



**NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS**



**ETHICS FORUM:
CONTRACTING WITH
THE STATE**

NOVEMBER 14, 2018

Has an employee sought approval to enter into a contract with a State agency? What kind of questions do you ask?

For outside activity approvals, have you encountered an employee specifically seeking approval to enter into a sole or single source contract with a State agency?

Do you communicate with your agency's procurement department about Public Officers Law Section 73(4)? Do they know what to look for when reviewing bids?

TOPIC OVERVIEW

UNDERSTANDING ISSUES ARISING FROM POL § 73 AND OTHER LAWS

- PUBLIC OFFICERS LAW
- STATE FINANCE LAW
- ADVISORY OPINIONS
- JCOPE ENFORCEMENT ACTIONS

SPOTTING QUESTIONABLE BUSINESS PRACTICES

- RESOURCES FOR AGENCIES
- WHAT DO AGENCIES ALREADY DO?
- WHAT ELSE CAN AGENCIES DO?

ANALYZING HYPOTHETICAL SCENARIOS

- ETHICS OFFICER HYPOTHETICALS
- OTHER QUESTIONS?

PUBLIC OFFICERS
LAW § 73(4)(a)

PUBLIC OFFICERS LAW § 73(4)

Public Officers Law § 73(4)(a)(i) permits a State officer or employee, or a company owned or controlled by a State officer or employee, to sell goods and services to a State agency only pursuant to an award or contract issued after:

- (1) public notice, and
- (2) competitive bidding.

INTERPLAY WITH OTHER
LAWS – STATE FINANCE LAW

STATE FINANCE LAW § 163 REQUIREMENTS

The State Finance Law does not require a State agency to bid a contract for goods or services in all circumstances. For instance:

A **Sole Source procurement** is one in which only one vendor can supply the commodities, technology and/or perform the services required by an agency.

A **Single Source procurement** is one in which two or more vendors can supply the commodity, technology and/or perform the services required by an agency, but the State agency selects one vendor over the others for reasons such as expertise or previous experience with similar contracts.

STATE FINANCE LAW REQUIREMENTS

However, POL § 73(4) prohibits a State officer or employee from entering into no-bid contracts with any State agency.

Bottom line: The exceptions allowed by the State Finance Law do not override or supersede the specific proscription of Public



Officers Law § 73(4)(i). State officers and employees may not enter into single source, sole source, or any other no-bid contracts with a State agency.

INTERPLAY WITH OTHER LAWS –
PUBLIC OFFICERS LAW § 73(7)

INTERPLAY WITH PUBLIC OFFICERS LAW § 73(7)(a)(i)

State officers and employees are prohibited from being paid for appearing or rendering services before a State agency in connection with... the purchase, sale, rental or lease of real property, goods or services, or a contract therefor, from, to, or with any such agency.



INTERPLAY WITH PUBLIC OFFICERS LAW § 73(7)

A State officer or employee may not be compensated in any way for an appearance in support of the bid on the contract.

For instance, a State officer or employee is prohibited from:

- accepting compensation to appear at a bidders' conference, or
- for preparing or submitting the actual contract bid.

(Advisory Opinion No. 91-5)

ADVISORY OPINION NO. 91-5: PUBLIC OFFICERS LAW § 73(7)

A SUNY Stony Brook employee – who was the sole shareholder of a company - submitted a competitive bid on an OPWDD contract, in compliance with § 73(4).

There is no indication that the State employee was compensated for the submission of the bid to OPWDD which, if so, would have been a prohibited appearance and a violation of § 73(7)(a).

DON'T FORGET...

POL § 73(7) also applies to State officers or employees whose outside activity involves **assisting or representing** another individual in, among other things:

- Obtaining a contract with the State
- Obtaining a grant or loan with the State

INTERPLAY WITH OTHER LAWS –
PUBLIC OFFICERS LAW § 73(15)

PUBLIC OFFICERS LAW § 73(15)

No statewide elected official, state officer or employee, member of the legislature or legislative employee shall:

participate in any state contracting decision involving the payment of more than one thousand dollars to that individual, any relative of that individual, or any entity in which that individual or any relative has a financial interest.

INTERPLAY WITH OTHER LAWS –
PUBLIC OFFICERS LAW § 74

The General Rule: Public Officers Law § 74(2)

New York State officers and employees and Legislative members and employees shall not...

“have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his (or her) duties in the public interest.”



ADVISORY OPINION EXAMPLES

ADVISORY OPINION No. 95-36

May SUNY hospital employees contract with their hospital/agency to provide services through a managed care network?

- Several HMOs and hospital networks approached the SUNY Hospitals about negotiating hospital services agreements for the benefit of their subscribers.
- The SUNY Hospitals appoint health care professionals for academic assignment purposes as faculty.
- These individuals may also render services to private patients for a fee, but, when doing so, they are not acting as State employees. SUNY stated that it cannot legally bind these professionals when they are acting in their non-State capacities, to accept fee schedules or require them to participate in managed care networks, HMOs or as participating providers in indemnity plans.

ADVISORY OPINION NO. 95-36

SUNY noted that the competitive bidding process was not appropriate. These were personal services that require a professional to hold an academic faculty title from the SUNY and to have admitting privileges to the Hospital, pursuant to the Hospital Bylaws.

SUNY indicated, however, that negotiation of the terms of the subcontracts would not be conducted between the institutions and the individual professionals. Rather, the individuals would negotiate all terms, including professional compensation, directly with the HMO or the network.

The Commission concluded that although the employees had a boilerplate contract with the SUNY Hospital, the relationship was with the network.

ADVISORY OPINION NO. 95-36

“To bar a health care professional from negotiating with or joining a network because one of the papers in the three-way arrangement would be a purely boilerplate subcontract between the professional and the Hospital would be placing form over substance.”

Public Officers Law § 73(4) prohibits SUNY employees from contracting with the SUNY Hospital at which they work and a managed care network unless:

(i) the Hospital or the Center exercises no discretion in establishing the three-way arrangement, and (ii) the arrangement, or an employee’s refusal to enter into any such arrangement, has no bearing on the employment status of the employee.



WHAT HAVE WE LEARNED?

- To closely examine all terms of the contract.
 - Here, the Commission focused on the business relationship of each of the parties to the contract, noting the pertinent one was between the employee-doctors and the network.
- Whether you are reviewing an employee's outside activity or assisting your procurement department with ethics questions, your analysis will need to examine **BOTH** §§ 73(4) and 74.

ADVISORY OPINION NO. 93-10 – POL § 73(4)(a) ISSUES

POL § 73(4)(a) does not prohibit an SED employee from leasing his home to OPWDD for use by OPWDD clients where the State agencies advertised for rental property in two newspapers. This is the normal business practice of OPWDD when it leases houses.

“Thus, while OPWDD does not ‘bid out’ in the traditional sense (because real estate is, by nature, unique) public notice and inspection of the property are . . . for purposes of our review, tantamount to a competitive bid. Consequently, the award process met the strict procedural standards of the ethics law.”



ADVISORY OPINION NO. 93-10 – POL § 74 Issues

The Commission concluded that the State employee did not use his State position to gain advantage or use undue influence in the leasing process, and did not otherwise engage in activities in violation of his public trust.

“He was not an employee of the DDSO or OPWDD nor designated as a policymaker, and there is no evidence that he or his wife have any business or social relationship with any of the State employees involved in the lease arrangement.”

WHAT HAVE WE LEARNED?

- There may be “non-traditional” bids that JCOPE would consider meeting the requirements of a competitive bid.
- Call JCOPE or e-mail the Legal inbox for guidance.

ADVISORY OPINION NO. 91-11

The Commission considered whether OPWDD employees, on approved leaves of absence, could contract with OPWDD as certified family care providers in the employees' homes for persons with developmental disabilities.

OPWDD considered the development of a Specialized Home Service Program which would allow OPWDD employees to serve as family care providers and be paid by a stipend, without competitive bidding. Non-OPWDD provider candidates were not eligible to receive the stipend.

ADVISORY OPINION No. 91-11

POL §§ 73(4) and 74 prohibited OPWDD employees from serving as certified family care providers under this program:

- The provision of the stipend necessarily means that OPWDD employees who participate in the program would be "selling goods or services" to their Stage agency without public notice and competitive bidding, all of which would be in violation of POL § 73(4).
- Additionally, the stipend would violate POL § 74 because only OPWDD employees would be eligible to receive the stipend.

ADVISORY OPINION NO. 95-30

Is there a conflict of interest if an employee, or her spouse, were to bid on a competitively let contract that **emanates from the unit in which she works.**

In the facts presented here, the employee was completely screened from the bid process, as well as from consideration of the specifications and recommendations prepared by her unit before a request for proposals was issued.

ADVISORY OPINION NO. 95-30

Public Officers Law §§ 73 and 74 do not prohibit the spouse of a State employee who is not a policymaker from submitting a bid to the State employee's agency, provided that:

(i) the contract is awarded after public notice and competitive bidding, and

(ii) the State employee has no involvement with the contract or the bid criteria.

WHAT HAVE WE LEARNED?

Appropriate recusals, coupled with a competitive bid, may allow your agency's employees to bid on agency contracts.

ENFORCEMENT ACTIONS

A University professor initiates the procurement of specialized research software.

- The professor submits a sole source memorandum that states after careful review of other software vendors and soliciting advice from industry experts, only one company is capable of meeting the unique specifications required of the research software.
- The memorandum is sent to the university and the state agency responsible for funding the purchase of the software through a graduate and research initiative.
- His agency issues payment for the nearly \$45,000 research software.



How does this look so far?

What other information do we need?



The university professor is the owner of the software company and opens up a P.O. Box and business checking account on behalf of the company prior to his agency submitting payment for the purchase of the research software.

This is the only sale this software company has ever received.

Similar software vendors were never reviewed and advice from experts was never solicited.

Things to Consider

- 1) What is the relevant information?
- 2) What steps should the professor have taken?
- 3) Which Standards of Conduct do you think were violated?
- 4) What other ethics laws may have been violated?
- 5) What types of consequences might this State Officer face?

Consequences

Following an investigation ...

- The professor admitted violating Public Officers Law § 73(15) in a settlement agreement
- Paid a fine of \$20,000
- Refunded the entire purchase price of the software valued at nearly \$45,000
 - In total paid nearly \$65,000 in fines and restitution

IS THERE ANOTHER POL SECTION THAT HE POTENTIALLY VIOLATED?

What about POL § 73(4)(a)(i)?

- The professor created/responded to a sole source bid.
- Although the State Finance Law permits agencies to seek certain goods or services through a sole source bid, the POL prohibits a State employee from responding to those that are not competitively bid.

BEST PRACTICES —

SPOTTING QUESTIONABLE
BUSINESS RELATIONSHIPS

OSC Guide to Financial Operations

State agency managers should determine whether a vendor is a State employee.

Agency managers should:

- Implement controls to ensure compliance with Section 73 of the Public Officers Law.
- Ensure that all employees are familiar with the provisions of the Public Officers Law, especially § 73(4)(a).

WHAT DO SOME AGENCIES
ALREADY DO?

Appendix B- NYS Contracts

ETHICS COMPLIANCE:

All Bidders/Contractors and their employees must comply with the requirements of Sections 73 and 74 of the Public Officers Law, other State codes, rules, regulations, and executive orders establishing ethical standards for the conduct of business with New York State.

In signing the Bid, Bidder certifies full compliance with those provisions for any present or future dealings, transactions, sales, contracts, services, offers, relationships, etc., involving New York State and/or its employees. Failure to comply with those provisions may result in disqualification from the Bidding process, termination of contract, and/or other civil or criminal proceedings as required by law.

- D. All reports of research, studies, publications, workshops, announcements, and other activities funded as a result of this proposal will acknowledge the support provided by the State of New York.
- C. This agreement cannot be modified, amended, or otherwise changed except by a writing signed by all parties to this contract.
- D. No failure to assert any rights or remedies available to the State under this agreement shall be considered a waiver of such right or remedy or any other right or remedy unless such waiver is contained in a writing signed by the party alleged to have waived its right or remedy.
- E. Expenses for travel, lodging, and subsistence shall be reimbursed at the per diem rate in effect at the time for New York State Management/Confidential employees.
- F. No fees shall be charged by the Contractor for training provided under this agreement.
- G. Nothing herein shall require the State to adopt the curriculum developed pursuant to this agreement.
- H. This agreement, including all appendices, is, upon signature of the parties and the approval of the Attorney General and the State Comptroller, a legally enforceable contract. Therefore, a signature on behalf of the Contractor will bind the Contractor to all the terms and conditions stated therein.

The parties to this agreement intend the foregoing writing to be the final, complete, and exclusive expression of all the terms of their agreement.

Certifications

- A. Contractor certifies that it has met the disclosure requirements of State Finance Law §139-k and that all information provided to the State Education Department with respect to State Finance Law §139-k is complete, true and accurate.
- B. Contractor certifies that it has not knowingly and willfully violated the prohibitions against impermissible contacts found in State Finance Law §139-j.
- C. Contractor certifies that no governmental entity has made a finding of nonresponsibility regarding the Contractor in the previous four years.
- D. Contractor certifies that no governmental entity or other governmental agency has terminated or withheld a procurement contract with the Contractor due to the intentional provision of false or incomplete information.
- E. Contractor affirms that it understands and agrees to comply with the procedures of the STATE relative to permissible contacts as required by State Finance Law §139-j (3) and §139-j (6)(b).
- F. Contractor certifies that it is in compliance with NYS Public Officers Law, including but not limited to, §73(4)(a).

Notices

Any written notice or delivery under any provision of this AGREEMENT shall be deemed to have been properly made if sent by certified mail, return receipt requested to the address(es) set forth in this Agreement, except as such address(es) may be changed by notice in writing. Notice shall be considered to have been provided as of the date of receipt of the notice by the receiving party.

Miscellaneous

- A. Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208). Contractor shall be liable for the costs associated with such breach if caused by Contractor's negligent or willful acts or omissions, or the negligent or willful acts or omissions of Contractor's agents, officers, employees or subcontractors.
- B. If required by the Office of State Comptroller ("OSC") Bulletin G-226 and State Finance Law §§ 8 and 163, Contractor agrees to submit an initial planned employment data report on Form A and an annual employment report on Form B. State will furnish Form A and Form B to Contractor if required.

SUNY-Purchasing and Contracting (Procurement)

Document No. 7553 (Issued 2016)

The conflict of interest and code of ethics provisions of NYS Public Officers Law §§ 73 & 74 shall apply to all purchasing activities of the University. Campuses are required to inquire as to the status of entities with which they intend to contract or lease.

To accomplish this, campuses must utilize Form XIII in the initial phase of the purchasing/contracting process. Form XIII is a standard form designed in accordance with NYS Public Officers Law § 73(4) ...

If the answer to such inquiry is in the affirmative, campuses must use the formal competitive bidding process ... or the State Procurement Guidelines, if applicable, before a valid agreement may be entered into with such individual or organization, in order to comply with provisions of NYS Public Officers Law § 73.

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Re: Item 300 Purchasing and Contracting Procedures (Attachment A-1 Procurement)

Inquiry To Determine Compliance With the Provisions Of Public Officers Law §73(4)

Please indicate if you or any officer of your organization, or any party owning or controlling more than 10 percent of your stock if you are a corporation, or any member if you are a firm or association, is an officer or employee of the State of New York or of a public benefit corporation of the State of New York.

YES NO

Name of Employee: _____

Name of Organization/Corporation/Firm/Association: _____

Employee Signature: _____

Date: _____

Upon completion return to:

Matt Schofield
Director of Purchasing
Binghamton University
Purchasing Department
PO Box 6000
Binghamton, NY 13902-6000



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Guidelines

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REQUISITIONS AND PURCHASE ORDERS

MINORITY/WOMEN OWNED BUSINESS

Procurement Card

VEHICLE RENTAL

STATE EMPLOYEE OWNED COMPANIES

Public Officer's Law, section 73(4)(a)(i), states that no State employee shall sell any goods or services having a value in excess of twenty-five dollars(\$25.00) to any state agency unless such goods and services are provided pursuant to an award or contract let after public notice (Contract Reporter) and competitive bidding. The State Ethic's Commission has interpreted competitive bids to mean sealed bids.

This section of the Law was put in place to ensure a fair, open and competitive process and to avoid the appearance of a conflict of interest or favoritism being given to agency employees or state employees in general.

Buffalo State College will only enter into an agreement to conduct business with a state employee owned company after advertising in the Contract Reporter and conducting formal sealed bids.

requirement, how it was determined only one vendor could meet the need, and how it was determined the cost is reasonable. One method available to document the sole source status is to advertise in the Contract Reporter and only receive one response.

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Current State Commodity and Service Contracts (P-Contracts)

The Office of General Services (Albany) awards Statewide term contracts for many commodities at reasonable prices. Departments should take advantage of these whenever possible. For most items, an unlimited dollar amount can be purchased without the need for further competition. State contracts are available to view on the Internet at <http://www.ogs.state.ny.us/purchase/SearchBrowse.asp>

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Executive Order #134

Executive Order #134 directs all state agencies to procure and use cleaning products having properties that minimize potential impacts to human health and the environment consistent with the maintenance of the effectiveness of these products for the protection of public health and safety. The Procurement Office is working to identify "green" cleaning products for use on campus. At this time, there are several products that are available from OGS Contracts, please visit: www.ogs.state.ny.us/purchase. For information about green cleaning products available from the New York State Industries for the Disabled (NYSID), please visit: <http://www.nysid.org>. For information about green cleaning products available from the Industries for the Blind of New York State, Inc. (IBNYS) please visit: <http://www.ibnys.org>. For information about green cleaning products available from the Division of Industries (Corcraft) please visit: <http://www.corcraft.org>.

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Public Officers Law

NYS State Employees doing Business with the State of New York

The New York State Public Officers Law prohibits companies/corporations, whose owner is a New York State employee with ten percent or more of stock in that company/corporation, from selling goods or providing services to the State of New York valued over twenty-five dollars.

Public Officer Law Section 4.(a) states, No statewide elected official, state officer or employee, member of the legislature, legislative employee or political party chairman or firm or association of which such person is a member, or corporation, ten percentum or more of the stock of which is owned or controlled directly or indirectly by such person, shall (i) sell any goods or services having a value in excess of twenty-five dollars to any state agency, or (ii) contract for or provide such goods or services with or to any private entity where the power to contract, appoint or re tain on behalf of such private entity is exercised, -directly or indirectly, by a state agency or officer thereof, unless such goods or services are provided pursuant to an award or contract let after public notice and competitive bidding.

This paragraph shall not apply to the publication of resolutions, advertisements or other legal propositions or notices in newspapers designated pursuant to law for such purpose and for which the rates are fixed pursuant to law.

QUESTION FOR YOU:

As your agency's General Counsel or Ethics Officer, have you taken a critical look at the nature of your employees' outside activities, particularly if there is a contractual relationship between the employee and a State agency?

WHAT ELSE CAN ETHICS
OFFICERS DO TO EDUCATE THEIR
AGENCIES?

TRAINING FOR PROCUREMENT DEPARTMENT

- Points to emphasize:
 - Assessing internal controls to ensure that State employees are identified on bids
 - Analyzing implications of the State Finance Law – State employees may not bid on sole source, single source, and any other no-bid contracts
 - Discussing “non-traditional” bids that may qualify as competitively bid (i.e., leasing from AO No. 93-10)

OGS- NYS Procurement Guidelines

Procurement Ethics – “Procurements are an expenditure of public monies, and public employees must always ensure that all procurements are conducted so as not to cause any concern that special considerations have been shown to a vendor.

“Actions such as providing a vendor with information that is not available to other vendors, accepting a gift, or having lunch with a potential vendor could be construed as showing favoritism to a vendor, and may violate State law.”



OUTSIDE ACTIVITY REGULATIONS

Closely examine requests:

- Is the employee a policymaker? Has the employee fully disclosed information about the contract on Outside Activity request forms?
 - For example: the type of bid, the parties, other terms of the contract.
- What if the individual is *not* a policymaker?
 - Does your agency have policies about all employees seeking Outside Activity approval?
 - If not, consider sending periodic e-blasts to employees that Section 73(4) applies to all employees.

TRAINING FOR ALL EMPLOYEES

- Emphasizing POL § 73(4) in CETC training to FDS filers
- Providing Ethics Reminder regarding contracting with the State to all employees via e-mail
- Additional ideas from participants?

HYPOTHETICALS

My procurement department notified me that an employee from my agency has entered into several purchase orders for training services with our agency.

What steps should I take next to ensure compliance with POL § 73(4)(a)?



Employee of Agency A wants to provide training to Agency B as an outside activity. Can the employee do it?

JCOPE CONTACT INFORMATION

**FOR ALL INQUIRIES, CALL:
1-800-87-ETHICS or (518) 408-3976**

**FOR FDS QUESTIONS, E-MAIL US AT:
ethel@jcope.ny.gov**

**FOR TRAINING QUESTIONS, E-MAIL US AT:
education@jcope.ny.gov**