

January 23, 2007

To: Presidents
Provosts
Vice Presidents of Finance and Administration

From: Frederick P. Schaffer
Barry Kaufman

Subject: Procurement Lobbying Act - Advisory Memo

In response to concerns about outside influence on the public procurement process and in awarding state contracts, including real estate and construction contracts, New York State enacted the Procurement Lobbying Act (State Finance Law §§ 139-j and 139-k), effective January 1, 2006. Executive Order 127, which also addressed this issue, has been withdrawn. This memo sets forth the obligations of the University, including all colleges, employees, agents, and consultants, in complying with this law

Summary of the Law

The Procurement Lobbying Act (PLA):

- requires CUNY to direct all communications concerning a potential procurement to a designated contact person during certain periods in the procurement process;
- prohibits vendors from contacting anyone other than a designated contact person during these periods (e.g. during an Invitation for Bids solicitation process);
- requires CUNY and all of its campuses to record and maintain documentation regarding certain communications made by vendors and their representatives during these periods;
- requires CUNY to include such documentation in the related procurement record and be ready to submit same to the State; and
- requires CUNY to include certain provisions of the PLA in its procurement and contract documents.

Key Terms

“Contact” is defined by statute and refers to those communications (written or oral) that a reasonable person would infer are attempts to influence a procurement at the College/University.

“Designated Contact” is a University employee who is responsible for receiving vendor communications permissible under the Procurement Lobbying Act. The name and contact information of the Designated Contact is stated in the solicitation document.

“Restricted Period” is the period during which communication between vendors (and their representatives) and University employees (including consultants and representatives) is prohibited. It begins with the earliest written notice, advertisement, or method of soliciting a response from vendors for a contract through contract registration (or the equivalent) at the City or the State and ends when the subject contract has been signed by the vendor and the University and registered by the City or the State. For CUNY procurements, the Restricted Period will begin when the Purchasing Department has been requested to initiate a solicitation. If the basis of the procurement is a single source contract or a sole source contract, then the Restricted Period will begin with the earliest method used by the University to solicit a response from vendors intending to result in a procurement contract. All communication regarding the intended purchase between University employees (except for the Designated Contact) and any potential vendors should cease as soon as the end users have requested that Purchasing initiate a purchase effort.

“Record of Contact” is the form that must be completed by the University employee for each “Contact” (person or organization) that takes place during a “Restricted Period”. The Purchasing Department must include all “Records of Contact” in its purchasing record for each contract.

What does the law require of the business community?

The Procurement Lobbying Act obligates the business community to make only permissible Contacts during the Restricted Period. The business community generally is prohibited from contacting anyone other than the designated contact person during the Restricted Period. Vendors who are seeking an opportunity to sell to the University must disclose whether there has been a finding of non-responsibility (as defined by law) with regard to compliance for the past four years. Vendors will be required to affirm their understanding of and agreement to comply with the University policy, guidelines, and procedures and certify that all information provided to the University regarding Contacts is complete, true, and accurate.

What does the law require of the College/University?

- Any person at the College/University who receives a Contact from a vendor during a Restricted Period must make a written record of such contact and must inquire and record whether the person or organization that made the Contact was a vendor involved in the procurement or was retained, employed, or designated on behalf of a

vendor to appear before or contact the College/University. A copy of a "Record of Contact" form is attached to this memorandum. Should a Contact occur during the Restricted Period, complete the form and send it to your college's Purchasing Director immediately after the Contact occurs.

- The Purchasing Department must include all of the completed "Records of Contact" in its procurement record for each contract.
- The Purchasing Department must designate one individual as the "Designated Contact" for each procurement effort, and all inquiries from the business community to the University must be directed to the Designated Contact.
- The University is obligated to notify the State Comptroller of all determinations of non-responsibility and debarment. The University Controller's office will make such notifications.

What triggers the requirements of the Procurement Lobbying Act for the University?

- a solicitation for proposals or bids from the business community
- mini-bids (in connection with a State contract)
- granting of a concession or franchise where the recipient is required to pay a fee

The Procurement Lobbying Act generally does not apply to the following situations:

- inter-governmental agreements ("MOUs")
- solicitations and purchases made with non tax-levy monies
- serial purchases (even exceeding \$20,000 within a one-year period) from a state centralized contract that does not require a solicitation resulting in a procurement contract

Is every communication between a University employee and the business community a "Contact"?

No, the communication must take place during the Restricted Period and be a communication that a reasonable person would infer are attempts to influence a procurement at the College/University. Communications may be in person, by telephone, by mail, or by electronic mail and may occur in a business or social setting. It is a good idea to assume that all communications that are not ministerial in nature are attempts to influence.

Communications that a reasonable person would infer are not intended to influence a procurement do not have to be recorded. Each situation will depend on its facts, but unsolicited advertisements, emails, or phone calls would not likely be deemed a "Contact".

State Finance Law §§ 139-j and 139-k do not apply to communications between one governmental entity and another regarding requests for information about a potential vendor's performance.

Are intra-CUNY communications covered by the Procurement Lobbying Law?

University employees and University consultants may continue business communications previously allowed under existing law. State Finance Law §§ 139-j and 139-k do not apply to communications between University employees regarding information about a potential vendor's performance.

Does the Procurement Lobbying Act apply to non-tax-levy money purchases?

No, the Procurement Lobbying Act does not apply to non-tax-levy money purchases; however, the University must still follow sound purchasing practices, and the University has a duty to ensure that all purchases are made with good business judgment and fiscal responsibility. Good business practice requires that all communication with the business community during the solicitation and procurement process must be directed to one designated person, and the designated person should be notified if any other communications with the business community took place during the solicitation and procurement process. Bear in mind that non-tax-levy money purchases may be subject to heightened scrutiny.

What communications are *not* affected by the Procurement Lobbying Law?

Other than communications regarding covered procurements during a Restricted Period, University employees and University consultants may continue business communications previously allowed under existing law. The following communications are allowed at any time and are not subject to the Procurement Lobbying Act:

- communications among University employees and University consultants, or between University employees/University consultants and other state agencies' employees during the normal conduct of their duties, even if the communication pertains to a covered procurement during a Restricted Period;
- communications between vendors and University employees/University consultants concerning ongoing contract administration of an existing contract, such as for billing inquiries or performance issues;
- communications between University employees/University consultants and the commercial marketplace in the course of doing preliminary research, such as for product demonstrations, prior to the public advertisement or solicitation of a response from one or more vendors; and
- communications between vendors and University employees/University consultants in the course of general marketing outreach, such as when a vendor sends

unsolicited advertising materials to University or a vendor conducts a demonstration of a new product where the vendor describes the product and advocates its use (not related to a specific procurement).

Can the Designated Person (for a particular procurement) receive a "Contact"?

Yes, if a vendor contacts the Designated Contact, and the contact is one that a reasonable person would infer is intended to influence a procurement during the Restricted Period, then it is also considered a "Contact" and the Designated Contact must complete a Record of Contact and include it the procurement file.

What are permissible Contacts during the Restricted Period?

The following Contacts during the Restricted Period are permissible and there is no need to create a Record of Contact if directed to the Designated Contact:

- submission of a bid, proposal, or response to a solicitation;
- submission of written questions (as part of solicitation process);
- ministerial communications concerning due dates or contact information
- participation in a pre-bid conference or site visit;
- complaints by a vendor to the Office of General Counsel where the Designated Contact fails to respond in a timely matter;
- negotiations with the University after notice of a tentative contract award;
- debriefings about a procurement contract award; and
- filing of written disputes in administrative hearings, judicial proceedings and to the attorney general, inspector general, district attorney or state comptroller.

What are the consequences/penalties for violating the Procurement Lobbying Act?

If a vendor knowingly and willfully violates the law, then the vendor and its subsidiaries, related entities, and successor entities will be found "non-responsible" (defined in the law) and may not be awarded the contract. Two such findings within four years will result in debarment, that is, the vendor will be ineligible to respond to any solicitation or be awarded any (New York State) procurement contract for four years from date of second finding of non-responsibility.

It is not yet clear what the consequences might be if the University is found to violate the Act, but it is likely that the subject contract would not be registered (and would therefore be invalid and would not be paid).

If you require additional guidance or if you have any questions, please call Howard Altschuler (212-397-5655) at the Office of the University Controller or Marina Ho (212-794-5382) or Jane Sovern (212-794-5382) at the Office of General Counsel.

Please distribute this Advisory Memorandum as widely as possible on your campus.

Attachment: Record of Contact Form

- c: Board of Trustees
- Chancellor Matthew Goldstein
- Cabinet
- Administrative Council
- Internal Audit
- Business Managers
- Purchasing Directors
- Financial Aid Directors
- Campus Facilities Officers
- Environmental Health & Safety Officers
- Labor Designees
- Legal Designees
- Ethics Officers
- Human Resources Directors
- Registrars
- Chief Student Affairs Officers
- Information Technology Directors
- Public Safety Directors

Record of Contact under State Finance Law §139-k(4)

To: Procurement Record for _____
Procurement Contract Number _____

From: _____
(name and title of person completing this form)
_____ College, City University of New York

Subject: Record of Contact under State Finance Law §139-k(4)

Date: _____

I had Contact with the below-named individual regarding the above identified procurement. The term "Contact" is defined in State Finance Law §139-k(1)(c). In accordance with State Finance Law §139-k(4), the following information was obtained:

Name: _____

Address: _____

Telephone Number: _____

Place of Principal Employment: _____

Occupation: _____

1. Was the person making the contact informed that the contact would be documented?
(check one) Yes No
2. Is the above-named person or organization the bidder or proposer ("Offerer") in this procurement?
(check one) Yes No
3. If the above-named person or organization is not the Offerer, then was the above-named person or organization retained, employed, or designated by the "Offerer" to:
 - a. appear before the College/University about the procurement?
(check one) Yes No
 - b. contact the College/University about the procurement?
(check one) Yes No

List date(s) of Contact: _____
(add additional pages as necessary)

Summarize the form (e.g., email, letter, conversation) and topic of the communication on each date of Contact:

(add additional pages or copies of written communications as necessary)

Instructions for Completing Record of Contact
under State Finance Law §139-k(4)

The Procurement Lobbying Act prohibits vendors from contacting anyone other than the designated contact person(s) during the Restricted Period and obligates the College/University to make a written record of any Contacts that are made during the Restricted Period. The law also obligates the University to inquire and record whether the person or organization that made the Contact was the Offerer or was retained, employed or designated on behalf of the Offerer to appear before or Contact the College/University.

- ☞ “Contact” is defined by statute and refers to those oral, written or electronic communications that a reasonable person would infer are attempts to influence a procurement at the College/University.
- ☞ “Restricted Period” means the earliest written notice, advertisement, or method of soliciting a response from vendors for a contract through contract registration (or equivalent) at the City or the State. For practical reasons, as soon as your end users are talking to Purchasing about making a purchase, any communication between the end users and the vendors must cease.

Any person at the University who receives a Contact during a Restricted Period must complete a separate form

http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/budget_fiscal/PROCUREMENT-LOBBYING-FORM.pdf

for each “Contact” (person or organization) that takes place during the restricted period of a procurement pursuant to New York State Finance Law §139-k(4). Purchasing must include all of the completed “Records of Contact” in its procurement record for each contract.

Information and guidance on the “restricted period” and permissible Contacts can be found in the guidelines issued by the Advisory Council on Procurement Lobbying, which can be found on the OGS website at

http://www.tax.ny.gov/about/procure/procurement_lobbying_act.htm