



**Department of
Civil Service**

Albany, NY 12239

ADMINISTRATION SERVICES DIVISION

OFFICE OF COUNSEL

Procurement Lobbying Policy: Restrictions on
Contacts during the Procurement Process

ADM-982.1 (7/2019)

**Policy on Restrictions on Contacts During the Procurement Process
Procurement Lobbying, Ch.4, L. 2010 State Finance Law (SFL)
Sections 139-j and 139-k**

State Finance Law sections 139-j and 139-k enacted the Procurement Lobbying Law (Law), which regulates attempts to influence state and local procurement contracts in order to increase transparency and accountability in the public procurement process. Primarily, the Law regulates two related aspects of procurements: (i) activities by the business and lobbying community seeking procurement contracts (through amendments to the Legislative Law); and (ii) activities involving governmental entities establishing procurement contracts (through amendments to the State Finance Law).

In general, the Law requires the Department of Civil Service (DCS or Department) to collect and record certain information pertaining to those who contact it in an attempt to influence a governmental procurement and restricts the time frame and manner in which the business community and others may contact DCS with regard to attempting to influence a governmental procurement. DCS must collect, record, report (if applicable), and maintain specific information about contacts made during the restricted period. Under the Law, the business community and others are obligated to make only permissible contacts during the restricted period and may only contact those who are designated by DCS regarding a governmental procurement.

The Law places a series of obligations on DCS during the procurement process. In addition to setting up the formal rules for the exchange of information, DCS must include the following as part of the solicitation: Offeror affirmation of understanding, certification and termination right, question about prior non-responsibility determination and a summary of the Law.

This document sets forth DCS's policy implementing the Law. Please contact Counsel's Office with any questions you may have regarding this Law or policy. Additional information is available from the Advisory Council on Procurement Lobbying, available at <https://www.ogs.ny.gov/ACPL/>.

Restricted Period and Designated Contacts:

For each governmental procurement, DCS shall simultaneously impose a restricted period and designate a person or person(s) who are knowledgeable about the procurement and who may be contacted by Offerors relating to the governmental procurement (Designated Contacts). Each Offeror who contacts DCS during a procurement's restricted period is permitted to make permissible contacts only to the DCS Designated Contacts.

Offeror Affirmation of Understanding and Agreement to Comply:

As a threshold requirement to participating in a procurement, DCS shall require each Offeror to provide written affirmation of its understanding of an agreement to comply with the DCS' policy and procedures relating to permissible contacts during the governmental procurement's restricted period. Such a written affirmation by an Offeror shall be deemed to apply to any amendments to a procurement submitted by DCS after an initial affirmation is received with an initial bid.

Contact Documentation:

Upon any contact during the procurement's restricted period, DCS staff shall obtain identifying information about the person or organization making the contact. All contacts shall be recorded on the appropriate form(s) and included in the procurement record.

Non-responsibility Disclosure and Determination:

DCS staff shall ensure that each solicitation requires an Offeror to disclose findings of non-responsibility made within the previous four years by any governmental entity, where such prior finding of non-responsibility was due to:

- a) a violation of the procurement lobbying requirements established at SFL section 139-j; or
- b) the intentional provision of false or incomplete information to a government entity.

An Offeror's failure to timely disclose accurate or complete information to DCS regarding the above shall be considered as part of the responsibility determination. No procurement contract shall be awarded to any such Offeror, unless DCS finds that such award is necessary to protect public property or public health or safety, and that the entity is the only source capable of supplying the required article of procurement within the necessary timeframe. Such finding must be included in the procurement record.

Contractor Certification and Termination Clause:

Each solicitation shall require a certification by an Offeror that all information provided to the DCS with respect to the procurement lobbying requirements established by those sections is complete, true and accurate.

Each contract shall authorize DCS to terminate such contract in the event such certification is found to be intentionally false or intentionally incomplete. The DCS shall include in the procurement record a statement describing the basis for such

termination. (Note: As of January 2014, Appendix A contains the termination clause.)

Impermissible Contacts:

Any employee of DCS who becomes aware that an Offeror has made an impermissible contact(s) during the procurement shall immediately notify the DCS Ethics Officer or the DCS Director of Internal Audit. An impermissible contact includes an Offeror's contact with the Department regarding a procurement conducted by another governmental entity. If an Offeror violates these requirements with regard to permissible contacts at a governmental entity other than the DCS, the employee of that entity who becomes aware of the violation shall notify that entity's Ethics Officer, Inspector General, if any, or other official of that entity responsible for reviewing or investigating such matters, who shall in turn notify the DCS Ethics Officer or the DCS Director of Internal Audit.

DCS Review of Alleged Violations and the Imposition of Sanctions:

- a) If the DCS Ethics Officer or the DCS Director of Internal Audit receives notification of an allegation that an Offeror has made an impermissible contact during the procurement's restricted period, the DCS Director of Internal Audit shall immediately investigate such allegation. If the position of Director of Internal Audit is vacant, the Ethics Officer shall conduct the investigation, or the Commissioner may appoint a designee to investigate the allegation. In no event shall the person conducting the investigation be someone who has participated in the preparation of the solicitation document, the evaluation of proposals, or the selection decision.
- b) If the investigation indicates that sufficient cause exists to believe that the allegation is true, DCS shall give the Offeror reasonable notice that an investigation is ongoing and the availability of an opportunity to be heard in response to the allegation. At DCS' discretion, such opportunity to be heard may be provided by giving the Offeror the opportunity to meet with the DCS staff conducting the investigation or by the Offeror's submission of a written statement, or both. The Offeror may, but need not, be represented by counsel during the investigation. Any and all issues concerning the manner in which the investigation process is conducted shall be determined solely by the DCS staff conducting the investigation.
- c) If it is found that an Offeror has knowingly and willfully made an impermissible contact in violation of these requirements, then the DCS staff making such findings shall report to the head of DCS who shall issue the determination.

Sanctions:

- a) A finding that an Offeror has knowingly and willfully made an impermissible contact shall result in a determination of non-responsibility for such Offeror. Concomitantly, such Offeror and its subsidiaries, and any related or successor entity with substantially similar function, management, board of directors, officers and shareholders, shall not be awarded the procurement contract, unless the DCS finds that the award of the procurement contract to that entity is necessary to protect public property or public health or safety, and that the entity is the only source capable of supplying the required article of procurement within the necessary timeframe. In such case, the DCS shall include in the procurement record a statement describing the basis for such a finding.
- b) Any subsequent determination of an Offeror's non-responsibility due to violation of these requirements within four years of a prior determination of non-responsibility due to a violation of these requirements shall result in the Offeror being rendered ineligible to submit a proposal on or be awarded any procurement contract for a period of four years from the date of the second non-responsibility determination.
- c) All such findings shall be reported by Counsel's Office to the Office of General Services.

Model Language for Solicitation Documents

DCS staff shall ensure that this model language is included in all solicitation documents, subject to final review by the Office of Counsel.

Restrictions on Contacts Between Offerors and State Staff During the Procurement Process

- a) Pursuant to State Finance Law sections 139-j and 139-k, this procurement includes and imposes certain restrictions on communications between DCS and an Offeror during the procurement process. An Offeror is restricted from making contacts from the earliest posting, on DCS's website, in a newspaper of general circulation, or in the procurement opportunities newsletter in accordance with article four-C of the economic development law, of written notice, advertisement or solicitation of a request for proposal, invitation for bids, or solicitation of proposals, or any other method provided for by law or regulation for soliciting a response from Offerors intending to result in a contract with DCS through final award and approval of the contract by DCS and, if applicable, the Office of the State Comptroller ("Restricted Period") to other than the DCS Designated Contacts (unless it is a Contact that is included among certain statutory exceptions set forth in State Finance Law §139-j(3)(a)). The DCS Designated Contacts for this procurement are set forth in section (b) below and on the first page of the Introductory section of

this solicitation. Staff is required to obtain certain information from an Offeror whenever contacted about the procurement during the restricted period and is required to make a determination of the Offeror's responsibility that addresses the Offeror's compliance with the statutory requirements. Certain findings of non-responsibility can result in rejection for contract award and in the event of two findings within a 4-year period, the Offeror is debarred from obtaining governmental Procurement Contracts.

The DCS' policy and procedures can be found at: <https://www.cs.ny.gov/extdocs/pdf/ADM-982.1.pdf>. Further information about these requirements can be found at: <https://www.ogs.ny.gov/ACPL/>.

- b) DCS strictly controls communications between any Offeror and participants in the procurement process. "Offeror" means the individual or entity, or any employee, agent or consultant or person acting on behalf of such individual or entity, that contacts DCS about a governmental procurement during the restricted period of such governmental procurement whether or not the caller has a financial interest in the outcome of the procurement; provided, however, that a governmental agency or its employees that communicate with DCS regarding a governmental procurement in the exercise of its oversight duties shall not be considered an offeror. "Offeror" includes prospective Offerors prior to the due date for the submission of offers/bids in response to the solicitation document. All contacts and inquiries concerning this procurement must be made to a Designated Contact:

(Name of Designated Contacts)
(Name of Division)
NYS Department of Civil Service
Agency Building 1 Albany, NY 12239
Telephone: xxx-xxx-xxxx
Fax: xxx-xxx-xxxx
E-mail: (special email address for procurement)