STATE OF NEW YORK

6616

2021-2022 Regular Sessions

IN SENATE

May 10, 2021

Introduced by Sen. SKOUFIS -- (at request of the State Comptroller) -- read twice and ordered printed, and when printed to be committed to the Committee on Procurement and Contracts

AN ACT to amend the state finance law, in relation to establishing the ethical standards for state agency contractors act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings and intent. The legislature finds that to a great extent, state agencies and public authorities rely on contractors to help accomplish a broad array of complex, inherently governmental and mission-critical functions. State agencies and public authorities contract for services that involve the contractors' exercise of judgment, providing operational and policy advice to state officers and employees, overseeing other contractors and, at times, working alongside state officers and employees on the same projects. This intermingling of public and private workforce reveals a need to address what processes are in place to ensure the integrity of government operations and maintain public confidence.

While a majority of contractors deliver services with integrity, some contractors could, nonetheless, engage in misconduct during the course of the contract term - for example, engaging in acts for personal financial gain, accepting inappropriate gifts, or inappropriately negotiating for certain jobs.

Furthermore, in carrying out the day-to-day tasks for state agencies and public authorities, contractors often require extensive access to and use of nonpublic government information. Protection of nonpublic information is critical, because unauthorized disclosure can erode the integrity of government operations and lead to situations in which such information is misused for private gain, potentially harming important interests such as the privacy of individuals, commercial business proprietary rights, security, and law enforcement.

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

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The legislature further finds that opportunities for organizational and personal conflicts of interest by contractors, and the misuse of nonpublic information by contractors through negligence or misconduct, can have a significant effect on the government's ability to perform its primary functions, potentially resulting in inappropriate use of taxpayer dollars, damaged reputation, and loss of public trust.

The legislature further finds that while few cases of improper conduct by contractors have been publicly identified, safeguards are lacking to identify whether organizational or personal conflicts of interest exist among contractors. The cost to the state of contractors or their employees engaging in actions reaping organizational or personal gain - an outcome increasingly likely based on sheer numbers - would likely never be known, let alone calculable, as long as there is no transparency.

§ 2. Short title. This act shall be known and may be cited as the "ethical standards for state agency contractors act".

§ 3. The state finance law is amended by adding a new section 148 to read as follows:

§ 148. Ethical standards for contractors performing inherently governmental and mission-critical functions or rendering services pursuant to an information-risk contract. 1. For the purposes of this section, the following terms shall have the following meanings:

(a) "State agency contractor" or "contractor" shall mean an individual, subcontractor, or other agent of the contractor who, or an entity which, pursuant to contract or other arrangement with a state agency and under the supervision or oversight of a state officer or employee, (i) performs or assists a state agency in the performance of inherently governmental activities and mission-critical functions, or (ii) renders services pursuant to an information-risk contract.

(b) "State agency" shall mean any state department, or division, board, commission, or bureau of any state department; the state university of New York or the city university of New York and the independent institutions operating statutory or contract colleges on behalf of the state; any public benefit corporation, public authority or commission at least one of whose members are appointed by the governor other than a local authority as defined in section two of the public authorities law; and any governmental entity performing a governmental or proprietary function for the state, other than the legislature or the judiciary.

(b-1) "Employee" shall mean any officer, employee, agent or representative of a state agency contractor.

(c) "Inherently governmental and mission-critical function" shall mean a function that involves the discretionary exercise of state government authority, or involves monetary transactions and entitlements including, but not limited to, program management support, systems engineering, technical assistance, or contract and acquisition support. Inherently governmental and mission-critical functions shall include, but are not limited to:

(i) The determination of state budget priorities, policy, guidance or strategy;

(ii) The determination of state agency policy, such as determining the content and application of regulations;

(iii) The direction and control of state employees;

(iv) The selection or non-selection of individuals for state government employment, including the interviewing of individuals for employment;

(v) The approval of position descriptions and performance standards for state employees;

(vi) The approval of state government property to be acquired or disposed of and on what terms; provided, however, a state agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by such state agency;

(vii) Approving any state contractual documents, including documents defining requirements, incentive plans and evaluation criteria;

(viii) Awarding, administering or terminating contracts;

(ix) Determining whether contract costs are reasonable, allocable and allowable;

(x) The approval of state licensing actions and inspections;

(xi) The conduct of criminal investigations; or

(xii) The control of prosecutions and performance of adjudicatory functions.

(d) "Nonpublic information" shall mean information under a state agency's authority or control, the unauthorized access to, or loss, misuse, or modification of, which may compromise important interests, such as personal or medical privacy, government security, law enforcement, proprietary rights, or the conduct of state agency programs. Nonpublic information includes, but is not limited to, information that:

(i) is exempt from disclosure under article six of the public officers law or otherwise protected from disclosure by law, rule or regulation; is private information, the release of which would constitute a security breach under section two hundred eight of the state technology law; has been designated as confidential by a state agency; has not been disseminated to the public and is not authorized to be made available to the public on request; is personal identifying information including, but not limited to, a person's name, social security number, birth date, health/medical information, financial information, or taxpayer data; or is source selection information including, but not limited to, source selection plans, technical evaluation plans, cost evaluations or rankings;

(ii) is business proprietary information relating to trade secrets, operations, apparatus, or processes; or

(iii) is state agency information related to continuity of operations information; security management information, planning information, budgeting information, protection services/ building security information, or personnel records.

(e) "Proprietary information" shall mean information including, but not limited to, source selection, business proprietary information or personal information as such term is defined in section ninety-two of the public officers law.

(f) "Information-risk contract" shall mean any contract pursuant to which certain state agency contractors may:

(i) receive access to information relating to a state agency's deliberative processes, management operations, or staff, which is not generally released or available to the public;

(ii) have access to proprietary information that could be exploited for financial gain; or

(iii) have access to nonpublic information.

(g) An "organizational conflict of interest" shall mean a state agency contractor's present or currently planned interests, including business or relationships with other private sector entities, which either directly or indirectly relate to the work to be performed under a state agency contract and (i) which may diminish its capacity to give impar-

tial, technically sound, objective assistance or advice, or (ii) may result in it having an unfair competitive advantage.

(h) A "personal conflict of interest" shall mean a state agency contractor's employee's performance of services or exercise of discretion under a state agency contract, in a way to benefit such contractor's employee or his or her relative including, but not limited to, financial conflicts of interest where the contractor's employee or relative stands to gain or lose financially from the contractor's work; lack of impartiality; acceptance of gifts valued at fifty dollars or more alone or in the aggregate within a given twelve-month period from an individual or entity reviewed, audited, or investigated under the state agency contract, or from anyone who could be affected by the performance of the contractor's duties.

(i) "Relative" shall mean any person living in the same household as the individual and any person who is a direct descendant of that individual's grandparents or the spouse of such descendant.

(j) "State agency contract" shall mean a contract with a state agency to perform an inherently governmental and mission-critical function, or an information-risk contract.

2. Any contract executed by a state agency with a contractor performing or assisting or providing advice to a state agency in the performance of an inherently governmental and mission-critical function, and any information-risk contract shall:

(a) prohibit a contractor from organizational conflicts of interest with respect to such state agency contract except to the extent that such contractor has disclosed such conflict to the state agency and proposed a method of mitigation or elimination satisfactory to such agency;

(b) prohibit contractors' employees from taking any action that would constitute a personal conflict of interest as defined in paragraph (h) of subdivision one of this section and provide that such agency may, when a contractor discloses that a personal conflict of interest has occurred, take appropriate action;

(c) include a nondisclosure agreement or clause requiring the contractor to certify that they have an executed nondisclosure agreement for each individual employed by such contractor pursuant to a state agency contract as a condition of access to nonpublic information and requiring that agreements between such contractors and third parties must protect the state agency's nonpublic information;

(d) require contractors to obtain written consent from the state agency prior to disclosing nonpublic information to subcontractors or others;

(e) require contractors to train at least biannually its employees and subcontractors, if any, rendering services on state agency contracts regarding organizational conflicts of interest, personal conflicts of interest and protection of nonpublic information and the consequences for unauthorized disclosure or misuse of such information;

(f) require contractors to immediately notify the state agency regarding any such organizational or personal conflicts of interest, or the misuse or unauthorized disclosure of nonpublic information; and

(g) impose consequences for violations.

3. Contractors shall be responsible for the security of any system relating to nonpublic information whether such system is maintained electronically or otherwise.

4. Contractors involved in source selection and related activities supporting award of state agency contracts shall be subject to laws and regulations to prevent release of nonpublic information.

5. In addition to the requirements of subdivisions two, three and four of this section, contractors performing inherently governmental and mission-critical services or information-risk contract services for which more than five million dollars is to be paid and involving work in excess of one hundred twenty days shall be required to have a written code of business ethics and conduct. The provisions of this subdivision shall not apply to contracts for the purchase of commodities.

6. The comptroller, in his or her discretion, may promulgate rules and regulations addressing the appropriate content for a model written code of business ethics to be utilized by contractors and employees of such contractors performing inherently governmental and mission-critical functions, or rendering information risk contract services, for the purpose of preventing organizational and personal conflicts of interest and protecting nonpublic information.

(a) The comptroller's regulations may include safeguards to identify and prevent organizational and personal conflicts of interest including, but not limited to:

(i) prohibiting the contractor's employees from participating in a state agency contract in which they have a personal conflict of interest, absent notification to the contracting state agency and specific approval to proceed following mitigation;

(ii) requiring the contractor's employees avoid the appearance of loss of impartiality in performing contracted duties;

(iii) requiring the contractor to review and address any of its employees' personal conflicts of interest before assigning them to deliver services;

(iv) prohibiting the contractor's employees from using nonpublic information obtained while performing work under contract for personal gain;

(v) prohibiting the contractor's employees who provide procurement support services from initiating a future employment contact or future employment contacts involving a bidding state agency during an ongoing procurement;

(vi) imposing limits on the ability of the contractor and its employees to accept gifts in connection with contracted duties;

(vii) prohibiting misuse of contract duties to provide preferential treatment to a private interest; and

(viii) establishing disciplinary processes for violations of such codes.

(b) Such regulations shall require contractors to:

(i) report any organizational or personal conflict of interest violations by an employee of such contractor to the applicable state agency contracting officer as soon as identified;

(ii) maintain effective oversight to verify compliance with safeguards; and

(iii) establish and maintain procedures to screen for potential conflict of interest for all employees either on a task by task basis or annually, through a financial disclosure statement.

7. When review of contractor disclosure pursuant to paragraph (a) of subdivision six of this section reveals an actual or potential conflict of interest, financial conflict of interest, impaired impartiality or misuse of information and authority, contractors shall establish procedures to mitigate such conflict, impairment or misuse including, but not

limited to, disqualification from being assigned to the government task, reassignment or divestiture.

8. In addition to the vendor responsibility process, state agencies may conduct regular background checks of state agency contractors and employees of such contractors performing inherently governmental and mission-critical functions, or rendering information risk contract services. Such background checks may include, at the state agency's discretion, fingerprinting of the state agency contractor's employees performing inherently governmental and mission-critical functions, or rendering information risk contract services or its personnel.

9. A contractor's failure to implement an adequate system for employee conflict certification, to disclose or correct instances of personnel misconduct, or to take appropriate disciplinary measures against an employee who commits misconduct may be grounds for contract termination by the state agency.

§ 4. This act shall take effect one year after the date on which it shall have become a law and apply to contracts executed on and after such date. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made on or before such date.