

Advisory Council on Procurement Lobbying
Annual Report
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EXECUTIVE SUMMARY

On August 23, 2005, Governor George Pataki signed into law Chapter 1 of the Laws of 2005 (“Chapter 1”). Chapter 1 enacted major changes to the Legislative Law and the State Finance Law aimed at increasing transparency and accountability in New York State’s procurement process. These amendments, referred to as the “Procurement Lobbying Law” (“the Law”), included the creation of a new public body, the Advisory Council on Procurement Lobbying (“ACPL”), charged with examining the effects of the new Law and issuing guidance to assist Governmental Entities and the vendor/business community with compliance.

Among its duties, the ACPL is charged with reporting annually to the Governor and the Legislature on implementation issues arising out of the Law and recommendations intended to increase the effectiveness of the Law. The ACPL issued a Preliminary Report on Implementation of the Law in December 2005 and a Supplemental Preliminary Report on Implementation in May 2006. Those reports identified issues which arose in connection with implementing the Law. Those issues included:

1. Differing interpretations of whether the recording requirement set forth in State Finance Law §139-k(4) applies to all Contacts, including those made to Designated Contacts and within the categories of Permissible Subject Matter Communications set forth in State Finance Law §139-j(3)(a)(1-7);
2. The lack of a dollar threshold to determine when contract amendments are covered by the new requirements;
3. Whether it should be discretionary to obtain a written affirmation when a contract is amended and the Offerer has already submitted an affirmation;
4. Increase value of annualized expenditure that triggers the requirements of the new Law to match thresholds in State Finance Law §112 and §163;
5. Whether there should be an ability to “waive” debarred status under specified circumstances;
6. Determination of whether Executive Order Number 127 should be modified or rescinded after enactment of the Law; and
7. Determination of the scope of the exclusion of contracts between the Unified Court System and not-for-profit organizations.

Issues six and seven have since been resolved. The remaining issues continue to exist; however, and the ACPL recommends that the Governor and the Legislature consider the analysis set forth in its Preliminary and Supplemental Reports and provide clarification on these issues.

Since the issuance of its previous reports, the ACPL has identified the following new issues for consideration by the Governor and the Legislature:

1. Determination of the Scope of the Definition of the Term “Offerer” and the Implications of that Determination on the Procurement Process;
2. Types of Contracts Exempt from the Procurement Lobbying Requirements;
3. Establishing Uniformity in the Definition of the Term “Restricted Period” within the Legislative and State Finance Laws;
4. What Process is Due Under the Review and Investigation Function Required by State Finance Law §139-j(10);
5. Developing Consistent Standards for Making a Determination of Knowingly and Willfully Regarding an Impermissible Contact and the Effect of an Offerer’s Affirmation on Such Determination;
6. Determination of What Constitutes a Permissible Contact Among Agencies Involved in a Procurement, such as Between the Procuring Governmental Entity and the Control Agencies;
7. Difficulties Encountered with the Application to Real Property Transactions; and
8. Clarification of the Permissible Subject Matter Communications Category that Permits the Responsibility Determinations Under State Finance Law §139-j to be Conducted by Someone Other than the Designated Contact.

For the reasons set forth herein, the ACPL believes that action on and clarification of these issues by the Governor and the Legislature will increase the effectiveness of the Law.

I. INTRODUCTION

In August 2005, Governor George Pataki signed into law Chapter 1 which enacted major changes to the Legislative Law and the State Finance Law regulating lobbying on procurement contracts. Additional minor amendments were also made to

these laws in 2005 and 2006. The Law, among other things, created a new public body, the Advisory Council on Procurement Lobbying (“ACPL”), charged with examining the effects of the new Law and issuing guidelines to assist in compliance. In accordance with its responsibilities pursuant to Legislative Law §1-t(9)(d), the ACPL transmitted a Preliminary Report to the Governor and the Legislature on January 3, 2006 and a Supplemental Report on May 4, 2006. Both reports can be accessed on the ACPL’s website.¹

This document sets forth the ACPL’s annual report for 2006. In addition to presenting issues identified by Governmental Entities and the vendor/business community and offering a series of recommendations to increase the effectiveness of implementation, this report summarizes the initiatives and progress of the ACPL in providing guidance to Governmental Entities and Offerers impacted by the Law.

The Law introduced a series of new requirements to the procurement process through a combination of amendments to the Legislative Law (also known as the “Lobbying Act”), and the State Finance Law. The Lobbying Act regulates the activities of lobbyists and their clients, imposing registration and reporting requirements on those who engage in lobbying or lobbying activities under certain circumstances. Interpretation and enforcement of these provisions is the responsibility of the New York Temporary State Commission on Lobbying (“Lobbying Commission”). In pertinent part, the amendments to the State Finance Law added two provisions intended to regulate certain communications (“Contacts”)² and advocacy efforts undertaken by Offerers and their representatives and standardize certain actions of Governmental Entities during the procurement process.

As the Law impacts both Governmental Entities and the vendor/business community, the ACPL believed it was important to obtain input from both groups regarding any issues encountered in the implementation of the Law for purposes of preparing this annual report. Governmental Entities and the vendor/business community were formally invited to submit comments and suggestions to the ACPL for consideration in the development of the recommendations to the Governor and the Legislature which are contained in this report.

¹<http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html>

²State Finance Law §§139-j (1)(c) defines “Contacts” as, “[a]ny 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 procurement.”

II. ADVISORY COUNCIL ACTIVITIES TO FACILITATE IMPLEMENTATION

A. Education and Outreach Efforts to Date

The ACPL met 10 times in 2006. During this time, the ACPL focused its attention on outreach and training, as well as the provision of guidance to those covered under the Law. Minutes from these meetings are available on the ACPL's website.³ Outreach, training and guidance were provided in three key ways: 1) through the development of extensive guidance, forms and reference materials that were distributed via the Internet; 2) through direct mailings and e-mails to entities known to be impacted by the Law; and 3) through the development of, and participation in, various training programs and conference workshops across the State. In addition, the ACPL created an Ad Hoc Committee on Real Property Transactions in February 2006 to help address compliance issues presented by the unique nature of real property transactions.

To assist Governmental Entities and the vendor/business community in understanding and complying with the Law, the ACPL developed guidance materials which were distributed over the Internet. Guidance in the form of Frequently Asked Questions ("FAQs") and model language and forms were developed to assist covered Governmental Entities and the vendor/business community in their efforts to comply with the provisions of State Finance Law §§ 139-j and 139-k. This information is available on the ACPL website.⁴ As part of the ACPL's outreach, training programs were developed and implemented by the Office of General Services ("OGS") to educate Governmental Entities and the vendor/business community about the requirements of the Law. Informational letters and a two-page summary of the new State Finance Law provisions were sent to over 600 covered Governmental Entities in early January 2006. Information was also sent via e-mail to over 28,000 registrants on the Bidder Notification System maintained by the OGS Procurement Services Group about the new provisions. Letters were sent to approximately 90 chambers of commerce across New York State providing information on the Law, including an offer to provide a training session and/or an article suitable for inclusion in newsletters and other mailings to their members.

A number of continuing legal education programs and general presentations for state agencies and public authorities began in February 2006, and OGS continues to provide training to Governmental Entities and the vendor/business community upon request. In March 2006, statewide training sessions regarding the new provisions of the State Finance Law were held in Albany and New York City and were attended by representatives of over 60 state agencies and public authorities. In addition, approximately 1,400 people attended the annual State Purchasing Forum in May 2006, where a number of training workshops were held on procurement, including a keynote address focusing on procurement lobbying given by Robert Fleury, First Deputy Commissioner of the OGS, and David Grandeau, Executive Director of the Lobbying Commission. Small session workshops were also provided on the State Finance Law

³<http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/MtgReportTable.htm>

⁴<http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html>

aspects of the new law. Numerous presentations on the State Finance Law provisions were provided at conferences and events organized by the vendor/business community or other organizations.

Additional efforts were undertaken to assist the vendor/business community's compliance with the requirements of the Law as well. In September and October 2006, OGS and the Lobbying Commission provided three separate training and information sessions in Albany, New York City and Rochester specifically for vendors and contractors. Over 900 people registered on-line to attend this free training event, although actual attendance was lower. In an effort to increase the availability of training information, the PowerPoint presentations used in these training sessions were posted to the ACPL website.⁵ In addition, the Office of the State Comptroller ("OSC"), a member of the ACPL, provided outreach and training about certain aspects of the Law to Governmental Entities whose contracts are subject to OSC's pre-approval.

B. Coordination with the Temporary State Commission on Lobbying

OGS and the Lobbying Commission engaged in communication and cooperative efforts to further implementation of the new Law. In addition to the joint training sessions discussed above, the agencies held joint meetings and communications regarding, among other things, definitional issues. The two agencies continue to work together responding to questions regarding implementation of the Law. Both entities are available to conduct additional training seminars upon request. Furthermore, staff from OGS routinely attend Lobbying Commission meetings and staff from the Lobbying Commission routinely attend ACPL meetings. These combined efforts promote the dissemination of information to Governmental Entities and to the vendor/business community in a comprehensive and uniform manner that embodies the spirit of the Law.

III. IMPLEMENTATION ISSUES AND RECOMMENDATIONS

A. Previously Identified Implementation Issues

The prior reports issued by the ACPL identified a series of issues encountered with implementation of the new law. Detailed discussions on each implementation issue can be found in the prior reports. For the reader's convenience, a summary of these previously identified implementation issues is set forth below.

- The existence of different statutory interpretations of the obligation to record Contacts-whether Covered Entities are required to record all Contacts or whether they are permitted not to record the seven exempt categories of contacts set forth in State Finance Law §139-j(3)(a)(1-7) presents an appropriate opportunity for statutory clarification.

⁵See, <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/TrainingandOpportunities>

- The lack of a dollar threshold to determine when contract amendments are covered by the new requirements.
- Whether it should be discretionary to obtain a written affirmation when a contract is amended and the Offerer has already submitted an affirmation.
- Increase value of annualized expenditure that triggers the requirements of the new Law to match thresholds in State Finance Law §112 and §163.
- Whether there should be an ability to “waive” debarred status under specified circumstances.
- Determination of whether Executive Order Number 127 should be modified or rescinded after enactment of the Law.
- Determination of the scope of the exclusion of contracts between state agencies and not-for-profit organizations.

B. Action on Previously Identified Implementation Issues

The following two issues, raised in the ACPL’s Preliminary and Supplemental Reports, have since been resolved:

1. Executive Order Number 127

Concerns were expressed regarding the administrative difficulties covered Governmental Entities faced by having to comply with both the new Law and the previously enacted Executive Order No. 127 (“EO 127”). EO 127 required certain state agencies, public benefit corporations, and public authorities to collect and record certain information from contractors seeking a procurement contract and to make that information available to the public. While there were some similarities between the requirements of EO 127 and the Law, there were also many differences which resulted in additional and duplicative administrative burdens for covered Governmental Entities and the vendor/business community. As a result, the ACPL recommended that an assessment be made as to whether EO 127 was still necessary or whether it needed to be modified in light of enactment of the Law. Citing the ACPL’s recommendation, on June 30, 2006, Governor George Pataki revoked and rescinded EO 127.

2. Scope of Exclusion for Not-for-Profit Organizations

The ACPL’s Supplemental Preliminary Report identified an inconsistency in the scope of the exclusion of contracts between state agencies and not-for-profit organizations, namely that contracts between not-for-profits and the Judiciary were not included in the exclusion. Thus, the ACPL recommended that the definition of procurement contract be modified to clarify that the exclusion of contracts between state

agencies and not-for-profit organizations also included not-for-profit contracts with the Unified Court System. The Unified Court System requested the introduction of a bill to address the issue, and Chapter 395 of the Laws of 2006 was enacted amending the definition of procurement contract to exclude contracts between the Unified Court System and certain not-for-profit organizations.

C. New Implementation issues

For the reasons set forth in its earlier reports, the ACPL continues to believe that it is appropriate for the Governor and the Legislature to resolve the previously identified issues that have not yet been resolved (see above). Additionally, in the course of its actions over the past year, the ACPL has identified other challenges arising from the implementation of the Law. While some of the issues identified are a result of statutory language, others are more in the nature of clarification regarding the intent and scope of the new provisions. Each issue is separately set forth below.

Issue 1. Determination of the Scope of the Definition of the Term “Offerer” and the Implications of that Determination on the Procurement Process

Background:

The State Finance Law and the Legislative Law contain distinct definitions of the term “Offerer.” Both definitions, however, can be construed as having far reaching applicability. Governmental Entities and the vendor/business community have been left to determine the exact scope of those definitions, their relationship to one another and the procurement process, and the implications of those determinations. This has created confusion for these constituencies and has impeded the development of standardized practices.

Statutory Provisions:

The term “Offerer” is defined in State Finance Law §§139-j(1)(h) and 139-k(1)(h) as 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. The term is also defined in §1-c (q) of the Legislative Law as the individual or entity, or any employee, agent or consultant of such individual or entity, that Contacts a state agency, either house of the State Legislature, the Unified Court System, a municipal agency or local legislative body about a Governmental Procurement.

Discussion:

The definitions of the term “Offerer” in the State Finance Law and the Lobbying Law can be read literally and construed as encompassing any individual or entity that Contacts a Governmental Entity about a procurement. This interpretation would not

only include individuals who are responsible for the procurement, but also individuals such as subcontractors. In addition, while the definition specifically refers to consultants, a question arises as to whether the Legislature was referring to all consultants or just those who are consulting on the specific terms of the procurement. The vendor/business community and some Governmental Entities have argued that a literal reading of the definitions has a “chilling effect” on the exchange of information during the procurement process. Traditionally, it was viewed as beneficial to have a free exchange of information between the vendor/business community and the procuring Governmental Entity which allowed for greater certainty in the decision-making process. This included communications between engineers and others who may have had particular knowledge about the article of procurement. An argument has been made that a broad application of the term “Offerer” that causes such communications to now be subject to the requirements of the Law hinders this free exchange. There has also been some indication that the vendor/business community and Governmental Entities are encountering greater confusion regarding the procuring process as a result of the uncertainty surrounding this issue.

Conversely, it can be argued that the Legislature intended for the Law to promote openness and uniformity in the procurement process and that a broad construction of the definitions of the term “Offerer,” which encompasses **everyone** involved in the procurement process, including subcontractors and consultants, is consistent with that intent. This interpretation allows parties to make clear-cut determinations of who is considered to be an Offerer for purposes of the Law, eliminates the ambiguity created by the opposing viewpoint and promotes the development of standardized practices within the vendor/business community and the Governmental Entities. It does not, however, address the “chilling effect” cited by the procuring community.

An additional issue to consider is whether the definitions are also intended to encompass those individuals or entities that are ineligible to bid on a procurement, but still seek to have Contacts with a Governmental Entity about that procurement. Despite the fact that those individuals or entities are not eligible to bid on the procurement, the question of whether the definition of the term “Offerer” encompasses such individuals and entities must be addressed. An argument can be made that the legislative intent was not to include those individuals or entities within the definition because they are not subject to the “penalty” of not having the contract awarded. However, those individuals and/or entities may still attempt to influence the procurement.

Recommendation:

It is the ACPL’s position that the statutes have broad applicability which extends to individuals or entities such as consultants, subcontractors and those individuals or entities ineligible to bid on the procurement. However, as discussed above an alternative position exists which argues that the “chilling effect” of such an interpretation is too great and therefore may not have been what the Legislature and the Executive Branch intended. The ACPL recommends that the Governor and the Legislature consider the above analysis and provide clarification on these issues.

Issue 2. Types of Contracts Exempt from the Procurement Lobbying Requirements

Background:

In the course of its activities and in response to its outreach efforts, the ACPL has received recommendations suggesting expansion of the categories of contracts exempted from the Procurement Lobbying requirements. The exemption from the requirements is provided via an exclusion contained within the definition of “procurement contract.” The three kinds of transactions recommended for addition to the exemption are: emergency contracts; sole source contracts; and preferred source contracts.

Statutory Provisions:

In pertinent part, State Finance Law §§139-j(1)(g) and 139-k(1)(g) state that “[g]rants, Article Eleven-B State Finance Law contracts, program contracts between not-for-profit organizations, as defined in Article XI-B of the State Finance Law, 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.”

Discussion:

The current exemptions in State Finance Law §§139-j(1)(g) and 139-k(1)(g) appear to reflect selected transactions where there is either a public policy rationale or the existence of another system that negates or mitigates inappropriate influences that the Law seeks to prevent, thereby eliminating the need for additional statutory controls. Emergency contracts reflect a specific set of circumstances that generally involve the health, safety and welfare of the public. Arguably, the need for procurement lobbying restrictions in these situations is mitigated by public need and the need to quickly obtain the needed services or commodities. It is also argued that procurement lobbying restrictions on sole source transactions are unnecessary since a sole source transaction is predicated on a finding that only one entity is capable of providing the needed item or service.

Finally, an argument has been presented that acquisitions of commodities and services under the preferred source program are governed by another system that either negates or mitigates inappropriate influences. State Finance Law §162 obligates certain Governmental Entities to determine if a preferred source commodity or service offering meets that entity’s form, function and utility; and if so, directs them to make the acquisition through the preferred source program. Therefore, it is argued that procurement lobbying restrictions are unnecessary since some Governmental Entities are statutorily obligated to purchase certain services and commodities from preferred sources prior to initiating any other procurement, thus negating or mitigating inappropriate influences. It is also noted that the Lobbying Law differentiates the

activities of preferred source facilitating agencies, applying its requirements only to selected aspects.⁶

Recommendation:

The ACPL recommends that the Governor and the Legislature consider the above analysis and provide clarification on these issues. The ACPL plans to provide additional information regarding these issues through its frequently asked questions documents.

Issue 3. Establishing Uniformity in the Definition of the Term “Restricted Period” Within the Legislative and State Finance Laws

Background:

The term “Restricted Period” is integral to the implementation of the Legislative Law and State Finance Law provisions regarding Contacts during the procurement process. However, while both Legislative Law §1-c (m) and State Finance Law §§139-j (1)(f) and 139-k(1)(f) define the term, the definitions are not identical. This discrepancy creates confusion and uncertainty in the procuring process.

Statutory Provisions:

Legislative Law §1-c(m) defines the term "Restricted Period" to mean the period of time commencing with the earliest written notice, advertisement or solicitation of a request for proposal, invitation for bids, or solicitation of proposals, or any other method for soliciting a response from Offerers intending to result in a procurement contract with a state agency, either house of the State Legislature, the Unified Court System, or a municipal agency, as that term is defined by paragraph (ii) of subdivision (s) of this section, and ending with the final contract award and approval by the state agency, either house of the State Legislature, the Unified Court System, or a municipal agency, as that term is defined by paragraph (ii) of subdivision (s) of this section, and, where applicable, the State Comptroller.

State Finance Law §139-j(1)(f) defines the term “Restricted Period” as the period of time commencing with the earliest written notice, advertisement or solicitation of a request for proposal, invitation for bids, or solicitation of proposals, or any other method for soliciting a response from Offerers intending to result in a procurement contract with a Governmental Entity and ending with the final contract award and approval by the Governmental Entity and, where applicable, the State Comptroller.

State Finance Law §139-k(1)(f) defines the term "Restricted Period" as the period of time commencing with the earliest written notice, advertisement or solicitation of a request for proposal, invitation for bids, or solicitation of proposals, or any other method

⁶See Legislative Law §1-c(c)(G).

for soliciting a response from Offerers intending to result in a procurement contract with a Governmental Entity with the final contract award and approval by the Governmental Entity and, where applicable, the State Comptroller.

Discussion:

The term “Restricted Period” is at the heart of the Legislative Law and the State Finance Law’s regulation of Contacts during the procurement process. It is during the Restricted Period that Offerers and Governmental Entities need to be concerned about whether their communications rise to the level of Contacts and be mindful of the obligations placed upon them in such situations. Therefore, it is imperative that both the vendor/business community and Governmental Entities have a clear understanding of what the term “Restricted Period” means.

When the Law was enacted, the definition contained in the Legislative Law included a definitive termination point for the Restricted Period, but the definitions in State Finance Law §§139-j(1)(f) and 139-k(1)(f) lacked such language. Offerers and Governmental Entities were left to infer that the Restricted Period, as defined in the State Finance Law, also ended with the final contract award and approval by the Governmental Entity and, where applicable, OSC. This created confusion for both parties. Therefore, the ambiguity in the State Finance Law with respect to the termination of the Restricted Period needed to be eliminated.

Chapter 56 of the Laws of 2006 partially addressed this issue by, in pertinent part, making technical corrections to §139-j(1)(f) of the State Finance Law and stating that in fact the Restricted Period ended with the final contract award and approval by the Governmental Entity and, where applicable, OSC. Chapter 56, however, did not make conforming corrections to State Finance Law §139-k(1)(f).

Recommendation:

It is the ACPL’s position that the Legislature intended that the definitions of Restricted Period in the State Finance Law be consistent with the definition in the Legislative Law and provide for a clear termination point for the Restricted Period. Therefore, it is recommended that State Finance Law §139-k(1)(f) be amended to add the phrase “and ending” consistent with State Finance Law §139-j(1)(f).

Issue 4. What Process is Due Under the Review and Investigation Function Required By State Finance Law §139-j(10)

Background:

Several concerns have been raised regarding what process is due to an Offerer when a Governmental Entity conducts a review and investigation of an alleged impermissible Contact pursuant to State Finance Law §139-j(10). These reviews and investigations can result in a finding that an Offerer knowingly and willfully violated the

procuring Governmental Entity's policy on permissible Contacts, which can have far reaching consequences, including debarment. If the Governmental Entity determines that sufficient cause exists to believe the allegation is true, State Finance Law requires an investigation of an allegation and that the Offerer be provided with reasonable notice that an investigation is ongoing and an opportunity to be heard in response to the allegation. The statute provides no further guidance, however, as to what constitutes "sufficient cause" and what procedures Governmental Entities should use in these investigations. As Governmental Entities conduct these reviews and investigations, additional questions have arisen about how the statute should be implemented, noting that there is a potential for variation in practices among the Governmental Entities.

Statutory Provisions:

In pertinent part, State Finance Law §139-j(10)(a) provides that:

[u]pon notification of an allegation of violation of the provisions of subdivision three of this section with regard to permissible contacts on governmental procurements, the governmental entity's ethics officer, inspector general or other official of the procuring governmental entity responsible for reviewing or investigating such matters shall immediately investigate such allegation and, if sufficient cause exists to believe that such allegation is true, shall give the offerer reasonable notice that an investigation is ongoing and an opportunity to be heard in response to the allegation.

Discussion:

State Finance Law §139-j(10) identifies elements of the process that a Governmental Entity must follow if there is an allegation of a violation of the permissible Contact requirements. The statute, however, does not provide detailed guidance as to how that process should be carried out. The ACPL developed a model process for Governmental Entities to use in their review and investigation, which is available on the ACPL website.⁷ This process is issued only as guidance, however, and Governmental Entities are not obligated to adhere to it. Anecdotal information indicates that variation does exist in the review and investigation processes employed at the various Governmental Entities. As the debarment of an Offerer is based on two findings of non-responsibility within a four-year period by any Governmental Entity, the business community should receive a level of assurance that all the process that is due in these reviews and investigations is provided and that such due process is provided in a consistent manner by every Governmental Entity. Without this level of consistency, the possibility exists of contrary findings under similar circumstances due to inconsistent applications of the process. In addition, Governmental Entities have raised concerns

⁷ <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/ModelLang.html> and <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/forms/form7.rtf>

about whether their processes satisfy the statutory requirements. Given the critical importance of these determinations to the vendor/business community, further statutory direction regarding the nature of the opportunity to be heard is warranted.

Recommendation:

The ACPL has identified two possible approaches for consideration by the Governor and the Legislature. One approach would be to amend existing legislation to provide a specific standard that all Governmental Entities would be required to use. While this approach would provide the desired consistency, it may not account for all variables that occur in these investigations. Another approach would be to require every Governmental Entity to administratively define their processes, outside of the formal rule-making process, and to make such process widely available to the public, such as through the Internet. Current law obligates the Governmental Entity to establish a process.⁸ If the latter approach is adopted, the ACPL could obtain “best practices” from Governmental Entities which could be published through the Internet. This approach, however, does not address the issue of developing consistent practices among the Governmental Entities. Governmental Entities would remain free to employ a variety of practices and the vendor/business community would be left with continuing uncertainty. The ACPL recommends that the Governor and the Legislature consider the above analysis and provide clarification on these issues.

Issue 5. Developing Consistent Standards for Making a Determination of Knowingly and Willfully Regarding an Impermissible Contact and the Effect of an Offerer’s Affirmation on Such Determinations

Background:

The ACPL has discussed the ambiguity that exists regarding the elements of the legal standards of knowingly and willfully. Neither the Law nor other statutes clearly articulate what these standards are; yet, they form the standard of review in an investigation of an alleged impermissible Contact. While New York State and federal case law provide some information regarding these standards, it is not at a sufficient level of detail. This creates the possibility that Governmental Entities could reach differing conclusions under similar facts. This result is of particular concern to the vendor/business community because the debarment of an Offerer is based on two findings of non-responsibility within a four-year period by any Governmental Entity. The issue is further complicated by the lack of clarification regarding the evidentiary value that should be placed on the written affirmation that an Offerer is required to provide in accordance with State Finance Law §139-j(6)(b). While the logical inference is that the written affirmation establishes the Offerer’s knowledge regarding the requirements pertaining to permissible Contacts, it is unclear what bearing it has on the second standard of willful.

Statutory Provisions:

⁸See State Finance Law §139-j (9)

While State Finance Law §139-j(10)(b) establishes the standard of knowingly and willfully, it does not provide definitions. In pertinent part, this statute provides:

[a] finding that an Offerer has knowingly and willfully violated the provisions of subdivision three of this section shall result in a determination of non-responsibility for such Offerer, and such Offerer and its subsidiaries, and any related or successor entity with substantially similar function, management, board of directors, officers and shareholders (hereinafter, for the purposes of this paragraph Offerer), shall not be awarded the procurement contract, ...

State Finance Law §139-j(6)(b) provides:

[e]very Governmental Entity shall seek written affirmations from all Offerers as to the Offerer's understanding of and agreement to comply with the Governmental Entity's procedures relating to permissible Contacts during a Governmental Procurement pursuant to subdivision three of this section.

Discussion:

The State Finance Law establishes procedures that Governmental Entities must follow if it is believed that an Offerer made an Impermissible Contact in violation of §139-j(3) of the State Finance Law. Those procedures provide for recordation of the Contact, referral of the same to the appropriate individual within the agency, review and investigation by that individual and after due process has been afforded, the rendering of a determination of whether the violation was carried out knowingly and willfully. For the most part, this is a clearly articulated procedural process. The State Finance Law, however, does not define the terms knowingly and willfully that are the standard of review in the process. While a review of case law provides some guidance on the issue, often the courts use the word knowingly to define the word willfully. As the Legislature intends these as two separate standards to be established, such guidance is of minimal assistance. The vendor/business community has had no greater success in defining these standards, and has even relied on dictionary definitions to support a contention that a violation was not done knowingly and willfully.

State Finance Law §139-j(6)(b) provides some assistance with respect to the element of knowingly. In the written affirmation, required by that provision, the Offerer affirms that it understands and agrees to comply with the Governmental Entity's procedures relating to permissible Contacts during a Governmental Procurement pursuant to State Finance Law §139-j(3).⁹ The Governmental Entity can make certain inferences from that affirmation regarding the Offerer's knowledge of the requirements

⁹While §139-j(3) does not set forth procedures on permissible Contacts, it does require Offerers that Contact a Governmental Entity about a Governmental Procurement to only make permissible Contacts with respect to the Governmental Procurement, and sets forth what constitutes a permissible Contact. Governmental Entities can use this requirement and explanatory material to develop procedures regarding permissible Contacts. Offerers can use the statute as a guide for their actions with the Governmental Entity.

pertaining to permissible Contacts. Situations may arise, however, where a potentially impermissible Contact occurs before the affirmation is signed; leaving the Governmental Entity unable to draw any conclusions regarding the Offerer's knowledge from the existence of the affirmation. There is no additional guidance in the State Finance Law that Governmental Entities may look to in such situations. Therefore, it is important that some clear standards be articulated on this element.

The statute provides even less guidance on the standard of willfully. It establishes the term as an element of the review standard, but does not elaborate its meaning. Case law, in other areas, suggests that a determination of "willfulness" should look to the intent of the Offerer, and also suggests that intent can be assessed based upon whether the Offerer's conduct intentionally, deliberately or consciously violated applicable statutory requirements. However, the elements of willfully can be difficult to ascertain and Governmental Entities are looking for guidance in this area.

In addition, the consequences that an Offerer faces if a determination is made that an Offerer has knowingly and willfully violated the statute are severe, potentially leading to debarment; and therefore, both Governmental Entities and the vendor/business community have a desire for articulated standards on this issue.

Recommendation:

The ACPL recommends the development of clear statutory language regarding the elements of the legal standards of knowingly and willfully. It further recommends that clear direction be provided regarding the evidentiary value of the written affirmation regarding these two standards.

Issue 6. Determination of What Constitutes a Permissible Contact Among Agencies Involved in a Procurement, such as Between the Procuring Governmental Entity and the Control Agencies

Background:

In general, the procurement process and governmental activities inherently anticipate interplay and exchanges of information between Governmental Entities. Various procurement methods also require communications between Governmental Entities because by their very nature they place one Governmental Entity in a control agency role. For example, a condition precedent to certain kinds of technology and software contracts entered into by state agencies is approval by the NYS Office of Technology ("NYS OFT"). The process for obtaining this approval is referred to as the "Intent to Purchase" which can require provision of a detailed description of the programmatic purpose of the proposed acquisition by the procuring agency to NYS OFT. This description requires communications between NYS OFT and the procuring agency on a variety of factors, including the business need being addressed; the technology or solution being sought in the proposed acquisition; the business case for the proposed acquisition, the estimated costs and benefits, timeframe for return on

investment; and an estimate of the timeframe for the acquisition process. Similar situations also arise in which communications are required with other control agencies, such as OSC. These communications often occur during the Restricted Period. In addition, during the procurement process, the vendor/business community might have communications with control agencies but one or more of these communicating parties may not be aware that a transaction is in the Restricted Period. Unaware there is a Restricted Period, such control agencies may in turn communicate with the procuring Governmental Entity about a specific transaction, relaying concerns or issues raised by an Offerer, which may not fall within the permissible subject matter communications outlined in State Finance Law §139-j(3)(a)(1-7). Questions have now been posed, in light of enactment of the Law, as to whether a Governmental Entity should be considered an “Offerer” in these situations and what statutory obligations arise if they are an Offerer. Governmental Entities are, therefore, looking for clarification on their obligations in these situations.

Statutory Provisions:

The term Offerer is defined in State Finance Law §§139-j(1)(h) and 139-k(1)(h) as 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. The term applies to any Contact to any Governmental Entity about a specific Governmental Procurement. State Finance Law §139-j(4) specifically states that the permissible Contact requirements preclude an Offerer from Contacting a Governmental Entity other than the procuring Governmental Entity (except as authorized under State Finance Law §139-j(3)(a)(1-7)).

Discussion:

Many of the mechanisms used by Governmental Entities to acquire the articles of procurement needed to fulfill their business mission by their very nature create a relationship between agencies that requires the exchange of information. Use of centralized contracts, for instance, allows many Governmental Entities to procure from contracts that are established by OGS which necessitates communications between those entities and OGS. Control agencies often pose questions regarding a specific transaction. These exchanges of information between Governmental Entities are an inherent part of the procurement process. With the enactment of the Law, however, Governmental Entities must now ask questions about whether the agencies that they are communicating with can be considered to be Offerers and if so, are they subject to the requirements of State Finance Law §§139-j and 139-k with regard to Contacts.

The definitions of Offerer are broad, and a strict reading of these definitions could be construed as including another Governmental Entity if it appears that the Governmental Entity is acting on the behalf of the vendor/business community. To the extent that such communication is directed to the Designated Contact, arguably there is no problem. However, frequently communications from control agencies are directed to

different personnel at the procuring Governmental Entity. In those situations, the ramifications of such a construction can be enormous and can impose significant additional burdens on Governmental Entities. Agencies would now need to check Restricted Periods prior to communicating with another Governmental Entity, check on Designated Contacts, Permissible Subject Matter Communication Exceptions, adhere to the recording requirements set forth in State Finance Law §139-k, and, as applicable, follow the procedures pertaining to Impermissible Contacts.

The Law provides a broad definition of the term “Offerer,” but guidance is not provided on the intended scope of the definition. A broad interpretation of the definition could result in Governmental Entities taking a conservative approach toward assessing whether communications from control agencies are Contacts and towards recording and reporting in accordance with statute. While there are limited circumstances where a Governmental Entity may be acting on behalf of the vendor/business community, it is the exception not the rule. A conservative approach could result in recordation of many communications that do not fall within these limited circumstances.

Recommendation:

The ACPL believes that the Legislature did not intend inter-agency actions to fall under the definition of the term Offerer as set forth in the Law and that Governmental Entities should be free to carry on their established practices in fulfillment of their statutory responsibilities. While it is recognized that there are occasions when a Governmental Entity may be acting on behalf of an Offerer, it is suggested that this role can be addressed in an amended definition of the term “Offerer.” The ACPL defers to the Governor and the Legislature to provide clear guidance. Therefore, the ACPL recommends that the Governor and the Legislature consider the above analysis and provide clarification on these issues.

Issue 7. Difficulties Encountered with the Application to Real Property Transactions

Background:

While it is recognized that State Finance Law §§139-j and 139-k are applicable to the purchase, sale or lease of real property and the acquisition or granting of other interest in real property, there are numerous instances where it has been difficult to implement the new requirements. There are unique statutes addressing the activities of Governmental Entities regarding real property that complicate the application. In an effort to gain a better understanding and thereby provide guidance regarding the application to real property transactions, the ACPL formed an ad hoc committee to explore issues that are specific to real estate transactions.

Statutory Provisions:

State Finance Law §139-j(1)(b) sets forth the definition of “article of procurement” as “a commodity, service, technology, public work, construction, revenue contract, the purchase, sale or lease of real property or an acquisition or granting of other interest in real property, that is the subject of a Governmental Procurement.”

Discussion:

While the Ad Hoc Committee has only met once, the exchange of information continues. Topics discussed include: the commencement of the Restricted Period, especially in those transactions that are not commenced by a solicitation; various kinds of real property interests held by the State; whether the issuance of a permit implicates an interest in real property; whether the payment of mineral royalties are a covered transaction; whether the disposal of real property through the Empire State Development Corporation is a covered transaction; how the Law operates when special legislation directs the sale of real property; whether the sale of abandoned land is a covered transaction; and appropriate interactions by a client agency when a lease is being negotiated for space the client agency will occupy.

There has been resolution and information provided on some of these topics, however, issues still exist and the list set forth above illustrates the complexity of these issues.

Recommendation:

The ACPL recommends that the Governor and the Legislature consider the above analysis and provide clarification on these issues.

Issue 8. Clarification of the Permissible Subject Matter Communications Category that Permits the Responsibility Determinations Under State Finance Law §139-j to be Conducted by Someone Other than the Designated Contact

Background:

State Finance Law §139-j requires a Governmental Entity to make a determination about an Offerer’s responsibility prior to an award of a procurement contract. This determination must be made during the Restricted Period and requires the exchange of information between the Offerer and Governmental Entity. The State Finance Law, however, does not clearly provide a category of Permissible Subject Matter Communications which facilitates this exchange and determination. While the ACPL has issued guidance indicating that these determinations fall within the Permissible Subject Matter Communication categories set forth at State Finance Law §139-j(3)(a)(5), (6) and (7)(a), statutory clarification is desirable in light of the severe consequences that result from an impermissible Contact.

Statutory Provisions:

State Finance Law §139-j(7) in pertinent part provides “[N]otwithstanding any law to the contrary, prior to conducting an award of a procurement contract, a Governmental Entity conducting a Governmental Procurement shall make a final determination of responsibility of the proposed awardee ...”

State Finance Law §139-j(10)(a) requires a Governmental Entity to make a determination of non-responsibility if there is a finding that an Offerer knowingly and willfully violated State Finance Law §139-j(3). It further requires the consideration of specific information in the conduct of the Governmental Entity’s responsibility determination.

Discussion:

While the statutory requirements appear to contemplate the exchange of information between an Offerer and the Governmental Entity during the responsibility determination process under State Finance Law §139-j, requests have been made for clarification regarding which category of State Finance Law §139-j(a)(3)(1-7) covers the situation. While the ACPL has issued guidance on this point, legislative clarification is desired.

Recommendation:

The ACPL recommends amendment of State Finance Law §139-j(3)(a)(5) to expressly provide that communications and Contacts between an Offerer and the procuring Governmental Entity for the purpose of rendering a responsibility determination fall within this Permissible Subject Matter Communication category.

D. Results of Solicitation of Governmental Entities and Business Community

The ACPL recognizes the importance of incorporating the viewpoints of both the vendor/business community and Governmental Entities into any discussion of implementation of the Law because its requirements impact both constituencies. Therefore, the ACPL contacted over 500 Governmental Entities and over 700 representatives of the vendor/business community asking them to provide their impressions of the Law and its implementation for inclusion in this annual report. Copies of the letters requesting comments from Governmental Entities and the vendor/business community are set forth in Appendix A to this report. Additionally, a link was provided on the ACPL web site requesting comments and suggestions from the vendor/business community on this topic. Although fewer than 20 responses were received, the information gathered provides insight into the implementation issues faced by the entities actually working within the confines of the Law and suggests that some commonalities exist in the issues experienced by both Governmental Entities and the vendor/business community.

The majority of those who responded to the solicitation letter were from the vendor/business community. For the most part, they represented industry and trade associations as well as private-sector member organizations whose focus is to help sustain the economic viability of doing business in New York State. Several vendors also responded. Other respondents included some relatively large state agencies and a few public authorities or public benefit corporations. There were no responses from industrial development agencies covered under the Law.

A few common themes were present in the responses received from both groups. The first theme was the importance of amending the threshold for the application of the Law to match the discretionary purchasing thresholds and the thresholds for contracts requiring the prior approval of OSC as increased by Chapter 56 of the Laws of 2006. In particular, Chapter 56 amended State Finance Law §§112(2)(a) and 163(6) to increase the discretionary buying thresholds from \$15,000 to \$50,000 (\$85,000 for OGS) and to allow the letting of contracts below these amounts without pre-approval by OSC. The definition of procurement contract under Legislative Law §1-c(r) and State Finance Law §§139-j(1)(g) and 139-k(1)(g) appeared to use the previous discretionary thresholds, subjecting contracts with an annualized expenditure of \$15,000 or more to the requirements and obligations under the Law. In its Supplemental Preliminary Report, the ACPL recommended aligning these thresholds stating “[T]he ACPL recommends that technical amendments be proposed to increase the dollar values for the references to estimated annualized expenditure of a procurement contract to match those in §§ 112(2)(a) and 163(6) of the State Finance Law.” Justifications cited in support of this amendment by respondents include simplifying paperwork associated with lower valued contracts, creating a standard threshold for the application of additional reviews and requirements, and “reflect[ing] the apparent lessened need” or risk of inappropriate attempts to influence for lower valued contracts.

Another theme identified was the need for continued access to information about the Law which is clear and easy to understand. Respondents seemed to appreciate the abundance of guidance materials already made available on the websites of the ACPL and the Lobbying Commission. However, industry and trade associations, pointed to the importance of having additional information available in order to assist their members in understanding the requirements of the Law. Businesses expressed a desire to “have a good understanding of the rules” as well. Additionally, respondents expressed a desire for common-sense interpretations of the Law that provide for accountability to the public and conservation of tax dollars consistent with good business practices established in both the public and private sectors.

There were several comments that focused on the procurement process in general, such as the need for more information regarding bids and bid solicitation methods, the ability to ask questions of Governmental Entities regarding the same and the availability of readily accessible information about the winner of each solicitation and the basis for award.

Other responses were specifically directed to either the Lobbying Act or the State Finance Law as they pertain to procurement lobbying. An overview of the responses received is set forth in Appendix B of this report. As a number of issues were raised about the Lobbying Act, the ACPL forwarded these comments to the Lobbying Commission for their review and consideration.

One issue not otherwise addressed in this report that was raised by several respondents is the desire for greater clarification regarding the differences between normal commercial communications and Contacts during the Restricted Period. It has been expressed that the act of vendors providing basic information on their products and services to Governmental Entities, whether via print advertising or direct communications, absent an attempt to influence a specific procurement, should not be considered lobbying or a Contact. In addition, communications made specifically to generate interest in a vendor's product or service, absent a determination of need, should not be considered lobbying.

A second issue, not otherwise addressed, is a recommendation for greater clarity and guidance regarding the "determination of need" concept presented in the Lobbying Act. While the Lobbying Commission's guidelines provide information on this concept and the concept is not a component of the State Finance Law requirements, a burden is placed on the vendor/business community to ascertain if a "determination of need" has been made. Consideration needs to be given to facilitating the provision of information regarding the "determination of need".

IV. SUNSET PROVISION

State Finance Law §§139-j and 139-k are subject to sunset on December 31, 2007. Pursuant to §1-t(f) of the Legislative Law, the ACPL is charged with submitting to the Governor and the Legislature a report on the effects of the Law by October 30, 2007. As this study is not due until two months prior to the sunset date, the ACPL recommends that the Legislature amend Chapter 1 to extend the expiration date of State Finance Law §§139-j and 139-k to July 31, 2008 in order to continue the Law while the discussion of relevant issues continues. Ideally the issues raised and recommendations made in this and previous ACPL reports, as well as the forthcoming study, would be acted upon by the Governor and the Legislature prior to that date.

APPENDIX A



JOHN J. SPANO
ACTING COMMISSIONER

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES
MAYOR ERASTUS CORNING 2ND TOWER
THE GOVERNOR NELSON A. ROCKEFELLER EMPIRE STATE PLAZA
ALBANY, NEW YORK 12242

ROBERT J. FLEURY
FIRST DEPUTY COMMISSIONER

RICHARD A. REED
DEPUTY COMMISSIONER
& COUNSEL

September 28, 2006

RE: Implementation of Procurement Lobbying Law

Dear

As you know, in August 2005, Governor George E. Pataki signed into law amendments to the Legislative Law ("Lobbying Act") and the State Finance Law, to include provisions for the regulation of attempts to influence state and other governmental entity procurement contracts. The new law created the Advisory Council on Procurement Lobbying ("Advisory Council"), to examine the implementation of the new law and authorized the Advisory Council to issue guidelines to assist governments and the vendor community in complying with the new law. Information about the Advisory Council, including the guidance issued in the form of frequently asked questions is available at:
<http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html>

The Advisory Council is annually required to report to the Legislature any problems in the implementation of the law, including any recommended changes to increase the effectiveness of implementation. On behalf of the Advisory Council, we seek your input with respect to any problems or issues your agency, department, division or authority may be experiencing regarding implementation of this law. We also welcome your thoughts as to appropriate statutory changes that the Advisory Council may consider in making its recommendations to the Legislature in December 2006. To be considered, your input is requested by mail to Teneka Frost, Government Law Center, 80 New Scotland Avenue, Albany, NY 12208-3494 or by email to tfros@albanylaw.edu no later than **October 20, 2006**.

The Government Law Center of Albany Law School provides support to the Office of General Services in its role as Secretariat to the Advisory Council. The Government Law Center will compile a report of the responses received from this request. While the goal is to provide information to the Legislature based on your responses, it is not our intention to publish the name or other identifying information of your organization in the annual report. If you have any questions or concerns, please do not hesitate to contact me or Teneka Frost (tfros@albanylaw.edu or by telephone at 518-445-2310) at the Government Law Center.

Sincerely,

A handwritten signature in black ink that reads "Richard A. Reed".

Richard A. Reed, Chair
Advisory Council on Procurement Lobbying



JOHN J. SPANO
ACTING COMMISSIONER

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES
MAYOR ERASTUS CORNING 2ND TOWER
THE GOVERNOR NELSON A. ROCKEFELLER EMPIRE STATE PLAZA
ALBANY, NEW YORK 12242

ROBERT J. FLEURY
FIRST DEPUTY COMMISSIONER

RICHARD A. REED
DEPUTY COMMISSIONER
& COUNSEL

September 27, 2006

Dear Sir/Madam:

RE: Implementation of Procurement Lobbying Law

As you know, in August 2005, Governor George E. Pataki signed into law amendments to the Legislative Law ("Lobbying Act") and the State Finance Law, to include provisions for the regulation of attempts to influence state and other governmental entity procurement contracts. The new law created the Advisory Council on Procurement Lobbying ("Advisory Council"), to examine the implementation of the new law and authorized the Advisory Council to issue guidelines to assist governments and the vendor community in complying with the new law. Information about the Advisory Council, including the guidance issued in the form of frequently asked questions is available at: <http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html>

The Advisory Council is annually required to report to the Legislature any problems in the implementation of the law, including any recommended changes to increase the effectiveness of implementation. On behalf of the Advisory Council, we seek your input with respect to any problems or issues that members of your business association may be experiencing regarding implementation of this law. We also welcome your thoughts as to appropriate statutory changes that the Advisory Council may consider in making its recommendations to the Legislature in December 2006. To be considered, your input is requested by mail to Teneka Frost, Government Law Center, 80 New Scotland Avenue, Albany, NY 12208-3494 or by email to tfros@albanylaw.edu no later than **October 20, 2006**.

The Government Law Center of Albany Law School provides support to the Office of General Services in its role as Secretariat to the Advisory Council. The Government Law Center will compile a report of the responses received from this request. While the goal is to provide information to the Legislature based on your responses, it is not our intention to publish the name or other identifying information of your company or organization in the annual report. If you have any questions or concerns, please do not hesitate to contact me or Teneka Frost (tfros@albanylaw.edu or by telephone at (518-445-2310) at the Government Law Center.

Sincerely,

A handwritten signature in black ink that reads "Richard A. Reed".

Richard A. Reed, Chair
Advisory Council on Procurement Lobbying

APPENDIX B

APPENDIX B

SUMMARY OF RESPONSES RECEIVED FROM LETTER SOLICITING IMPLEMENTATION ISSUES AND COMMENTS FROM GOVERNMENTAL ENTITIES AND THE BUSINESS COMMUNITY

At its September 21, 2006 meeting, the Advisory Council on Procurement Lobbying (“ACPL”) approved a letter requesting input from Governmental Entities and the business community with regard to any problems or issues experienced in the implementation of the Procurement Lobbying Law as well as thoughts for appropriate statutory changes that the ACPL could consider in making recommendations to the Legislature in its 2006 Annual Report. The letter was sent to the counsel’s office at approximately 592 of the covered Governmental Entities listed on the ACPL website as well as to over 700 members of the business community during the last week in September and first week of October 2006. The letter was also posted on the ACPL website. Responses were received from Governmental Entities (three responses from state agencies and three from public authorities or public benefit corporations), businesses (two responses), and business organizations (five responses). Below is a brief summary of implementation issues and recommendations/comments regarding the State Finance Law from each group of respondents followed by those which were specific to the Legislative Law.

GOVERNMENTAL ENTITIES

A. Implementation Issues for State Finance Law provisions:

- increased administrative workload
- found that requirement of State Finance Law to record attempts to influence captures communications regarding marketing and technical information germane to the contract

B. Recommendations/Comments:

- exclude normal commercial communications received during the Restricted Period from the scope of the State Finance Law
- modify State Finance Law §139-k(4) to read as follows, “...inquire and record whether the person or organization making such Contact was retained, employed or designated by or on behalf of another individual or entity to appear before or Contact the Governmental Entity about the Governmental Procurement.”
- amend threshold for the State Finance Law and the Legislative Law’s application from \$15,000 to \$50,000 to reflect the change made to §112 and §163 of the State Finance Law
- exempt Sole Source contracts and amendments from the requirements of the State Finance Law

- one Governmental Entity commented that it had no implementation issues
- another stated that it has yet to experience any attempts to influence

BUSINESSES

A. Implementation Issues for State Finance Law provisions:

- gathering information about a bid and getting answers to follow-up questions from Designated Contacts has been problematic

B. Recommendations/Comments:

- one business stated that it had no problems with the procurement lobbying requirements of the State Finance Law or Legislative Law

BUSINESS ORGANIZATIONS

A. Implementation Issues for State Finance Law provisions:

- appears to be unnecessary for professional design companies and contrary to good public policy; design professionals provide technical resources in the structuring of design projects but because of the procurement lobbying requirements of the State Finance Law and Legislative Law they may be considered as lobbyists if they provide such to Governmental Entity
- wastes significant taxpayer dollars and makes the private sector more inefficient because keeping information on communications is time consuming for public employees
- hurts small firms, particularly women and minority owned firms because smaller firms do not have the resources of larger firms in meeting the compliance obligations of the State Finance Law and Legislative Law provisions relating to procurement lobbying

B. Recommendations/Comments:

- [exempt Preferred Source contracts under the State Finance Law - definition of Procurement Contract](#)
- subject State Finance Law provisions to the enforcement provisions of the Legislative Law

- establish an integrated, web accessible database of information regarding the Restricted Period and other information related to a procurement, including information such as:
 - identification of all state and local Governmental Entities;
 - indication of any differences in the governmental jurisdictions covered under the separate Restricted Period provisions of the Legislative Law and State Finance Law;
 - all acts of procurement for which a Restricted Period has commenced;
 - the starting date and end date for all such Restricted Periods; and
 - identification of the Designated Contact person for each procurement.

SPECIFIC COMMENTS RELATED TO THE LEGISLATIVE LAW

The comments below are specific to the provisions of the Legislative Law. Please note that these comments were received from those who responded under the Business Association category. -

A. Implementation Issues for Legislative Law provisions:

- appears to be unnecessary for professional design companies and contrary to good public policy; design professionals provide technical resources in the structuring design projects but because of the procurement lobbying requirements of the State Finance Law and Legislative Law they may be considered as lobbyists if they provide such to Governmental Entity
- wastes significant taxpayer dollars and make the private sector more inefficient because keeping information on communications is time consuming for public employees
- hurts small firms, particularly women and minority owned firms because smaller firms do not have the resources of larger firms in meeting the compliance obligations of the State Finance Law and Legislative Law provisions relating to procurement lobbying
- inconsistent and unclear definitions from Lobbying Commission regarding what constitutes lobbying and potential inconsistent interpretations which may be presented given that opinions of Lobbying Commission apply only to those that request such opinion
- timing for procurement is unclear because of difficulty in determining when a “Determination of Need” is made

B. Recommendations/Comments:

- repeal Legislative Law provision regarding Restricted Period because it conflicts with State Finance Law and creates confusion
- make statutory clarification in definition of contingent retainer in Legislative Law §1-k so that discretionary bonuses are excluded from this definition
- amend definition of procurement lobbying in 1-c(c) of the Legislative Law to replace the phrase “related to” to “a specific action” from within the five categories enumerated in the definition
- provide in the definition of Lobbying contained in the Legislative Law that "attempts to influence" exclude Contacts that are intended to generate interest in a vendor’s product occurring prior to the Governmental Entity’s having determined that a need exists for the particular product
- amend Legislative Law to specify what types of non-written Contacts can trigger a Restricted Period or change law so that it states “any other method specifically provided for in statute or regulation” for soliciting a response from Offerers
- identify categories of permissible Contacts prior to commencement of a Restricted Period that do constitute procurement lobbying pursuant to the Legislative Law such as communications intended to affect bid specifications and other requirements before the RFP is issued
- amend the definition of Commissioned Salesperson in the Legislative Law either by defining “substantially in excess” in this definition, or otherwise establishing a specific threshold
- amend Section 1-e (a) (3) of the Legislative Law to specify that the threshold applies on an annual basis
- provide definition of franchise or refer to “revenue contracts” rather than “franchise” in exemption to franchise negotiations in the Legislative Law
- amend Section 1-c(c) (P) of the Legislative Law to reflect that the phrase “primary purpose” means the person has been required to register as a lobbyist
- Lobbying Commission should continue to keep easy to understand language and accessible information available to assist businesses in following the procurement lobbying provisions of the Legislative Law

OTHER COMMENTS

A comment was received from one of the businesses that was not specifically related to the State Finance Law or the Legislative Law but the procurement process in general. The comment suggests requiring each NYS agency to post contract award information on the OGS website, such as the final winner of each RFP and the rate(s) or total cost of the award.