

**Minutes of the Advisory Council on Procurement Lobbying**  
**Meeting of March 11, 2010, 11:00 am**  
**Governor Nelson A. Rockefeller Empire State Plaza, Meeting Room 4**  
**Albany, New York**

**Call to Order**

Chair Anne Phillips called the meeting of the Advisory Council on Procurement Lobbying (“Council”) to order at 11:02 a.m.

**Housekeeping**

**Webcasting**

Chair Phillips advised that in accordance with a recent directive from the Office of Taxpayer Accountability (the “OTA”) the Advisory Council on Procurement Lobbying’s (the “Council”) meetings will no longer be webcast live or captioned. She explained that instead, videos of the meetings will be stored on the OGS website following the meetings and the minutes of the Council meetings will continue to be posted to the Council’s website after they are approved.

**Membership**

Chair Phillips introduced Richard P. Jacobson, an attorney in private practice in Albany, to the Council as the representative of the Senate. She explained that Mr. Jacobson will be replacing Bruce Fernald and thanked Mr. Fernald for all of his efforts as a member of the Council and wished him the best in his retirement. Chair Phillips also indicated that James Henly, General Counsel for the Metropolitan Transit Authority, has been appointed to the Council by the Governor as the representative of the public authorities. She explained that Mr. Henly could not be present for the meeting but plans to attend the next Council meeting.

**Review and Acceptance of Minutes**

Chair Phillips asked if there were any changes or comments to the November 12, 2009, Council meeting minutes. No changes or comments were offered and Chair Phillips asked for approval to accept the November 12, 2009, minutes. Michael Nevins made a motion to accept the minutes and Gerard Minot-Scheuermann seconded. All approved.

**Old Business**

**Report- Outreach and Training**

Chair Phillips advised that the Council’s 2009 Annual Report was transmitted to the Governor and the Legislature on November 13, 2009. She indicated that copies were sent to the State Libraries as required, the report was posted to the Council’s website and Council members were provided with a copy of the report. She stated that she has not received any comments on the

report, to date, and asked if any of the Council members had received any comments. The members indicated that no comments were received.

### **Report-Legislative Update**

Chair Phillips advised that the Council's legislative proposals probably would be moot soon because the Senate and Assembly passed a bill introduced by Assemblywoman DeStito which would extend State Finance Law §§ 139-j and 139-k until July 31, 2014 (A9949-A and S6924-B). She explained that the bill also contained changes to the Procurement Lobbying Law (the "Law") that the Legislature wanted to make in order to improve the clarity of the Law. Chair Phillips stated that State Finance Law §§ 139-j and 139-k did sunset on March 10, 2010, but indicated that the new legislation was delivered to the Governor for signature on March 10<sup>th</sup> and that she was trying to obtain confirmation that it was signed. She explained that the Council's existence continued because the Council was created in the Legislative Law and was made a permanent body last year. Chair Phillips also advised that OGS was asking entities to continue to honor State Finance Law §§ 139-j and 139-k during any lapse.

Chair Phillips discussed some of the highlights of the new legislation. She explained that the bill revises the definition of the term "governmental procurement" by determining that a procurement begins with the public announcement, public notice, or public communication to any potential vendor of a determination of need for a procurement, including the public notification of the specifications, bid documents, request for proposals, or evaluation criteria for a procurement contract. She explained that a discussion was held with the Assembly about the need for agencies to be able to determine what is available in the marketplace without triggering a restricted period and indicated that the new legislation may present some barriers to such discussions. Chair Phillips indicated that the Council's Frequently Asked Questions ("FAQs") should be reviewed in light of this change. Mr. Nevins asked if Chair Phillips had specific thoughts on this redraft and she indicated that the FAQs had not been reviewed yet, but stated that she felt that there was a distinction that needed to remain between what an entity intended to procure and what it was procuring.

Chair Phillips stated that the definition of the term procurement contract was revised to include an amendment, extension, renewal, or change order to an existing contract (other than amendments, extensions, renewals, or change orders that are authorized and payable under the terms of the contract as it was finally awarded or approved by the comptroller, as applicable.) She also stated that the new legislation exempted two of the contract types that the Council proposed exempting, contracts governing organ transplants and contracts allowing for state participation in trade shows, from the definition of the term procurement contract.

Chair Phillips explained that the new legislation did not include the Council's proposal to amend the definition of the term offerer to remove advocacy groups or others who are only exercising their right to free speech, but the legislation did exclude a governmental agency or its employees that communicate with the procuring agency regarding a governmental procurement in the exercise of its oversight duties from the definition of the term offerer.

A discussion also ensued regarding the addition of the requirement that designated contacts be knowledgeable about the procurement and Chair Phillips advised that the legislation was enacted as Chapter 4 of the Laws of 2010. She advised that OGS would draft a notice to post on the Council's website announcing passage of the legislation and the basic facts of how it was passed.

Chair Phillips asked if there were any other comments on the legislation, and received none. She asked the members to provide any future comments so that they could be considered as the FAQs were redrafted.

Chair Phillips indicated that Governor Paterson's Article 7 legislative proposal provided for the elimination of several entities, including the Council, in accordance with a directive from OTA to consolidate governmental entities where possible. She explained that OTA asked agencies to identify groups that the agency was involved with in order to determine if those entities should continue to exist and as a result of that exercise, the proposed Article 7 bill would repeal §1-t of the Legislative Law which created the Council. She stated that the proposal would also amend §161 of the State Finance Law (which is the section which created the State Procurement Council) to include the current subdivisions (c), (d) and (e) of Legislative Law §1-t. Chair Phillips advised that with these changes, the State Procurement Council would take on the following responsibilities of the Council with regard to providing guidance and reporting to the Legislature:

- Providing advice to the Commission on Public Integrity with respect to the implementation of the provisions of the Legislative Law pertaining to procurement lobbying;
- Reporting annually to the legislature on any problems in the implementation of the provisions of the Legislative Law pertaining to procurement lobbying (including in the report any recommended changes to increase the effectiveness of that implementation);
- Establishing model guidelines on procurement lobbying in accordance with §139-j of the State Finance Law.

She stated that there has been virtually no discussion of this proposal with the Legislature or the Governor's office, but advised that the Assembly indicated that it was not interested in abolishing the Council because it felt that the Council's work was distinct and different from that of the State Procurement Council. Chair Phillips stated that the Assembly had a positive impression of the Council's actions and advised that she would keep the Council updated on the status of this proposal.

### **Survey Results**

Chair Phillips advised that the Council members were provided with a summary of the survey results and a memo outlining some of the findings and explained that the NYS Office of Cyber Security and Critical Infrastructure Coordination (the "CSCIC") reported that it made a determination of a knowing and willful violation of the Procurement Lobbying Law in its survey response. She stated that this determination was not independently reported to the New York State

Office of General Services (the “OGS”) as required by State Finance Law §139-j(10)(b). She explained that pursuant to State Finance Law §139-j(10)(b) findings that an offerer has knowingly and willfully violated State Finance Law §139-j(3) result in a non-responsibility determination for the offerer which must be reported to OGS. She went on to state that an additional non-responsibility determination within a four year period results in an offerer being debarred. She explained that OGS is required to post a list of offerers that are determined to be non-responsible or debarred on its website and that presently there is only one vendor listed on the website as non-responsible. Chair Phillips stated that she felt it was important to reiterate that the determinations need to be sent to OGS and posted on the OGS website in compliance with State Finance Law §139-j(10)(b). She asked if the Council felt that any additional action was warranted and the Council members replied no. Kevin King asked if OGS received the actual determination or just the name of the offerer and Chair Phillips replied that OGS has not received any notices but believes that just the name of the offerer would be provided.

Thomas Perreault asked what communication would be made to CSCIC. Chair Phillips indicated that the communication would advise CSCIC that it missed a step and would ask if it wanted to correct the oversight in failing to report on its determination to OGS. Mr. Perreault stated that the Procurement Lobbying Law requires agencies to report to OGS so the Council can only ask CSCIC to act, while OGS can require compliance; so the outreach should come from OGS and provide CSCIC an opportunity to discuss lessons learned with the Council. Chair Phillips agreed. Mr. Minot-Scheuermann asked if the survey response could be wrong and Chair Phillips stated that CSCIC called with questions while completing the survey and based upon those questions it appears that the response was correct. Chair Phillips asked if the Council would like to include the survey findings in its 2010 annual report. Mr. Perreault stated that the findings should be included in the draft report for consideration by the Council because in the past other findings have provided valuable information.

## **New Business**

### **Inspector General Report**

Chair Phillips advised that she received a copy of the New York State Office of the Inspector General’s (the “NYSOIG”) report which determined that Robert Kelsey, an employee of Ajilon Consulting, engaged in impermissible communications with Stephen Warner of the New York State CIO/OFT (the “NYS CIO/OFT”) during the restricted period of a procurement in apparent violation of State Finance Law §139-j(3). She explained that the NYSOIG asked that the Council review Mr. Kelsey’s actions for consideration in providing guidance to state agencies, public authorities, public benefit corporations and other covered public entities.

Chair Phillips stated that NYS CIO/OFT was engaged in the next cycle of obtaining IT services under the OGS centralized contract and Ajilon Consulting, NYS CIO/OFT’s existing vendor, was one of the bidders. During the procurement resumes and writing samples were requested from the bidders, and Mr. Warner reviewed Ajilon Consulting’s writing samples before they were submitted to the procurement official. Mr. Minot-Scheuermann asked if NYS CIO/OFT contacted the Council about this matter and Chair Phillips replied no. She explained that the NYSOIG will be issuing a full report which will contain the NYS CIO/OFT’s response. She

indicated that the NYISOIG referred Mr. Warner's conduct to the NYS CIO/OFT for appropriate disciplinary action as an employee matter. She explained that NYS CIO/OFT will also need to conduct an investigation pursuant to §139-j(10)(a) of the State Finance Law to determine if there was a knowing and willful violation of the Procurement Lobbying Law and asked if the Council wanted to reach out to NYS CIO/OFT. Mr. King stated that NYS CIO/OFT's initial response to the NYISOIG report acknowledged that it needed to conduct an investigation into a possible violation of the Procurement Lobbying Law. Chair Phillips replied that such an investigation may take several months. Mr. Minot-Scheuermann stated that the NYISOIG did a credible investigation and asked why NYS CIO/OFT would also need to conduct a full investigation. Chair Phillips agreed that some of the legwork was done by the NYISOIG and stated that hopefully NYS CIO/OFT would be able to use some of the NYISOIG's investigation in their review. She asked if the Council would like to ask NYS CIO/OFT to come and speak with the Council. Mr. Minot-Scheuermann stated that any outreach should be in terms of asking for information on lessons learned and what the Council can do in the future in terms of guidance. Mr. Perreault asked what the outreach to NYS CIO/OFT would be like. Chair Phillips stated that it would indicate that the NYISOIG report was referred to the Council and after reviewing the same, the Council would like to be apprised of what actions NYS CIO/OFT will take and provide an opportunity for NYS CIO/OFT to discuss the matter with the Council once NYS CIO/OFT completed its review and made its determinations. Mr. Perreault stated that the Council has no ability to interfere in the investigation. Chair Phillips agreed that the Council has no enforcement power and stated that she indicated that to the NYISOIG. Ronald Younkens agreed that the Council should not be acting in an enforcement or oversight capacity but trying to learn from this experience. Chair Phillips stated that OGS learned from previous investigations that making a knowing and willful determination is challenging and indicated that the Council's Frequently Asked Questions may need to be reviewed in light of this. Mr. King stated that the request should be made to NYS CIO/OFT after its determination has been made to ensure that the Council is not viewed as acting in an oversight capacity. Mr. Younkens suggested that NYS CIO/OFT may also wish to just speak to OGS on this matter. Chair Phillips agreed to present that as an option and if that was appropriate she would report back to the Council after meeting with the NYS CIO/OFT.

## **Discussion Items**

### **Open Council Discussion**

Chair Phillips asked if there was anything to consider and no issues were raised.

Chair Phillips advised that the next meeting will be held on Monday, June 14, 2010, at 11:00 a.m. in Meeting Room 5. Mr. Younkens asked if the Council members would be provided with a draft of the revised Frequently Asked Questions prior to the meeting. Chair Phillips indicated that draft language would be provided for review prior to the meeting.

Mr. Minot-Scheuermann made a motion to adjourn and Mr. King seconded. The meeting was adjourned at 11:52 a.m.

### **Attachments**

Voting Record List (1)

In Attendance

Michael Nevins  
Thomas Perreault  
Ronald Younkins

Anne Phillips  
Gerard Minot-Scheuermann

Kevin King  
Richard Jacobson

Absent:

S. John Campanie  
Elisa Velazquez  
James Henly

**ADVISORY COUNCIL ON PROCUREMENT LOBBYING**

**VOTING RECORD LIST**

DATE: March 11, 2010

MOTION/RESOLUTION: Motion to approve minutes from the November 12, 2009 Council meeting.

<b>MEMBER NAME</b>	<b>APPOINTING AUTHORITY</b>	<b>AYE</b>	<b>NO</b>	<b>ABSTAIN</b>	<b>ABSENT</b>
Campanie, S. John, Madison County Attorney	Governor, Representing Local Governments				X
Henly, James, General Counsel, Metropolitan Transportation Authority	Governor representing Public Authorities				X
Jacobson, Richard P.,	Temporary President of the Senate	X			
King, Kevin, Supervising Attorney Office of the State Comptroller	State Comptroller	X			
Minot-Scheuermann, Gerard, Division of the Budget	Director of the Division of the Budget	X			
Nevins, Michael J., Senior Vice President, JP Morgan Chase	Governor, Representing the Contracting Community	X			
Perreault, Thomas D., First Assistant Counsel, Dept. of Transportation	Commissioner of Transportation	X			
Phillips, Anne G., (Chair), Associate Counsel, Office of General Services	Commissioner of General Services	X			
Velazquez, Elisa, General Counsel, NYC Mayor's Office of Contract Services	Mayor of the City of New York				X
Younkins, Ronald P., Chief of Operations Office of Court Administration	Chief Judge of the Court of Appeals	X			
Vacant	Speaker of the Assembly				

**TOTALS:**

AYES: 7

NOES: 0

ABSTENTIONS: 0

ABSENCES: 3