



**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**

**I. Definitions**

For the purpose of this policy, the following definitions apply:

"Article of procurement" means a commodity, service, technology, public work, construction, revenue contract, the purchase, sale or lease of real property or an acquisition or granting of other interest in real property, that is the subject of a DCS governmental procurement.

"Contacts" means any oral, written, or electronic communication with DCS or any other State governmental entity under circumstances where a reasonable person would infer that the communication was intended to influence the governmental entity's conduct or decision regarding the governmental procurement. However, any communications received by DCS from members of the State legislature or legislative staff, when acting in his or her official capacity, shall not be considered to be a "contact" and shall not be recorded by DCS staff pursuant to this policy.

"Procurement Contract" means any contract or other agreement, including 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), for an article of procurement involving an estimated annualized expenditure in excess of \$15,000. Grants, contracts entered into under SFL Article 11-B, and intergovernmental agreements shall not be deemed "procurement contracts" for the purpose of this policy.

"Governmental entity" means: (1) any department, board, bureau, commission, division, office, council, committee or officer of the state, whether permanent or temporary, including DCS; (2) each house of the state legislature; (3) the unified court system; (4) any public authority, public benefit corporation or commission created by or existing pursuant to the public authorities law; (5) any public authority or public benefit corporation, at least one of whose members is appointed by the governor or who serves as a member by virtue of holding a civil office of the state; (6) a municipal agency, as that term is defined in paragraph (ii) of subdivision (s) of section one-c of the legislative law; (7) a subsidiary or affiliate of such a public authority.

“Offeror” means any individual or entity, or any employee, agent, consultant, or person acting on behalf of such individual or entity, who contacts DCS or any other State governmental entity about a governmental procurement during that procurement’s 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 communicates with the procuring agency 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.

“Proposal” means any bid, quotation, offer or response to a DCS solicitation of submissions relating to procurement.

“Governmental procurement” means:

- a) the public announcement, public notice, or public communication to any potential vendor of a determination of need for a procurement, which shall include, but not be limited to, the public notification of the specifications, , bid documents, request for proposals or evaluation criteria for a procurement contract;
- b) the solicitation for a procurement contract;
- c) the evaluation of a procurement contract;
- d) the award, approval, denial, or disapproval of a procurement contract; or
- e) the approval or denial of an assignment, amendment (other than amendments that are authorized and payable under the terms of the procurement contract as it was finally awarded or approved by the State 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 Offeror/Contractor.

“Restricted period” means the period of time commencing with the earliest written notice, advertisement or solicitation of a request for proposal, or invitation for bids, or solicitation of proposals, or any other method for soliciting a response from Offerors intending to result in a procurement contract with DCS, and ending with the final contract award and approval of DCS and, where applicable, the State Comptroller.

“Revenue contract” means any written agreement between DCS and an Offeror whereby DCS gives or grants a concession or a franchise.

## II. Designated Contacts

For each governmental procurement, DCS shall at the same time that a restricted period is imposed, designate, with regard to each governmental procurement, a person or person(s) who are knowledgeable about the procurement and who may be contacted by Offerors relating to the governmental procurement. Each Offeror who contacts the DCS during a procurement's restricted period is permitted to make permissible contacts only the person(s) designated by the DCS for that purpose (i.e., Designated Contact). Such contacts must comply with the requirements established by SFL sections 139-j and 139-k, and with the requirements set forth by DCS in the solicitation document.

### **III. 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 and 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.

### **IV. Contact Documentation**

Upon any contact during the procurement's restricted period, DCS staff shall obtain the name, address, telephone number, place of principal employment, and occupation of the person or organization making the contact, and also shall inquire whether the person or organization making the contact was the Offeror or was retained, employed, or designated by or on behalf of the Offeror to appear before or contact the DCS about the procurement. All recorded contacts shall be recorded on the appropriate form(s) and included in the procurement record.

### **V. Non-responsibility Disclosure**

DCS staff shall ensure that all solicitation documents require Offerors to disclose findings of non-responsibility made within the previous four years by any State 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.

### **VI. Non-responsibility Determination**

The failure of an Offeror to timely disclose accurate or complete information to the DCS regarding the above shall be considered by DCS in its determination of the Offeror's responsibility. No procurement contract shall be awarded to any such

Offeror, its subsidiaries, and any related or successor entity with substantially similar function, management, board of directors, officers and shareholders unless the DCS finds that the award of the 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, provided however, that the DCS shall include in the procurement record a statement describing the basis for such finding.

## **VII. Contractor Certification**

A contract award subject to SFL sections 139-j and 139-k shall contain a certification by the successful 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 contain a provision authorizing the 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.

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. 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.

## **VIII. 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 as described above, 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, the DCS shall give the Offeror reasonable notice that an investigation is ongoing and an opportunity to be heard in response to the allegation. At the 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 President of the Civil Service Commission related instances, if any, of any DCS employee's violation of Public Officers Law sections 73(5) and 74.

## **IX. 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. If such in the 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.

## **X. Model Language For Solicitation Documents**

DCS staff shall ensure that the model language set forth below is included in all solicitation documents issued by DCS, 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 imposes certain procurement lobbying limitations. Offerors are restricted from making contacts during the procurement's "Restricted Period" to other than designated staff of the DCS and the Executive Branch of New York State government, unless the contact falls within certain statutory exceptions ("permissible contacts"). Staff is required to obtain certain information from Offerors and others whenever there is a contact about the procurement during the Restricted Period, and are required to make a determination of the Offeror's responsibility that addresses the Offeror's compliance with the statutes'

requirements. Findings of non-responsibility result in rejection for contract award, and if an Offeror is subject to two non-responsibility findings within four years the Offeror also will be determined ineligible to submit a proposal on or be awarded a contract for four years from the date of the second non-responsibility finding. The DCS' policy and procedures are attached as Exhibit (TBD) to this solicitation instrument. Further information about these requirements can be found at:

<http://www.ogs.ny.gov/aboutOGS/regulations/defaultAdvisoryCouncil.html>

- b) In order to ensure public confidence and integrity in the procurement process, DCS will control strictly all communications between any Offeror and participants in the evaluation process from the earliest notice of intent to solicit offers in this procurement through the final award and approval of the procurement contract by DCS and OSC, if applicable. "Offeror" means any individual or entity, or any employee, agent, consultant, or person acting on behalf of such individual or entity, who contacts DCS or any other State governmental entity about a governmental procurement during that procurement's restricted period whether or not the caller has a financial interest in the outcome of the governmental procurement; provided, however, that a governmental agency or its employees that communicates 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 the Procurement Manager. DCS shall disqualify any Offeror who fails to comply with this requirement.

(Name of Procurement Manager)

(Name of Division)

NYS Department of Civil Service  
80 South Swan Street, A.E.S.O.B.

Albany, NY 12239

Telephone: xxx-xxx-xxxx

Fax: xxx-xxx-xxxx

E-mail: (special email address for procurement)

Additionally, any Offeror is strictly prohibited from making any contacts or inquiries concerning the procurement with any member, officer or employee of any governmental entity other than the DCS from the date the public announcement, public notice, or public communication to any potential vendor of a determination of need for a procurement, which shall include, but not be limited to, the date the solicitation instrument is released until the end of the procurement, subject only to the specific exceptions listed below. Further, any Offeror shall not attempt to influence the procurement in any manner that would result in a violation or an attempted violation of Public Officers Law sections 73(5) or 74.

- c) The following contacts are exempted from the provisions of paragraph 3 of section 139-j and as such do not need to be directed to the Procurement Manager pursuant to section 139-k:
- (1) the submission of written proposals in response to the solicitation document;
  - (2) the submission of written questions by a method set forth in the solicitation document when all written questions and responses are to be distributed to all Offerors who have expressed an interest in the procurement;
  - (3) participation in a demonstration, conference or other means for exchange of information in a setting open to all potential bidders provided for in the solicitation document;
  - (4) complaints by an Offeror regarding the failure of the DCS Procurement Manager to respond to an Offeror's authorized contacts, when such complaints are made in writing to the DCS' Office of the General Counsel, provided that any such written complaints shall become a part of the procurement record;
  - (5) communications by a successful Offeror(s) who has been tentatively awarded a contract and is engaged in communications with DCS solely for the purpose of negotiating the terms of the contract after having been notified of tentative award;
  - (6) contact by an Offeror to request the review of a procurement award when done in accordance with the procedure specified in the solicitation document;
  - (7)
    - A. contacts by an Offeror in protests, appeals or other review proceedings (including the apparent successful Offeror and its representatives) before DCS seeking a final administrative determination, or in a subsequent judicial proceeding; or
    - B. complaints of alleged improper conduct in the procurement when such complaints are made to the State Attorney General, Inspector General, District Attorney, or to a court of competent jurisdiction; or
    - C. protests, appeals or complaints to the State Comptroller's office during the process of contract approval, where the State Comptroller's approval is required provided that the state comptroller shall make a record of such communications and any response thereto which shall be entered into the procurement record pursuant to State Finance Law section 163; or
    - D. complaints of alleged improper conduct in a governmental procurement conducted by a municipal agency or local legislative body to the state comptroller's office; and

- (8) communications between Offerors and governmental entities that solely address the determination of responsibility by a governmental entity of an Offeror.