



ITS PROCUREMENT LOBBYING GUIDELINES FOR VENDORS

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INTRODUCTION

This document establishes The New York State Office of Information Technology Services (ITS) Procurement Lobbying Guidelines (Guidelines) for Vendors in accordance with the NYS Procurement Lobbying Law (“Law”), which became effective on January 1st, 2006.

The *Guidelines* published herein, and any amendments thereto, are required to be posted on the ITS public website. Vendors submitting proposals to ITS for covered governmental procurements, as defined in the Law, are required to certify their understanding of and intent to comply with these Guidelines for each covered procurement.

ASSISTANCE

For additional information concerning the Law, vendors should consult the website of the Advisory Council on Procurement Lobbying at the link below or contact their own legal counsel.

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

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NYS Office of the Office of Information Technology Services
Procurement Lobbying Guidelines for Vendors

I. INTRODUCTION

Effective January 1, 2006, all vendors and persons acting on their behalf (also referred to herein as vendors who communicate with the NYS Office of the New York State Office of Information Technology Services(ITS) with respect to certain procurements are subject to the requirements and restrictions set forth in Chapter 1 of the Laws of 2005, as amended, also known as the Procurement Lobbying Act (the Act). ITS policy requires full compliance with the Act by vendors and ITS employees and ITS consultants.

Please note that for purposes of the restrictions on communications contained in sections 139-j and 139-k of the State Finance Law, "commission salespersons" as defined in section 1-c(u) of the Legislative Law are not exempt from the lobbying restrictions.

Pursuant to State Finance Law §139-j(6), this document will be incorporated in ITS solicitations of proposals or bid documents or specifications for all ITS procurement contracts. Vendors will be required to affirm as to their understanding of, and agreement to comply with, the policy, guidelines and procedures specified in these *Guidelines*.

II. DEFINITIONS

- **Article of Procurement.** 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 ITS governmental procurement.
- **Contacts.** Any oral, written or electronic communication with ITS under circumstances where a reasonable person would infer that the communication was intended to influence the ITS governmental procurement.
- **Designated Agency Contact (DAC).** The person or persons designated by ITS pursuant to State Finance Law §139-j(2)(a) to receive attempts to influence from vendors relative to a ITS governmental procurement during the restricted period of such ITS governmental procurement. The DAC contact information is posted at the ITS website (<http://www.cio.ny.gov/Contracts/ProcRestrctPer.htm>).
- **Governmental Entity.** All New York State agencies and authorities, both houses of the Legislature, the Unified Court System, certain municipal agencies and their respective employees.
- **Governmental Procurement** shall mean: (i) the preparation or terms of the specifications, bid documents, requests 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 and payable under the terms of the procurement contract as it was finally awarded or approved by the Comptroller,

as applicable), renewal or extension of procurement contract, or any other material change in the procurement contract resulting in a financial benefit to the vendor.

- **Vendor.** The individual or entity, or any employee, agent or consultant or person acting on behalf of such individual or entity, that attempts to influence ITS about a ITS governmental procurement during the restricted period of such procurement. *Vendor* also includes individuals who are “commission salespersons” as defined in §1-c(u) of the Legislative Law.
- **Procurement Contract.** Any contract or other agreement for an Article of Procurement involving an estimated annualized expenditure in excess of \$15,000. Grants, Article Eleven-B State Finance Law Contracts, program contracts between not-for-profit organizations, as defined in Article Eleven-B of the State Finance Law, and the Unified Court System, Intergovernmental Agreements, Railroad and Utility Force Accounts, Utility Relocation Project Agreements or Orders of Eminent Domain Transactions shall not be deemed Procurement Contracts in these Guidelines.
- **Proposal.** Any bid, quotation, offer or response to a ITS solicitation of submissions relating to a procurement.
- **Restricted Period.** 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 vendors intending to result in a procurement contract with ITS and ending with the final contract award and approval by ITS and, where applicable, the state comptroller.
- **Solicitation Contact (SC).** The ITS Solicitation Contact (SC) is a ITS employee, other than the Designated Agency Contact (DC), who is identified in the solicitation document. The Solicitation Contact is responsible for receiving those communications which are referenced in Part IV below. The name and contact information of the SC is posted at the ITS website (<http://www.cio.ny.gov/Contracts/ProcRestrctPer.htm>).

III. ITS RESTRICTED PERIODS AND DESIGNATED AGENCY CONTACT

For each ITS governmental procurement subject to the Law, ITS will establish a specific Restricted Period during which attempts to influence the procurement may only be made to a ITS Designated Agency Contact. Allowable communications may continue with the agency Solicitation Contact, only as set forth below.

Notice of open Restricted Periods for ITS governmental procurements and ITS Designated Agency Contact(s) will be posted on the ITS public website: (<http://www.cio.ny.gov/Contracts/ProcRestrctPer.htm>) and in the New York State Contract Reporter, as applicable.

ITS employees and ITS consultants are also notified of applicable Restricted Periods, ITS Designated Agency Contact(s) and ITS Solicitation Contact (SC) information on the ITS public website.

IV. ALLOWABLE VENDOR COMMUNICATIONS

The new Law does not prohibit all communications between ITS employees and/or ITS consultants and vendors. It only prohibits attempts to influence a covered procurement during a restricted period by contacting any person other than the ITS Designated Agency Contact (DAC).

Unless otherwise noted below, the following communications are allowed between vendors and ITS employees and ITS consultants, and do not have to be recorded or reported:

1. Communications Unaffected by the Procurement Lobbying Law

Other than communications regarding covered procurements during a restricted period, ITS employees and ITS consultants (ITS employees/consultants) may continue business communications previously allowed under existing law. The following communications are allowed at any time and are not subject to the new lobbying restrictions:

- a. Communications among ITS employees/consultants, or among ITS employees/ consultants and other state agencies' employees during the normal conduct of their duties, e.g., calls between state employees carrying out their normal job duties, even if the call pertains to a covered procurement during a restricted period;
- b. Communications between contractors and ITS employees/consultants concerning ongoing contract administration of an existing NYS contract, e.g., project management meetings, billing inquiries, performance issues, dispute resolution. (Note: If ITS has established and posted a restricted period due to the negotiation of an assignment, amendment (other than amendments authorized and payable under the terms of the existing contract), or renewal or extension of the existing contract, communications relating to such negotiations (as opposed to contract administration) will be subject to the Procurement Lobbying Law);
- c. Communications between ITS employees/consultants and the commercial marketplace in the course of doing preliminary market or technical research, (e.g., market canvas, Requests for Information, product demonstrations, and business needs analysis) prior to the first public advertisement, or solicitation of a specific proposal or response from one or more vendors, whichever is earlier; and
- d. Communications between vendors and ITS employees/consultants in the course of general marketing outreach, e.g.:
 - Vendor sends unsolicited advertising materials to ITS.
 - Vendor seeks meeting to introduce new salesperson.
 - Vendor meeting to conduct a demonstration of a new product where the vendor describes the product and advocates its use in a general call not in conjunction with a specific procurement

2. Permitted Vendor Contacts During A Restricted Period

ITS-initiated communications with a vendor about a covered procurement during a restricted period are permitted. For example, ITS may initiate communications with an

offerer to seek clarifications or elicit further information concerning the contents of an offerer's proposal. ITS may initiate communications with an offerer once the award of the contract has been made for the purposes of finalizing the terms of the contract or state approvals.

However, it is ITS policy that these communications will be initiated by the authorized ITS Solicitation Contact (SC).

Even when a covered procurement is subject to a restricted period, certain vendor-initiated communications with ITS employees about the covered procurement are permitted and are not required to be recorded or reported by ITS employees and ITS consultants unless otherwise noted (*) below:

- a. **Standard procurement communications** from the vendor to the designated ITS Solicitation Contact(s)(SC(s) identified in the public notice or bid document. Standard procurement communications must be documented in the official ITS Procurement Record only where noted below.

“Standard procurement communications” are defined as:

- i. *Factual Inquiries* which are not intended to influence the covered procurement;
 - “May I have a copy of the bid?”
 - “Could I have directions to the pre-bid conference?”
 - “Are you going to publish any additional amendments to the specifications?”
- ii. *Submission of written proposals* in response to a ITS bid solicitation or other request for a response from vendors intending to result in a procurement contract;
- iii. *Submission of *written questions about a covered procurement *provided that the question is submitted in writing to the ITS SC, and all written questions and responses are disseminated to all vendors who have expressed an interest in the procurement;*
- iv. *Participation in a conference* provided for in the ITS bid solicitation, including but not limited to: pre-bid conferences; site visits; product demonstrations; executive interviews; and other like events;
- v. *Negotiating the terms of the procurement contract* after being notified of tentative award;
- vi. *Communications between a vendor and the ITS SC to request a review of the proposed award;*
- vii. *Communications by vendors in protests, appeals or other review proceedings* before ITS seeking a final administrative determination, or in a subsequent judicial proceeding.

The above types of vendor-initiated communications must be directed solely to the ITS Solicitation Contact (SC) named in the procurement document.

- b. **Communications intending to influence a covered procurement during a restricted period which are made to the ITS Designated Agency Contact (DAC)** provided that the communication is recorded by the DAC and included in the ITS Procurement Record;

- c. **Complaints made in writing by a vendor to the ITS Counsel regarding the failure of the ITS DAC to respond in a timely manner to authorized vendor contacts**, provided that the communication is recorded in the ITS Procurement Record;
 - d. **Complaints to third parties of improper conduct** involving a ITS covered procurement. The communication may involve vendor contacts:
 - i. To the attorney general, inspector general, district attorney or other court of competent jurisdiction;
 - ii. Written protests, appeals or complaints to the State Comptroller's Office during the process of contract approval, where the State Comptroller's approval is required by Law, and where such communications and any responses are made in writing and entered in the procurement record pursuant to section one hundred sixty-three of the state finance law
3. **Legislative Communications** between the vendor and members of the Legislature or their staffs concerning any ITS covered procurement:
- a. Vendor communications with members of the Legislature and/or their staff regarding governmental procurements other than those conducted by the Legislature.
 - b. Communications from members of the Legislature or their staff to the letting agency during the conduct of a governmental procurement are not subject to a recording requirement and should not be recorded.

V. REQUIRED VENDOR FORMS AND DOCUMENTATION

For ITS governmental procurements subject to the Law, the Vendor is required to provide the Procurement Lobbying Law Certifications listed in Attachment A, and the contract with the Vendor must contain the termination language listed in Attachment B.

VI. POTENTIAL VIOLATIONS OF THE ACT

Communications which may have violated the prohibition on attempts to influence persons other than the ITS Designated Agency Contact (DAC) during the restricted period of a covered procurement will be investigated by ITS. If, after such investigation, ITS determines that there is reason to believe that State Finance Law §139-j(3)(a) has been violated, ITS will notify the vendor in writing and afford it an opportunity to submit a written response.

Attempts by a Vendor to influence a governmental procurement in a manner that would result in a violation of the Public Officers Law or any other applicable ethics code shall also be a violation of these *Guidelines*.

VII. RESPONSIBILITY DETERMINATION

In the event that ITS finds that a Vendor has knowingly and willfully engaged in one or more prohibited communications, or has failed to timely disclose accurate and complete information or otherwise cooperate in providing the information required by State Finance Law §139-k, the Vendor must be determined non-responsible and ineligible for contract award. The Vendor may receive an award of the contract notwithstanding such a determination where

ITS finds that (i) the award of the procurement contract to the Vendor is necessary to protect public property or public health or safety and (ii) that the Vendor is the only source capable of supplying the required article of procurement within the necessary timeframe.

Two determinations of non-responsibility within four years by ITS and/or any other governmental entity under the Act will result in the Vendor's debarment for four years.

VIII. FURTHER GUIDANCE ON THE ACT

Any questions about compliance with the Procurement Lobbying Act, should be directed to your own legal counsel.

Additional information concerning the Act is available at the following web sites:

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

<http://www.nyintegrity.org/law/lob/guidelines.html>

Attachments and Required Forms

Following are the required forms referenced in this *Bulletin*:

Attachment A: Bid Solicitation Language:
Procurement Lobbying Law Certifications

Attachment B: Contract Language:
ITS Contract Language for ITS Right to Terminate Contract

The following language or its equivalent must be put into all solicitation documents for covered procurements:

PROCUREMENT LOBBYING LAW CERTIFICATIONS

I. Disclosure of Prior Terminations and Non-Responsibility Determinations:

DISCLOSURE OF PRIOR CONTRACT TERMINATIONS AND FINDINGS OF NON-RESPONSIBILITY UNDER THE PROCUREMENT LOBBYING LAW		
QUESTION:	YES	NO
1. Has any "governmental entity," as defined in State Finance Law sections 139-j and 139-k terminated a procurement contract with Bidder due to the intentional provision of false or incomplete information required by such Laws and/or the failure to comply with the requirements of State Finance Law section 139-k(3) relating to permissible contacts? (If yes, fill in the following information. Attach additional pages, if necessary)		
Governmental Entity	Contract Name	Contract No.
QUESTION:	YES	NO
2. Has any "governmental entity," as defined in State Finance Law sections 139-j and 139-k, made a finding in the last four years that the Bidder was not responsible?		
QUESTION:	YES	NO
3. If yes, was the basis for any such finding(s) the intentional provision of false or incomplete information required by State Finance Law sections 139-j and 139-k, and/or the failure to comply with the requirements of State Finance Law section 139-j(3) relating to permissible contacts? If yes, please provide details regarding each finding of non-responsibility below. (Attach additional pages, if necessary.)		
Governmental Entity	Details (including the basis and exact date of each finding)	

II. Bidder Affirmation relating to procedures governing permissible contacts:

(Bidder Must Check Applicable Box)

Bidder: affirms does not affirm

that it understands and has to date and agrees hereafter to comply with ITS's procedures relating to permissible contacts pursuant to §139-j(3) of the New York State Finance Law.

III. Bidder Certification relating to Prior Non-Responsibility Determinations:

(Bidder Must Check Applicable Box)

Bidder: certifies does not certify

that all information provided to ITS in accordance with §139-j and/or §139-k of the New York State Finance Law is complete, true and accurate.

CERTIFICATION:

The undersigned: (1) recognizes that the above required certification information is submitted for the express purpose of assisting the State of New York in making a determination to award a contract; (2) acknowledges that the State may in its discretion, by means which it may choose, verify the truth and accuracy of all statements made herein; and (3) states that the information submitted in this questionnaire and any attached pages is true, accurate and complete.

Signature of Bidder

Printed Name

Title:

Firm's Name:

The following language or its equivalent must be put into all contracts for covered procurements:

Contract Termination Clause Required Under NYS Procurement Lobbying Law

ITS reserves the right to terminate this contract in the event it is determined by ITS in its sole discretion that the certification filed by the Contractor in accordance with §139-j and/or §139-k of the New York State Finance Law was intentionally false or intentionally incomplete. Upon such finding, ITS may, at its sole option, exercise its termination right by providing 10 days written notification to the Contractor, or providing notice in accordance with other written notification terms in the contract.