORTH IN SUBDIVISION TWO OF SECTION ONE HUNDRED
22 TWELVE OF THIS CHAPTER, PARAGRAPH B OF SUBDIVISION SIXTEEN OF SECTION
23 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.

LBD07915-03-9

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

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

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

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

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

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

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

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

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

1 [(4)] (5) complaints by an offerer regarding the failure of the person
2 or persons designated by the procuring governmental entity pursuant to
3 this section to respond in a timely manner to authorized offerer
4 contacts made in writing to the office of general counsel of the procur-
5 ing governmental entity, provided that any such written complaints shall
6 become a part of the procurement record;

7 [(5)] (6) offerers who have been tentatively awarded a contract and
8 are engaged in communications with a governmental entity solely for the
9 purpose of negotiating the terms of the procurement contract after being
10 notified of tentative award;

11 [(6)] (7) contacts between designated governmental entity staff of the
12 procuring governmental entity and an offerer to request the review of a
13 procurement contract award;

14 [(7)] (8) (a) contacts by offerers in protests, appeals or other
15 review proceedings (including the apparent successful bidder or proposer
16 and his or her representatives) before the governmental entity conduct-
17 ing the procurement seeking a final administrative determination, or in
18 a subsequent judicial proceeding; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42 a. 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;

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

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