

## **OGS Process for the Review and Investigation in accordance with State Finance Law §139-j(8), (9) and (10)**

### Summary:

State Finance Law §139-j(8),(9) and (10) obligate the Office of General Services to establish a process for the review and investigation of possible violations of State Finance Law §139-j(3) regarding permissible Contacts. State Finance Law §139-j (8) obligates a Governmental Entity to refer allegedly impermissible Contacts about another Governmental Entity's procurement to such other entity. This document sets forth the process that will be followed by the Office of General Services (OGS).

### Process:

The OGS Ethics Officer, or his/her designee (Ethics Officer), is responsible for the review and investigation of possible violations of State Finance Law §139-j(3). Please see the OGS Policy Manual and the OGS policy for detailed information regarding permissible and impermissible Contacts under State Finance Law §139-j(3). The Ethics Officer is the Deputy Commissioner and Counsel, located on the 41<sup>st</sup> floor of the Corning Tower, telephone number 518-474-5988. If an OGS officer or employee has reason to believe that an Offerer possibly made an impermissible Contact, such officer or employee shall refer the matter to the Ethics Officer, providing specific information to facilitate the review. Such specific information shall include, but not be limited to, the Record of Contact and other information relevant to the procurement. In accordance with law, such referral shall be made immediately after the occurrence. The form entitled *Referral of a Contact for Review and Investigation under State Finance Law §139-j(9)* can be used by an OGS officer or employee to refer all impermissible Contacts (whether it is a procurement conducted by OGS or another Governmental Entity).

### Preliminary Review:

Upon receipt, the Ethics Officer shall commence an internal review of the allegations regarding the possibly impermissible Contact to determine if sufficient cause exists to believe the allegation is true. Such internal review shall be commenced within two (2) business days of receipt. Such internal review may consist of, but not be limited to, an examination of the procurement, interviews with the officer or employee, and review of submitted information. This stage shall be referred to as the "Preliminary Review." The focus during the Preliminary Review is whether there is sufficient cause to believe that an impermissible Contact occurred. Such Preliminary Review shall be diligently pursued until completed.

If, as a result of the Preliminary Review, the Ethics Officer determines that sufficient cause does **not** exist to believe that such allegation is true, then the Ethics Officer shall so advise the officer or employee and close the matter. A writing shall be prepared to set forth the conclusion that sufficient cause did not exist to believe the allegation was true. Such writing shall not be part of the procurement record and shall be maintained as part of the Ethics Officer's files.

If as a result of the Preliminary Review, the Ethics Officer determines that sufficient cause does exist to believe that such allegation is true, then the Ethics Officer shall provide the Offerer with written notification regarding the possible impermissible Contact. This stage shall be referred to as the “Investigation.”

Investigation:

The written notification regarding the possibly impermissible Contact provided to the Offerer by the Ethics Officer shall include the following information:

1. OGS has undertaken a preliminary review and has determined there is sufficient cause to believe that the allegation regarding an impermissible Contact is true and that an investigation has been commenced in accordance with State Finance Law §139-j(3);
2. The nature and details about the alleged impermissible Contact;
3. If a determination is made that the impermissible Contact was knowing and willful, State Finance Law requires a determination that the Offerer is non-responsible and such Offerer and its subsidiaries, and any related or successor entity with substantially similar functions, management, board of directors, officers and shareholders shall not be awarded the contract (absent a specific statutory finding of need);
4. If a determination of non-responsibility is made under State Finance Law §139-j, then the Offerer will be placed on a public listing of non-responsible offerers for four years from the date of the determination;
5. While on the public listing of non-responsible offerers, the Offerer may continue to submit proposals and be eligible for contract awards by any Governmental Entity;
6. If there is a second determination of non-responsibility under State Finance Law §139-j within a four-year period, then the Offerer will be debarred, and ineligible to submit proposals or be awarded a procurement contract for a four year period from the date of the second such determination by any governmental entity as such term is defined under State Finance Law §139-j(1)(a). Further, the Offerer will be placed on a public listing of debarred offerers;
7. In accordance with State Finance Law §139-j(10)(a), Offerer is provided with an opportunity to be heard in regard to this allegation. Offerer must be advised that an OGS attorney will be attending and that Offerer is invited, but not required, to bring an attorney to the meeting. With the approval of OGS, Offerer may elect, however, to submit documents rather than appear in person to respond to the allegations. (It is optional whether the meeting is set up in the letter.)
8. A date certain for responding to the allegations. Offerer should be advised that the failure to respond to the letter will be deemed a failure to cooperate. State Finance Law §139-j(10)(b) provides that OGS shall not award a contract to an Offerer that fails to timely disclose

accurate and complete information or cooperate in administering this provision (absent a specific statutory finding of need).

The exact scope and nature of the needed investigation depends upon the nature of the allegation. The focus of the investigation is multi-fold: first, there must be investigation and a determination that the impermissible Contact occurred; second, there must be an investigation and determination that the impermissible Contact was made by an Offerer (Note: definition of Offerer is broad and includes the business and also those employees, agents, consultants or other persons on the business's behalf); and third, there must be investigation and determination that the Offerer knowingly and willfully violated the provisions of State Finance Law §139-j(3).

Results of the Investigation:

A. If as a result of the Investigation, the Ethics Officer determines that:

1. no impermissible Contact occurred; or
2. the impermissible Contact was not by the Offerer; or
3. the Offerer's impermissible Contact was not knowing and willful

then the allegation shall be deemed unfounded and the Ethics Officer shall advise the appropriate OGS staff that the allegation should not form the basis for a finding of non-responsibility under State Finance Law §§139-j or 139-k. A writing shall be prepared to set forth the results of the Investigation. Such writing shall not be part of the procurement record and shall be maintained as part of the Ethics Officer's files. A written determination shall be sent to the Offerer, setting forth the basis for the determination.

B. If as the result of the Investigation, the Ethics Officer determines that:

1. the Offerer failed to timely disclose accurate and complete information; or
2. the Offerer failed to cooperate with OGS in the administration of this provision

then the Ethics Officer shall advise the appropriate OGS staff that the failure to timely disclose accurate information or cooperate shall be considered by OGS in its responsibility determination. A writing shall be prepared to set forth the results of the Investigation. Such writing shall be part of the procurement record and shall be maintained as part of the Ethics Officer's files. A written determination shall be sent to the Offerer, setting forth the basis for the determination.

C. If as a result of the Investigation, the Ethics Officer determines that:

1. an impermissible Contact occurred; and
2. the impermissible Contact was by the Offerer; and
3. the Offerer's impermissible Contact was knowing and willful

then the Ethics Officer shall advise the appropriate OGS staff that there has been a finding that the Offerer knowingly and willfully violated State Finance Law §139-j(3) and in accordance with law, there must be a determination that the Offerer is non-responsible and cannot be

awarded the contract, unless the program can satisfy the statutory requirements for awarding. A writing shall be prepared to set forth the results of the Investigation. Such writing shall be part of the procurement record and shall be maintained as part of the Ethics Officer's files. A written determination shall be sent to the Offerer, setting forth the basis for the determination.

Allegations of an Impermissible Contact regarding another Governmental Entity's Procurement

If the allegation of impermissible Contact referred for review and investigation involves another Governmental Entity's procurement contract (referred to as "Procuring Governmental Entity"), the Ethics Officer shall immediately forward such information to the appropriate individual at the Procuring Governmental Entity for review and investigation at the Procuring Governmental Entity. OGS shall provide appropriate assistance to the Procuring Governmental Entity. The Ethics Officer may use the form entitled *Referral of a Contact made to OGS for Review and Investigation by the Procuring Governmental Entity under State Finance Law §139-j(9)*.



*Referral of a Contact made to OGS for Review and Investigation  
by the Procuring Governmental Entity under State Finance Law §139-j(9)*

To: [reference responsible individual at Procuring Governmental Entity]  
Procuring Governmental Entity

By: (Name)  
Deputy Commissioner and Counsel  
Office of General Services

Date: \_\_\_\_\_

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It appears that a Contact may have been made in violation of State Finance Law §139-j(3) and (4) regarding a procurement by your agency. This Contact is being referred to you for further review and investigation in accordance with the process required under State Finance Law §139-j(9) for a determination whether this Offerer can be found responsible for purposes of contract award. I can be reached at (518) 474-5988.

We are available to provide whatever assistance you deem appropriate.

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Offerer: \_\_\_\_\_  
Name of Person who made the Contact being referred  
\_\_\_\_\_  
Name of Business  
\_\_\_\_\_  
Date of Contact  
\_\_\_\_\_  
Description/Reference Information on Governmental Procurement

Person Contacted: \_\_\_\_\_

Description  
Of Contact: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Add additional information as necessary)

A copy of the Record of Contact is attached.