

Plain Language Guide to Procurement Lobbying



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New York State Joint Commission on Public Ethics
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What is Lobbying?

Lobbyists and their clients spend millions of dollars each year on efforts to influence State and local government.

One of the core missions of the New York State Joint Commission on Public Ethics (“JCOPE”) is regulating those lobbying activities. It does so by, among other things, shedding sunlight on how money is spent to influence government decision-making by requiring registered lobbyists and their clients to disclose their activities and expenditures.

JCOPE also provides guidance to lobbyists and clients concerning State ethics and lobbying laws, which, among other things, govern attempts to influence governmental procurements. This guide will focus on those provisions of Article 1-A of the Legislative Law (the “Lobbying Act”) that address procurement lobbying.

The Lobbying Act may apply to you if you are employed, retained, or designated to influence the award of a government contract. Generally, the Lobbying Act requires registration and disclosure of procurement lobbying activities and restricts communications with the State at specific points during the procurement process.

The State Finance Law also governs communications with governmental entities during the procurement process and requires the Office of General Services (“OGS”) to disclose and maintain a list of non-responsible bidders. For additional information on these provisions, contact OGS.

Lobbying Overview

Lobbying is defined as any attempt to influence certain government decision-making and can take many forms. It can occur on both the State and local level and may include attempts to influence government contracting for goods and services. The Lobbying Act defines lobbying as any “attempt to influence”:



- State or local legislation or resolutions;
- State or local executive orders;
- State or local rules or regulations;
- Rate making proceedings by a State agency or municipality;
- Governmental procurements; or
- Tribal-state compacts, memoranda of understanding, or any other tribal-state agreements.

These activities are listed in Section 1-c(c) of the Lobbying Act, and are thus referred to as “1-c(c) activities”.

An “*attempt to influence*” these governmental actions may include any activity intended to support, oppose, modify, delay, expedite, or otherwise affect any of the governmental actions specified above.

Did you know?

Local lobbying applies to attempts to influence:

- Any county, city, village, town, or special district with a population over 5,000;
- Any industrial development agency (“IDA”) in a jurisdictional subdivision with a population over 5,000; and
- All school districts, local public authorities and public benefit corporations.

Lobbying Review

The Lobbying Act requires registration and regular reporting to JCOPE once a person or entity spends, incurs, or receives \$5,000 in reportable compensation and expenses (or anticipates expending, incurring, or receiving that amount) to attempt to influence one of the 1-c(c) activities.

Reportable compensation is money or anything of value paid for lobbying services, either to an external (retained) lobbyist, or on internal (in-house) spending (including salaries and business costs associated with in-house lobbying).

Reportable expenses include any cost of lobbying activity that is not lobbyist compensation. It includes, but is not limited to, non-lobbyist staff salaries, consulting, postage over \$500 advertising, and electronic advocacy.

Registered lobbyists and clients are also subject to general prohibitions on making gifts to public officials (or on their behalf) or their families, and from entering into a contingent retainer agreement. For additional information on rules surrounding gifts, see Section 1-m of the Lobbying Act and Commission regulations at 19 NYCRR Parts 933 and 934, and for restrictions on contingent retainers see Section 1-k of the Lobbying Act.

PROCUREMENT LOBBYING

Government Contract - Covered Transactions

Procurement lobbying is any attempt to influence a “**governmental procurement**” in excess of \$15,000. Covered transactions considered “**governmental procurements**” include:

- Commodity
- Service (including bond underwriting)
- Technology
- Public Work
- Construction
- Revenue Contract
- Real Property - purchase, sale, lease, acquisition or granting of other interest



Government Contract - Excluded Transactions

Grants

Some transactions are excluded from what is considered procurement lobbying. As an example, State or local entities may award grants that designate a specific entity to receive certain funding.

Once the State or municipality determines that a transaction is a grant, the procurement is not covered by the Lobbying Act. However, there may still be disclosure required by the Lobbying Act.

For instance, if an otherwise-registered lobbyist anticipates spending \$5,000 per year or more to influence a solicitation, award, or administration of a grant, loan, or agreement involving the disbursement of public monies in excess of \$15,000, the lobbyist must file a Lobbyist Disbursement of Public Monies Report.

Did you know?

Lobbyist Disbursement of Public Monies Report

This requirement is separate and apart from the typical client and lobbyist reports. Unlike the client and lobbyist reports, this report only needs to be filed in periods when the lobbying has occurred.

State Finance Law Article XI-B Contracts

Article 11-B of the State Finance Law sets forth prompt contracting and prompt payment procedures for contracts between certain not-for-profit organizations and State agencies or the Unified Court System.

Intergovernmental agreements

An intergovernmental agreement can generally be defined as an agreement between two or more governments for accomplishing common goals, providing a service, or solving a mutual issue.

Eminent domain transactions

In general, an eminent domain transaction results in the taking of private real property for government or public use subject to a party receiving just compensation.

Other transactions

The Lobbying Act also excludes from regulation attempts to influence certain railroad, utility, and organ donor contracts.

GENERAL LOBBYING EXCEPTIONS

Certain activities relevant to the procurement process are specifically excluded from the definition of “lobbying activity”:

Pre-determination of need

Procurement lobbying activities do not begin until a procuring entity makes a “determination of need” for the article of procurement; therefore, communications and activity before such a determination are not considered lobbying. This could include, for instance, sales calls, demonstrations, and other business development activity before a governmental entity determines it intends to proceed with a procurement.

Commission salespersons

Activities of commission salespersons are not lobbying activity. Commission salespersons are those compensated for their efforts, either in whole or in part, by receiving a percentage of the amount of all, or a substantial part of, a sale they have helped

consummate. Additional detail on Commission salespersons can be found in Lobbying Act Section 1-c(c)(O).

Certain complaints and appeals

Procurement protests, appeals, or other review proceedings are not considered lobbying activity, nor are complaints of alleged improper conduct in a procurement made to the Attorney General, Inspector General, the State Comptroller, a district attorney, or an appropriate court.

Preferred sources

Activities related to procurements made under State Finance Law §162 by certain qualified not-for-profit entities for the blind and disabled are not lobbying.

Bidders’ conferences

Appearing and participating in a conference for a procurement proposal, bid, or other solicitation for a procurement contract is not lobbying activity.

Post-award contract negotiations

Communications after the award of a procurement contract to negotiate the contract’s terms are not considered lobbying activity.

Submission of bids

Submitting a bid or proposal in response to a request for proposals, invitation for bids or other solicitation intending to result in a procurement contract is not lobbying activity.

Questions and answers disseminated to all bidders

Bidders submitting written questions to a procuring entity for a proposal, bid, or other solicitation when all written questions and answers are to be disseminated to all bidders are not considered lobbying activities.

Technical services or expertise

Contacts during procurements by certain technical experts for purposes of explaining or demonstrating characteristics or performance of an article of procurement are not considered lobbying activities. Such contacts must be limited to providing technical

information on the article of procurement, may not include any advocacy or recommendations on contract provisions, and must be otherwise consistent with the procuring entity’s solicitation or guidelines/procedures. Such contacts are limited to an analysis directly applying accounting, engineering, scientific or other technical disciplines.

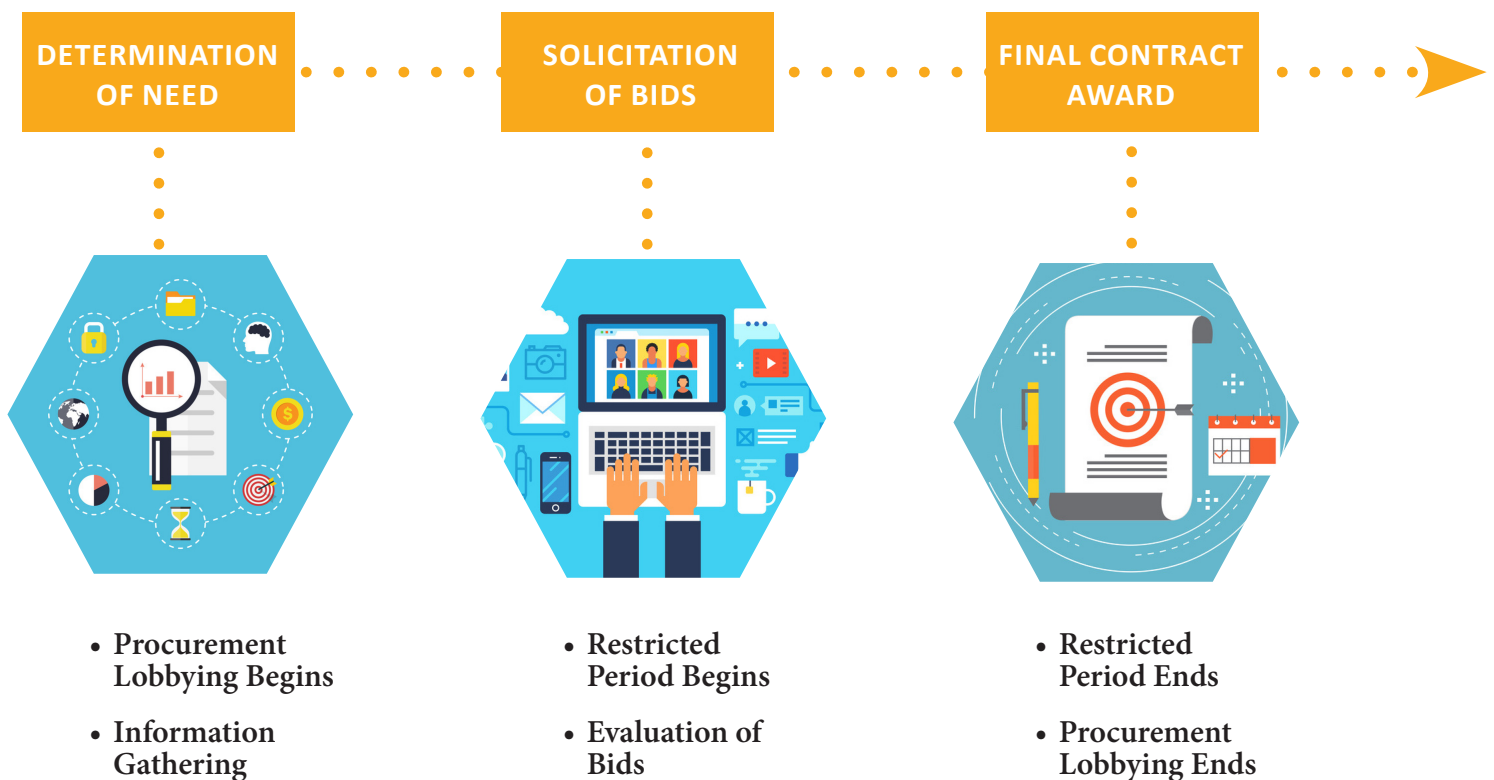
Post award communications/contract management

Communications made by a bidder after a contract award that are in the ordinary course of providing the article of procurement are not lobbying activities. This exemption does not apply to a bidder officer or employee whose primary employment is to engage in procurement lobbying activities, nor to a lobbyist of the bidder hired to primarily engage in procurement lobbying.

Benefits and incentives

Contacts with public officials limited to obtaining factual information on benefits or incentives offered by a State or municipal agency where the contacts do not include recommendations or advocate government action or are attempts to influence the terms of the contract, and which are not otherwise connected with legislative or executive action or determinations are not lobbying activities. This exception is not available to registered lobbyists.

TIMELINE OF PROCUREMENT LOBBYING



Determination of Need

A procurement begins with the Determination of Need -- the point where an agency decides there is a commodity, service or other article of procurement that it needs. *Before* a Determination of Need has been issued, you are free to approach agencies with sales calls, product demonstrations and other general business development contacts; these contacts are not lobbying activity. After the Determination of Need, the Lobbying Act's registration and reporting rules are in effect and **attempts to influence** any of the following information-gathering methods *before formal solicitation* of bids are regulated lobbying activity:

1. **Requests for Information** ("RFI") are used in a procurement by an agency to learn about the options available for addressing a particular need by creating viable requirements for a potential solicitation. Bidders' responses to an RFI enable the agency to write specifications to provide the agency with the best solution.
2. **Requests for Comment** ("RFC") are used to solicit input from all potential bidders about a solicitation's structure and language to assess its impact on potential bidders. For example, an agency may draft a Request for Proposals ("RFP") and send out only certain sections for the bidders' review and comment.
3. Agencies may send out complete **draft RFPs** to potential bidders for comments prior to issuance of the solicitation.
4. **Roundtable Sessions** include bidders and the agency(ies) involved in the procurement before the release of a competitive solicitation. These meetings allow potential vendors and agency staff to ask questions of each other and allow for an open exchange of information.

The "Restricted Period" Begins:

The "*restricted period*" triggers additional rules and restrictions under the Lobbying Act. Specifically, the restricted period is the time period during which lobbying communications are prohibited, and any communication related to such procurement must be directed to the designated point of contact at the procuring agency.

The restricted period starts with the procuring agency's earliest written attempt to solicit a response with regard to a written procurement contract. This may include, but is not limited to:

- written notices,
- advertisements,
- requests for proposal,
- invitations for bids, solicitations of proposals, or
- any other method for soliciting a response with regard to a procurement contract.

The restricted period ends when the State Comptroller finally approves the contract (Lobbying Act § 1-c(m)).

Rules regarding the restricted period apply to procurements by State entities and certain IDAs, i.e., those with a population exceeding 50,000. While the Lobbying Act does not extend the restricted period to local government procurements, a municipality (or IDA with a population of 50,000 or less) may have its own statutory, regulatory or administrative restrictions on procurement communications.

Prohibited Contacts

When a procuring agency makes a solicitation for a contract, the agency must designate a person(s) to serve as the designated contact person during the procurement. Under the Lobbying Act, during the restricted period, a registered lobbyist may NOT:

"engage in lobbying activities concerning a governmental procurement by contacting any person within the procuring agency who has not been designated ...to receive communications related to the governmental procurement."

(Lobbying Act § 1-n(1)).

Additionally, the Lobbying Act provides that the restricted period applies to communications about the procurement with a different agency.

The State Finance Law defines a "contact" as any oral, written or electronic communication with a 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. Contacts could include, but are not limited to: telephone conversations, correspondence, e-mails, and in-person discussions. This includes communications initiated by an employee of the procuring agency.

What is an “attempt to influence” during the restricted period?

If your contact with the procuring agency is meant to impact or cause the agency to make a certain determination regarding the procurement contract, a reasonable person would consider this contact to be an “*attempt to influence*” the procurement.

On the other hand, contacts that are routine or purely factual in nature, should not be considered an attempt to influence. For instance, if you called the procuring agency to ask only about the status of the contract approval, such a contact would not be considered an attempt to influence the procurement.

Additional examples of contacts not intended to influence a procurement could include:

- The bidder sending unsolicited advertising materials in the course of ordinary business.
- A bidder describing and promoting a new product in a cold call to the agency not in conjunction with a specific procurement.

Note:

Active bidders should be careful when contacting an agency for business development while a procurement is on-going to avoid appearing to be attempting to influence the open procurement.

Exceptions-Permissible Contacts during the “Restricted Period” to persons other than the designated contact:

Generally, contacts during the restricted period may only be made to the agency point of contact. However, the Lobbying Act provides exceptions for certain complaints and appeals, as well as for contacts with the legislature regarding executive branch procurements.

What are the penalties for impermissible contacts during the restricted period?

The Lobbying Act provides that a lobbyist or client who violates the restricted period rules may be subject to a civil penalty of up to \$10,000. Subsequent violations may carry penalties of up to \$25,000.

Additionally, the Lobbying Act provides for civil penalties and debarment from procurement lobbying for a knowing and willful failure to file a lobbying report, a false filing of a lobbying report or for violating the prohibition on gifts to public officials. Furthermore, civil and criminal penalties are permitted if lobbyists



or clients engage in contingent retainer agreements whereby lobbying compensation (in whole or in part) is dependent upon any government determination regarding a procurement.

In addition, the State Finance Law imposes penalties. All contacts during the restricted period intended to influence the awarding of the contract are required to be recorded by the procuring agency's staff and become part of the procurement record, including communications with the designated contact person. However, impermissible contacts – those made with someone other than the designated contact or contacts which would violate the Public Officers Law provisions regarding gifts and conflicts of interest – must also be made part of the procurement record and referred to the agency's ethics officer or inspector general for investigation regarding a violation of the State Finance Law procurement rules. JCOPE also has independent

jurisdiction to investigate gifts and conflicts and assess civil penalties, as well as refer such violations to the appropriate prosecutor for criminal penalties.

Violations may also result in disqualification from the procurement at issue, as well as potentially from future procurements.

For questions regarding the application of the State Finance Law to procurements, please contact the Office of General Services.

Advice and Guidance

If you have a situation or subject matter that appears to be considered lobbying based on what you have read, JCOPE staff is available to answer questions and provide guidance on whether your activities require registration. Call the JCOPE main line at 518-408-3976 or toll free at 1-800-87-Ethics.

