

Model Process for the Review and Investigation in accordance with State Finance Law §§139-j(8), (9), and (10)

Background:

State Finance Law §§139-j(8), (9) and (10) obligate a Governmental Entity to establish a process for the review and investigation of possible violations of State Finance Law §139-j(3) regarding permissible Contacts. In addition to referring for review and investigation an impermissible Contact regarding a procurement by a Governmental Entity, State Finance Law §139-j(8) obligates a Governmental Entity to refer allegedly impermissible Contacts about another Governmental Entity's procurement to such other entity. For example, if Vendor A Contacts Governmental Entity 1 about a Governmental Procurement of Governmental Entity 2 during the Restricted Period, then Governmental Entity 1 must refer the impermissible Contact to Governmental Entity 2 for review and investigation.

Instructions:

These model documents were developed to assist a Governmental Entity in establishing a process for the review and investigation of possible violations of State Finance Law §139-j(3) regarding permissible Contacts. State Finance Law §139-j(10)(a) requires that upon an allegation of violation of the provisions of subdivision three, if sufficient cause exists to believe that such allegation is true, the Governmental Entity give the Offerer reasonable notice that an investigation is ongoing and an opportunity to be heard in response to the allegation. The documents that follow outline a model process that is more comprehensive than the language provided by the statute. Note that the review process may vary on an agency by agency basis. For example, one agency may elect to send the allegation directly to the ethics officer, while another may direct such allegation through supervisors and/or responsible executive staff. It is recommended that a copy of the Government Entity's process for review and investigation be kept on file and available to an Offerer upon request.

The following forms can be used by staff to refer a possibly impermissible Contact for review and investigation.

Form 8, Model Form to Refer a Contact for Review and Investigation Under State Finance Law §139-j(9), can be used by staff to submit the required information about any allegedly impermissible Contact for review and investigation. Form 8 is designed for the referral of all impermissible Contacts — whether it is a procurement conducted by that entity or a different Governmental Entity.

Form 9, Model Form for Use by a Non-procuring Governmental Entity to Refer a Contact for Review and Investigation by the Procuring Governmental Entity under State Finance Law §139-j(9), can be used by the responsible official at a non-procuring Governmental Entity to advise the responsible official at the Procuring Governmental Entity of an allegation of an impermissible Contact.

Process:

State Finance Law §139-j(8) states that any member, officer or employee of a Governmental Entity who becomes aware that an Offerer has violated the provisions of State Finance Law §139-j(3) shall immediately notify the ethics officer, inspector general, if any, or other official of the procuring Governmental Entity responsible for reviewing and investigating the matter. Please see [**reference to the Governmental Entity's internal document(s) setting forth its policy on permissible contacts**] for detailed information regarding permissible and impermissible Contacts under State Finance Law §139-j(3). The [**reference to the person(s) responsible for the review and investigation**] is responsible for the review and investigation of possible

violations of State Finance Law §139-j(3). The [reference to responsible person(s)] can be reached at [with specific information about how to reach]. If an officer or employee has reason to believe that an Offerer possibly made an impermissible Contact, such officer or employee shall refer the matter to the [reference responsible person(s)], providing specific information to facilitate the review. Form 8, *Model Form to Refer a Contact for Review and Investigation under State Finance Law §139-j(9)*, may be used to submit such information. The material submitted for review and investigation shall include, but not be limited to, the Record of Contact and other information relevant to the procurement. In accordance with the law, such referral shall be made immediately after the member, officer or employee becomes aware of the violation.

Preliminary Review:

Upon receipt, the [reference responsible person(s)] shall commence an internal review of the allegations regarding the possibly impermissible Contact to determine if sufficient cause exists to believe the allegation is true. Such internal review shall be commenced immediately. It is anticipated that such internal review will generally be commenced within two (2) business days of receipt. Such internal review may consist of, but not be limited to, an examination of the procurement, interviews with the officer or employee, and review of submitted information. This stage shall be referred to as the “Preliminary Review.” The focus during the Preliminary Review is whether there is sufficient cause to believe that an impermissible Contact occurred. Such Preliminary Review shall be diligently pursued until completed.

If as a result of the Preliminary Review, the [reference responsible person(s)] determines that sufficient cause does not exist to believe that such allegation is true, he or she shall so advise the officer or employee and close the matter. A writing shall be prepared to set forth the conclusion that sufficient cause did not exist to believe the allegation was true. Such writing does not have to be part of the procurement record and shall be maintained as part of the reviewer’s files.

If as a result of the Preliminary Review, the [reference responsible person(s)] determines that sufficient cause does exist to believe that such allegation is true, then he or she shall provide the Offerer with written notification regarding the possible impermissible Contact. This stage shall be referred to as the “Investigation.”

Investigation:

The written notification regarding the possibly impermissible Contact provided to the Offerer by the [reference responsible person(s)] shall include the following information:

1. [Insert name of Governmental Entity] has undertaken a preliminary review and has determined there is sufficient cause to believe that the allegation regarding an impermissible Contact is true and that an investigation has been commenced in accordance with State Finance Law §139-j(3);
2. The nature and details about the alleged impermissible Contact;
3. If a determination is made that the impermissible Contact was knowing and willful, State Finance Law requires a determination that the Offerer is non-responsible and such Offerer and its subsidiaries, and any related or successor entity with substantially similar functions, management, board of directors, officers and shareholders shall not be awarded the contract (absent a specific statutory finding of need);
4. If a determination of non-responsibility is made under State Finance Law §139-j, then the Offerer will be placed on a public listing of non-responsible Offerers for four years from the date of the determination;
5. While on the public listing of non-responsible Offerers, the Offerer may continue to submit

proposals and be eligible for contract awards by any Governmental Entity;

6. If there is a second determination of non-responsibility under State Finance Law §139-j within a four-year period, then the Offerer will be debarred, and ineligible to submit proposals or be awarded a Procurement Contract for a four-year period from the date of the second such determination by any Governmental Entity as such term is defined under State Finance Law §139-j(1)(a). Further, the Offerer will be placed on a public listing of debarred Offerers;

7. In accordance with State Finance Law §139-j(10)(a), the Offerer is provided with an opportunity to be heard in regard to this allegation. The Offerer should be advised if the Governmental Entity will have an attorney in attendance and that the Offerer is invited, but not required, to bring an attorney to the meeting. With the approval of the Governmental Entity, the Offerer may elect, however, to submit documents rather than appear in person to respond to the allegations. (It is optional whether the meeting is set up in the letter.)

8. A date certain for responding to the allegations. The Offerer should be advised that the failure to respond to the letter may be deemed a failure to cooperate. State Finance Law §139-j(10)(b) provides that the Governmental Entity shall not award a contract to an Offerer that fails to timely disclose accurate and complete information or cooperate in administering this provision (absent a specific statutory finding of need).

The exact scope and nature of the needed investigation depends upon the nature of the allegation. The focus of the investigation is multi-fold: first, there must be an investigation and a determination that the impermissible Contact occurred; second, there must be an investigation and determination that the impermissible Contact was made by an Offerer (Note: definition of Offerer is broad and includes the Offerer and also those employees, agents, consultants or other persons acting on the Offerer's behalf, regardless of whether the individual has a financial interest in the outcome of the Governmental Procurement); and third, there must be an investigation and a determination that the Offerer knowingly and willfully violated the provisions of State Finance Law §139-j(3).

Results of the Investigation:

A. If as a result of the Investigation, the [reference responsible person(s)] determines that:

1. no impermissible Contact occurred; or
2. the impermissible Contact was not by the Offerer; or
3. the Offerer's impermissible Contact was not knowing and willful

then the [reference responsible person(s)] shall advise the appropriate staff that the allegation should not form the basis for a finding of non-responsibility under State Finance Law §§139-j or 139-k. A writing shall be prepared to set forth the results of the investigation. Such writing does not have to be part of the procurement record and shall be maintained as part of the reviewer's files. A written determination shall be sent to the Offerer, setting forth the basis for the determination.

B. If as the result of the Investigation, the [reference responsible person(s)] determines that:

1. the Offerer failed to timely disclose accurate and complete information; or
2. the Offerer failed to cooperate with the Governmental Entity in the administration of this provision

then the [reference responsible person(s)] shall advise the appropriate staff that the failure to timely disclose accurate information or cooperate shall be considered by the Governmental Entity in its responsibility determination. A writing shall be prepared to set forth the results of the investigation. Such

writing shall be part of the procurement record and shall be maintained as part of the reviewer's files. A written determination shall be sent to the Offerer, setting forth the basis for the determination and that no award is allowed to the Offerer unless the Governmental Entity can satisfy the statutory requirements for awarding the contract to the Offerer.

C. If as a result of the investigation, the **[reference responsible person(s)]** determines that:

1. an impermissible Contact occurred; and
2. the impermissible Contact was by the Offerer; and
3. the Offerer's impermissible Contact was knowing and willful

then the **[reference responsible person(s)]** shall advise the appropriate staff that there has been a finding that the Offerer knowingly and willfully violated State Finance Law §139-j(3) and in accordance with the law, there must be a determination that the Offerer is non-responsible and cannot be awarded the contract, unless the Governmental Entity can satisfy the statutory requirements for awarding the contract to the Offerer. A writing shall be prepared to set forth the results of the investigation. Such writing shall be part of the procurement record and shall be maintained as part of the reviewer's files. A written determination shall be sent to the Offerer, setting forth the basis for the determination.

Allegations of an Impermissible Contact regarding another Governmental Entity's Procurement

If the allegation of impermissible Contact referred by staff for review and investigation involves another Governmental Entity's governmental procurement (referred to as "Procuring Governmental Entity"), the **[reference responsible person(s)]** shall immediately forward such information to the appropriate individual at the Procuring Governmental Entity for review and investigation at the Procuring Governmental Entity. The referring Governmental Entity should provide appropriate assistance to the Procuring Governmental Entity. Form 9, *Model Form for Use by a Non-procuring Governmental Entity to Refer a Contact for Review and Investigation by the Procuring Governmental Entity under State Finance Law §139-j(9)*, can be used to refer an allegation of an impermissible Contact to the Procuring Governmental Entity.