What is the Procurement Lobbying Law?

Two separate amendments in Chapter 1 of the Laws of 2005, amended by Chapter 596 of the Laws of 2005

- Legislative Law – interpreted and enforced by the NYS Temporary Commission on Lobbying
  - also establishes Advisory Council on Procurement Lobbying
  - State Finance Law §139-j and §139-k – addresses actions of governmental entities and the business community
The Purpose of the Procurement Lobbying Law (cont.)

- Builds on the pre-existing requirements governing procurement activities, such as State Finance Law Articles 9 and 11, the Freedom of Information Law, the Open Meeting Law, Public Officers Law Code of Conduct and Executive Order Number 127

- Formalizes practices already in place documenting the procurement process and clarifies responsibilities and expectations when expending public funds
The Purpose of the Procurement Lobbying Law (cont.)

- Reemphasizes the values of the government procurement process described in State Finance Law.
  - Prudent use of public money
  - Efficient and timely acquisitions of commodities and services
  - Highest quality purchases at the lowest practicable cost
  - Emphasis on open, transparent, and fair procurement process
The new statutory requirements supplement the obligations under Executive Order Number 127.

Governmental entities, such as State agencies, will need to comply with both sets of requirements.

Be mindful of the differences between the two requirements.
The Advisory Council on Procurement Lobbying

- Created by Legislative Law §1-t
- Eleven members, chaired by Office of General Services
- Three general obligations of Council
  - Reports
  - Guidance
  - Advice to Lobbying Commission on procurement lobbying
The Advisory Council on Procurement Lobbying (cont.)

Guidance developed by the Advisory Council on Procurement Lobbying, model forms and language and other materials, are present on the internet at

http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html
**ADVISORY COUNCIL ON PROCUREMENT LOBBYING (ACPL)**

- **ACPL Description and its Membership**
- **ACPL Reports and Meeting Minutes**
- **Statutory References**
- **Statutory Summary**
- **List of Governmental Entities**
- **Guidelines on Procurement Lobbying (Frequently Asked Questions)**
- **List of Offerers Determined to be Non-responsible bidders Maintained by the Office of General Services under State Finance Law §139-1(10)(b)**
- **List of Debarred Offerers Maintained by the Office of General Services under State Finance Law §139-1(10)(b)**
- **Training Opportunities**
- **Model Language and Forms**

Coming Soon ...

In August, 2005, Governor George Pataki signed into law major changes to the Legislative Law and the State Finance Law which regulate lobbying on procurement contracts. The significant amendments included the creation of a new public body, the Advisory Council on Procurement Lobbying, to issue guidelines to assist governments in complying with the new law and to examine the effect of the new law. The new procurement lobbying restrictions are effective on January 1, 2006.

For further information regarding the Advisory Council on Procurement Lobbying, please contact OGS Legal Services, at 518-474-5607 or by email through the "contact us" button at the top of the page.

Additional information on the procurement lobbying requirements may be obtained from the websites hosted by the Temporary State Commission on Lobbying and State Ethics Commission.
Applicability of State Finance Law Provisions

- Every State Agency
- Public Authorities of which at least one member is appointed by the Governor
- Unified Court System
- Legislature
- Certain Industrial Development Agencies
- Public Benefit Corporations
Types of Contracts Subject to the Law

- Construction
- Procurement (commodities, services and technology)
- Real Estate (Purchase, Sale, Lease of Real Property including interest therein.)
- Certain Revenue Contracts
- Assignments, renewals, extensions and certain amendments

When the estimated annualized expenditure will exceed $15,000
Types of Contracts Subject to the Law (cont)

Definition of Procurement Contract expressly exempts the following:

- Grants
- SFL Article 11-B contracts
- Intergovernmental agreements
- Railroad and utility force accounts
- Utility relocation agreements
- Eminent domain transactions
State Finance Law Provisions

General Rule is:

- State Finance Law restricts and directs communications by Offerers with government entities about procurement contracts
- Recognizes that some communications are necessary to the conduct of government procurement and that there are different kinds of communications
State Finance Law Provisions (cont.)

- Obligates Governmental Entities and Offerers to undertake specific actions as part of the procurement process.
- Sets forth specific requirements regarding communications during the procurement process.
- Establishes specific contractual requirements.
- Imposes new consequences if Offerers have impermissible communications.
Restricted Period

- Represents the time period from the earliest solicitation of a proposal to the final approval of the contract

- Start point differs based on the nature of the contract. For example, with a single source contract it appears to start when the Governmental Entity asks for a proposal.
Most Important Definitions in State Finance Law (cont.)

- During the Restricted Period, the Offerer is limited in whom it can communicate with in an attempt to influence the procurement.
- It is only within the Restricted Period that a prohibited communication can take place.
- Restricted Period ends when the contract receives all the necessary approvals.
Most Important Definitions in State Finance Law (cont.)

Contact

- Defined as an oral, written or electronic communication with governmental entity under circumstances where a reasonable person would infer that the communication was intended to influence the governmental procurement
Most Important Definitions in State Finance Law (cont.)

Number of factors to consider
- “Reasonable person” standard
- Consider totality of the circumstance
Most Important Definitions in State Finance Law (cont.)

- Factual exchanges of information are generally not Contacts
  - When is the bid due?
  - Where is the bid due?
  - I am missing pages 38 – 47 from the RFP. Can you please send to me?
Most Important Definitions in State Finance Law (cont.)

Communications that a reasonable person would probably consider an attempt to influence

- You should award the bid to my company because …
- You shouldn’t award the contract to Company X because …
Most Important Definitions in State Finance Law (cont.)

Record of Contact - Requires collection of certain information, recordation of and placement in procurement record of communications that attempt to influence a procurement
Most Important Definitions in State Finance Law (cont.)

Designated Contact

- SFL requires the Governmental Entity to identify a person or persons who may be contacted by Offerers about a procurement
- The Designated Contact may receive all communications from Offerers, including attempts to influence
- Communications to Designated Contact are limited by Public Officers Law and Penal Law (ie., bribery)
Most Important Definitions in State Finance Law (cont.)

- There can be more than one designated contact for a procurement.
- Best practice would be to have at least two designated contacts to facilitate responsiveness to the Offerers.
Most Important Definitions in State Finance Law (cont.)

- Permissible Subject Matter Contacts - State Finance Law §139-j(3)(a) recognizes a specific series of communications and contacts that can go to other than the Designated Contacts.
- Important that Offerer’s Contacts be limited to the specific subject matter.
Permissible Subject Matter

Contacts - #1

The submission of written proposals in response to a request for proposals, invitation for bids or any other method for soliciting a response from offerers intending to result in a procurement contract.
Permissible Subject Matter Contacts - #2

The submission of written *questions* to a designated contact set forth in a request for proposals, or invitation for bids, or any other method for soliciting a response from offerers intending to result in a procurement contract, when all written questions and responses are to be disseminated to all offerers who have expressed an interest in the request for proposals, or invitation for bids, or any other method for soliciting a response from offerers intending to result in a procurement contract.
Permissible Subject Matter

Contacts - #3

Participation in a conference provided for in a request for proposals, invitation for bids, or any other method for soliciting a response from offerers intending to result in the procurement contract.

- Appears that term “conference” can be broadly interpreted to include all types of pre-proposal activities that are provided for under a written solicitation.
Complaints by an Offerer regarding the failure of the person or persons designated by the procuring governmental entity pursuant to this section to respond in a timely manner to authorized Offerer contacts made in writing to the office of general counsel of the procuring governmental entity, provided that any such written complaints shall become a part of the procurement record.
Permissible Subject Matter
Contacts - #5

- Offerers who have been tentatively awarded a contract and are engaged in communication with a governmental entity solely for the purpose of negotiating the terms of the procurement contract after being notified of tentative award.
  - Additional personnel can be involved in the negotiation process
Permissible Subject Matter
Contacts - #6

Contacts between designated governmental entity staff of the procuring governmental entity and an Offerer to request the review of a procurement contract award.

- Debriefing are covered by this category
Permissible Subject Matter
Contacts #7 (a) – (d)

Contacts by offerers in **protests, appeals or other review proceedings** (including the apparent successful bidder or proposer and his or her representatives) before the governmental entity conducting the procurement seeking a final administrative determination, or in a subsequent judicial proceeding.

Complaints of **alleged improper conduct** in a governmental procurement to the attorney general, inspector general, district attorney, or court of competent jurisdiction.
Permissible Subject Matter
Contacts - #7 (a) – (d) (cont.)

Written protests, appeals or complaints to the state comptroller’s office during the process of contract approval, where the state comptroller’s approval is required by law, and where such communications and any response thereto are made in writing and shall be entered in the procurement record pursuant to section one hundred sixty-three of the state finance law.

Complaints of alleged improper conduct in a governmental procurement conducted by a municipal agency or local legislative body to the state comptroller’s office
Impact on Offerers

- Offerer is limited on who can be Contacted about specific topics
  - Designated Contacts – communications and Contacts
  - Permissible Subject Matter Contacts – only the specific subject matter
Impact on Offerers (cont.)

Offerer cannot contact other governmental entities unless falls within one of the permissible subject matter (SFL §139-j(4))

- For example, okay to file written protest or complaint with OSC, but not to otherwise contact
- Cannot contact DOB to complain about a procurement
Impact on Offerers (cont.)

- However, statute does permit Offerer to contact Legislature about governmental procurements (unless Legislature is conducting the procurement) and the Legislature may contact the procuring agency (in its official capacity).
- If are contacted by the Legislature, the statute indicates you shall not record the Contact under the SFL.
Impact on Offerers (cont.)

- Offerer must provide written affirmation on understanding of and agreement to an agency’s policy on permissible contacts
- Offerer must disclose additional information about prior findings of non-responsibility
- Offerer must certify that the information provided under SFL section 139-k is complete, true and accurate
- Offerer must agree to the inclusion of specific termination clause in contract
Consequences to Offerer

- Failure to timely disclose accurate and complete information equals no award.
- Failure to cooperate equals no award.
- Finding of non-responsibility equals no award and the Offerer is listed on the OGS maintained list of bidders determined to be non-responsible under this statute.
Consequences to Offerer (cont.)

- If there is a finding that an Offerer knowingly and willfully violated the requirements about permissible contacts, no award.
- This determination can only be made after Offerer is given reasonable notice that an investigation is ongoing and an opportunity to be heard.
Consequences to Offerer (cont)

- Second finding of non-responsibility equals debarment absent compelling governmental interest (public property, public health or safety) and sole source status
- Offerer is listed on the OGS maintained list of bidders debarred sue to violations of this statute
Agency Obligations

- Designate Contact Person or Persons
- Incorporate the required information into your procurement process (both competitive and noncompetitive)
- Establish the necessary policies and procedures regarding permissible contacts, reporting of and investigating possible violations
- Record Contact and file in Procurement Record.
Agency Obligations

Immediately notify the General Counsel at the NYS Office of General Services if you have determined a bidder as non-responsible or debarred a pursuant to this law.

Office of the General Counsel
NYS Office of General Services
41st Floor - Corning Tower
Albany, New York 12242
LegalServicesWeb@ogs.state.ny.us
Telephone 518-474-5988
Facsimile 518-473-4973
Agency Obligations (cont.)

- Determine if the Contact must be reported/referred for investigation as a violation of the permissible contacts requirements
- Whether a Contact must be reported/referred for investigation depends on the role in the procurement
- Brief review of the major possible roles
Agency Roles During a Restricted Period

- **Designated Contact(s)** – those employees specifically named to receive **all** communications from the Offerers during the Restricted Period

- **Permissible subject matter contacts** – those employees who may receive **only** specific subject matter communications during the Restricted Period

- **All other employees** – may only receive factual inquiries (not Contacts)

- **Control agency contacts** – only may receive specific subject matter communications during the restricted period
Reporting/Referring of Contacts

- **Designated Contact** – would only need to report/refer a Contact that was in violation of Public Officers Law or Penal Law (i.e., bribery)

- Report/referral generally to agency ethics officer or inspector general, who has specific obligations to investigate under the law
Permissible Subject Matter Contacts
– must report/refer any Contact that is outside of the specific subject matter

Report/referral generally to agency ethics officer or inspector general, who has specific obligations to investigate under the law
Reporting/Referring of Contacts (cont.)

- All Other Employees of the Procuring Governmental Entity – report/refer all Contacts

- Report/referral generally to agency ethics officer or inspector general, who has specific obligations to investigate under the law
Reporting/Referring of Contacts (cont.)

- Control agency or other non-procuring agency communications
  - SFL section 139-j(3) specifies limited instances when a non-procuring agency can be Contacted during the Restricted Period
  - If the Contact is not within the permissible subject matter area, the Contact must be immediately reported/referred to the official at that agency responsible for investigations
Reporting of Contacts (cont.)

- Such official shall in turn notify the ethics officer, IG or other official at the procuring agency that is responsible for reviewing or investigating, who shall conduct an investigation.
Example of Restricted Period for a Competitively Bid State Agency Contract

Definition of business need

Ad in Contract Reporter

Restricted Period (limits who can receive communications)

Approval of contract by OSC
Example of Restricted Period for a Competitively Bid State Agency Contract (cont.)

Contract administration (no restricted period) / For example, certain amendments will trigger a new restricted period / Approval by OSC (no restricted period)

New restricted period
Thank you.