

Advisory Council on Procurement Lobbying

2008 Annual Report

Table of Contents

Executive Summary

I. Introduction

- A. The Advisory Council on Procurement Lobbying (“ACPL”)
- B. The ACPL’s Reporting Obligations Pursuant to Sections 1-t(d) and (f) (2) of the Legislative Law

II. ACPL Activities to Facilitate Implementation

- A. 2008 Education and Outreach Efforts
- B. Coordination with the New York State Commission on Public Integrity

III. Implementation Issues and Recommendations

- A. Issues Identified as a Result of the Outreach Conducted by the ACPL
 - 1. Discussion of the Outreach Conducted by the ACPL in Connection With Drafting Proposed Legislation for Introduction During the 2009 Legislative Session
 - 2. Implementation Issues Identified Through the Outreach Conducted by the ACPL
 - a. Misunderstandings Regarding the Applicability and Purpose of the Law
 - b. Identification of Administrative Burdens Faced by Governmental Entities as They Implement the Law
- B. Legislative Recommendations of the ACPL
 - 1. Clarify the Definition of Offerer
 - 2. Clarify the Definition of Contacts
 - 3. Clarify the Definition of Governmental Procurement
 - 4. Clarify the Definition of Procurement Contract
 - 5. Expand the Permissible Subject Matter Communication Categories

6. Clarify the Recording Requirements Set Forth in State Finance Law §139-k
- C. Previously Identified Implementation Issues

Executive Summary

Chapter 1 of the Laws of 2005 (“Chapter 1”) enacted August 23, 2005, made 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 from the Law and recommendations intended to increase the effectiveness of the Law. In compliance with these mandates, the ACPL has transmitted several reports to the Governor and the Legislature, which can be reviewed at <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/MtgReportTable.htm>.

The vast majority of the issues previously identified, discussed below at pages 23-25, continue to exist. Therefore, the ACPL recommends that the Governor and the Legislature consider the analysis and recommendations set forth in its previous reports.

In addition, in 2008 the ACPL continued to do outreach to Governmental Entities regarding implementation issues that they had experienced with the Law. The outreach underscored the fact that misunderstandings still exist regarding the Law, and highlighted the fact that Governmental Entities feel burdened by certain of the Law’s requirements. In an effort to address these concerns, and provide greater clarity regarding the Law, the ACPL proposes a series of legislative amendments to address the following issues:

- Clarification of the definition of the term Contacts;

- Clarification of the definition of the term Governmental Procurement;
- Clarification of the definition of the term Procurement Contract;
- Clarification of the definition of the term Offerer;
- Expansion of the Permissible Subject Matter Communication Categories; and
- Clarification of the recording requirements imposed by State Finance Law §139-k(4)

I. Introduction

On August 23, 2005, Governor George E. Pataki signed Chapters 1 and 596 of the Laws of 2005, which amended the Legislative Law (the “Lobbying Act”) and the State Finance Law. Those statutes, known as the “Procurement Lobbying Law” (“the Law”), included provisions for the regulation of attempts to influence state and local Governmental Entity procurement contracts in order to increase transparency and accountability in New York State’s procurement process. The Law was modified in 2005, 2006 and 2007. The State Finance provisions of the Law are due to sunset on July 31, 2009. However, legislation will be proposed for the 2009 legislative session which seeks to extend those provisions of the Law through July 31, 2011.

In comparison to the State Finance Law, the Lobbying Act regulates the activities of lobbyists and their clients, imposing under certain circumstances, registration and reporting requirements on those who engage in lobbying or lobbying activities. Interpretation and enforcement of those provisions is the responsibility of the New York State Commission on Public Integrity (“Commission”).¹ The amendments to the State Finance Law added §§ 139-j and 139-k which regulate certain communications made during the procurement process. Specifically,

¹ Interpretation and enforcement of the Lobbying Act is the responsibility of the New York Commission on Public Integrity, as successor, by merger, to the New York Temporary State Commission on Lobbying and the New York State Ethics Commission.

the Law regulates Contacts² made by Offerers³ and their representatives to Governmental Entities during a Restricted Period.⁴

A. The Advisory Council on Procurement Lobbying

The ACPL is charged with examining the effects of the Law and issuing guidance to assist Governmental Entities and the Vendor/business community with compliance. The ACPL has complied with these mandates by developing and distributing Frequently Asked Questions (“FAQs”) and model language and forms 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.⁵

B. The ACPL’s Reporting Obligations Pursuant to Sections 1-t(d) and (f)(2) of the Legislative Law

Legislative Law §§1-t(d) and (f)(2) require the ACPL to periodically report on the implementation of the Law. In compliance with these mandates, the ACPL transmitted several reports to the Governor and the Legislature, all of which can be accessed on the ACPL’s website.⁶

This document sets forth the ACPL’s annual report for 2008. This report summarizes the ACPL’s continuing efforts to provide guidance to Governmental Entities and Vendors/Offerers impacted by the Law. In addition, the report also discusses outreach conducted by the ACPL in an effort to draft legislative proposals intended to clarify the Law.

² State 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.”

³ State Finance Law §139-j(1)(h) defines “Offerer” 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”.

⁴ State Finance Law §139-j(1)(f) defines “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.

⁵ <http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html>

⁶ *Ibid.*

II. ACPL Activities to Facilitate Implementation

A. 2008 Education and Outreach Efforts

The ACPL met six times in 2008; the minutes from these meetings are available on the ACPL's website.⁷ The ACPL website continues to be updated with new forms and reference materials, and in an effort to assist users, a topical index was added this year to the FAQ section of the website.⁸

Presentations for Governmental Entities and the Vendor/business community also continued to be held in 2008. In addition, in May 2008 over 1,400 people attended the annual State Purchasing Forum, where training workshops were held on procurement and the State Finance Law aspects of the Law. Presentations on the State Finance Law provisions of the Law were also provided at conferences and events organized by Governmental Entities, the Vendor/business community and other organizations.

In an effort to increase the availability of training information, selected PowerPoint presentations are available on the ACPL website.⁹

The ACPL continues to consider new ways in which to provide those subject to the Law with training and information. Currently under consideration are methods through which the Law can be explained in a real-time, easy-to-understand format. In addition, the ACPL is always looking for suggestions on ways to provide training and information to groups that would benefit from such training.

B. Coordination with the New York State Commission on Public Integrity

⁷ <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/MtgReportTable.htm>

⁸ <https://www3.ogs.state.ny.us/legal/lobbyinglawfaq/FAQIndex.pdf>

⁹ See, <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/TrainingandOpportunities.html>

Because the Law amended both the Lobbying Act and the State Finance Law, the Commission and the ACPL work together to provide guidance and outreach through the use of joint training sessions, joint meetings and communications.

III. Implementation Issues and Recommendations

A. Issues Identified as a Result of the Outreach Conducted by the ACPL

1. Discussion of the Outreach Conducted by the ACPL in Connection With Drafting Proposed Legislation for Introduction During the 2009 Legislative Session

As the ACPL finalized its 2007 Annual Report, a discussion ensued regarding whether legislative proposals should be included in the report. At the time, the ACPL determined that more experience with the Law was required before such changes could be proposed. Accordingly, the ACPL undertook a process to obtain input from the affected communities about the impact of the Law. The ACPL identified specific issues that it wished to address, and asked OGS to explore conducting outreach to Governmental Entities on the issue of clarifying the types of contracts that are exempt from the requirements of the Law.

In January 2008, OGS contacted 414 Governmental Entities, requesting input about appropriate statutory changes for the ACPL to consider, including areas where it was believed a regulatory or control system existed that negated the need for the Law's additional statutory controls. Twenty-three (23) responses were received from a variety of Governmental Entities, including State agencies, public authorities and local Governmental Entities. The ACPL analyzed and used these responses to formulate their legislative proposals. While not all of the suggestions received were appropriate for inclusion in the legislative proposal, the responses underscored the fact that implementation issues still exist regarding the Law.

2. Implementation Issues Identified Through the Outreach Conducted for the ACPL

Previous reports issued by the ACPL indicated that a number of misconceptions and implementation issues existed regarding the Law. The outreach conducted by the ACPL in 2008 suggests that these misconceptions and implementation issues continue to exist.

a. Misunderstandings Regarding the Applicability and Purpose of the Law

In the outreach conducted in 2008, the ACPL asked Governmental Entities to identify specific contracts where a system exists that negates the need for the Law's additional statutory controls. While the ACPL anticipated the responses would serve as the basis for broadening the statutory exemption to the definition of the term "Procurement Contract"¹⁰, many of the responses received merely highlighted a continued misunderstanding of the Law's applicability.

In previous reports, the ACPL stated that its outreach identified fundamental misunderstandings that existed regarding the Law's application. Those reports indicated that those subject to the Law did not believe that it applied to them because they did not "lobby," and offered suggestions for eliminating these misconceptions. The ACPL's 2008 outreach highlighted another fundamental misconception, namely, a failure to understand the purpose of the Law.

In response to the most recent outreach, when asked to identify contracts where it was believed that a system existed negating the need for the Law's additional statutory controls, respondents described a vast array of contracts. However, frequently those responses described a type of contract which involves the very type of risks that the Law seeks to avoid.

¹⁰ State Finance Law Sections 139-j(1)(g) and 139-k(1)(g) provide 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."

For example, recommendations were received asking for the exemption of large dollar contracts with powerful national organizations and contracts with entities that are chosen from pools of possible vendors created due to pre-existing relationships.¹¹ Such situations inherently create the potential for compromising the integrity of the procurement process that the Law seeks to maintain, and underscore the need for the Law. These responses emphasized the fact that Governmental Entities remain unsure about how the contracts that they enter into may give rise to the potential abuses that the Law seeks to prevent.

The misconceptions regarding the purpose and applicability of the Law that continue to exist highlight the importance of the training efforts engaged in by the ACPL. It is the ACPL's hope that those efforts and the information provided through its reports will serve to enlighten those subject to the Law.

b. Identification of Administrative Burdens Faced by Governmental Entities as They Implement the Law

The outreach conducted by the ACPL in 2008 also accentuated the administrative burdens placed on Governmental Entities as they implement the Law. A major theme of the responses was that the requirements of the Law made the procurement process more complicated, costly and confusing, and also lengthened its duration. These themes were also present in the responses received to the 2007 survey conducted by the ACPL.

These responses take on a greater significance as Governmental Entities are being asked to do more with less funding and staff. One possibility is that there is a correlation between the continued misconceptions regarding the Law's application, and the belief that the Law is imposing additional burdens on Governmental Entities. Perhaps if there was an increased understanding of

¹¹ Specifically, the ACPL received recommendations to exempt contracts for membership fees and national accreditations which may cost over \$100,000.00 annually, and to exempt contracts with arbitrators that are placed on a selection list which is developed by the unions and the State and comprised of individuals that are personally known to those developing the list.

the Law's requirements and applicability, the Governmental Entities that are subject to its requirements would view it as less of a burden. The ACPL is also hopeful that its proposed legislation will bring greater clarity to the Law, and assist those persons and entities that are subject to its requirements.

B. Legislative Recommendations of the ACPL

The legislative recommendations made by the ACPL are the product of careful deliberation by the ACPL into the issues that Governmental Entities and Vendors have presented. Three years after the Law's enactment, the same issues continue to arise. Accordingly, the ACPL intends to propose legislation in the upcoming legislative session, to address these issues.

1. Clarify the Definition of Offerer

Background:

The ACPL's previous reports addressed this issue and explained that the broad scope of the definition of the term "Offerer" has created implementation issues for Governmental Entities and the Vendor/business community. The issues discussed at that time have continued, and as time passes new situations arise which create additional confusion for these constituencies and impede their actions in the procurement process.

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.

Discussion:

As discussed in previous reports, there are various ways to interpret the definition of the term “Offerer” in the State Finance Law. A literal reading, which provides for broad coverage, allows for ease of administration, but may result in the characterization of entities and individuals as Offerers whom the Law may not have intended to categorize as such. One example of the implementation issues that may arise due to such over-inclusion is when a “good government” group Contacts a Governmental Entity about a Governmental Procurement in an exercise of its First Amendment rights. Under a literal reading of the statute, those individuals or entities could be characterized as Offerers, but that characterization raises implementation issues. For example, the standard provided in the statute is “a knowing and willful violation of the provisions of State Finance Law §139-j(3).” As discussed in previous reports, the “willful” standard creates its own problems, and is further complicated in this situation when the Governmental Entity needs to determine whether an individual or entity exercising his/her/its First Amendments rights would be capable of making a “knowing” violation of the statute. In addition, the penalty for “a knowing and willful violation of the provisions of State Finance Law §139-j(3)” is a determination of non-responsibility and a determination that the Offerer shall not be awarded the procurement contract unless extenuating circumstances exist.¹² This penalty does not serve any purpose when applied to “good government” groups, because they are not seeking an award of the contract.

Conversely, a dilution of the definition could result in a weakening of the statute and introduce additional subjective judgment to its application. This approach has the potential to increase the administrative burdens placed upon Governmental Entities implementing the statute

¹² State Finance Law §139-j(10)(b) provides that Offerers, as defined therein, shall not be awarded the procurement contract unless the governmental entity finds that the award is necessary to protect public property or public health or safety, and that the offerer is the only source capable of supplying the required article of procurement within the necessary timeframe, provided that the governmental entity shall include in the procurement record a statement describing the basis for such a finding.

because they would be required to make a determination of the individual or entity's intent when the Contact was made. This may also result in an under-inclusion of violators.

Recommendation:

The ACPL's legislative proposal clarifies that persons or entities would not be considered to be an Offerer if they, or the person or entity on whose behalf they make a Contact, is not reasonably likely to receive a direct or indirect financial or personal benefit from the governmental procurement. This revision removes "good government" groups, concerned citizens and others who are not reasonably likely to receive a direct or indirect financial or personal benefit from the governmental procurement, from the scope of the Law, and lessens the burden placed upon Governmental Entities in determining the intent of an individual or entity that Contacts a Governmental Entity regarding a Governmental Procurement. Placing the focus on the motives behind the Contact to the Governmental Entity should reduce the number of reviews and investigations undertaken by a Governmental Entity, while still serving to deter the improper influences that the Law seeks to control.

2. Clarify the Definition of Contacts

Background:

The definition of "Contacts" is another issue that has created implementation problems for Governmental Entities attempting to comply with the Law.

Statutory Provisions:

The term “Contacts” is defined in State Finance Law §§ 139-j(1)(c) and 139-k(1)(c) as any 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.

Discussion:

The breadth of this definition creates problems similar to those discussed above in the section pertaining to the definition of the term “Offerer.” Governmental Entities face challenges determining whether or not a reasonable person would infer that a communication was intended to influence the Governmental Procurement. These challenges increase the cost and complexity of procurements. The definition may also yield inconsistent results because of differing determinations about whether a communication was intended to influence the Governmental Procurement. The goal of the Law is even-handed application and consistency, so the “reasonable person” standard is problematic at best.

In addition, the focus of the current definition is misplaced. Under the current definition, the Governmental Entity needs to determine whether a reasonable person would believe that the communication was intended to influence the Governmental Procurement. In actuality, what they should be focusing on is whether a reasonable person would believe that the communication was intended to influence the Governmental Entity. The Governmental Procurement can only be influenced if someone at the Governmental Entity is influenced by the Contact.

Recommendation:

The ACPL will propose legislation to clarify the key issue of whether or not the communication was intended to influence the Governmental Entity regarding the Governmental

Procurement. The revised definition would define “Contacts” as any 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 Entity regarding the Governmental Procurement. This revision will clarify the true intent of the provision, and it should also reduce administrative burdens and lessen false reporting by Governmental Entities.

3. Clarify the Definition of Governmental Procurement

Background:

The definition of the term Governmental Procurement in the State Finance Law has created confusion among those subject to the Law because there is a discrepancy between when the requirements of the Law begin under the Lobbying Act, and when the requirements begin pursuant to the State Finance Law. The Lobbying Act has been interpreted to apply once a “Determination of Need” is made, while the Law is interpreted as applying upon the commencement of the “Restricted Period,” which has been defined more specifically.

Statutory Provisions:

State Finance Law §§ 139-j(1)(f) and 139-k(1)(f) define the term “Governmental Procurement” as (i) the preparation or terms of the specifications, bid documents, request for proposals, or evaluation criteria for a procurement contract, (ii) solicitation for a procurement contract, (iii) evaluation of a procurement contract, (iv) award, approval, denial or disapproval of a procurement contract, or (v) approval or denial of an assignment, amendment (other than amendments that are authorized or payable under the terms of the procurement contract as it was finally awarded or approved by the comptroller, as applicable), renewal or extension of a procurement contract, or any other material change in the procurement contract resulting in a financial benefit to the Offerer.

Discussion:

One of the first challenges that Governmental Entities and Vendors face when attempting to comply with the Law is determining when the Law's requirements begin to apply. As a threshold matter, an inherent discrepancy exists between the Lobbying Act and the State Finance Law because regulation under the Lobbying Act begins at the time that a Governmental Entity makes a determination of need, while under the State Finance Law it begins with the commencement of the Restricted Period. "Restricted Period" is defined as the earliest written notice, advertisement or solicitation of a request for proposals, invitations for bids, or solicitation of proposals, or any other method of soliciting a response from Offerers intending to result in a procurement contract with a Governmental Entity. Complicating matters is the fact that the Lobbying Act does not statutorily define the term "Determination of Need." Vendors and Governmental Entities are, therefore, left to determine what that term means, and then must comply with two competing timeframes.

In addition, the definition of the term Governmental Procurement in the State Finance Law creates another discrepancy because that definition could be construed as beginning at a point in time that precedes the timeframe set forth in the definition of the term Restricted Period. These discrepancies create the possibility of unintentional non-compliance with the Law on the part of both Vendors and Governmental Entities. Accordingly, clarification is required.

Recommendation:

The ACPL's legislative proposal will revise the definition of the term "Governmental Procurement" by removing the phrase "the preparation or terms of". This change will reconcile the timeframes in this definition and the definition of the term "Restricted Period," so that under

both definitions the requirements of the Law begin with the actual written notification of the solicitation. While this will not eliminate the discrepancy which exists between the State Finance Law and the Legislative Law, it will provide some much needed consistency within the State Finance Law provisions of the Law.

The ACPL also recommends that the Governor and the Legislature consider amending the Legislative Law so that it provides a commencement point which is consistent with the definition of Restricted Period in the State Finance Law.

4. Clarify the Definition of Procurement Contract

Background:

In its previous reports, the ACPL discussed amending the threshold for application of the Law to be consistent with the discretionary purchasing threshold set forth in State Finance Law §§112 and 163(6) and expanding the types of contracts exempt from the requirements of the Law.

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.”

State Finance Law §§139-j(1)(g) and 139-k(1)(g) define a “procurement contract” subject to procurement lobbying restrictions as an agreement with an “estimated annualized expenditure in excess of fifteen thousand dollars.”

Discussion:

In 2006, changes were made to increase the discretionary purchasing thresholds in State Finance Law §§112 and 163(6). These changes created an inconsistency in the State Finance Law because transactions with an estimated annualized value over \$15,000 were subject to State Finance Law §§139-j and 139-k, but were still under the discretionary purchasing threshold of \$50,000 for State agencies. In its previous reports, the ACPL recommended that technical amendments be made to State Finance Law §§112 and 163(6) in order to bring about a general consistency among the dollar values associated with applicability of the procurement lobbying restrictions and the requirements for a formal competitive solicitation and pre-audit by OSC.

Accordingly, the ACPL's legislative proposal seeks to amend the definition of the term "Procurement Contract" so that it would pertain to any contract or other agreement for an article of procurement made by a Governmental Entity involving an estimated annualized expenditure in excess of the greatest amount, as applicable for such Governmental Entity, set forth in §112(2) of the State Finance Law, §§355.16(b) and 6218(a) of the Education Law and/or §§1209.7, 1209.8, 1265-a(2), 1265-a(3) and 2879 of the Public Authorities Law.

As discussed above, the ACPL conducted outreach to Governmental Entities in order to propose legislation regarding the expansion of the exemptions contained in State Finance Law §§139-j(1)(g) and 139-k(1)(g). In addition, the ACPL previously received recommendations suggesting expansion of the categories of contracts exempted from the Law's requirements. As set forth elsewhere in this report, a number of these recommendations were determined by the ACPL to not be suitable for exemption from the requirements of the Law. However, the ACPL did recommend that emergency contracts, sole source contracts, preferred source contracts and contracts for trade show participation and organ transplant reimbursement be added to the list of

excluded contracts. The rationale for these recommendations was that, like the current exemptions in State Finance Law §§139-j(1)(g) and 139-k(1)(g), these contracts reflect transactions where there is either a public policy rationale or the existence of another regulatory or control system that negates or mitigates inappropriate influences that the Law seeks to prevent, thereby eliminating the need for additional statutory controls.

The ACPL's legislative proposal memorializes these prior recommendations by expanding the exemptions to the term "Procurement Contract" to include emergency contracts, sole source contracts, preferred source contracts and contracts for trade show participation and organ transplant reimbursement. This proposal addresses the administrative burdens that Governmental Entities referred to in their responses to the ACPL's recent outreach. The amendment should reduce the cost and duration of these procurements which already have systems in place to negate or mitigate the inappropriate influences that the Law seeks to prevent.

Recommendation:

The ACPL's legislative proposal will make the Law consistent with other statutory provisions that Governmental Entities must work within by aligning the thresholds for those statutes and eliminating the need for Governmental Entities to work within competing regulatory or control systems as they carry out their procurements. This amendment should serve to reduce Governmental Entities' administrative burdens and eliminate some confusion that exists regarding the Law.

5. Expand the Permissible Subject Matter Communication Categories

Background:

In its previous reports, the ACPL discussed the fact that the Law does not provide permissible subject matter communication categories that accurately reflect the components of the

procurement process. Specifically, the ACPL discussed and recommended that State Finance Law §139-j(3)(a)(3) be amended to expressly provide that Contacts between an Offerer and the procuring Governmental Entity for the purpose of evaluating bids fall within the Permissible Subject Matter Communication categories.

Statutory Provision:

State Finance Law §163(2)(b) provides in pertinent part, “The State’s procurement process shall be guided by the following principles: ... to be based on clearly articulated procedures which require ... a documentable process for evaluating offers”

Discussion:

The State Finance Law requires the exchange of information between the procuring Governmental Entity and Bidders in order to maintain an open and competitive procurement process that is fair to all. The Law, on the other hand, by its very terms limits this flow of information by regulating Contacts made by Offerers and their representatives to Governmental Entities during the Restricted Period. This dichotomy adds to the administrative burdens placed upon Governmental Entities during the procurement process, and is counterintuitive to the goals of the State Finance Law.

One of the specific problems discussed in the ACPL’s prior reports is how the Law’s requirements impede the evaluation process. One of the operating principles of the procurement process set forth in State Finance Law §163(2) is to protect the interests of the State and the taxpayers. This can only be achieved when a Governmental Entity is able to gain information about bidders through the evaluation process. However, it has remained unclear whether any of the permissible subject matter category exemptions set forth in State Finance Law §139-j(3)(a)(1-7) allow for such an exchange of information.

In an effort to clarify the Law, and assist procuring Governmental Entities, the ACPL is proposing legislation which would add a permissible subject matter category for oral, written or electronic communications between the procuring Governmental Entity and an Offerer who has submitted a bid or responded to a solicitation that is in response to the request of a Governmental Entity and that pertains solely to an evaluation of the Offerer's bid or response made prior to an award of a Procurement Contract. This amendment will allow Governmental Entities to obtain information from Offerers for purposes of evaluation without running afoul of the requirements of the Law. The exception is narrowly tailored so that it still serves to prevent the types of inappropriate Contacts that the Law is intended to eliminate, but at the same time, it allows Governmental Entities necessary flexibility and promotes the goals of the State Finance Law regarding procurements.

The ACPL is also proposing another clarifying amendment to expressly state that participation in demonstrations, interviews, or other means of exchanging information provided for in a solicitation are permissible subject matter category exceptions to the Law. The current exception allows for participation in a conference provided for in a solicitation, and has been interpreted by the ACPL, as noted in one of its Frequently Asked Questions, to permit demonstrations, interviews or other communication methods. Governmental Entities need to participate in these types of exchanges in order to adequately evaluate bidders and their products and services.

Recommendation:

The ACPL recommends amendment of State Finance Law §139-j(3)(a)(3) to expressly provide that communications and Contacts between an Offerer and the procuring Governmental

Entity for the purpose of evaluating the bids fall within this Permissible Subject Matter Communication category.

6. Clarify the Recording Requirements Set Forth in State Finance Law §139-k

Background:

One problem identified by Governmental Entities when they discuss implementation of the Law is uncertainty regarding the recording requirements that the Law imposes. Staff are often unsure of when they need to record a communication that rises to the level of a Contact, and then face difficulties in obtaining all of the information required by the Law.

Statutory Provision:

State Finance Law §139-k(4) provides that “Upon any Contact in the Restricted Period, the Governmental Entity shall obtain the name, address, telephone number, place of principal employment and occupation of the person or organization making the Contact and inquire and record whether the person or organization making such Contact was the Offerer or was retained, employed, or designated by or on behalf of the Offerer to appear before or Contact the Governmental Entity about the governmental procurement. All recorded Contacts shall be included in the procurement record for the procurement contract.”

Discussion:

The ACPL has dedicated itself to providing training and outreach on the Law. One of the ways in which this is accomplished is through the development of model forms, such as the Model Form for Governmental Entity Report of Contact under State Finance Law §139-k(4). This form, which is available on the ACPL website,¹³ was provided to Governmental Entities in an effort to

¹³ <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/forms/form1.rtf>

allow them to collect the information required by the Law. The form does assist in focusing data collection, but a separate form must be completed for each person or organization that Contacts the Governmental Entity about each Procurement Contract. This imposes additional administrative burdens for Governmental Entities during the procurement process. Often staff feel overwhelmed by their obligation to obtain all the required information for each individual. The burden obviously grows if the staff person is on a conference call or in a meeting with several individuals. The ACPL has attempted to address these concerns in its training, and has advised Governmental Entities that it is permissible to use a sign-in sheet that captures all of the required data elements. However, apprehension continues to exist among the Governmental Entities.

Accordingly, the ACPL proposes a legislative amendment which would impose a reasonableness standard to the reporting requirements. That would mean that the Governmental Entity would now be required to make a reasonable attempt to collect all of the required data elements set forth in the Law. This amendment would serve to eliminate some of the anxiety that Governmental Entity staff feel if they fail to obtain one of the required pieces of data. The intent of the Law is to bring all attempts to influence to light and subject to recordation and require direction to the appropriate personnel, but that goal should not be accomplished at the expense of Governmental Entity staff. Compliance with the Law will be achieved more consistently and effectively if the Law's requirements are easier to implement.

Recommendation:

The ACPL recommends that the Governor and the Legislature consider the above analysis, as well as the analysis provided in its prior reports, and determine whether the legislative amendments proposed by the ACPL are warranted.

C. Previously Identified Implementation Issues

The prior reports issued by the ACPL identified a series of issues encountered with implementation of the Law. Detailed discussions on each implementation issue can be found in the ACPL's prior reports.¹⁴ For the reader's convenience, a summary of these previously identified implementation issues is set forth below.

- Determination of the scope of the definition of the term "Offerer" and the implications of that determination on the Procurement process.
- Types of contracts exempt from the Procurement Lobbying requirements.
- Establishing uniformity in the definition of the term "Restricted Period" within the Legislative and State Finance Laws.
- What process is due under the review and investigation function required By State Finance Law §139-j(10).
- 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.
- Determination of what constitutes a Permissible Contact among agencies involved in a Procurement, such as between the procuring Governmental Entity and the control agencies.
- Difficulties encountered with the application to real property transactions.
- Clarification of the Permissible Subject Matter Communications Category that permits responsibility determinations under State Finance Law §139-j to be conducted by someone other than the Designated Contact

¹⁴ The ACPL has issued several reports to date which can be found on its website at <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/MtgReportTable.htm>

- 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).
- 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.
- Increasing the value of annualized expenditure that triggers the requirements of the 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.

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 consider these previously identified issues, except for the last two issues, which have since been resolved.