

THE NEW PROCUREMENT LOBBYING LAW

- Beware of the “Black Out” Period

By Henry L. Goldberg
Goldberg & Connolly

Imagine that your company was the low bidder on a multi-million dollar project and you were anxious, after learning that the award was “held up” for an undetermined reason, to obtain more information from the agency. Routinely, someone from your company would call a “friend” at the agency to find out what was going on.

However, a new state statute, effective January 1, 2006, strictly prohibits, during what can effectively be considered a “black-out period,” any communications between a contractor and a contracting agency that could be deemed to be intended to influence a procurement decision (i.e., award of the contract). This period runs from the earliest date of solicitation to ultimate award and approval.

The simple act of a contractor calling that “friend” at a New York State agency about a pending low bid can now be very problematic. If that friend is not the “designated contact person” and if that communication is for other than a very limited number of exempted topics, such contact could cause very serious problems for the contractor, including a loss of the opportunity to be awarded the contract. The new

law also creates strict disclosure requirements regarding any such contacts with state government personnel during the black out period.

What a “contact” is under the statute is very broadly defined, namely “Any oral, written or electronic communication with the governmental entity under circumstances where a reasonable person would infer that the communication was intended to influence the governmental procurement.”

The “black out period” duration (i.e., “Restricted Contract Period”) is as follow:

Start: The earliest attempt to solicit a response with regard to a procurement contract. This may include, but is not necessarily limited to, written notices, advertisements, RFP’s, IFB’s, solicitations of proposals, or any other method for soliciting a response with regard to a procurement contract.

End: At final contract award. However, final contract award means that all parties that must approve the contract have granted that approval. For instance, some contracts may require the approval of the State Comptroller or a legislative body. The black out period will continue through the end of these extra approval periods.

Impermissible Contacts During Restricted Period

Impermissible contacts with the governmental entity occurs when the bidder contacts an individual at a state agency who is not the “designated contact person” for the particular procurement in an attempt to influence that agency. For example, the bidder contacts a person other than the designated representative of the agency and engages in a communication which a reasonable person would infer was intended to influence the procurement. Not only is this contact strictly prohibited, the agency employee is now required to record the event. Such report is required to be made a part of the procurement record.

Conversely, there are specific, limited exceptions in the statute. Submission of a bid, proposal or response for a procurement contract is clearly exempted, as are the submission of written questions (e.g., RFI’s) when written responses are to be provided to all bidders. In addition, participation in a formal pre-bid conference or negotiations with a state governmental entity after a tentative award are permissible. Finally, the filing of written disputes in administrative or judicial proceedings or with the Attorney General, Inspector General, District Attorney or State Comptroller are similarly not limited.

Government Agencies Covered

The new Procurement Lobbying Law is applicable to any attempt to influence contract awards once a procurement process has been commenced by any state agency (departments, boards, bureaus, commissions, divisions, offices, councils, committees and officers of the state including those which are temporary), NYS Senate and Assembly, Public Authorities, Public Benefit Corporations, Industrial Development Agencies and Local Benefit Corporations. This covers quite a bit of territory. Included, for example, would be the New York State DOT, New York State OGS, DASNY, MTA and its subsidiaries, TBTA, NYC-SCA, NYS Thruway Authority, et al. Significantly, not covered as yet, are New York City, as well as other cities, towns, and counties.

The law also requires such governmental agencies to designate a person who generally may be the only staff member contacted relative to a particular procurement during the restricted period. It also requires a timely disclosure of accurate and complete information by bidders with respect to determinations of non-responsibility and debarment.

New Requirements Imposed Upon NYS Governmental Entities

The new law requires state agencies to collect certain information about any person or organization contacting it about a procurement in attempts to influence same during the Restricted Period. In addition, state agencies must obtain

information from bidders about any findings of non-responsibility made within the previous four years by any other governmental entity and if the finding of non-responsibility was due to: (1) engaging in impermissible contacts during a black out period, or (2) intentional provision of false or incomplete information to a governmental agency. It is also now the responsibility of the governmental entity to request such information in its original solicitation or initial bid documents.

In addition, there are new recordkeeping requirements imposed upon state agencies. A governmental entity contacted by an individual or company that reasonably appears to be attempting to influence the procurement during the “black out” period must be disclosed and the contacted state agency must record the contact, obtaining the following specific information for each contact: name of the person and company, address, telephone number, place of principal employment, occupation, and whether the person making the contact was the bidder or a lobbyist retained by the bidder. All this information must be included in the procurement record for the project.

The New Law’s “Teeth”

The State Finance Law now also requires a governmental entity to make a determination of responsibility before awarding a procurement contract. In addition to the classic responsibility factors such as financial and organizational capacity, integrity, and past performance, the State Finance Law now require state agencies to

consider in responsibility determinations any prior violation of the permissible contact or disclosure requirements of the new law.

If it is found that the bidder had knowingly and willfully violated the State Finance Law in this regard, the bidder and any of its subsidiaries, related or successor entity will be determined to be a “non-responsible” bidder and shall not be awarded the contract. This is an extremely harsh penalty. Furthermore, a subsequent finding of non-responsibility by the vendor or contractor within four years prior to the determination of non-responsibility will result in the vendor or contractor becoming ineligible (i.e., debarred) to submit a bid or receive an award in any procurement with the state for four years from the date of the second finding of non-responsibility.

Even more significant is the fact that a state agency is now precluded from awarding a contract to a bidder that has been determined to be non-responsible because of a knowing and willful violation of the prohibitions against impermissible contacts unless the state entity finds that a limited exception is applicable. This exception only applies to narrow circumstances where the procurement contract is “necessary to protect public property or public health and safety” and where the bidder is “the only source capable of supplying the required article of procurement within the necessary time frame.”

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It is hard to imagine making a call to a state agency or authority about a pending award, and by that same informal inquiry losing any chance of receiving the very award about which the caller was originally concerned. Being formally found “non-responsible” as well, with all the ramifications that entails, certainly appears to be overkill.

This is a dramatic change in NYS procurement law. One can only question if New York legislators not expert in government contracting really understood or appreciated the far-reaching implications and limitations imposed by this new “Procurement Lobbying” Law. The law has numerous harsh provisions – not the least of which is the requirement that the contractor: (1) be found non-responsible, and (2) not be awarded the public contract in question for a knowing and willful violation of the black out period. Similarly the requirement that the contractor be debarred for four years is a virtual death sentence. The ramifications of this law are so severe, in fact, that we caution all contractors to receive advice of counsel before attempting to contact a state agency during a “black out period.”

Inquiries to the NYS Lobbying Commission or the Advisory Council on Procurement Lobbying clearly indicates that the state government is still grappling

with a full implementation of this significant new law. Not all questions regarding implementation have been resolved, but for now, caution is strongly advised.