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Government, Law and Policy Journal

A Publication of the New York State Bar Association
Committee on Attorneys in Public Service, produced in cooperation with the
Government Law Center at Albany Law School

Procurement Issues

- Model Procurement Code
- Ethics in Procurement
- Preferred Sources
- Vendor Responsibility in the Contracting Process
- Procurement at the Local Government Level
- Public Authority Contracts
- Recent Developments in New York City Procurement
- New York's Procurement Lobbying Law

Committee on Attorneys in Public Service 2007 Annual Meeting

Tuesday, January 23, 2007

Marriott Marquis Hotel, 1535 Broadway, New York City

NYSBA Committee on Attorneys in Public Service
Patricia E. Salkin, Committee Chair
Donna J. Case, Mary A. Berry, Program Chairs
Anthony T. Cartusciello, Robert J. Freeman, Awards Chairs

2007 Annual Meeting Programs and Annual Awards Reception

Morning Educational Program: 9 a.m.–12:15 p.m.
United States Supreme Court Term in Review: Introducing the Roberts Court

Afternoon Program: 2 p.m.–5 p.m.
Eminent Domain: Is this land your land?

Co-sponsored by the Task Force on Eminent Domain and the Real Property Law Section, Committee on Condemnation, Certiori and Real Estate Taxation

Annual Awards Reception: 5:30 p.m.–7:00 p.m.

Free and open to all NYSBA members; RSVPs requested

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2007 Honorees:

The Honorable Judith Kaye, Chief Judge, NYS Court of Appeals
Joan Kehoe, Esq., Counsel, NYS Department of Agriculture and Markets
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To register or for more information on the 2007 Annual Meeting:
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Contents

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Message from the Chair

By Patricia E. Salkin

I am honored to have been asked by State Bar President Mark Alcott to serve as Chair of the Committee on Attorneys in Public Service (CAPS). Established in 1998, this Committee has been responsible for introducing countless government lawyers to opportunities afforded by the New York State Bar Association and for introducing to the Association Sections and special projects, the resources and diversity of viewpoints offered by public sector lawyers. In February of 1999, the founding members of CAPS adopted a mission statement which, among other things, states that the Committee will:

- promote the highest standards of professional conduct and competence, fairness, social justice, diligence and civility
- advocate for public service attorneys in their quest for excellence, fairness and justice in the performance of their duties
- facilitate the contribution of public service attorneys as members and leaders of their communities, the legal profession and NYSBA
- serve as a network system for public service attorneys
- provide continuing legal education and resources related to the practice of public service attorneys
- promote research of interest to public service attorneys and formulate such reports as may be deemed useful to the profession and advisable to the public interest

I am proud to continue working side-by-side with dedicated, committed, intelligent and thoughtful public service attorneys who bring public sector perspectives to the Bar Association, and who continue to facilitate opportunities for other government lawyers to engage in meaningful participation in our Association.

Through the leadership of my predecessor Chairs—Tricia Troy Alden, Hank Greenberg, Barbara Smith and James Horan—CAPS has flourished from a concept to a vibrant program that our Association can be proud of. To build upon the wonderful legacy of these extraordinary leaders, this year CAPS has organized into a series of subcommittees to more efficiently fulfill the Committee's mission. Although membership on CAPS is made through the Presidential appointment process, NYSBA members may volunteer to serve on one of our subcommittees. Inside this issue of the *Government, Law and Policy Journal* you will find a listing of our subcommittees, along with a brief description of their focuses, and information on how you can participate.

"I am proud to continue working side-by-side with dedicated, committed, intelligent and thoughtful public service attorneys who bring public sector perspectives to the Bar Association, and who continue to facilitate opportunities for other government lawyers to engage in meaningful participation in our Association."

Already, our CLE subcommittee, working with the subcommittee on administrative law judges, has developed and implemented a series of courses across the State on administrative adjudication, and the awards subcommittee reviewed dozens of nominations for our prestigious Excellence in Public Service Award. As you read inside these pages, the subcommittees on the Annual Meeting and special programs have joined forces to present a spectacular January 2007 program agenda, and our legislation subcommittee has been busy developing some exciting new proposals for consideration during the 2007 Legislative session. Watch for innovations from our e-news subcommittee, who will be working with our web subcommittee to implement creative technology applications to support the work and interests of government lawyers. On the publications front, the *Government, Law and Policy Journal* subcommittee, together with the editorial board, has not only produced this timely themed issue on procurement, but will produce a Spring 2007 issue which will focus on Eminent Domain and a Fall 2007 theme will examine issues in public education. In addition, our book subcommittee is planning a second edition of the popular government ethics book, as well as a new edition of the book on legal careers in government in New York.

CAPS has been busy fulfilling its mission, and we look forward to welcoming more government lawyers as active members and participants in the programming and policy development of the New York State Bar Association. Special thanks to the enormously talented and dedicated staff at the Bar Association who continue to provide incredible support making CAPS look even better—Patricia Wood, Maria Kroth, Wendy Pike and Lyn Curtis.

Editor's Foreword

By Rose Mary Bailly

The ability of state and local governments to procure goods and services through state contracts is critical to the operation of government. During the 2005-2006 fiscal year, the New York State Office of the State Comptroller (OSC) reviewed 18,709 contracts valued at nearly $43.4 billion. Prior to 1995, New York State procurement law was governed by former State Finance Law sections 160 to 179-c, adopted in 1940. Amendments were made over time, but there were no significant changes in the overall procurement process. Without a uniform structure, the law provided minimal guidance for state contracting and competitive bidding.

The Procurement Stewardship Act of 1995 (hereinafter "the Act") brought reform and consistency to the procurement process in New York State. The Act contained provisions for the procurement of services, awards based on factors other than lowest bid, cooperative purchasing, provisions for small, minority and women-owned businesses (MWBE), and the creation of the State Procurement Council. The Act initially contained a five-year sunset clause ensuring that the new law would be evaluated. But in 2000, absent evaluation, the Act was amended to extend the sunset provisions, among other things, to June 30, 2005. In April of 2005, the Act was again extended for one year and was set to sunset June 30, 2006.

Two recent and major developments in the area of procurement law make the topic of this issue of timely import for policymakers, businesses and others who have grappled with the challenges of procurement law. In September 2005, the N.Y.S. Legislature began the long-awaited evaluation process by holding a series of public hearings focusing attention on issues that might be ripe for reform. At the same time the hearings were taking place, the New York State Office of General Services (OGS) retained the Government Law Center of Albany Law School (GLC) to conduct a series of statewide focus groups to assist OGS in obtaining detailed comments and suggestions from constituencies involved in the New York State procurement process. Four focus groups were held throughout the State, and participants provided comments and suggestions on six major issues within the Act. These issues included procurement thresholds, preferred sources and MWBEs, the state contract process, vendor responsibility, debriefing, and the sunset provision of the Act.

In 2006, with the sunset of the Act on the horizon, the Governor and Legislature amended the Act and increased discretionary purchasing thresholds from $15,000 to $50,000 for state agency contracts, $50,000 to $85,000 for contracts awarded by the Office of General Services, and $50,000 to $100,000 for small businesses, MWBEs, and recycled and remanufactured products. In addition, the Act was again extended for one year.

Also in 2006, the Legislature enacted the new procurement lobbying law. Aimed at increasing transparency and accountability in New York State's procurement process, the Omnibus Lobbying Law Reform Act of 2005 enacted what is known as the "Procurement Lobbying Law," which for the first time places restrictions on those who attempt to influence procurement contracts in the State of New York. Signed into law on August 23, 2005, the Procurement Lobbying Law is a combination of amendments to the Legislative Law (also known as the Lobbying Act), and the State Finance Law. The Lobbying Act regulates the activities of lobbyists, imposing registration and reporting requirements on those who engage in lobbying or lobbying activities under certain circumstances as these terms are defined in the Lobbying Act. The State Finance Law is comprised of a set of provisions regulating certain communications during the procurement process and how certain Governmental Entities should carry out their procurement responsibilities in light of those regulations. As such, the Procurement Lobbying Law has implications for both Governmental Entities and the vendor community (i.e., those who do or desire to do business with covered Governmental Entities in New York).

"During the 2005-2006 fiscal year, the New York State Office of the State Comptroller reviewed 18,709 contracts valued at nearly $43.4 billion."

This issue of the *Government, Law and Policy Journal* addresses several legal issues that concern New York procurement law, including the state and local procurement process, ethics in procurement, preferred sources, debriefing, vendor responsibility, and the procurement lobbying law. We are fortunate to have many noted scholars on procurement law contribute to this issue.

Our introductory article, "*Making the State's Procurement Practices More Business Friendly*," authored by Kim Fine and Joan Sullivan, highlights this year's legislative

changes to the Procurement Stewardship Act and addresses proposals for future reform of the Procurement Stewardship Act.

Larry C. Ethridge's article, "*A Brief History of the Model Procurement Project and the New York Experience*," explains the origins of the Model Procurement Code as well as the revisions to the Code in 2000. Ethridge also looks at the influence the Code has had on New York procurement law and discusses how New York could benefit from the Code's new provisions.

Anne Phillips' article, "*Ethical Considerations in Procurement*," discusses the impact of the Code of Ethics on public procurement in New York State. Phillips draws from several opinions of the State Ethics Commission to illustrate the interrelation between the purchasing process and the need to ensure fairness and integrity within it.

Lawrence L. Barker Jr., in his article, "*Preferred Source Procurement: Successfully Merging Social and Economic Policy*," discusses in detail New York's Preferred Source Program. Barker provides the history of the program in New York State and outlines the law as it is currently written. Portraying the "Human Side," Barker tells the story of "Kasey," a disabled woman who was given an opportunity to work through the Program.

Donna Snyder, in her article, "*Debriefs: A Window Into State Agency Procurements*," provides an overview of New York State's debriefing process for unsuccessful offerers. Snyder states that debriefings "lead to better proposals" and promote "confidence in the system." To improve debriefing procedures, Snyder argues that New York should adopt standard debriefing rules based on current methods used by the federal government.

Patrick E. Tolan Jr.'s article, "*Federal and New York Contracting Preferences for Small, Minority and Women-Owned Businesses*," provides a brief history of federal contracting with small businesses. Tolan also compares New York's contracting preferences program with the current federal preference programs, examining the vulnerabilities and opportunities afforded to small businesses contracting with the government.

The next two articles focus on the issue of vendor responsibility in the State contract process. Noreen VanDoren, in her article, "*Assessment of a Responsible Contractor by New York State*," focuses on the responsibility determinations of offerers seeking government contracts under Article 11 of the State Finance Law. VanDoren addresses the four main areas in assessing a contractor's responsibility (financial capacity, legal authority, integrity and past performance), OSC's plan to implement a centralized database of information about the offerers, and what processes are due if an agency deems an offerer non-responsible. In "*New York State's Contracting Process Strengthened by Increasing Focus on Vendor Responsibility*," author Joan M. Sullivan examines the role that vendor responsibility determinations play in the procurement process. She also discusses the Office of the State Comptroller's "VendRep" initiative, which is a proposal to develop an electronic clearinghouse to capture and manage information related to vendors and vendor responsibility.

Taking a look at procurement on the local government level, in her article titled "*Procurement: A Local Government's Perspective*," Albany County purchasing agent Karen Storm discusses the need for greater flexibility in procurement law and regulations for local governments in order to ensure greater efficiency. She also points out the need for more training of procurement professionals at the local level.

Kim Fine talks about the reform of public authority procurement practices and the need for increased monitoring of such practices by the New York State Office of the State Comptroller in her article, "*Oversight of Public Authority Contracts by the State Comptroller*." She discusses the process that subjects certain state agency contracts to approval by the State Comptroller's Office and proposes that public authority contracts also be subject to a process whereby public authorities are required to submit their contracts to the State Comptroller's Office before they become effective. In the article, Fine also describes legislation proposed by New York State Comptroller Alan G. Hevesi which would have achieved this goal if passed.

Marla Simpson, in her article titled "*Blueprint for Change: Recent Developments in New York City Procurement*," discusses the rules and regulations governing state contracting in New York City. Simpson addresses several procurement topics, including MWBEs, environmentally preferable purchasing, prevailing wage enforcement, access to spouse and domestic partner health insurance coverage, and vendor rehabilitation.

Two of the articles in this issue discuss the implementation of the Procurement Lobbying Law from the perspective of the New York State Temporary Commission on Lobbying and from one of the state's largest agencies, the New York State Department of Transportation. In "*Procurement Lobbying Disclosure in New York: Form over Substance*" by Steve Hensel and Cara Romanzo, the authors highlight the experience of the Lobbying Commission's implementation of the law as it applies to the Lobbying Act since the law took effect. It also explains the definition of procurement lobbying under the Lobbying Act and explores the relationship between the Lobbying Act and the State Finance Law provisions of the Procurement Lobbying Law. Authors Marie A. Corrado and William A. Howe describe some of the practical implications that the Department of Transportation has encountered and addressed in complying with the Procurement Lobbying Law. Their article, entitled "*Practical Implementation*

of New York's Procurement Lobbying Law: Issues, Solutions and Lessons Learned," addresses key steps that the Department of Transportation took to implement the law, discusses the ramifications of each step and provides recommendations and comments regarding those steps as it attempted to implement the Procurement Lobbying Law.

Finally, there is a glossary of terms for those seeking clarification of terms and phrases relating to procurement.

All in all, this issue is intended to explain a subject that presents many challenges to those whose conduct it governs. A wonderful collaboration of many people produced this issue. First and foremost, I want to thank Michael Cassidy, Esq., and Teneka E. Frost, Esq., our special guest editors for this issue. Their expertise on the subject of procurement law has infused this issue. Our Board of Editors offered very helpful suggestions and provided continuing support of our efforts. The admirable skills of the Albany Law School student editorial staff, Executive Editor Michael Pendell and his law school colleagues Luke Davignon, Margaret Lavery, Joshua Luce, Mark Myers, Olivia Nix, William Robertson, and Mark Simoni assisted all of us through the editorial process. The New York State Bar Association staff, Pat Wood, Lyn Curtis, and Wendy Pike, deserve special thanks for their inexhaustible patience and good humor.

"All in all, this issue is intended to explain a subject that presents many challenges to those whose conduct it governs. A wonderful collaboration of many people produced this issue."

Finally, any flaws, mistakes, oversights or shortcomings in these pages are my responsibility. Your comments and suggestions are always welcome at rbail@albanylaw.edu or Government Law Center, 80 New Scotland Avenue, Albany, New York 12208

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New York State Bar Association

Committee on Attorneys in Public Service

2007 Annual Meeting Programs

Tuesday, January 23, 2007

Marriott Marquis Hotel, 1535 Broadway, New York City

NYSBA Committee on Attorneys in Public Service

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2007 Annual Meeting Programs and Annual Awards Reception

Morning Educational Program: 9 a.m.–12:15 p.m.

United States Supreme Court Term in Review: Introducing the Roberts Court

Speakers: Susan N. Herman, Centennial Professor of Law, Brooklyn Law School

Jason Mazzone, Associate Professor of Law, Brooklyn Law School

In June 2006, the Supreme Court of the United States completed its first full term with Chief Justice John G. Roberts Jr. at the helm. During this past term, the Court issued significant decisions addressing the First Amendment and military recruitment on university campuses, the Fourth Amendment, federalism, the death penalty, and military trials of detainees in Guantanamo. The Court's docket for the October 2006 term includes cases of great interest to public service attorneys, involving such topics as race-conscious assignments in public schools, federal regulation of abortion, and important issues of criminal and civil punishment. Join eminent constitutional law scholars Susan Herman and Jason Mazzone, as they discuss the work so far of the Roberts Court and its future directions.

Afternoon Program: 2 p.m.–5 p.m.

Eminent Domain: Is this land your land?

Co-sponsored by the Task Force on Eminent Domain and the Real Property Law Section, Committee on Condemnation, Certiori and Real Estate Taxation

Speakers: John Nolan, Professor, Pace University School of Law, White Plains

Henry DeCotis, NYS Department of Law, Albany

Lisa Bova-Hiatt, NYC Department of Law, New York

Jon Santemma, Jaspan, Schlesinger and Hoffman LLP, Garden City

Charlene M. Indelicato, Westchester County Attorney, White Plains

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Annual Awards Reception
Tuesday, January 23, 2007, 5:30 p.m.–7 p.m

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Making the State's Procurement Practices More Business Friendly

By Kim Fine and Joan M. Sullivan

Kim Fine

This year, as part of the legislation enacting the State budget, the Governor and Legislature increased discretionary purchasing thresholds for which formal competitive processes and approval by the State Comptroller are required. Specifically, Chapter 56 of the Laws of 2006 amended Section 112(2)(a) of the State Finance Law to require the approval by the Comptroller of State agency contracts valued at more than $50,000 and set a threshold of $85,000 for contracts awarded by the Office of General Services (OGS).[1] Chapter 56 further amended Section 163(6) of the State Finance Law to increase competitive bidding thresholds to $50,000 for State agencies, and $85,000 for OGS.[2] The amendments preserved the incentive to contract with certified Minority and Women Owned Businesses (MWBE) and small businesses, as well as to purchase recycled and remanufactured products, by raising the threshold requiring competition to $100,000.[3]

The discretionary threshold increase, intended to reduce unnecessary bureaucracy for lower-dollar-value and consequently lower-risk procurements, was originally proposed by State Comptroller Alan G. Hevesi in April 2005.[4] A review by the Comptroller determined that contracts valued between $15,000 and $50,000 accounted for 23 percent of all new contracts handled by agency employees and reviewed by Comptroller's Office staff. These same contracts accounted for only one percent of the dollars spent pursuant to contracts. This disproportion between the demand on limited resources and the value of contracts formed the basis of the recommended reform which was included in the 2006-07 Executive Budget proposal, revised slightly by the Legislature, and enacted as part of Chapter 56 of the Laws of 2006.

Chapter 56 also extended the Procurement Stewardship Act, which is codified in Article 11 of the State Finance Law, and was originally enacted by Chapter 83, Sections 31 to 33, of the Laws of 1995.[5] The Act was intended to provide a comprehensive statement of the requirements for public contracting and to promote competition in the public procurement of services and commodities. Equally important, the legislation was enacted to protect public funds by preventing favoritism, fraud and corruption in awarding public contracts. The Procurement Stewardship Act provides a competitive bidding process for services, outlines the "best value" award criteria, and establishes a means to streamline the procurement process and cut administrative costs by allowing the use of contracts awarded by other governmental entities.

Joan M. Sullivan

Assembly Member RoAnn M. Destito has advanced proposals, some of which were proposed in consultation with the Comptroller and others that resulted from a series of public hearings, to amend the Procurement Stewardship Act at the same time its sunset is further extended. The reforms are intended to streamline contracting processes while maintaining necessary oversight, ensuring fairness and creating business opportunities for MWBEs.[6]

Proposed Reforms

Consultation with affected parties is essential in formulating a meaningful reform agenda. In the case of procurement reform, vendors who have or wish to have contracts with the State have the ability to provide important insights. The Business Council of the State of New York and the Partnership for New York City, among other organizations, provided staff of the Office of the State Comptroller with access to the contracting community. Sessions with the business community helped identify contracting challenges faced by vendors that were not evident from the government perspective. They also assisted in confirming or clarifying perceived problems identified through review of government contracts.

One such problem identified through contract review experience and confirmed by representatives of the vendor community was the lack of accurate and consistent information about losing bids. On occasion, the Office of the State Comptroller has received inquiries from vendors about final approval of a contract only to find that they were not the vendor selected by the procuring agency. Representative vendors confirmed that they often did not find out the status of their proposal in a timely way and often were not debriefed by the agency in a way that would allow them to understand why their proposals were unsuccessful.

Despite advice contained in the State Procurement Council's Guidelines (which state that debriefings should be offered to unsuccessful vendors), a number of State agencies are frequently reluctant to debrief unsuccessful vendors prior to the Comptroller approving the contract award. This may make it difficult for unsuccessful vendors to file any effective procurement protests, since vendors would not be aware of possible errors in the evaluation process or, indeed, may even be unaware that their bids or proposals were unsuccessful. To solve this problem, the Comptroller has in the past stated, in the context of a bid protest decision, that the Office would not approve a contract until an unsuccessful vendor's request for a debriefing was honored. However, a legislative solution is preferable, whereby all unsuccessful vendors would know their rights to be debriefed and all agencies would understand the necessity of providing a debriefing.[7]

"As procurement reform—specifically, the amendment of the Procurement Stewardship Act—is pursued, it will be important to achieve balance between the need to encourage more entities to do business with the State in an effort to get the best products and services at the lowest price and the need for rules and oversight to ensure fair competition."

A properly conducted debriefing can, in some cases, eliminate the need for a formal protest by providing acceptable answers to the unsuccessful bidder. Conducting the debriefing, and possibly eliminating a potential protest also can save time in the procurement review and improve the ability of the agency to secure needed commodities or services in a timely manner. Finally, debriefings should occur before the contract is submitted to the Office of the State Comptroller because once the Comptroller has approved a contract, the only avenue available to a dissatisfied, unsuccessful bidder is litigation.

Discussions with the vendor community also confirmed frustration with the rigidity of rules that may require the results of a competitive procurement process to be overturned because of a minor procedural defect. Reform proposals have been advanced to provide the Comptroller with the authority to waive minor deviations in the procurement process and allow the award of a competitively bid contract in certain circumstances, thus avoiding the time and expense of a new procurement.

Currently, where the agency has otherwise conducted a good faith competition and the deviation does not favor the winning bidder or prejudice losing bidders or others, the Office of the State Comptroller often attempts to salvage these procurements by approving them on a single source basis. The rationale the Office of the State Comptroller applies is the best interest of the State. Generally in these instances, the Office of the State Comptroller concludes that the same bidder would win a re-bid and, therefore, State resources would be wasted by conducting a new procurement.

Reform would provide the Office of the State Comptroller with statutory authority to waive minor deviations from competitive bidding requirements. Obviously, this ability would be employed judiciously, and only when certain standards have been met.

A third proposed reform that would benefit the business community and the State is the ability to develop a creative procurement solution that otherwise might not fit within the rules prescribed in the Procurement Stewardship Act. The Comptroller recommends legislation to provide flexibility to approve a pilot procurement if:

- The procuring agency demonstrates that a Pilot Procurement Method would better serve the interests of the State than other methods currently available under the Procurement Stewardship Act;
- The Pilot Procurement Method can be applied on a fair and equitable basis;
- The Comptroller approves the procuring agency's proposed Pilot Procurement Method; and
- The procuring agency must file a report with the Comptroller, not later than the midpoint of the term of the contract, assessing the pilot procurement method's success or failure. The Comptroller will then review the report and make written recommendations to the Governor and the Legislature regarding the possible continued use of the Pilot Procurement Methodology.

When the Procurement Stewardship Act initially was enacted, unique arrangements between State agencies and businesses were envisioned as "strategic partnerships." The strategic partnership provision has not been used successfully and the time has come to replace it with a provision that would allow for creative procurement of goods or services offered by businesses, with appropriate safeguards and oversight.

As procurement reform—specifically, the amendment of the Procurement Stewardship Act—is pursued, it will be important to achieve balance between the need to encourage more entities to do business with the State in an effort to get the best products and services at the lowest price and the need for rules and oversight to ensure fair competition. The increase in discretionary thresholds was a first step, based on experience, discussion and analysis of relevant data. Additional reform proposals have been

developed following the same fact-based, thoughtful process. These reforms should be pursued to preserve the integrity of the State's procurement processes and reduce unnecessary bureaucracy.

Endnotes

1. N.Y. EDUC. LAW § 355(5), § 355(16), § 6218(a)(i) (McKinney Supp. 2006) (Permits the Comptroller to approve higher thresholds for S.U.N.Y. and C.U.N.Y. contracts).
2. In order to prevent the split ordering of goods and services by State agencies in an attempt to avoid competitive procurement and oversight by the Office of the State Comptroller, legislation has also been recommended that would codify the Comptroller's longstanding position that, as a matter of law, statutory competitive bidding requirements cannot be avoided through split ordering and therefore State agencies must aggregate purchases over a 12-month period when applying discretionary thresholds. *See* 1990 Opns St Comp No. 90-35 (and cases cited therein).
3. Prior to these changes, Section 112 had a flat rate discretionary threshold of $15,000 for all contracts, and Section 163 of the State Finance Law called for discretionary buying thresholds of $15,000 for State agency contracts, $30,000 for the Office of General Services, and $50,000 for MWBEs, small businesses and recycled or remanufactured products.
4. Report, N.Y.S. Office of the State Comptroller, Alan G. Hevesi, *Strengthening State Procurement Practices: Producing the Best Results for New Yorkers* (April 2005), available at http://www.osc.state.ny.us/press/releases/apr05/procurement.pdf.
5. The Procurement Stewardship Act was scheduled to expire five years after enactment (see Section 362 of Chapter 83 of the Laws of 1995), but Section 1 of Chapter 95 of the Laws of 2000 extended the provisions of the Act until June 30, 2005. The sunset date was extended until June 30, 2006, by Chapter 56, Part K., Section 1, of the Laws of 2005, and until June 30, 2007 by Chapter 56, Part D, Section 1, of the Laws of 2006.
6. New York State Assembly, New York State Committee on Governmental Operations, "Annual Report—2004" (December 15, 2004).
7. *See In the Matter of the Bid Protest* filed by CAT*ASI with respect to the procurement determination, Contract Number C000285, State Comptroller's Legal File Number SF- 20020263.

Kim Fine is Deputy Comptroller for Budget and Policy Analysis and coordinates various reform agendas advanced by the Office of the State Comptroller, including procurement reform and public authority reform. She is the Comptroller's representative to the Advisory Council on Procurement Lobbying and is co-executive director of the Local Government Assistance Corporation. Her government experience includes serving as Special Assistant to the Governor, where she was responsible for monitoring government programs and policies and compiling associated statistical information. Outside of government, as an executive of a major regional non-profit organization, Ms. Fine developed specialized health programs and was an advocate for people with disabilities. She is a graduate of New York University and resides with her family in Saratoga County.

Joan M. Sullivan serves as Assistant Comptroller for the State Financial Services Group at the New York State Office of the State Comptroller. She is responsible for the oversight of five Bureaus including Contracts, State Expenditures, Financial Reporting, Accounting Systems and Accounting Operations, as well as the project to redesign the state's Central Accounting System and the VendRep Initiative. Ms. Sullivan joined the Comptroller's Office in January 2000 as Assistant Director of Contracts and in September 2001 was appointed Director. Prior to joining OSC, she managed the Strategic Technology Assessment and Acquisition Team for the Office for Technology. Before this assignment, she spent 21 years with the former Department of Social Services, rising to the level of Director of the Office of Contract Management and later Director of Administration for the Human Services Application Service Center.

A Brief History of the Model Procurement Project and the New York Experience

By Larry C. Ethridge

I. Initial Code Development

The project to develop the Model Procurement Code for State and Local Governments ("MPC" or "Code") was one of the largest projects ever undertaken by any Section or group within the American Bar Association at the time of its inception in 1974.[1] A joint undertaking of two ABA Sections, the Section of Public Contract Law and the Section of State and Local Government Law, the Project was overseen by a six-member Coordinating Committee, made up of three members from each of the sponsoring Sections.[2] Through the ABA's Fund for Public Education, the project received and expended nearly $3 million in the development of the MPC, by obtaining grants and contributions from federal agencies as well as many states and cities. There was no template for such an undertaking at that time, and a small project staff located in Washington, D.C. eventually coordinated the work of over 200 volunteers, experts in various areas of procurement law from all levels of government, the private sector and academia. The original idea for developing the Code came to light in 1970, and work began in earnest in 1974.[3] After nine long years, the final draft of the Code was presented to the ABA House of Delegates and approved as an official publication of the Association on February 13, 1979.[4]

Organizationally, the Coordinating Committee established twelve National Substantive Committees, one for each Article of the Code.[5] Each Committee was composed of purchasing professionals and practitioners from the private and public sectors, with particular expertise in their drafting area (e.g., source selection, specifications, construction, remedies, ethics, etc.).[6] Furthermore, many national governmental and professional purchasing groups assisted in the drafting effort, serving as members of the MPC Advisory Board. These groups included, among others, the National Institute of Governmental Purchasing ("NIGP"), the National Association of State Purchasing Officials ("NASPO"), the National Association of Attorneys General ("NAG"), the Council of State Governments ("CSG"), the National Council of State Legislatures ("NCSL") and the International City Management Association ("ICMA"). The coordinated work of the twelve drafting groups was coalesced by the Coordinating Committee into two preliminary drafts in 1976 and 1977, resulting in compilation of the final draft in late 1978 after extensive revisions and reviews.[7]

During the development of the Code, the Coordinating Committee established a program of Pilot States and Cities for external review of the three official drafts, thus ensuring its adoptability by governmental bodies at all levels.[8] Several of these states (Kentucky, New Mexico and Utah) and cities (Louisville and Baltimore) were among the first jurisdictions in the country to adopt primarily Code-based legislation.[9] There were concerns within the procurement community that this effort would simply be a "cram down" of federal procurement laws and practices, and the MPC drafters were keenly aware that it was most important to reflect the accumulated wisdom of state and local procurement professionals in this "model" document.[10] The word "model" was stressed throughout the drafting process, as this was never intended to be a uniform code; rather it was described as a smorgasbord from which enacting jurisdictions could pick and choose the provisions they felt most pertinent to their needs.[11]

"As of this writing, the Code has been adopted in major part by sixteen states, and it has been enacted in part and parcel by many other state and local governments."

The Code provided a framework for codification of state procurement laws and regulations strewn out all over the statute books.[12] Indeed, many jurisdictions were drawn to the Code due to its clear exposition of several different types of source selection methods, most notably the introduction of competitive negotiations at the state and local level. There was a significant gap between technological advances in procurement activities and the outmoded "lowest and best" language of the various sealed-bid statutes then in effect, and the MPC bridged that gap.[13] A groundswell of support for modernization of the procurement process, coupled with the advent of increased professionalism in the procurement community, resulted in widespread enactment of MPC–based legislation.[14] As of this writing, the Code has been adopted in major part by sixteen states, and it has been enacted in part and parcel by many other state and local governments.[15] The Code is also used by literally thousands

of local units of government across the country, either under state law mandates (e.g., South Carolina and New Mexico) or through voluntary local enactments (e.g. New York City).[16]

After the Code was approved for distribution as an official policy publication of the American Bar Association by the House of Delegates in 1979, the Coordinating Committee went on to produce Recommended Regulations to implement the Code, and the Model Procurement Ordinance for consideration by cities.[17] All of these publications received widespread distribution over the next two decades, but it became obvious to the Code's original drafters that advancing technology again called for an update and modernization of the Code materials as we neared the 21st century. At the ABA Annual Meeting in 1997, former Coordinating Committee Chair Tom Madden addressed the need for changes in the Code, based upon experiences encountered in many of the enacting jurisdictions.

Madden specifically referred to the provisions of Article 2 (Procurement Organization) as an impediment to implementation of the Code in some states, as this had been perceived as more of a "uniform" than a "model" Code Article. He noted that few states had changed their internal organizational structures when they adopted the Code, and this was an Article he felt was in need of serious reconsideration. As to the provisions of Article 3 of the Code (Source Selection and Contract Formation), Madden noted the Federal Acquisition Streamlining Act of 1994 ("FASA") as a model for change, given its emphasis on obtaining commercially available products in the most economical fashion, particularly in the areas of information technology and telecommunications. Citing various surveys which showed that as much time was spent on small purchases as those of larger dollar values, Madden also suggested that small purchases be viewed as "simplified acquisitions"—with a much less labor-intensive methodology for conducting said purchases utilizing the evolving concepts of e-commerce.

Newly emerging practices and procedures in the construction industry also indicated that the Code should be updated in order to facilitate transactions such as lease-purchase agreements, design-build contracts, and other developing project delivery methods. Although most of these methods were implicitly allowed by the provisions of the MPC, they were not explicitly set forth and authorized for use in the original Code. Changes in the infrastructure acquisition area also fostered the rising use of "public-private partnerships," so important to the preservation and revitalization of our country's transportation and utilities infrastructure. Madden further cited the need to revisit the socioeconomic provisions contained in MPC Article 11 in light of emerging trends in the law, and to consider provisions that would facilitate e-commerce in the governmental procurement arena. He noted that fax machines were not in widespread use at the time the Code was initially drafted, and the project coffers could have saved thousands of dollars in overnight mail expenses had such equipment been available in the late '70s! From this technology explosion perspective, Code observers saw the need to review the entire Code from the standpoint of whether it would work in the context of the evolving electronic purchasing environment.[18]

There was widespread consensus at that time that the provisions of the MPC Article 10 (Intergovernmental Relations) needed to be revised in order to expand the utilization of cooperative purchasing activities across city, county and state boundary lines. Subsequent developments have proven this course of action to be a correct one, given the creation of such multi-state cooperative purchasing entities as U.S. Communities and the Western States Cooperative Alliance. All in all, the time had come in the late 90s for re-engineering the MPC.

II. The Code Revision Project—MPC 2000

Based upon the above observations and the need for updating the Code, the two sponsoring ABA Sections agreed to jointly support the MPC Revision Project at the ABA Annual Meeting in 1997. The Project was guided by a Steering Committee consisting of two members from each of the sponsoring Sections and two Reporters who were instrumental in conducting and managing the Project on the World Wide Web through the resources of the Massachusetts Institute of Technology. The Code website was yet another technological advancement that was not available when the initial Code was drafted. The Steering Committee solicited and encouraged full participation from members of both sponsoring ABA Sections, procurement law practitioners, public interest groups who had participated previously on the Advisory Board, and purchasing officials and agencies across the country.

The stated purpose of the Revision Project was to update the Code to meet the requirements and needs of state and local governments and their vast cadre of diversified contractors as we headed into the 21st century. The major goals of the Revision Project were:

1. To reduce transaction costs for all governmental entities at the state and local levels, and to expand the use of multi-jurisdiction contracts;
2. To reduce transaction costs to the private sector suppliers of goods and services;
3. To substantially increase available levels and ranges of competition through modern methods of electronic communications; and
4. To encourage the competitive use of new technologies, new methods of performing, and new forms of project delivery in public procurement, particularly in the construction and infrastructure area.

From the outset, all those involved in the Revision Project acknowledged the 1979 Code was confining in respect to the use of electronically based commercial contracting, and it needed to be repositioned to incorporate the myriad e-commerce advancements in the public procurement sector. Indeed, the mechanisms for advertising needs, opening bids, and similar procurement processes were overtaken in many respects by technological changes in telecommunications. It was also noted that state and local governments were responding to these changes in a manner that equipment and service purchases were being done on an *ad hoc* basis, resulting in great experimentation and variation in practices among state and local governmental entities. The resulting proliferation of "local contact" procurement regulations created negative trends, due to the fact that complex and arcane procurement rules for technologically advanced acquisitions by numerous jurisdictions discouraged competition, while the jumble of procurement operations raised the cost to companies of understanding and complying with different rules in each jurisdiction. Unfortunately, these costs of doing business were recovered in the prices offered by decreasing numbers of competitors, resulting in unnecessarily high costs to state and local governments.

While delving into these new areas such as e-commerce and infrastructure delivery, the Revision Project Steering Committee members and the Reporters kept in mind throughout the need to retain the basic principles and concepts contained in the original Code, which had provided a fundamental foundation for durable procurement systems over the past twenty years. These principles have been described as bedrock notions in the law of public procurement, and the coverage of same was preserved in the updated MPC 2000 in the following specific areas:

1. Maximization of competition;
2. Ethics in public procurement;
3. Predictability and transparency of the procurement system (stability and accountability);
4. Clear statements of procurement needs;
5. Equal treatment of all bidders and offerors;
6. Flexibility in methods of source selection;
7. Objective bid and proposal evaluations;
8. A streamlined system of remedies; and
9. Facilitation of intergovernmental transactions across all boundary lines.

With the above goals in mind, the Steering Committee compiled a report for the sponsoring Sections in the form of a compilation entitled "Reporter's Recommendations," which were put together over a two-year period of fact finding and serious consideration of all suggestions received. The Recommendations were adopted in principle by each of the sponsoring Sections at the ABA Annual Meeting in August of 1999. Any differences that existed at that time between the sponsoring Sections were resolved by the Steering Committee, acting as a Conference Committee for both Sections. The resulting MPC 2000 was submitted to the ABA House of Delegates and unanimously approved as an official policy publication at the ABA Annual Meeting in August of 2000. The Recommended Regulations were then updated and approved by both Sections in 2002.

After three years of intensive debate and massive communications around the country, the following major changes were included in the MPC 2000:

- Electronic Commerce—The revisions facilitating e-commerce were made mostly in the area of modified definitions and new definitions found in Articles 1 and 3 of the Code, which allow procurement processes to more easily adjust to the "electronic age."
- Cooperative Purchasing—The revisions in this area modified definitions and language in Article 10 of the Code seeking to extend the scope and encourage the benefits of cooperative purchasing of supplies and services among all state and local governments.
- Flexibility in Purchasing Methods—The revisions in this area provided badly needed flexibility to procurement officials to adapt procurement processes to unusual circumstances, with appropriate safeguards and reporting responsibilities, found in Article 3 of the Code.
- Processes for Delivery of Infrastructure Facilities and Services—Sweeping revisions to the Code in this area necessarily provided more explicit guidance on the use of construction delivery methods than those previously authorized by the 1979 Code. These revisions provided best practice recommendations in the use of alternative project delivery methods as effective tools in managing the entire collection of a city's or state's infrastructure facilities.

These new delineated methods of infrastructure project delivery include design-bid-build, design-build, design-build-finance-operate-maintain, and design-build-operate-maintain. Each of these delivery systems has its own particular source selection methodology as set forth in Articles 3 and 5 of the MPC 2000. Hopefully the ongoing review of New York's procurement laws will include a comparison and consideration of adopting the new provisions of the MPC 2000.

III. Activities in New York

The staff of the American Bar Association's Model Procurement Code Project first became involved in procurement review and reform efforts on the state level in New York in 1978. The ABA Project Office was asked to assist the Legislative Commission on Economy and Efficiency in Government in its overall review of New York State's purchasing laws and practices, beginning with a comprehensive comparison of the numerous state statutes to the provisions of the MPC. The first major product of those early activities was the preparation of a "Comprehensive Comparison of the ABA Model Procurement Code and Related New York Statutes," which was released by the Commission in March of 1983. This was a daunting task in that the state's purchasing laws at that time were spread over some twelve different volumes of statutes, encompassing over 150 statutes in all. The Commission's staff at that time provided the ABA Project Office with procurement provisions from the State's finance law, transportation law, public buildings law, public authorities law, printing and documents law, education law, labor law, judiciary law, correction law, commerce law, general municipal law and highway law. The enormity of this task was reflected in the 163-page comparison document, which formed the basis for a "Conference on Procurement in New York," held by the Commission in Albany on April 22, 1983.

The major findings reported from the Comparison and the 1983 Conference were that:

1. There was no overall purchasing law setting forth policy for all branches of state government;
2. There was no central procurement policy-making body at the state level;
3. There was no cohesive source selection framework throughout the state purchasing laws encompassing competitive sealed bids, competitive sealed proposals, small purchases, sole source procurements, emergency procurements and competitive selection procedures for professional services;
4. There was no uniform system for the procurement of construction, architect-engineer and land-surveying services in New York purchasing laws;
5. There was no overall system of supply management and disposal within the New York purchasing laws;
6. There was no discernable systematic approach or procedure for the resolution of bid protests and contract disputes at the administrative level;
7. There was no provision for true cooperative purchasing activities by all units of state and local government in the New York laws;
8. There was no consolidated treatment of small and disadvantaged businesses under New York purchasing laws; and
9. There was very little detailed coverage regarding ethical considerations in the procurement process in New York.

The resulting Report reflected the consensus of the Conference participants that one of the major benefits of adopting legislation based on the Model Procurement Code would be the resulting codification of the numerous existing state statutes relating to procurement into a single body of procurement law. The proposed review process suggested following the Conference would also allow the state to evaluate the current status of its overall treatment of procurement organizations, source selection methods, legal and contractual remedies, intergovernmental relations, and provisions related to ethics in procurement.[19]

The proposed review process moved along in fits and starts over the next three years, culminating with the publication of a two-volume study entitled "Procurement Reform in New York State Government." This study was published by the renamed Legislative Commission on Public Management Systems in 1986. Again, former ABA Project staff members served on the Procurement Advisory Panel for the Commission. This lengthy report also contained a proposed Consolidated Procurement Law, and a memorandum in support of said legislation which set forth the following goals:

1. To consolidate all state law related to procurement of supplies, services and construction in one new chapter of the state's consolidated laws;.
2. To establish consistency in state procurement laws and regulations through the creation of a new Procurement Policy Office;
3. To balance centralization and decentralization in procurement by creating the office of a Chief Procurement Officer, while allowing procurement authority to be delegated to agencies on a monitored basis;
4. To extend procurement law coverage to all state level governmental entities, including the legislature, the judiciary, and statewide public authorities;
5. To separate procurement policy-making functions from operations;
6. To require competition in the procurement of services;
7. To provide alternative means of competitively selecting vendors under special circumstances;

8. To strengthen the state's commitment to increased purchasing from minority and women owned businesses;

9. To improve procedures for notifying vendors of contract opportunities;

10. To create an independent administrative Procurement Appeals Board which would ensure fair hearings to firms doing business with the state, while providing the state with an internal audit of its contract award and debarment procedures; and

11. To establish a Commission with the primary responsibility of investigating and making determinations of ethical violations in the procurement process.

As was the case with the previously suggested procurement reform legislation, this Bill also met with considerable opposition from various entities throughout state government who sought to preserve the status quo.

Further symposia and seminars were held over the following three years, and in 1989 the Legislative Commission on Public Management Systems produced yet another procurement publication entitled "Improving the Purchase of Goods, Services and Construction in New York State Government." Again with the assistance of former ABA staffers, this lengthy publication summarized prior activities in the area of procurement policy review and proposed reforms, and contained yet another proposed Consolidated Procurement Act. In addition to the findings of previous studies, the Executive Summary of this report found that:

1. Vendors were not provided competitive access to many state contracting opportunities, thus resulting in higher state procurement costs;

2. A tremendous lack of standardization in procurement operations throughout state government also increased costs and imposed additional burdens on this process;

3. The existing scattered state procurement system precluded the use of private market forces to obtain the highest quality goods at the lowest possible price, noting that the majority of state procurements at that time did not require advertising or competition;

4. Executive discretion was found to dominate procurement operations in the state, and oversight and control of procurement functions did not adequately address procurement operations;

5. Vendors were not provided with impartial methods of recourse in the event that they disagreed with the procurement actions of the various state agencies; and

6. The management of procurement operations in the state was hindered by a tremendous information gap.

Again, the proposed legislation resulting from this study of the New York procurement system did not move successfully through the Legislature. Finally, in 1995, the Procurement Stewardship Act was adopted by the State of New York as the culmination of nearly two decades of research and reviews of its procurement system and policies. Many of the provisions of the MPC cited in prior studies were incorporated in the Act, the bulk of which are found in Section 163 of the State Finance Law.

In the spring of 2005, the Albany Law School's Government Law Center hosted a Procurement Law Symposium, focusing on the then-current debate on whether to reauthorize the Procurement Stewardship Act or let it ride off into the sunset after ten years on the books. On the very day of that Symposium, the New York State Legislature passed a budget bill on time (a legislative first in many years), which contained a one-year extension of the Procurement Stewardship Act. This legislation also directed various entities to review the Act and make recommendations for substantive revisions.

In the ensuing months, a number of hearings were held by the Legislature, a Comptroller's Report was issued, and an OGS Focus Group Report was prepared from a series of meetings around the state. Bills were then developed by the Comptroller, the Assembly, the Governor's Office and OGS and the Senate. What emerged from all of this activity was another one-year extension of the Procurement Stewardship Act, giving all participants in the review process another opportunity to set forth their proposals for changes and reforms. New York has a golden opportunity at this time to incorporate the new provisions of the MPC 2000 into the Procurement Stewardship Act. It is the hope of the author that the drafters of proposed legislation will take advantage of this opportunity.

IV. Activities in New York City

The New York City Charter Revision Commission began its work of reviewing the City's procurement laws and processes in 1988, and at that time asked former ABA Procurement Code Project staff members to assist in that effort. In addition to attending several meetings of the Commission in New York, former ABA consultants also undertook a review of the coverage of procurement in the existing Charter, and its implementing Rules and Regulations. As a result of this effort, significant portions of the Model Procurement Code were incorporated by amendments to the Charter and included in the implementing Rules and Regulations for purchasing in New York City. Most significantly, the source selection provisions of the Code were adopted for utilization by all agencies in the City, and centralization of procurement policies and prac-

tices was also endorsed in the new Charter provisions. Procurement operations and policy making functions were also separated with the establishment of the Procurement Policy Board.[20]

"The main goal remains the modernization of the procurement processes to better meet the needs of state and local governments now and in the years ahead."

V. Conclusion

As previously noted, sixteen states have adopted the Model Procurement Code in large part, and many local jurisdictions follow the Code either by state mandate or local enactments. New York State can now be counted in that number given the contents of the Procurement Stewardship Act. It is hoped that those involved in the debate concerning reauthorization and revision of that Act will consider new provisions contained in the MPC 2000 which were not available during the period in which the various New York Commissions studied the state's procurement policies and laws, nor were they available when the Procurement Stewardship Act was enacted in 1995.[21] The main goal remains the modernization of the procurement processes to better meet the needs of state and local governments now and in the years ahead.

Endnotes

1. For a more detailed history of the Code's development, *see* F. Trowbridge Vom Baur, *A Personal History of the Model Procurement Code*, 26 PUB. CONT. L.J. 149 (1996).
2. *Id.* at 150.
3. *Id.* at 151-52.
4. *Id.* at 151.
5. *Id.* at 162.
6. *Id.*
7. *Id.*at 163-66.
8. *Id.* at 165.
9. *Id.*
10. *Id.*
11. *Id.* at 161-62.
12. *Id.* at 167.
13. *Id.* at 168.
14. *Id.* at 172.
15. Those states in order of enactment are Kentucky, Arkansas, Louisiana, Utah, Maryland, South Carolina, Colorado, Indiana, Virginia, Montana, Territory of Guam, New Mexico, Arizona, Alaska, Rhode Island, Hawaii and Pennsylvania.
16. *Id.* at 172.
17. *Id.* at 167, 171.
18. The MPC 2000 and Recommended Regulations can be purchased from the American Bar Association by calling 1-800-285-2221; ask for Product Code 529-0344 (Code/Regulations CD package) or Product Code 539-0245 (Code only on CD).
19. This study noted, as did those that followed in 1986 and 1989, that New York law provided for unique pre-award reviews of many contracts by the Comptroller's Office over contracts solicited by the Office of General Services (OGS). Delays related to that oversight function were cited by many using agencies as impediments to efficient purchasing operations. Copies of all of these studies have been donated by the ABA Coordinating Committee to the Government Law Center at the Albany School of Law.
20. For a detailed account of this process, *see* Constance Cushman, *New York City Meets the Model Code: Lessons from Experience*, 30 THE PROCUREMENT LAW (1995); Constance Cushman, *The ABA Model Procurement Code: Implementation, Evolution, and Crisis of Survival,* 30 PUB. CONT. L.J. 173 (1996).
21. Ch. 83, § 33, 1995 N.Y. Sess. Laws 537 (McKinney).

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Ethical Considerations in Procurement

By Anne Phillips

The statutory framework for public procurement in New York State was established in 1940.[1] Its focus was on obtaining commodities ("material, equipment and supplies") to meet the needs of state agencies through formal competitive bids with contract awards made to the responsive and responsible bidder offering the lowest price.[2] Statutory directions on the conduct of public procurement were minimal. By 1995, that framework no longer adequately supported public procurements where state agencies increasingly acquired services and technology as well as traditional commodities. Public procurement came to rely on more sophisticated bidding methodologies to determine what company would be awarded a state contract. Concepts such as best value were introduced where qualitative and technical considerations were evaluated in addition to price. The "one size fits all" law did not begin to address how these more complex procurements were to be conducted.

Accordingly, in 1995, the New York State Legislature engaged in a significant review and reform of State Finance Law Article XI, State Purchasing. The result was the enactment of a new Article XI known as the Procurement Stewardship Act.[3] The Act included robust provisions dealing with the diverse range of legal issues associated with public procurement from both a policy and process perspective. The Legislature realized that the impact of public procurement is much larger than just the purchase of commodities, services and technology, and the new law addressed fiscal, socio-economic, business, ethical and other factors. It also sought to achieve a balance between operating in the world of commerce and acting in a public capacity with accountability to the taxpayers.

Legislative findings that introduce the Procurement Stewardship Act emphasized that ethical considerations were essential for State procurements by stating:[4]

> It is hereby declared that it shall be the collective responsibility of state agencies and the Office of General Services in cooperation with the Office of the State Comptroller and the Division of the Budget to ensure, in both policy and application, that the State's procurement practices:
>
> a. Provide for the wise and prudent use of public money in the best interests of the taxpayers of the State;
>
> b. Guard against favoritism, improvidence, extravagance, fraud and corruption; and
>
> c. Facilitate the efficient and timely acquisition of commodities and services of the highest quality at the lowest practicable cost within available resources.
>
> Further in exercising their respective roles in addition to their collective responsibility, state agencies shall provide the state's primary line of defense for protecting the integrity of the state's procurement process and shall be responsible for ensuring that the decisions made in executing that process shall be made in accordance with the highest standards of professional practice.[5]

The need for application of ethical standards to public procurements is critical in several respects. The State spent an estimated $112.5 billion in governmental funds in 2005-06.[6] Based on such purchasing volume, the State has a clear obligation to engage in public procurement that serves and meets the expectations of its citizens, the vendor community, the buying state agencies and the governmental employees that oversee State contracts. The law recognizes the natural tension in the interaction of these groups and provides for a statutory infrastructure that permits purchasing agencies to comply with its many requirements and also meet the State's needs for commodities, services and technology. In meeting the goals referenced above, all of the perspectives of the involved parties must be supported and meet expectations relative to ethical procurement.

While the Procurement Stewardship Act sets the stage relative for incorporation of ethical standards in public procurement, it does not make direct provision for enforcement. That function is fulfilled by Section 74 of the Public Officers Law ("POL") which provides for a Code of Ethics for state officers and their employees.[7] Also relevant are Section 73 of the Public Officers Law relating to business and professional activities by state officers and employees and party officers, and Section 73-a of the Public Officers Law relating to financial disclosure.[8] Ethical standards in procurement are also addressed by recently enacted restrictions relative to attempting to influence the

outcome of a procurement ("procurement lobbying") in Sections 139-j and 139-k of the State Finance Law.[9] Additionally, vendor ethics are the focus of Section 163(9)(f) of the State Finance Law which sets forth the requirement for a state agency to make a responsibility determination in association with its recommendation for contract award.[10] (Note also: Executive Order No. 127, Providing for Additional State Procurement Disclosure, which was rescinded on June 30, 2006.)[11]

The impact of the Code of Ethics on public procurement is significant and is outlined through formal opinions of the State Ethics Commission.[12] In the following discussion of certain of these opinions, there will be a demonstration of how ethics principles are inherent to the purchasing process and that there is a continuing need to assess its value, fairness, equity and integrity.

Advisory Opinion No. 06-02.[13] Whether a state employee, who serves as an uncompensated member of the board of directors of a not-for-profit agency under contract with another state agency, may orally communicate with the state agency on the merits of a contract dispute. The New York State Office of Temporary & Disability Assistance ("OTDA") contracted with a not-for-profit for services to assist legal immigrants. The not-for-profit later suspended performance of services under the contract and sought final payment from OTDA. Payment was disputed by the parties. In the course of discussions to resolve the dispute, it came to OTDA's attention that the president of the not-for-profit, who served for no compensation, was also a state employee with the Department of Economic Development ("DED"). As president, this individual was taking an active role in dispute discussions.

Sections 73(7)(a) and 73(12) of the Public Officers Law offered guidance on whether such involvement by the DED employee was permissible:

> No . . . state officer or employee, other than in the proper discharge of official state and local [governmental] duties . . . shall receive, directly or indirectly, or enter into any agreement express or implied for, any compensation, in whatever form, for the appearance or rendition of services by himself or another in relation to any case, proceeding, application or other matter before a state agency where such appearance or rendition of services is in connection with:
>
> (i) the purchase, sale, rental or lease of real property, goods or services, or a contract therefor, from, to or with any agency.[14]
>
> A . . . state officer or employee . . . who is a member, associate, retired member, of counsel to, or shareholder of any firm, association or corporation which is appearing or rendering services in connection with any case, proceeding, application or other matter listed in paragraph (a) or (b) of subdivision seven of this section shall not orally communicate, with or without compensation, as to the merits of such cause with an officer or employee of the agency concerned with the matter.[15]

Because the DED employee was not receiving compensation from the not-for-profit, the Commission concluded that such individual did not violate Public Officers Law § 73(7)(a). The DED employee's participation in the dispute discussions, however, was violative of POL § 73(12) since oral communications were taking place with OTDA; compensation was not a relevant factor in that analysis.

State employees who participate in entities or organizations that do business with the State are bound by additional ethical obligations that can restrict their activities and interactions with another state agency. Public procurement should be conducted at arm's length by the involved parties avoiding the appearance of favoritism or a conflict of interest.

Advisory Opinion No. 05-03.[16] Whether the lifetime bar of POL § 73(8)(a)(ii) precludes a former employee of the Metropolitan Transportation Authority and the New York City Transit Authority from providing information on the next generation of automatic fare collection technology. Advisory Opinion No. 04-02.[17] Whether the lifetime bar of POL § 73(8)(a)(ii) precludes a former State employee from submitting a proposal to his former agency concerning upgrades to a fleet of locomotives that the former employee was directly involved in purchasing in 1995. Advisory Opinion No. 02-01.[18] Application of the lifetime bar restrictions of POL § 73(8)(a)(ii) to a former employee of the Metropolitan Transportation Authority and the New York City Transit Authority who seeks to work on a smart card technology with a different government agency.

Similar issues were raised in these three Advisory Opinions; however, due to the differences in the factual situations, the conclusions reached by the Ethics Commission were different. Each of the cases involved interpretation of the "lifetime bar" restriction imposed by POL § 73(8)(a)(ii) which states in pertinent part:

> No person who has served as a state officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer

> or employee on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration.[19]

In No. 02-01, a former senior employee of the Metropolitan Transportation Authority ("MTA") and the New York City Transit Authority ("TA") had worked on the implementation and roll-out phases of the TA's automated fare collection system known as "MetroCard," including negotiations with the selected vendor and planning and contract management.[20] MetroCard uses a magnetic read-write swipe card technology. When requesting the opinion, this individual was then employed by a private company that was interested in submitting a proposal to PATH's Kennedy Airport AirTrain for a new automatic fare collection system that would use smart card technology. It would also accept read-write cards such as the MetroCard. In analyzing the facts, the Commission noted that the contract was a new transaction and not associated with the MetroCard system as a procurement in large part because the technology that was proposed to be used for the PATH automatic fare collection system was different.[21] MTA and TA were also not involved with the proposed PATH project. Accordingly, the Commission held that the lifetime bar did not prohibit this employee from using the knowledge and methodologies that were developed through employment at the MTA and TA. The holding cautioned that if an issue arose with the TA's role in using the MetroCard on the new PATH automatic fare collection system, this individual's involvement would be precluded by POL § 73(8)(a)(ii) as a lifetime bar.[22]

In No. 04-02, a former employee of the Long Island Rail Road ("LIRR") had been directly involved with preparing specifications and the subsequent contract for procurement of certain locomotives in 1995.[23] In the course of their use, these locomotives developed structural cracks. Some years later, the former employee was asked by an engineering company under contract with LIRR to assist in the technical evaluation of the mechanical problems. In an informal opinion, the Commission concluded that this individual was precluded by the POL § 73(8)(a)(ii) lifetime bar since work involved the same transaction, the procurement of the locomotives. "The Commission determined that the parties to the contract and the essence of the transaction—the acquisition of locomotives for the LIRR—were the same and that the evaluation of the mechanical problems naturally flowed from the procurement itself."[24]

Ten years after the original procurement this Opinion was requested by the former employee, who was then working for a locomotive manufacturing supplier that had been involved as a subcontractor for the original equipment. LIRR was still trying to deal with the structural cracks in the locomotives and had entered into discussions with such supplier about performing a major upgrade to the units. The supplier wanted the former employee to assist in the preparation of a proposal to LIRR. It was indicated by LIRR that the specifications for the original procurement were publicly available and that while the former employee was quite knowledgeable, it did not seem that he possessed insider information that would unfairly advantage the supplier over potential competitors. The former employee argued that the upgrade transaction should be considered a new procurement since these upgrades would not have been available at the time of the original procurement and because it would involve new specifications. He also noted that the parties to the transaction were not the same since the original manufacturer was not a likely source for the upgrades. Finally, he argued that application of the lifetime bar to these facts would be an overly broad application of the term "transaction," severely constraining such employee from ever working on the same property or equipment.[25]

The Commission's discussion and holding note that the lifetime bar establishes a ground rule for what individuals may do with the knowledge, experience and contacts acquired from work on a specific transaction while in public service after they are no longer employed by the State. They agreed that a case had been made that the upgrade project relied on substantial changes from the original procurement which would not have been available when the locomotives were first purchased. The procurement would use new specifications and a new Request for Proposals and was not derived from the original procurement. The Commission's holding was that the upgrade project constituted a new transaction and therefore the former employee was not precluded by the POL § 73(8)(a)(ii) lifetime bar.[26]

In No. 05-03, the former employee, who had been issued Advisory Opinion No. 02-01[27] asked for another Opinion involving application of the lifetime bar. The private company that employed this individual wanted to respond to a solicitation by the New York City Department of Transit ("NYCT") for procurement of a next-generation smart card technology system. The former employee, while working for NYCT, had been directly involved in the planning and contract management and roll-out of the MetroCard, a magnetic read-write swipe card system. The new NYCT project could be differentiated from the MetroCard system because the smart cards would use a non-magnetic, contact-less method of collecting fares; the card uses a computer chip which is scanned by a reader on a turnstile. Some components of the MetroCard hardware would be retained by NYCT to

support the use of both technologies, but this modernization project would replace core hardware and software elements and the interface specifications would be published by NYCT and made available to all prospective bidders, eliminating any technical advantage that might otherwise have been provided due the prior service of the former employee. The Commission's holding noted that the original procurement was transacted more than fourteen years earlier and that smart card systems would not have been available at that time for this function. By analogy to Advisory Opinion No. 04-02, the Commission concluded that the smart card project would be a new procurement transaction. It did not see that this former employee's involvement based on his prior government service would provide an advantage to his current employer.[28]

As seen from these three Opinions, the factual circumstances are significant to any determination regarding application of the lifetime bar to former governmental employees. Time between procurement transactions will be given weight regarding the employee's preclusion. Demarcation between procurements is also seen to be a significant factor to the determination of whether the former employee is subject to the lifetime bar. Under all of these Opinions, where the subject procurement transaction was seen as being set off from the prior procurement transaction, especially where there were new specifications and a new solicitation, the Commission was more inclined to agree that the former employee could work on the project and would not present an unfair advantage to competing parties. Companies doing business with state agencies and other governmental entities need to be cognizant that this ethical issue can arise in what might otherwise be considered an everyday transaction if former government employees are involved. The Public Officers Law is clearly grounded in ensuring that former employees doing business with the State do not obtain unfair advantages based on their insider knowledge, and so former employees will be limited in utilizing knowledge, experience and contacts acquired from working on the same procurement transactions while in public service.

Advisory Opinion No. 05-01.[29] Conditions under which a State employee may accept a discount on goods or services. Sprint PCS provided wireless telephone services for the Office of Temporary & Disability Assistance and other state agencies through a centralized contract awarded and administered by the Office of General Services. Several months after the contract award Sprint offered a national discount plan for federal, state and local employees of 15 percent on such employees' personal Sprint bill. This was communicated to such governmental employees through a mass mailing that announced that Sprint was an approved State contractor and that they were offering the 15 percent discount. A similar issue was presented by a State employee who indicated that he was able to secure a room discount at hotels while on personal business by showing his State identification even when he advised the hotel that he was not there on State business. The question raised in view of POL § 73(5) is whether such discounts can be accepted by State employees:

> No statewide elected official, state officer or employee, . . . member of the legislature or legislative employee shall, directly or indirectly, solicit, accept or receive any gift having a value of seventy-five dollars or more whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part. No person shall, directly or indirectly, offer or make any such gift to a statewide elected official or any state officer or employee, member of the legislature or legislative employee under such circumstances.[30]

Also pertinent are parts of the Code of Ethics, POL § 74(2) and (3)(d), (f) and (h):

> No officer or employee of a state agency, member of the legislature or legislative employee should 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 duties in the public interest.[31]
>
> 3. Standards . . .
>
> d. No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others. . . .
>
> f. An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position, or influence of any party or person. . . .

> h. An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.[32]

The Commission in prior Opinion No. 94-16 had previously stated that a "gift" includes anything of value given to a State officer and employee, including a discount.[33] Moreover, if the gift is offered by a contractor doing business with the State agency where the State employee works, such contractor is a "disqualified source."[34] The gift is therefore impermissible, and if it is more than $75.00, it is violative of the Public Officers Law. The Commission, however, drew on the principles underlying the statute in its analysis of the two discount issues. What needed to be considered was whether the offeror is seeking to influence a governmental procurement or to reward any employee for any official action. Sprint's discount offer does not fall in that category as it was offered to such a broad range of employees that it could not be viewed as influencing the procurement by OTDA of wireless telephone services. Their offer constitutes a common marketing practice where a vendor targets categories of customers hoping to enhance its sales volume, and this instance cannot be seen as connected with the performance of public duties.[35] The same conclusion that the discount was permissible was reached regarding the hotel discounts so long as the State employee affirmatively advises the hotel that he or she is not staying at the hotel while on official State business.[36]

Companies who do business with the State should carefully consider their marketing practices if they use the advent of a contract award to assist them in obtaining additional commercial sales. While the Commission found that the discounts offered by Sprint and various hotels was so broad based as to not raise ethical concerns, more narrowly tailored offers could cross the line and present ethical issues for State employees with adverse consequences.

Advisory Opinion No. 95-30.[37] Application of the POL §§ 73(4)(a) and 74 to a State employee's spouse competitively bidding on a contract prepared and reviewed by the employee's unit at the State agency. A non-policymaking employee of a State agency performed duties in connection with that agency's construction and renovation projects including interior design, lighting, wall coverings, window treatments, floor coverings and furnishings. The spouse of such employee was a sales representative of a carpet manufacturer that wanted to submit bids for carpet to such agency which would be secured through a competitive solicitation. To avoid an appearance of a conflict of interest, the agency proposed to remove the employee from any duties involving carpet selection and review. Those duties would be handled by other agency employees.[38]

Relative to whether there would be a conflict of interest is POL § 73(4)(a):

> No . . . state officer or employee . . . shall (i) sell any goods or services having a value in excess of twenty-five dollars to any state agency . . . unless such goods or services are provided pursuant to an award or contract let after public notice and competitive bidding.[39]

Additionally, POL § 74(2) was at issue:

> No officer or employee of a state agency . . . should 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 duties in the public interest.[40]

Also to be considered in responding to this inquiry is POL § 74(3)(c), (d), (f) and (h) [(d), (f) and (h) are referenced above]:

> (c) No officer or employee of a state agency … should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.[41]

The Commission relied on precedent to analyze whether POL § 73(4)(a) precluded the spouse from submitting a bid, referring to Advisory Opinion No. 92-02, where it was held that a State employee was not prohibited from bidding competitively on a contract with his agency.[42] By extension, the Commission held that a spouse of such employee would also not be prohibited from participating in the procurement so long as it was conducted through competitive bidding and with public notice.[43]

Relative to the Code of Ethics provisions of POL § 74, a higher standard was imposed on the conduct of the State employee as even the appearance of a conflict of interest may violate the law. State employees may not disclose confidential information for personal gain, and are precluded from using their official position to secure favorable treatment for themselves or others or even give the impression that favorable treatment could be had. Here, the State agency took steps to avoid the appearance of a conflict of interest by removing the employee from the planning for the procurement and the competitive bid process. Thus, the employee would be unable to take actions that would influence the procurement. The Commission noted that the competitive solicitation process

includes protections through the fact that it is an open and public process with the selection process for award and the agency review and recommendation for contract award based on the lowest cost, responsive bid on the record. Because of the protections offered by the formal competitive solicitation, it was held that the spouse was not prohibited from bidding on carpet for this State agency.[44]

The theme that is evident again in this Advisory Opinion, and which is reinforced by guiding principles of the Procurement Stewardship Act, is that state agencies and their officers and employees are responsible "for protecting the integrity of the State's procurement process." The Code of Ethics makes it clear that both State agencies and the business community must be mindful not only of conflicts of interest, but also the appearance of conflicts of interest. As in this instance, early recognition by the state agency that there may be ethical issues resulted in an equitable solution that was consistent with considerations under the State Finance Law, as well as the Public Officers Law. Agency Ethics Officers should be viewed as a resource by such State officers and employees in discerning when an issue may have ethical ramifications. Agency Ethics Officers can look at such ethical concern on behalf of the agency and its employees advising on its content based on law and opinion and whether there is a need to take action for the purpose of making the procurement, terminating the procurement, rebidding the procurement or recommending appropriate changes to internal controls.

These Advisory Opinions provide State agencies and officers and employees with a valuable and independent review of ethical issues that may arise in connection with procurement and contractual transactions. They reflect not only consideration of the Public Officers Law, but procurement policy and process set forth in the State Finance Law under the Procurement Stewardship Act. Furthermore, they present an evolving body of consideration of the prevailing statutory infrastructure in which public procurement is conducted, especially as it involves State officers and employees.

Ethical considerations are also addressed when State agency procurement decisions are challenged by the business community. While not the central issue in some of the decisions discussed below, their resolution was important to the final determination in several court cases.

Matter of Transactive Corporation v. New York State Department of Social Services, et al.; Matter of Check Cashers Association of New York, Inc., et al. v. New York State Department of Social Services, et al.[45]

Just after Article XI of the State Finance Law was enacted, the Department of Social Services ("DSS") faced a singular challenge in bidding for a project to develop an electronic benefits transfer system for welfare recipients. The value of the contract was estimated to be $145 million. A request for proposals ("RFP") based on best value selection was issued to meet this complex procurement requirement, requiring bidders to submit separate Technical and Financial Proposals to be reviewed by separate Technical and Financial Committees, with final selection to be made by a third Management/Steering Committee.[46]

The RFP included five weighted technical criteria for purposes of evaluation. Within the five evaluation criteria, the agency developed a scoring system with more than 100 scoring items. The scoring system was not disclosed to the bidders in the RFP. The RFP also stated that if cost among qualified bids varied significantly so that bids were not in a competitive price range, then price would be the basis for award. The competitive range was established at 10% among bids. The 10% competitive range was not stated in the RFP. It was not established until after bidders submitted their initial proposals, but was in place prior to the agency's request for "best and final" offers from the bidders.[47]

Five bids were received and "best and final" offers were requested from all five bidders. Fleet Bank ("Fleet") was ranked first on a technical basis, and Citicorp Bank ("Citicorp") was ranked fourth. Citicorp was ranked first in price (lowest) and the Fleet price was 18% higher. Contract award was recommended to Citicorp. Fleet, through its bidding partner, Transactive Corp., challenged the contract award alleging failure: (1) to disclose "relative weight" between technical and financial criteria because the scoring system was not included in the RFP; (2) to identify the competitive range relevant to evaluation of price; and (3) to establish the competitive range prior to initial receipt of bids. All of these issues have an underlying ethical issue relative to the fairness and openness of the process and whether the State agency changed the rules for the evaluation process to the detriment of certain bidders. The challenge, however, primarily focused on the compliance to the processes for conduct of such a best value competitive solicitation under the State Finance Law. The lower court found in favor of Fleet.[48]

On appeal, however, the Appellate Division reversed, upholding the award to Citicorp and finding that DSS properly complied with the law.[49] Again it focused on the procurement processes as outlined in § 163 of the State Finance Law ("SFL"). It found that the standard embodied in SFL § 163(9)(b) "does not require particularization but only generalization," and so the evaluation criteria were adequately disclosed.[50] The Court also found that since the competitive range was established prior to receipt of final offers, there was no violation of SFL § 163(7) and that the award was in the public interest.[51] It further examined the evaluation method that incorporated technical and

financial cost-benefit analysis indicating it met the SFL § 163(1)(j) directive that a contract must be awarded on the basis of best value, a method that optimizes quality, cost and efficiency among responsive and responsible bidders.[52] Implicit in finding that there was compliance with the various requirements of the Procurement Stewardship Act is that this procurement was conducted consistent with the law's operating principles of fairness, openness and making sure that the process was conducted on a level playing field. It is clear that the Court did not think that the agency had changed the rules for the evaluation to the detriment of any of the bidders.

Matter of Pallette Stone Corporation v. State of New York Office of General Services[53]

The issues examined in this case related to the validity of multiple contract awards for commodities and whether post-bid price reductions for commodities were acceptable. The terms and conditions of the invitation for bids (IFB) called for contractors to reduce the commodity price if a lower price was offered to other similarly situated customers. Bidders were further advised that such price reductions would be prospective and not impact pending purchase orders.[54]

One of the contractors, Peckham Materials Corporation, offered a price reduction on a separate bid by a local government and thereafter offered the lower price to the State. The Office of General Services ("OGS") accepted the lower price. Prior to this price reduction, the prices offered by Pallette Stone Corporation under the multiple awards for the region had been lower than those offered by Peckham. When another local government issued a purchase order under the OGS contract to Peckham to meet its requirements, Pallette challenged the acceptance of the price reduction by the State, alleging that it was outside OGS's statutory authority and inconsistent with competitive bidding. Pallette was also challenging the fairness of the State permitting price reductions during the contract term.[55]

The Supreme Court confirmed the authority of OGS to make multiple awards and to accept post-bid price reductions, disagreeing with Pallette's contention that the post-bid reduction undermined the entire competitive bidding process, noting that the public interest was served "by fostering honest competition in the belief that the best work and supplies might thereby be obtained at the lowest possible price."[56] The opinion also stated:

> The Commissioner interprets the new language of § 163(10)(c) of the State Finance Law as allowing the public to gain the benefit of price reductions occurring after the issuing of a multiple award contract when the opportunity to match the price reductions is offered to all other successful bidders. That is not only a rational interpretation of the statute, but a desirable one.[57]

The lower court decision was appealed, but the appeal was dismissed.[58] Recognizing that the multiple awards contracts were a relatively new type of procurement contract, the Appellate Division stated:

> In our view, petitioner's contention that the postbid reduction allowed herein undermined the bidding process is unavailing. Here the postbid price reduction for future purchase orders has the effect of benefiting taxpayers in that the State can purchase the commodity at a lower price. Clearly, if the State could not give effect to postbid reductions, then it would be forced to accept a price that may have reflected market prices at the time of bidding but one that is unnecessarily high throughout the term of the contract.[59]

Essential in this instance to resolution of the ethical issue of whether letting contractors reduce their price was fundamentally unfair was the interest of the taxpayers, including practical consideration of market conditions. All of the contractors had the same opportunity to lower their prices during the contract term.[60]

Breeyear General Contracting Corp. v. NYS Office of General Services[61]

The Office of General Services issued a Request for Quotes in 2004 against an existing multiple award contracts for temporary personnel. Based on its evaluation of the quotes received from the two potential providers, Breeyear and Kasselman, under such contracts, OGS issued a purchase order for procurement of such services from Kasselman. The evaluation was conducted through the use of a weighted average relative to several categories of temporary personnel. Breeyear challenged the use of such weighted average as being arbitrary and capricious, as it departed from the across-the-board average used in the original selection process that had previously resulted in issuance of a purchase order to Breeyear, and that the use of the weighted average had not been made known in the Request for Quotes. Breeyear argued that use of the across-the-board average would have resulted in its retention to perform such temporary services.[62]

As the incumbent, Breeyear had become familiar with what categories of temporary employees would be more frequently used by OGS. Based on this knowledge and experience, Breeyear submitted a quote that on its face constituted an unbalanced quote as it applied different markups for different titles and different locations. Kasselman had used a uniform discount for such titles and

locations as had Breeyear on the previous Request for Quotes. In proceeding with its evaluation, OGS determined that Breeyear had used insider knowledge and information which placed the incumbent at an unfair advantage to Kasselman. In order to preserve the equity of the evaluation and ensure that the parties were engaging in the procurement on a level playing field, OGS proceeded to rate the costs of the proposals through the use of weighted averages that took into account past historical use of the titles and locations of employees. Through such an evaluation, it was clearly established for the procurement record that the Kasselman quote was the lower-cost quote. The Court determined that OGS had appropriately considered the cost methodology offered by Breeyear and appropriately applied a weighted average to it in relation to the other quote and met the requirements of the Procurement Stewardship Act *and* the associated State Procurement Council Guidelines.[63]

"Expanding and taking advantage of the role of State Agency Ethics Officers is an important tool for State agencies and their employees to continue to ensure that public procurements are adhering to the law's guiding principles."

Awareness of issues involving ethics in public procurement in State government has increased and has been reinforced by precepts of the Procurement Stewardship Act. It is very important to the continuing integrity of State procurement that attention continue to be dedicated to ensuring that these issues are promptly addressed in a responsive manner promoting integrity in policy and process. In the past two years, major ethical considerations have revolved around vendor responsibility issues and newly enacted restrictions on procurement lobbying. However, ethics considerations are not solely within their purview and, as discussed herein, the Public Officers Law, the Ethics Commission's Advisory Opinions and case law all contribute to appropriately responding to procurement situations involving State agencies, officers and employees and the business community. Expanding and taking advantage of the role of State Agency Ethics Officers is an important tool for State agencies and their employees to continue to ensure that public procurements are adhering to the law's guiding principles. The ethical construct associated with the State's acquisitions continues to increase compliance with law and adds to the high value of public procurement systems to purchasers and the vendor community. It is imperative that the ethical perspective be strongly maintained to strengthen the State's delivery of health, safety and welfare services.

Endnotes

1. *See* former ch. 593, § 160, 1940 N.Y. Laws 1592, repealed by ch. 83, § 33, 1995 N.Y. Laws 537.
2. *Id.*
3. *See* N.Y. State Fin. Law §§ 160-168 (McKinney 2002 & Supp. 2006).
4. Ch. 83, § 32, 1995 N.Y. Laws 536.
5. *Id.*
6. New York State 2006-2007 Enacted Budget Report, by Div. of the Budget, May 12, 2006, page 2 *at* http://www.budget.state.ny.us/pubs/enacted 2006-07_Enacted_ Budget.pdf.
7. N.Y. Pub. Off. Law § 74 (McKinney 2001).
8. N.Y. Pub. Off. Law §§ 73-73-a (McKinney 2001 & Supp. 2006).
9. There has been a long-standing practice that State agencies designate an Ethics Officer to whom ethics issues are referred and who directs their resolution including interaction with the State Ethics Commission or other law enforcement agencies. Interestingly, State law first recognized the role of State Ethics Officers in State Finance Law § 139-j. N.Y. State Fin. Law §§ 139-j & 139-k (McKinney 2002).
10. N.Y. State Fin. Law § 169(9)(f) (McKinney 2002).
11. N.Y. Gov. Exec. Order No. 127, *reprinted in* N.Y.C.R.R. tit. 9, ch. I, § 4.127 (2001), *rescinded by* N.Y. Gov. Exec. Order No. 29, *reprinted in* N.Y.C.R.R. tit. 9, ch. I, § 5.29 (2001).
12. Opinions issued by the Commission previous to 2000 are available at the New York State Library, and those issued from 2000 to the present are available at http://www.dos.state.ny.us/ethc/opinions.
13. N.Y. State Ethics Comm'n Adv. Op. No. 06-02 (2006), http://www.dos.state.ny.us/ethc/opinions/06_2.htm.
14. N.Y. Pub. Off. Law § 73(7)(a) (McKinney 2001 & Supp. 2006).
15. N.Y. Pub. Off. Law § 73(12).
16. N.Y. State Ethics Comm'n Adv. Op. No. 05-03 (2005), http://www.dos.state.ny.us/ethc/opinions/05-03.
17. N.Y. State Ethics Comm'n Adv. Op. No. 04-02 (2004), http://www.dos.state.ny.us/ethc/opinions/04_02.html.
18. N.Y. State Ethics Comm'n Adv. Op. No. 02-01 (2002), http://www.dos.state.ny.us/ethc/opinions/02_01.html.
19. N.Y. Pub. Off. Law § 73(8)(a)(ii).
20. N.Y. State Ethics Comm'n Adv. Op. No. 02-01 (2002), http://www.dos.state.ny.us/ethc/opinions/02_01.html.
21. *Id.*
22. *Id.*
23. N.Y. State Ethics Comm'n Adv. Op. No. 04-02 (2004), http://www.dos.state.ny.us/ethc/opinions/04_02.html.
24. *Id.* at 2.
25. *Id*.
26. *Id.*
27. See discussion above.
28. *Id.*
29. N.Y. State Ethics Comm'n Adv. Op. No. 05-01 (2005), http://www.dos.state.ny.us/ethc/opinions/05-01.htm.
30. N.Y. Pub. Off. Law § 73(5).
31. N.Y. Pub. Off. Law § 74(2) (McKinney 2001).
32. N.Y. Pub. Off. Law § 74(3).
33. N.Y. State Ethics Comm'n Adv. Op. No. 94-16 (1994).
34. *Id.*

35. While it did not seem that the offer affected the award of such contract, Sprint should not have made the offer and referenced its status as a State contractor since that could have created an impression with employees that the State could be deemed to have endorsed the program.
36. *Id.*
37. N.Y. State Ethics Comm'n Adv. Op. No. 95-30 (1995).
38. *Id.*
39. N.Y. PUB. OFF. LAW § 73(4)(a).
40. N.Y. PUB. OFF. LAW § 74(2).
41. N.Y. PUB. OFF. LAW § 74(3).
42. N.Y. State Ethics Comm'n Adv. Op. No. 92-02 (1992).
43. *Id.*
44. *Id.*
45. 236 A.D.2d 48 (3d Dep't 1997), *aff'd*, 92 N.Y.2d 579 (1998).
46. 236 A.D.2d at 50-51.
47. *Id.* at 51.
48. *Id.* at 51.
49. *Id.* at 51.
50. *Id.* at 53.
51. *Id.*
52. *Id.*
53. 168 Misc. 2d 869 (N.Y. Sup. Ct. 1996), *aff'd*, 245 A.D. 2d 756 (3d Dep't 1997).
54. 168 Misc. 2d at 870-71.
55. *Id.* at 871.
56. *Id.* at 872.
57. *Id.*
58. 245 A.D.2d at 758.
59. *Id.* at 757.
60. *Id.*
61. Unreported decision, (N.Y. Sup. Ct., Albany County 2004).
62. *Id.*
63. *Id.*; State Procurement Council Guidelines, http://www.ogs.state.ny.us/procurecounc/pdfdoc/guidelines.pdf.

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Preferred Source Procurement: Successfully Merging Social and Economic Policy

By Lawrence L. Barker, Jr.

Introduction

New York State's nationally recognized Preferred Source Program represents a unique accomplishment in public policy—successfully meeting the two normally disparate goals of improving the lives of New Yorkers with disabilities while actually lowering costs to the taxpayer. This has been achieved by linking the state's procurement process to the employment of individuals who are significantly under-represented in the workforce, and who are chronically beset with an unemployment rate that is stagnant at up to *70%*! The 2004 National Organization on Disability/Harris Survey found that only 35% of Americans with disabilities were employed, compared with an employment rate of 78% among non-disabled individuals.[1]

This article will examine the policy goals, substance, and implementation of New York's Preferred Source Program, including the procurement-related challenges and opportunities faced over the past three decades.

Origins

Beginning in 1938 with passage of the Wagner-O'Day Act,[2] which was signed into law by President Franklin D. Roosevelt, himself a disabled individual, Congress recognized that the federal government could open employment opportunities for citizens with blindness by allowing them to manufacture mops and brooms for government purchase. At the end of World War II, the nation was faced with the challenge of thousands of "GIs" returning to civilian life with blindness and other disabilities resulting from service to their country. The 1938 law was used to open up more employment opportunities for disabled veterans who could produce commodity items in *sheltered* workshops for purchase by federal government agencies.

In 1971, under the leadership of New York's Senator Jacob Javits, Congress amended the statute[3] (now referred to as the Javits-Wagner-O'Day or JWOD Act[4]) to include people with other severe disabilities, and expanded the Program to provide services as well as commodities to the federal government. The 1971 legislation also created a unique federal agency—The Committee for Purchase From People Who Are Blind or Severely Disabled—to administer the JWOD Program.

Decades later, the JWOD Program provides federal government agencies with a wide array of products and services, while providing thousands of people with severe disabilities real jobs and increased independence.

Beginning in the 1970s, the federal JWOD Law became the model for a succession of state-level statutes designed to achieve the same original objective of employment for people with disabilities through a preferential purchasing process.

"This article will examine the policy goals, substance, and implementation of New York's Preferred Source Program, including the procurement-related challenges and opportunities faced over the past three decades."

New York's Legislative History

In 1945, New York State became first in the nation to enact legislation[5] designed to give a preference in state and local government procurement to products made by not-for-profit agencies employing people with blindness. While generally referred to as *state use* laws, the New York legislation is known as the *Preferred Source Program*. In 1974, the original statute, which was designed to help veterans and other people with blindness, was amended to add to the Preferred Source Program products made by rehabilitation agencies employing New Yorkers with other severe disabilities.[6] In 1978 the Preferred Source Law was again amended to include services as well as products.[7]

Pursuant to the expanded statute, in 1975 the State Commissioner of Education designated New York State Industries for the Handicapped, Inc. (now New York State Industries for the Disabled, Inc., or NYSID) as the "non-profit-making agency, other than the agency representing the blind, to facilitate the distribution of orders among qualified non-profit-making charitable agencies for the other severely disabled and the veteran's workshops."[8]

The New York law also provides for the appointment of three additional facilitating agencies to serve the following populations: (1) individuals with blindness (Industries for the Blind of New York State); (2) individuals

in special employment programs operated by the New York State Office of Mental Health (Buy OMH); and (3) incarcerated individuals (New York State Department of Correctional Services' Correctional Industries or *Corcraft* program).[9]

In 1995, the Preferred Source Law was significantly revised,[10] including the establishment of the New York State Procurement Council, with program oversight responsibility, and providing a formal process for approval and public listing of preferred source items, as well as creation of an innovative Corporate Partnering Program. The 1995 amendments also imposed a five-year *sunset* (expiration) of the program, requiring legislative review and determination. The original 2000 sunset date was later extended to 2005, and the sunset provision itself was removed from the program's legislation in 2002.[11]

"The N.Y.S. Preferred Source Law mandates that all state agencies, public benefit corporations, and local government entities purchase those products and services approved by the New York State Office of General Services which meet the buying agency's 'form, function, and utility' requirements, without competitive bidding."

New York's Preferred Source Law

The N.Y.S. Preferred Source Law mandates that all state agencies, public benefit corporations, and local government entities purchase those products and services approved by the New York State Office of General Services which meet the buying agency's "form, function, and utility"[12] requirements, without competitive bidding. Procurement of commodities and services from preferred sources takes precedence over all other methods of supply and competitive procurement methods. The purpose of the law is clear—*to direct the normal procurement activity of the state and local governments to benefit disabled residents through employment*:

> Purpose: To advance special social and economic goals, selected providers shall have preferred source status for the purposes of procurement in accordance with the provisions of this section. Procurement from these providers shall be exempted from the competitive procurement provisions of section one hundred sixty-three of this article and other competitive procurement statutes.[13]

An Outline of the Law

New York's Preferred Source Law contains the following key elements:[14]

(1) Exemption of preferred source commodities and services from competitive bidding statutory requirements.

(2) Approval process for inclusion of commodities and services on a *List of Preferred Source Offerings*.

(3) Designation of non-profit agencies to *facilitate the distribution of orders*.

(4) Identification of priorities among preferred source facilitating agencies.

(5) Applicability to state agencies, municipal subdivisions, public benefit corporations, public authorities, and educational institutions.

(6) Allowance for production, manufacture, assembly and repackaging of commodities.

(7) Requirement to meet *form, function,* and *utility* requirements of purchasing agencies.

(8) Establishment of authority for price approvals, within a maximum of 15% above prevailing market pricing.

(9) Establishment of a Corporate Partnering Program.

The National Context

New York's "first in the nation" Preferred Source Program is also the largest in size, and has itself become a model for *state use* programs. At present, forty-six states have some form of State Use Laws. At least half of these states have developed ongoing programs, which now employ more than 32,000 people across the country who provided almost half a billion dollars' worth of products and services to state and local governments in 2005.[15]

State use programs share the common goals of increasing employment opportunities for people with disabilities by offering some form of non- or reduced-competitive access to the public procurement process. All state use programs are highly regulated, in some cases by both central purchasing and vocational rehabilitation agencies, often acting through an independent council or commission.

The various state use programs are differentiated according to business management models (independent central nonprofit organizations—such as New York's NYSID, trade association programs, or state governmental agencies), varying discretionary pricing levels, governmental entity applicability, definition of "severe disability," and other attributes.

The table below lists the state use programs that are operating today.

States with State Use Laws and Operating Programs:[16]

State	2005 Sales
California	N/A
Connecticut	$7 million
Delaware	N/A
Florida	$22 million
Georgia	$3 million
Illinois	$20 million
Indiana	$9 million
Kansas	N/A
Louisiana	$7 million
Maryland	$34 million
New Jersey	$8 million
New York (NYSID)	$112 million
North Carolina	N/A
Ohio	$33 million
Oklahoma	$17 million
Oregon	$47 million
Pennsylvania	$34 million
South Carolina	N/A
Tennessee	N/A
Texas	$80 million
Virginia	N/A
West Virginia	$12 million
Wisconsin	$9 million
Total:	**$454 million**

Preferred Source Procurement in New York

Having described the origins, policy goals, content and national context of New York's Preferred Source Program, it is opportune to make some policy observations and to examine the New York program's outcomes, in terms of successfully merging its human service and economic development goals.

Policy Observations

Based on research and experience, including numerous discussions with JWOD and state use colleagues throughout the country, it seems apparent that the original public policy goal of these programs was one of *employing the unemployable*, and therefore while one may infer that employment of people with disabilities is preferable to long-term public assistance, many of these programs were conceived prior to the expansion of both general public assistance programs and others targeted to assist people with disabilities.

An examination of state and national statutes does not demonstrate a clearly intended societal and economic benefit resulting from what was primarily a policy designed to help those in need by linking employment to some form of limited preference in public procurement.

For example, while some of the state statutes (such as New York's) provide for a favorable market price differential, the majority do not offer any particular economic incentives, much less guarantees. In some cases, laws require that a state use program price must *meet or beat* a low competitive bid, which is ordinarily required for every procurement.

It is very important to note that while Preferred Source Programs are often considered similar, or even equivalent, to other socioeconomic programs designed to improve economic participation of disadvantaged groups through the procurement process, Preferred Source Programs operate very differently. A major difference is that percentages of procurement budgets are not "reserved" for participation by people with disabilities, and while certain items may be *set aside* for mandatory purchase, there are no blanket requirements for compliance by purchasing entities, and few penalties for non-compliance.

Economic Outcomes

However, experience with state use programs has demonstrated that these originally social policy initiatives are also sound economic policy. A number of national and individual state use economic benefit studies have been conducted that have conclusively demonstrated a significant return on taxpayer investment from these programs.[17] These *returns* have been expressed in various terms, ranging from direct public dollar savings to purchasing cost reductions. For example, in a State Use Programs Association (SUPRA) economic benefit study conducted in 2004, combined state government savings of $2,200 per individual were documented.[18]

While most of these studies concentrated on the overall benefits of these programs in terms of reduced public assistance and additions to the tax base, a 1999 study[19] commissioned by NYSID and conducted by the Center for Governmental Research, Inc. evaluated not only the benefits of New York's Preferred Source Program, but also any costs associated with its favorable pricing differential. The NYSID study, which has been updated with 2005 wage and benefit data,[20] showed a 2:1 benefit:cost ratio

for purchases made through New York's Preferred Source Program.

In economic development terms, the success or failure of public programs is best measured by the creation of jobs. In New York's Preferred Source Program, whose mission is *turning business opportunities into jobs for New Yorkers with disabilities*, strong growth in job creation has resulted from the continuing addition of new products and services to the "List of Preferred Source Offerings." In 2005 more than 6,200 New Yorkers with disabilities were employed through NYSID contracts.

While jobs for people with disabilities in New York have grown significantly in the past decade through the Preferred Source Program, and the NYSID program has become the largest employer of people with disabilities in the state, much more remains to be done in significantly reducing the unemployment/underemployment rates among people with disabilities.

A sobering statistic: "According to the 2000 census, of the approximately 31 million United States residents between the ages of 21 and 64 who have disabilities, 21 million are unemployed."[21]

The Human Side

In terms of achieving self-esteem, independence, and a better quality of life for people with disabilities, the true value of New York's socioeconomic policy that resulted in the state's Preferred Source Program is immeasurable.

Over the past three decades, many thousands of New Yorkers have found employment and self-worth through this innovative approach to a social issue that is also yielding a significant economic benefit to the state's taxpayers.

In addition to creating jobs through state and local government contracts performed by people with disabilities, preferred source business development has afforded thousands of people the same upward mobility opportunities that are offered to non-disabled citizens. Preferred source contracts carry with them training opportunities to learn basic work habits and job skills, to advance by learning new methods, to earn raises and promotions, to enter into supervisory and management positions, and to gain entry into the overall workforce.

Preferred Source Programs like New York's are perhaps best defined in the negative—they are *not* a set of Dickensian-like workshops where people are forced to labor at menial jobs for absurd wages, *nor* are they entitlements with public handouts in return for indolence, *nor* do they exist only through state budgets containing multimillion dollar appropriations of public funds for yet another government program.

New York's Preferred Source Program, as well as other state and national programs, does exist to help people that need help, but they are unique in that they are also fulfilling the ordinary purchasing needs of government. Most importantly, the people with disabilities who are employed on these contracts are truly earning their own way, and saving public dollars in the process.

One Person's Success

Kathleen "Kasey" Knott

Kathleen "Kasey" Knott of Wellsville, New York was born on August 4, 1978, two months premature with characteristics of Treacher-Collins syndrome, a genetic condition that occurs in approximately 1 in 10,000 births. It has several characteristic features, including underdeveloped cheek and jawbones, misshapen ears and down slanting eyes. Kasey's nasal passages were blocked off due to bone formation, requiring multiple surgeries to open the airway through her nose. She has a 40% hearing loss in one ear and is diagnosed with moderate mental retardation.

When Kasey began work, her disabilities led to excessive shyness, which initially contributed to deficits in co-worker relations, supervisory relationships and task initiation. She was 22 years old, living with her parents, and feeling very frustrated. She was at a critical crossroads in her life—at a typical age of independence, Kasey felt very dependent.

Gradually overcoming her shyness and interacting with her peers and supervisors, Kasey's sweet personality and engaging smile made her a favorite with all. As her self-confidence blossomed, Kasey's productivity increased along with her stamina.

Following the 9/11 tragedy, Kasey participated in an unprecedented effort to provide forensic kits under a NYSID contract to identify the remains of the World Trade Center victims, volunteering to work the weekend and overtime to help complete the project.

Her metamorphosis from a timid wallflower to a confident young woman was truly amazing. The NYSID contracts provided Kasey with an invaluable sense of dignity and self-respect. She is truly a different person—no longer a burden, but a contributor. She has a job, her own apartment, many friends, but most important, hope. Kasey has broken the stigma of dependency and now dares to dream of home ownership, relationships and a career.[22]

Conclusion

As John Donne, the poet and Dean of St. Paul's Cathedral, wrote in the seventeenth century, "No man is an island, entire of itself. . . . Any man's death diminishes me, because I am involved in mankind."[23]

People with disabilities are only today beginning to live more fulfilling and integrated lives within our communities, and well-designed and well-carried-out public policies like New York's Preferred Source Program are advancing this goal even more.

"People with disabilities are only today beginning to live more fulfilling and integrated lives within our communities, and well-designed and well-carried-out public policies like New York's Preferred Source Program are advancing this goal even more."

As people are "part of the main,"[24] no public policy initiative or program can work in a vacuum, and well-intentioned undertakings often miss their marks in the implementation process, either through inattention or hyperactive, limiting rulemaking. New York's Preferred Source Program, as well as other state use programs and the Federal JWOD Program, are not operating in a vacuum, but must—and should—exist and prosper in New York's and other political environments, amidst strongly competing interests ranging from programs designed to help other underprivileged groups, to organized labor, small and large businesses, disability advocacy groups, and other constituencies impacted by the Preferred Source Program.

In this always active environment, the Preferred Source Program cannot *escape* by merely proclaiming its good works, but must enter the fray and succeed through innovative cooperation, education, and partnering with all affected parties.

In its purest sense, socioeconomic and other public policy development is really experimentation. Although I am convinced that this particular decades-old *experiment* is a resounding success, the work continues until we can find a true *eureka* for people with disabilities.

Endnotes

1. 2004 National Organization on Disability/Harris Survey of Americans with Disabilities.
2. Act of June 15, 1938, Ch. 697, 52 Stat. 1196.
3. Pub. L. 92-28, 85 Stat. 77 (June 23, 1971).
4. 41 U.S.C. § 46-48c (2000).
5. Ch. 299, § 2, 1945 N.Y. Laws 1.
6. Ch. 771, § 1, 1974 N.Y. Laws 1188 (McKinney).
7. Ch. 611, § 1, 1978 N.Y. Laws 1162 (McKinney).
8. N.Y. FIN. LAW § 162.6(e) (McKinney 2002).
9. *Id.*
10. Ch. 83, § 362, 1995 N.Y. Laws 527 (McKinney).
11. Ch. 426, § 1, 2002 N.Y. Laws 1190 (McKinney).
12. N.Y. FIN. LAW § 162.1 (McKinney 2002).
13. *Id.*
14. N.Y. FIN. LAW § 162 (McKinney 2002).
15. State Use Programs Association 2005 Annual Survey and Employment Data.
16. *Id.*
17. "People with Disabilities Work . . . America Benefits," NISH (1999); "Indiana's State Use Program: A Review of Its Impacts," Crowe Chizek and Company LLC (2003); "The Employment of Individuals with Disabilities: An Economic Gain for Oregon," Oregon Rehabilitation Association (1994).
18. SUPRA Economic Benefit Analysis 2004.
19. Center for Governmental Research, Inc. "The Economic Impact of New York State's Preferred Source Legislation," (Nov. 1999).
20. *The Benefits of New York State's Preferred Source Legislation: An Economic Analysis,* CGR (August 2006).
21. NISH, Strategic Plan Overview for 2005-2007.
22. NYSID William B. Joslin Outstanding Performance Awards Program, 2004.
23. Donne, John. Meditation XVII (1624).
24. *Id.*

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Debriefs: A Window Into State Agency Procurements

By Donna Snyder

Competition, transparency, and integrity are the cornerstones of any successful government procurement system. These fundamental norms ensure that taxpayer funds are spent in the most effective, efficient, and productive manner. One method to ensure transparency and integrity is through a formal debrief for unsuccessful offerers. Debriefings serve several important purposes: they provide unsuccessful offerers with important feedback; they assist the offerer with improving future submissions/proposals; they provide open and frank discussions of the evaluation of the offerer's proposal; and they eliminate the need for exploratory protests.

When a government entity debriefs an unsuccessful offerer, it ensures not only transparency, but also accountability. As New York State evolves its procurement system, it should consider adopting formal debriefs as part of its procurement process. Under this system, each state agency[1] would be required to debrief unsuccessful offerers, when and if an unsuccessful offerer requests a debriefing within a specific time frame. The current federal procurement system serves as an excellent model upon which to build such a system.

Recent Studies Show a Need

In February of this year, the Government Law Center of Albany Law School for the New York State Office of General Services conducted a series of statewide focus groups.[2] The primary purpose of the focus groups was to identify areas of improvement within the Procurement Stewardship Act, as it faced its June 2006 sunset. One of the focus groups studied the issue of debriefings and dispute resolution. The group unanimously agreed that debriefings were an invaluable tool for both the government and the vendors.[3] From the vendor perspective, debriefings are an excellent way to learn about the procurement process and to learn how to improve their chances for success in future competitions. The government benefits from debriefings as it cuts down on exploratory protests and ensures vendors that the process is working properly.

The group found, however, that when debriefings were conducted, there was no standard format being followed.[4] This complicates a vendor's ability to improve proposals in the future, or to even understand the reasons behind the procurement decision. Clearly, the best manner in which to resolve these issues, and still meet the vendor's needs, is for New York State to adopt unified formal debriefing standards across all agencies.

The Current System

The New York State Procurement Council Procurement Guidelines, dated March 2001, require procuring agencies to notify offerers as to whether they are successful or unsuccessful.[5] According to the guidelines, upon request by a vendor, "an unsuccessful offerer should be provided a debriefing as soon as possible after selection of the successful offerer, as to why its proposal was unsuccessful."[6] The guidelines lack any direction as to the format and content of such a debriefing. The content is essentially left to the discretion of the agency. Unfortunately, each agency may not understand the benefits and pitfalls of timing, content and restriction. These considerations, however, have evolved and been refined into the now-existing debriefing rules used by the federal government.[7]

Timing

The first major consideration in establishing uniform debriefing standards is timing. State agencies, like federal agencies under the federal procurement system, should be required to hold the debriefing within a set amount of time after the announcement of the award—generally a few days. This deadline ensures agencies provide the freshest information and gives vendors the benefit of predictability. Additionally, timelines governing when an offerer can ask and expect to receive a debriefing allow both the vendor and agency to act accordingly.[8]

Under the federal procurement system, the contracting agency must notify offerers promptly when their proposals are eliminated from the competition.[9] This notice states the basis for the determination and reminds them that a proposal revision will not be considered. Within three days after the date of contract award, the federal agency must provide written notification of non-selection to each offerer whose proposal was within consideration or made it through the first cut.[10] This notification includes the number of proposals received,[11]and the name and address of each offerer receiving an award.[12] New York State would benefit greatly from adopting similar standards. During the focus groups mentioned earlier, vendors disagreed as to the length of time vendors should have, post award, to request a debrief. Some felt that vendors should have as many as 30 days after award within which to request a debrief.[13] This length of time, however, should be discouraged.

A vendor should know, within a relatively short period of time, whether it desires a debriefing. As such, there is no need to delay the process and cause the successful offerer to delay performance or begin performance with the prospect of a debrief and potential protest still hanging out there. Consequently, New York State should adopt timing rules similar to the federal government. Offerers who want to request a postaward debriefing should be required to do so within three days after the agency has notified the offerer of its selection decision and contract award. The debriefings should occur within five days after receipt of the written request.[14]

"It would be most advantageous to both state agencies and the vendor community if the timing, content and rules regarding debriefings were standardized."

It should also be noted that, under the federal system, a protestor cannot file a protest prior to the debriefing date.[15] This rule ensures that protestors have all available information prior to filing a protest. It likely cuts down the number of protests as well, as many protestor concerns are resolved upon receiving the debriefing. The federal system also requires that protests be filed no later than ten days following the debriefing. Any unresolved issues existing after the debriefing can be addressed at this time.

Format—What Should a Debriefing Cover?

Currently, debriefing format, content and process are inconsistent among and between agencies. Establishing a standard format statewide would not only ensure consistency, but also predictability. Vendors would know exactly what type of information to expect, as well as the limitations on what information will be revealed.

New York State should consider using the current federal guidelines as a model. While the federal system allows debriefings to be oral, in writing, or by another means acceptable to the unsuccessful offerers,[16] it is best to have these meetings face to face with the agency officer or the head of contract team leading the debriefing. Agency counsel and all members of the agency evaluation team should also attend. It is good practice to hold the debriefing at the unsuccessful offerer's office location or at the agency in a conference room setting. The debriefing should take the form of a Power Point presentation, and it should include information showing how the offerer was evaluated and rated against evaluation factors.[17] Both preaward and postaward debriefs shall not include a point-by-point comparison of the debriefed offerer's proposal with proposals of other offerers. Instead, it should focus on the weaknesses and strengths of that unsuccessful offerer's proposal.

The debriefing should begin by setting out the ground rules. This can be accomplished by creating a slide that explains exactly what information the agency can and cannot provide. For example, an agency should provide an overview of the strengths, weaknesses, and deficiencies in the proposal and reasonable responses to relevant questions. Also, it should be explained up front the limitations on the types of information that may be provided to the unsuccessful offerer. For example, they should be informed that this is not a point-by-point comparison with the successful offerer, nor will it reveal another offerer's competition sensitive proprietary information.

The Power Point presentation should also include the agency's evaluation of any significant deficiencies in the offerer's proposal.[18] This illuminates areas in which an offerer can improve in the future. The debrief should also include the overall ranking of the offerer during the evaluation process;[19] the overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offerer; any responsibility determination on the debriefed offerer;[20] and a summary of rationale for award.[21]

During the questions-and-answers portion of the debriefing, the evaluation team should have reasonable responses to relevant questions about whether evaluation procedures contained in the solicitation, applicable regulations, and other applicable authorities, were followed.[22] The debriefing should end with the agency stating that "the debriefing is considered closed." This statement ensures all parties understand there are no lingering issues; this also starts the protest clock as earlier discussed.

Debriefings must not include a point-by-point comparison of the debriefed offerer's proposal with any other offerer's proposal.[23] Prohibited discussions include any information exempt under New York State's Freedom of Information Law, Article 6 of the Public Officers Law, or exempt from release under the Freedom of Information Act, 5 U.S.C. § 552, as applicable. This includes but is not limited to trade secrets; privileged or confidential manufacturing processes and techniques; or financial information that is privileged or confidential.

Conclusion

Debriefings truly do offer an important window into the procurement system. This window ultimately leads to better proposals, confidence in the system, and illuminates true flaws that may have occurred during the procurement process. For these reasons, New York State should consider adopting standard debriefing rules, and they should be based on the proven methods used by the federal government. It would be most advantageous

to both state agencies and the vendor community if the timing, content and rules regarding debriefings were standardized.

Endnotes

1. For the purpose of this article, a "state agency" means all state departments, boards, commissions, offices or institutions.
2. Gov't Law Ctr. of Albany Law Sch.,The Procurement Stewardship Act: Opportunities for Reform (2006), http://www.ogs.state.ny.us/purchase/FocusGroupReport.pdf.
3. *Id*. at 20.
4. *Id.*
5. New York State Procurement Council, Procurement Guidelines VII-4, http://www.ogs.state.ny.us/procurecounc/pdfdoc/guidelines.pdf.
6. *Id.*
7. The Federal Acquisition Regulation also regulates preaward debriefs, but this topic is saved for a later date.
8. The author recognizes the argument that if timelines are too strict, flaws may escape oversight reducing the transparency and accountability debriefings can provide.
9. 48 C.F.R. § 15.503(a)(1) (2006). This notice is also sent to offerers who are excluded from the competitive range or otherwise eliminated from the competition.
10. 10 U.S.C. § 2305(b)(5)(A) (2000); 41 U.S.C. § 253b(c) (2000); 48 C.F.R. § 15.503(b)(1).
11. 48 C.F.R. § 15.503(b)(1)(ii).
12. 48 C.F.R. § 15.503(b)(1)(iii). 48 C.F.R. § 15.503(b)(1)(iv) instructs Federal Contracting Officers to include "the items, quantities, and any stated unit prices of each award. If the number of items or other factors makes listing any stated unit prices impractical at that time, only the total contract price need be furnished in the notice. However, the items, quantities and any state unit process of each award shall be made publicly available, upon request." 48 C.F.R. § 15.503(b)(1)(v) further requires the Officers to "state the reason(s) the offerer's proposal was not accepted, unless the price information in paragraph (b)(1)(iv) of this section readily reveals the reason."
13. Gov't Law Ctr. of Albany Law Sch., The Procurement Stewardship Act: Opportunities for Reform 20 (2006), http://www.ogs.state.ny.us/purchase/FocusGroupReport.pdf.
14. 31 U.S.C. § 3553(d)(4)(B) (2000); 48 C.F.R. § 15.506(a)(2) (2006).
15. The United States Government Accountability Office is the most common forum at which to file a federal protest.
16. 48 C.F.R. § 15.506(b).
17. Air Force Federal Acquisition Regulation, MP5315.506(a) (2004), http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/af_afmc/affars/mp5315.5.htm.
18. 48 C.F.R. § 15.506(d)(1).
19. 48 C.F.R. § 15.506(d)(3).
20. 48 C.F.R. § 15.506(d)(2).
21. 48 C.F.R. § 15.506(d)(4).
22. 48 C.F.R. § 15.506(d)(6).
23. 48 C.F.R. § 15.506(e).

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The Honorable James F. Horan, ALJ accepts a plaque recognizing his service as Chair of the Committee on Attorneys in Public Service from Patricia Salkin. Judge Horan completed his three years of service in June 2006 and Ms. Salkin was named Chair by NYSBA President Mark Alcott.

Federal and New York Contracting Preferences for Small, Minority and Women-Owned Businesses

By Patrick E. Tolan, Jr.

Overview

The United States Government affords numerous contracting initiatives to favor small and disadvantaged small businesses—and for good reason, as small businesses have been the "principal driving force behind America's tremendous economic growth and job creation."[1] Earlier this year, President Bush proclaimed, "Our economy has created almost 5 million jobs since August 2003 [and] [s]mall businesses create most new jobs in our country."[2] For thirty years, New York has similarly recognized that "the future welfare of the state depends on the continued development of small-business."[3]

In addition to supporting small businesses in general, both New York and the federal government have affirmative action programs in place specifically designed to promote government contracting with women-owned and minority-owned small businesses. The State of New York allows several preference buying programs.[4]

"Although choosing which social programs to advance and how to do so are matters for sovereign decision making, appreciating the vulnerabilities and opportunities afforded to small businesses contracting with the government should be beneficial to anyone practicing in this area."

In 1995, the United States Supreme Court decision in *Adarand Constructors, Inc. v. Pena*[5] (*Adarand*), subjecting affirmative action programs to strict scrutiny, sent shock waves through both the government and the minority business communities, "since virtually every significant government procurement contract is subject to some form of affirmative action that is based upon racial classifications."[6] However, despite victories for Adarand Constructors at the Supreme Court,[7] and on remand at the district court,[8] little changed in the federal government's preference programs.[9]

President Clinton's policy to "mend not end" affirmative action brought about only minor changes to the contracting landscape.[10] In many ways, New York's affirmative action programs are similar to their federal counterparts. Although the post-*Adarand* regulatory regime has been upheld on its face, to survive equal protection challenges (under the 5th and 14th Amendments), such laws must also be narrowly tailored or risk being found unconstitutional as applied.[11]

Earlier this year, the New York State legislature modified Executive Law § 314 (effective October 2006) to allow applicants for minority and women-owned business eligibility to rely on federal certifications to meet state requirements.[12] Those implementing and affected by this complimentary certification process should benefit by appreciating the similarities and differences between the federal scheme and New York State affirmative action programs.

This article begins with a short history of federal contracting with small businesses.[13] It then examines the current federal preference programs and compares New York contracting preferences with the federal programs. Although choosing which social programs to advance and how to do so are matters for sovereign decision making, appreciating the vulnerabilities and opportunities afforded to small businesses contracting with the government should be beneficial to anyone practicing in this area.

History of Federal Small Businesses Preferences

When the United States entered World War II, Congress perceived a need "to mobilize the productive facilities of small business in the interest of successful prosecution of the war, and for other purposes."[14] Congress created the Smaller War Plants Corporation (SWPC) to foster federal contracts with small businesses.[15] However, only 260 contracts were actually let by the SWPC to small businesses.[16]

Congress created a similar agency, the Small Defense Plants Administration (SDPA) during the Korean War to foster mobilization of small plants to contribute to America's productive strength.[17] After the SDPA also made little use of its authority, Congress created the Small Business Administration (SBA) pursuant to the Small Business Act of 1953.[18] Congress created the SBA to stimulate and encourage "small business enterprises in peacetime as well as in any future war or mobilization period."[19]

Evolution of the 8(a) Preference Program

The Small Business Act of 1958[20] created the statutory authority for the government to afford preferential treatment in the award of government contracts to small businesses.[21] Section 8(a) of the 1958 Act specifically allowed the SBA to contract with other government agencies and to subcontract "to small business concerns or others for the manufacture, supply, or assembly of such articles, equipment, supplies, or materials."[22] The legislation was designed to promote all small businesses, not only minority or "disadvantaged" businesses.

The SBA's focus on placing contracts with minority-owned businesses did not evolve until the late 1960s and early 1970s,[23] when earlier efforts under their 8(a) authority failed to convince contractors to relocate plants in or near inner-city ghettos and to provide jobs for the unemployed.[24] From 1969 to 1971, by direction of President Nixon, the SBA shifted its 8(a) efforts to assisting small minority concerns.[25]

The transformation to the modern 8(a) program—promoting small disadvantaged or minority businesses—was codified in the 1978 Amendments to the Small Business Act (1978 Amendments), which required that all 8(a) set-aside opportunities be subcontracted by the SBA to "socially and economically disadvantaged small business concerns."[26] The 1978 Amendments established requirements for agencies to set procurement goals for small businesses and small and disadvantaged businesses (SDB) and to report their progress in meeting these goals.[27] The SBA was charged with determining which businesses would qualify as "*socially* and *economically* disadvantaged."[28]

Although SBA regulations have evolved over time, the SBA has generally defined social disadvantage as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities."[29] Members of designated minority groups were presumed to be socially disadvantaged.[30]

Those who were not members of the named groups had to "establish . . . social disadvantage on the basis of clear and convincing evidence."[31] They were required to prove "chronic and substantial" disadvantage and personal suffering due to "color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause."[32] Additionally, these individuals had to prove that their social disadvantage "negatively impacted . . . entry into and/or advancement in the business world."[33]

In 1994, the Small Business Act was amended to add a government-wide goal for participation by small business concerns owned and controlled by women "at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year."[34] At the same time, the 8(d) program, discussed next, was similarly expanded to include women-owned businesses within the scope of preferred subcontractors.[35]

Evolution of the 8(d) Subcontracting Preference Program

The 1978 Amendments also created an "8(d)" preference program for minority subcontractors. All large government contracts were required to include incentives for contractors to employ "socially and economically disadvantaged" subcontractors. The SBA definition of *social disadvantage* for purposes of the 8(d) program contained the same presumptions as those applicable to the 8(a) program.[36] The definition of *economic disadvantage* was also tied to this race-based presumption.

The *Adarand* case took issue with Department of Transportation subcontracting incentives; the challenged provisions were based on identical race-based presumptions of both social and economic disadvantage used in the SBA's 8(d) program.[37] On remand, the District Court concluded that these presumptions were unconstitutional.[38] Notably, it found that the presumptions were both over- and under-inclusive, so they were not sufficiently "narrowly tailored" to satisfy strict scrutiny.[39] Note that New York was following the same federal laws, because these projects qualified as federal assistance projects for transportation infrastructure.[40]

Current Federal Small Businesses Preferences

Justice O'Connor, writing for the majority in *Adarand*, left the door open for affirmative action programs to survive strict scrutiny.

> Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact" (citation omitted). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.[41]

Justice O'Connor also provided some (albeit limited) guidance for making these decisions: "When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."[42] She further suggested that in deciding whether the programs are narrowly tailored, the lower courts should consider whether "race-neutral" means could instead be used to increase minority business participation, and whether an affirmative action program "will not last longer than the discriminatory effects it is designed to eliminate."[43] These same considerations apply today

in evaluating whether programs employed in a particular state are narrowly tailored.

The Current 8(a) Preference Program

Congress has required that (other than for micro-purchases)[44] all federal acquisitions below $100,000 be set aside for small businesses.[45] Race-based preferences are incorporated explicitly in parts of the Small Business Act (as amended).[46] As noted by DOJ: "These statutes permit federal agencies to allow competitive advantages, including price and evaluation credits, in awards involving small businesses owned and controlled by socially and economically disadvantaged persons."[47] However, even if the statutes themselves are deemed to be constitutional, the method of implementation must be narrowly tailored or the regulations are unconstitutional.[48]

The current federal regulatory scheme allows race-based presumptions to continue, but the regulations lower the evidentiary standard for those not presumed to be socially disadvantaged to a preponderance of the evidence.[49] Regulatory changes to the 8(a) program were estimated to result in a fifty percent increase in participants—from about 6,000, to about 9,000.[50] The new standards improve opportunities for persons with disabilities and firms located in poorer geographic areas to qualify more easily.[51]

The new rules renamed the program the "8(a) Business Development" program to avoid the appearance that it was only available to minority businesses.[52] In addition to the change in the standard of proof for social and economic disadvantage, the regulations were amended to clarify that the race-based presumption of disadvantage is rebuttable.[53]

Reducing the burden on those not presumed to be socially and economically disadvantaged is designed to make inclusion in the preferred group easier, thereby reducing under-inclusion. In turn, rebutting a race-based presumption should help prevent over-inclusion by eliminating those presumed to be, but who actually are not, disadvantaged. "The presumption . . . may be overcome with credible evidence to the contrary."[54]

Finally, "economic disadvantage" was clarified to highlight that the focus of the inquiry is on the financial condition of the individual, as opposed to the business.[55]

The 8(d) Subcontracting Preference Program

The Section 8(d) program requires that for all procurements over $500,000 ($1,000,000 for construction of public facilities), prime contractors must develop and submit subcontracting plans detailing how they will meet percentage goals for the utilization of small businesses, small businesses owned and controlled by "socially and economically disadvantaged individuals," and small businesses "owned and controlled by women."[56]

The statute allows prime contractors to rely on written representations by their subcontractors regarding their status as a small business, a small business owned and controlled by women, or a small business owned and controlled by socially and economically disadvantaged individuals.[57] It then requires that "[t]he contractor *shall* presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act."[58] The 8(d) presumption, therefore, extends to both social and economic disadvantage (in contrast to the 8(a) program, which requires an individualized showing of economic disadvantage).[59] In this author's opinion, the 8(d) program is therefore more vulnerable to constitutional challenge.

The Federal Acquisition Regulations (FAR) require that prior success in attaining affirmative subcontracting goals be evaluated any time past performance is required to be considered as an evaluation factor.[60] Agency officials have discretion when evaluating competing proposals to attach greater weight to bidders with firm commitments to use small disadvantaged business (SDB) subcontractors, as opposed to bidders merely stating explicit goals to use such subcontractors.[61] Beyond the evaluation preference, however, the FAR allows monetary incentives to prime contractors based upon their actual achievement of SDB contracting goals.[62]

Small Business Program Size Limitations

It goes without saying that to qualify as a "small" business, there must be certain size limitations. The Small Business Act grants SBA the power to establish size standards and other criteria for qualification as a small business.[63] The Act also requires that all offices of federal government having procurement powers accept as conclusive the SBA's determination.[64] Because industries vary considerably, the SBA historically made the determination of what businesses were "small" by considering numbers of employees or average annual receipts based upon the Standard Industrial Code (SIC) classification assigned to the industry.[65]

In 2000, the North American Industry Classification System (NAICS) replaced the Standard Industrial Classification System as the industry standard used by the SBA to determine whether businesses qualified for eligibility in the small business programs.[66] The contracting officer for the procuring agency selects the "NAICS code which best describes the principal purpose of the product or service being acquired."[67]

New York Small Businesses Preferences

There are two affirmative action schemes simultaneously at work affecting small businesses in New York: (1) the federal scheme, covering all work for the federal contracts in the State of New York (and all work where federal provisions flow down to the state, such as the transportation scheme discussed next); and (2) the New York scheme under Article 15A of the Executive Law, governing all other contracting actions within the state. Recent legislative changes, whereby the state recognizes federal certifications, should ease the burden on contractors who work on both state and federal projects.

Transportation Contractor Preferences[68]

The federal requirements discussed above relate directly to all New York Department of Transportation (NYDOT) contractors working on federal projects or state projects paid for with federal highway funds.[69] Federal law mandates that these affirmative action programs flow down to the implementing states.[70] In addition to the federal affirmative action goals and criteria, New York also has substantial support programs in place to help such small or "Minority or Women-owned Business Enterprises" (MWBEs).[71]

For example, the Transportation Capital Assistance and Guaranteed Loan Program provides financial assistance to small MWBEs "engaged in government sponsored, transportation related construction projects."[72] The types of assistance available for qualified MWBEs include technical and business assistance, as well as government contract loans, franchise loans, business development loans, and loan guarantees (for all these categories).[73] Typical amounts of loans related to government contract work range from $20,000 to $500,000.[74]

To date, the New York scheme has passed judicial muster. In *Jana-Rock Construction, Inc. v. New York State Department of Economic Development*,[75] a case decided earlier this year, the U.S. Court of Appeals for the Second Circuit considered a challenge to the NYDOT contracting program by a Hispanic contractor of Spanish heritage who had been excluded from the race-based MWBE preferences. Although the challenged state preferences included some Hispanics,[76] they were more circumscribed than the federal rules because they excluded persons of Spanish or Portuguese descent.[77] In this respect, the state provisions were more narrowly tailored than their federal counterparts. Jana-Rock alleged that the state preferences were impermissibly under-inclusive in redressing historic discrimination.[78]

The Court initially analyzed the case under the strict scrutiny standard[79] and noted "there can be no question that New York risks having its [minority business enterprise] program struck down if it expands it further than necessary to remedy past discrimination in New York."[80] This finding is not remarkable.[81] What was more interesting was the Court's shifting of the burden to Jana-Rock to show entitlement to preferential treatment.[82] The Court noted that "the narrow-tailoring requirement allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating conclusively that no other groups merit inclusion."[83] In other words, affirmative measures were allowed to be under-inclusive.

In effect, the state is free to tailor its programs to those most in need.[84] State affirmative action programs are necessarily allowed to be more restrictive than the federal programs, because the federal programs only create a template for historic nationwide disparity; those same disparities will not exist in every state. Thus, in order for its program to be narrowly tailored, the state must examine which groups have been chronically disadvantaged.[85]

The Jana-Rock case is also interesting because it highlights a situation where there are material differences in federal and state certification requirements. For over a decade, NYDOT had repeatedly certified Jana-Rock as a disadvantaged business for federal programs.[86] However, Jana-Rock failed to qualify for state MWBE certification because of different state preferences.[87] The Court noted, "there is no concurrent certification between the State and Federal program nor is there reciprocity of certification."[88] It will be interesting to see how the state integrates its new authority to recognize federal certifications[89] while preserving state minority preferences that are more restrictive under Article 15A.[90]

Article 15A Preferences

Article 15A of the New York Executive Law identifies minority or women-owned business enterprises as those at least fifty-one percent owned and controlled by women or minority members.[91] Section 310(8)(b) identifies qualifying minorities. New York relies upon certifications as the entry ticket for special MWBE preference programs.[92]

The New York Division of Minority and Women's Business Development promotes employment and business opportunities on state contracts for MWBEs, and state agencies are charged with establishing and enforcing employment and business participation goals.[93] New York State contracting advantages could be considerable given the over $8.5 billion awarded annually in state contracts.[94] The state recently created the position of statewide advocate to promote MWBEs.[95]

The New York State legislature recently called for a study to evaluate any disparity in participation of MWBEs in state contracts.[96] Specifically, the focus of the study is to determine what changes, if any, to make to policies affecting MWBEs, based upon a comparison of the number of qualified MWBEs "ready, willing, and able to perform" state contracts and those actually engaged to perform the contracts.[97] The study is mandated to include

an analysis of court decisions "regarding use of quotas and set-asides as a means of securing and ensuring participation by minorities and women."[98]

Ultimately, the results of this study should validate the need for continued use of affirmative action programs in the State of New York, based upon findings that disparities continue to exist (verifying present policies has not eliminated the compelling need for a competitive edge). The study could play an important role in "demonstrating affirmative action program[s] 'will not last longer than the discriminatory effects [they are] designed to eliminate.'"[99] Where quotas and set-asides have eliminated disparities, on the other hand, the case will be made for altering affirmative action policies, since such measures would no longer be constitutionally required.

"By carefully crafting lawful support for women-owned and minority-owned businesses, New York can likewise continue to cultivate and grow the American dream for its small, minority-owned, and women-owned businesses."

Potential Disconnects Between Federal and New York Certifications

In crafting rules to implement the new legislation, New York must be careful of potential disconnects between the State of New York and federal law. As discussed above and in *Jana-Rock Construction*, presumptive status under federal law to qualify for social and economic disadvantage may differ from New York standards. Size standards may also differ. New York has a bright-line rule setting a limit of 100 persons as the maximum size of a "small" business.[100] The corresponding federal size standards fluctuate by industry based on the NAIC codes (for example, as high as 500 employees for manufacturing). Therefore, the State of New York will need to evaluate whether the tighter restrictions are satisfied by companies already certified in the federal system.

Conclusion

A broader understanding of the federal contracting preference programs and their potential pitfalls should help New York implement better rules for acceptance of federal certifications as part of its state MWBE programs. By avoiding problem areas and applying the new regulations in a manner that is narrowly tailored, New York officials are best postured to overcome constitutional challenges to their actions. The new statewide MWBE advocate and the disparity study should provide future dividends along these lines.

In proclaiming Small Business Week, 2006, President Bush remarked, "We applaud the men and women who own and operate small businesses and spur economic growth. Through their entrepreneurial spirit and commitment to excellence, they help ensure that America remains a place where dreams are realized."[101]

Helping small businesses grow and expand keeps the economy moving forward and creates more jobs.[102] By carefully crafting lawful support for women-owned and minority-owned businesses, New York can likewise continue to cultivate and grow the American dream for its small, minority-owned, and women-owned businesses.

Endnotes

1. Proclamation No. 7990, 71 Fed. Reg. 15,321 (Mar. 23, 2006) (President George W. Bush, 2006 Small Business Week Proclamation). BB 14.7(a).
2. *Id*.
3. N.Y. Econ. Dev. Law § 130 (McKinney 2006).
4. N.Y. Exec. Law §§ 310-318 (McKinney 2006).
5. 515 U.S. 200 (1995).
6. Thomas J. Madden and Kevin M. Kordzeil, *Strict Scrutiny and the Future of Federal Procurement Set-Aside Programs in the Wake of Adarand: Does "Strict in Theory" Mean"'Fatal in Fact"?* 64 Fed. Cont. Rep. (BNA) 133 (Aug. 7, 1995).
7. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).
8. *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997).
9. For a detailed examination of the *Adarand* decision and its impact on federal procurement *see* Patrick E. Tolan, Jr., *Government Contracting with Small Business in the Wake of the Federal Acquisition Streamlining Act, the Federal Acquisition Reform Act, and Adarand: Small Business as Usual?* 44 A.F. L. Rev. 75 (1998).
10. *Clinton Unveils Affirmative Action Plans*, 37 Gov't Contractor 385 (1995). *See also* U.S. Dep't of Just., Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042 app. at 26,050 (May 23, 1996) (changes designed to survive strict scrutiny).
11. *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195 (2d Cir. 2006); *W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005).
12. 2006 N.Y. Sess. Laws ch. 59 (McKinney); N.Y. Exec. Law § 314(2-a)(c) (McKinney 2006) (effective Oct. 8, 2006).
13. *Adarand*, 965 F. Supp. 1556 (D. Colo. 1997).
14. Act of June 11, 1942, Pub. L. No. 603, 56 Stat. 351 [hereinafter Act of 1942]. For an excellent historical review of the evolution of small and disadvantaged business programs see Thomas Jefferson Hasty, *Minority Business Enterprise Development and the Small Business Administration's 8(a) Program: Past, Present, and (Is There a) Future?* 145 Mil. L. Rev. 1 (1994).
15. Act of 1942, § 4(f)(4).
16. Hasty, *supra* note 14, at 112 n.52.
17. *Id.* at 8.
18. *Id.* at 9.
19. H.R. Rep. No. 83-494, at 2021 (1953).
20. Small Business Act of 1958, Pub. L. No. 85-536, 72 Stat. 384 (to be codified at 15 U.S.C. §§ 631-647). Because later SBA set-aside programs stemmed from § 8(a) of the Act; they have been dubbed "8(a) set-asides."
21. Hasty, *supra* note 14, at 10.

22. Small Business Act of 1958 § 8(a)(1)-(2).

23. *See* Hasty, *supra* note 14, at 10-15.

24. *Id*. at 12-13.

25. Exec. Order No. 11,458, 34 Fed. Reg. 4,937 (Mar. 5, 1969). *See also* Exec. Order No. 11,518, 35 Fed. Reg. 4,939 (Mar. 29, 1970) (calling for increased representation of interests of minority business enterprises within federal departments); Executive Order No. 11,625, 36 Fed. Reg. 19967 (Oct. 13, 1971) (directing the Secretary of Commerce to "develop comprehensive plans and specific program goals for the minority enterprise program." To qualify for the minority enterprise program, a business had to be "owned or controlled by one or more socially or economically disadvantaged persons.").

26. Small Business Act and the Small Business Investment Act of 1958, amendment, Pub. L. No. 95-507, 92 Stat. 1757 (1978) (codified as amended in scattered sections of 15 U.S.C. The 8(a) program is codified at 15 U.S.C. § 637(a)).

27. *Id.* § 221 at 1770 (codified at 15 U.S.C. § 644(g) (2000)). *See also* 15 U.S.C.A. § 644 (West 1997) (Historical and Statutory Notes).

28. *See* 15 U.S.C. § 637 (2000) (emphasis added).

29. 13 C.F.R. § 124.105 (1997) (The provision quoted was in effect at the time of *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)). Subsequent references to the 1997 C.F.R. are likewise intentional, because the regulations were modified in 1998, in the aftermath of *Adarand*. *See* 63 Fed. Reg. 35,739 (June 30, 1998). Today's definition adds "within American society" after cultural bias, but is otherwise identical. 13 C.F.R. § 124.103.

30. 13 C.F.R. § 124.105(b) (1997) ("In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans; Native Americans . . . .").

31. 13 C.F.R. § 124.105(c)(1) (1997).

32. 13 C.F.R. § 124.105(c)(1)(i)-(iv) (1997).

33. 13 C.F.R. § 124.105(c)(1)(v) (1997).

34. Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified as amended in scattered sections of 10, 15, and 41 U.S.C.); § 7106 (codified at 15 U.S.C. § 644(g) (2000)). BB 12.4(a), 12.9(c).

35. *See* 15 U.S.C. § 637(d)(3)(D) (2000). *See also* 15 U.S.C.A. § 637 (West 1997) (Historical and Statutory Notes).

36. 13 C.F.R. § 124.105(a) (1997). BB T.1.

37. "Those regulations say that the certifying authority should presume both social and economic disadvantage (i.e., eligibility to participate) if the applicant belongs to certain racial groups, or is a woman." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 208 (1995) (referring to 49 C.F.R. § 23.62 (1994)).

38. *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997). On remand, the District Court struck down not only the particular subcontracting compensation clause at issue in the case, but also the 8(d) subcontracting incentive provision and the goal requirement of the Small Business Act as amended. *Id*. at 1584 (striking down 15 U.S.C. §§ 637(d), 644(g)). However, the judgment only holds these provisions unconstitutional "*as applied* to highway construction in the State of Colorado." *Id*. (emphasis added).

39. *Id*. at 1580.

40. N.Y. TRANSP. LAW § 428(1). Such set-asides for federally funded highway projects had formerly been upheld in state courts and at the U.S. Second Circuit Court of Appeals. *See, e.g.*, *Rex Paving Corp. v. White*, 531 N.Y.S.2d 831 (App. Div.1988); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992).

41. *Adarand*, 515 U.S. at 237.

42. *Id.*

43. *Id.* at 237-38 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980)).

44. A micro-purchase is one with a cost of less than $2,500; such contracts are not required to be set aside for small business. 15 U.S.C. § 644(j) (2000).

45. "Each contract . . . that has an anticipated value greater than $2,500 but not greater than $100,000 shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive." 15 U.S.C. § 644(j) (2000).

46. 15 U.S.C. § 637(d)(3)(C) (2000).

47. Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648, 25,648 (May 9, 1997).

48. *See, e.g.*, *W. States Paving Co. v. Wash. State DOT*, 407 F.3d 983, 997 (9th Cir. 2005) (holding that "If no such discrimination is present in Washington, then the State's . . . program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on basis of their race or sex."); *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195 (2d Cir. 2006) (upholding New York's exclusion of those of Spanish origin from preference for Hispanics).

49. Small Business Size Regulations; 8(a) Business Development/ Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, 63 Fed. Reg. 35,726, 35,727 (June 30, 1998) [hereinafter 8(a) Business Development].

50. *Proposed 8(a) Rules Should Increase Eligible Firms by 50 Percent, SBA Head Predicts*, 68 FED. CONT. REP. (BNA) 151 (Aug. 18, 1997) (citing an interview with SBA Administrator Aida Alverez).

51. *Id.*

52. 8(a) Business Development, 63 Fed. Reg. at 35,727.

53. *Id*. at 35,741.

54. *Id.*

55. *Id.* at 35,742.

56. 15 U.S.C. § 637(d)(6) (2000). Failure of a contractor to comply in good faith with the goals "shall be a material breach of such contract." § 637(d)(8).

57. § 637(d)(3)(F). 12.9(c).

58. § 637(d)(3)(C) (emphasis added). 12.9(c).

59. *Compare* § 637(d)(3)(C) to § 637(a)(6). *See also* 13 C.F.R. § 124.104 (2006) (individual economic disadvantage for 8(a)).

60. 48 C.F.R. § 19.1202-2.

61. 48 C.F.R. § 19.1202-3.

62. 48 C.F.R. § 19.1203.

63. 15 U.S.C. § 632(a)(2)(A).

64. 15 U.S.C. § 637(b)(6).

65. 13 C.F.R. § 121.101(a).

66. 65 Fed. Reg. 30,836, 30,840 (May 15, 2000) (amending 13 C.F.R. § 121.101(b)).

67. 13 C.F.R. § 121.402(b); 48 C.F.R. § 19.303. The contracting officer's code designation is typically final unless timely appealed. 13 C.F.R. § 121.402(c)-(d). The SBA may also assign a code or size standard when a solicitation contains an unclear, incomplete or missing NAICS code. *Id*.

68. Although New York has a variety of supports for minority and women-owned businesses, the transportation sector was selected for more detailed discussion because of the immediate parallels to *Adarand* and the federal programs challenged therein, as well as the heightened vulnerability of this sector to judicial

challenge. For detailed regulatory guidance on other affirmative action programs, *see, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 5, §§ 40-41, 140-144 (2001) (entrepreneurial assistance program and requirements for equal employment opportunities); N.Y. COMP. CODES R. & REGS. tit. 9, §§ 250.16-.17 (2001) (priority contracting preferences for products and services from the Department of Corrections, the blind, mentally ill, severely disabled persons, and qualified veterans); N.Y. COMP. CODES R. & REGS. tit. 21, §§ 4230.1-.16 (2001) (minority and women-owned business development and lending program).

69. *See* 49 C.F.R. § 26.21; N.Y. COMP. CODES R. & REGS. tit. 17, § 35.3 (2001).
70. As a condition of receiving federal funds, the NYDOT must adhere to regulations promulgated by the U.S. DOT to implement the anti-discrimination provisions of the Federal Highways Act. *See* 23 U.S.C. § 140 (2000); 49 C.F.R. § 26.21; 49 C.F.R. § 26.41 (10% goal for disadvantaged businesses); 49 C.F.R. §§ 26.61(c), 26.27 (rebuttable presumption must accrue to members of identified groups).
71. N.Y. COMP. CODES R. & REGS. tit. 21, §§ 4240.1-.13 (2001) (small, minority and women-owned business enterprises transportation capital assistance and guaranteed loan program).
72. § 4240.1.
73. § 4240.10.
74. § 4240.6.
75. 438 F.3d 195 (2d Cir. 2006).
76. New York's program, under Article 15A, includes in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." N.Y. EXEC. LAW § 310(8)(b) (McKinney 2005).
77. *Jana-Rock*, 438 F.3d at 201.
78. *Id.* at 206.
79. The court's discussion of compelling state interest deferred to its earlier analysis in *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 743 F. Supp. 977, 1001 (N.D.N.Y.1990) (*Harrison & Burrowes I*), and *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992) (*Harrison & Burrowes II*). To save the statute, the state promulgated emergency regulations suspending its MBE program until the state could compile evidence to show "that a factual basis demonstrated a compelling state interest." *Jana-Rock*, 438 F.3d at 206-209.
80. *Id.* at 208-209.
81. The court cites cases that were struck down for "over-inclusive" relief—extending preference beyond those not suffering past discrimination. *Id.* at 208 (citing, among others, *Builders of Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001) (holding broad Cook County preferences unconstitutional because persons of Spanish and Portuguese descent were never subject to significant discrimination by Cook County); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001) (lumping together "Blacks, Native Americans, Hispanics and Orientals" may well provide preferences where there has been no discrimination).
82. *Jana-Rock*, 438 F.3d at 209-214.
83. *Id.* at 206.
84. *Id.*
85. In New York, this study, "Opportunity Denied!" was completed in 1992. *Id.* at 209 (citations omitted).
86. *Id.* at 202. At the same time, the state erroneously certified them for MWBE status for New York contracts. *Id.*
87. *Id.* at 202-203.
88. *Id.* (quoting Jorge Vidro, Director of New York State's Minority and Women-Owned Business Enterprise Certification Program).
89. 2006 N.Y. Laws ch. 59; N.Y. EXEC. LAW § 314(2-a)(c) (McKinney 2005).
90. § 310(8)(b).
91. § 310.
92. § 314; N.Y. COMP. CODES R. & REGS. tit. 5, §§ 144.1-.7. For information on how and why to get certified, *see* http://www.empire.state.ny.us/pdf/htbcert.pdf. A certification application may be found at http://www.empire.state.ny.us/pdf/dmwbd.pdf. The MWBE site is http://www.empire.state.ny.us/Small_and_Growing_Businesses/mwbe.asp.
93. §§ 311-12; tit. 5, §§ 140-143.
94. *See* the Empire State web site, *available at* http://www.empire.state.ny.us/Small_and_Growing_Businesses/govt_procurement.asp.
95. 2006 N.Y. Laws ch. 59; § 311-a.
96. 2006 N.Y. Laws ch. 59; § 312-a.
97. *Id.*
98. *Id.*
99. *Adarand Constructors v. Pena*, 515 U.S. 200, 237-38 (1995).
100. N.Y. ECON. DEV. LAW § 131 (McKinney 2005).
101. Proclamation No. 7990, *supra* note 1.
102. *Id.*

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Assessment of a Responsible Contractor by New York State

By Noreen VanDoren

New York State procurement law requires that "prior to making an award of a contract each state agency shall make a determination of the responsibility of the proposed contractor."[1] There is also a continuing obligation under the procurement rules for contracting agencies to assess a contractor's ongoing position of responsibility; and to ensure that the continued contractual relationship withstands public scrutiny and is conducted in a manner consistent with the best interests of the state.[2] This review is generally referred to as "Vendor Responsibility" and is applicable to the state centralized contracts issued through the Office of General Services[3] as well as the individual state agency contracts for products and services required to support their programs.[4]

State procurement law requires that commodity contracts be awarded on the basis of lowest price to a responsive and responsible offerer, while contracts for services are awarded on the basis of best value from a responsive and responsible offerer.[5] Technology, by law, is defined as a service. Similar provisions relative to Vendor Responsibility are applicable to public building construction[6] and to local governmental entities.[7] This article focuses mainly on the responsibility determinations of contractors seeking procurement contracts under Article 11 of the State Finance Law, with limited references to the construction contracting arena.

Prior to January 1, 2005, state agencies followed the procurement guidelines set forth by the New York State Procurement Council[8] ("Procurement Council") in making their responsibility assessments. The Procurement Council is charged by law to, among other things, establish and maintain guidelines for single-agency contracts as well as for all state procurements in general.[9] The guidelines were first adopted by the Procurement Council on December 10, 1996, and have been updated over time as necessary. Section II of the guidelines focuses on responsibility determinations and advises agencies to administer a process in which the offerers are required to provide assurances that they conform to responsibility requirements. The guidelines specifically identify certain responsibility criteria for review, such as the offerer's qualifications, financial stability and integrity, and delegate to the contracting agencies the method to determine responsibility, as well as to identify any additional areas that should be investigated as relevant to the particular type of contract at hand. The guidelines state: "Responsibility differs from responsive in that it generally applies to the offerer and the constructs are established in case law. Responsive applies to the extent to which the offerer has complied with the specifications or requirements of the solicitation document."[10]

"State procurement law requires that commodity contracts be awarded on the basis of lowest price to a responsive and responsible offerer, while contracts for services are awarded on the basis of best value from a responsive and responsible offerer."

These general guidelines as well as Executive Order 4.170.1 dated June 23, 1993 and filed June 25, 1993 entitled "Establishing Uniform Guidelines for Determining Responsibility of Bidders,"[11] were relied upon by state procurement officials from December 1996 until November 1, 2004, when the New York State Office of the State Comptroller (OSC), acting independently of state contracting agency representatives or the Procurement Council, issued Bulletin G-221, "Vendor Responsibility: Standards, Procedures, and Documentation Requirements"[12] with an effective date of January 1, 2005 (Bulletin G-221). OSC relied upon State Finance Law § 112, subdivision 2, paragraph (a), which provides, in relevant part

> [b]efore any contract made for or by any state agency, department, board, officer, commission, or institution, shall be executed or become effective, whenever such contract exceeds fifty thousand dollars in amount . . . , it shall first be approved by the comptroller and filed in his or her office[,][13]

as the legal basis for requiring state agencies to comply with Bulletin G-221 as directed. OSC acknowledged in the Bulletin that responsibility determinations must be made on a case-by-case basis, keeping in mind that "[t]he courts in examining contractor 'responsibility' have indicated that 'responsibility' is an elastic word, encompassing factors including financial ability to complete the con-

tract, accountability, reliability, skill, sufficiency of capital resources, judgment, integrity and 'moral worth.'"[14]

While Bulletin G-221 does not change the law which requires the state agencies to make the vendor responsibility determinations in the first instance, it does set forth specific directions for the contracting agencies to follow if an agency wants its contract approved by OSC. Bulletin G-221 requires state agencies to not only assess four major categories of review, but also requires the agencies to certify to OSC in detail what was researched, how the research was performed, what information was disclosed by the contractor, what information was discovered by the agency on its own and what the agency relied upon in making the ultimate determination of responsibility. Since issuance of Bulletin G-221, OSC created a vendor responsibility section ("VendRep unit") within its Bureau of Contracts, which reviews the responsibility determinations of certain state agency contracts.[15]

It is important for the contracting community to know what a state agency and OSC are looking for in support of a determination of responsibility. Bulletin G-221 sets forth the information OSC first required in the fall of 2004 to approve a contract. However, certain agencies disagreed with some of those requirements such as the agency certification language, questions in the OSC questionnaire, the format of the Profile document, etc., and began working with OSC to make changes. In October of 2005, the Procurement Council issued the "New York State Procurement Bulletin: Best Practices, Determining Vendor Responsibility" to provide additional guidance to state agencies in making their responsibility determinations. This Procurement Council Bulletin, posted on the Office of General Services' website,[16] includes not only extensive guidelines, but also a Standard Vendor Responsibility Questionnaire for use with contracts with a value equal to or in excess of $100,000; a limited questionnaire for the lower-dollar-value contracts and a Profile form to use when submitting the contract to OSC, as well as a listing of evaluation criteria for agencies to consider in making a responsibility assessment.

As stated in the Procurement Council Bulletin and OSC Bulletin G-221, the four main areas of focus in assessing a contractor's responsibility are the contractor's financial capacity, legal authority, integrity and past performance (FLIP criteria). In assessing whether the contractor is financially capable of performing the contract, an agency will consider the following: current assets and liabilities; recent bankruptcies; commitments to other contracts; the ability to pay outstanding debts; and ability to provide the required amount of insurance coverage. For some contracts, more detailed information relative to the appropriate accounting and auditing procedures is also investigated. Numerous courts have upheld non-responsibility determinations based on lack of financial capacity,[17] as well as the filing of a bankruptcy proceeding.[18]

The second factor in the FLIP assessment is whether the contractor is legally capable of performing the contract. Factors considered are the filing with the Department of State (DOS) for authority to do business in New York State, a certificate of good standing from a foreign state of incorporation, evidence of the appropriate licensing from the State Education Department or DOS or a debarment from contracting as issued by the State Labor Department due to prevailing wage violation.[19]

The third factor, and the one that is the most subjective, is the issue of whether the contractor possesses the integrity to perform the contract. To assess business integrity of either the company or its principals, agencies consider criminal indictments, criminal convictions, civil fines and injunctions imposed by governmental agencies, anti-trust investigations, ethical violations, tax delinquencies, debarment by the federal government and prior determinations of integrity-related non-responsibility, among others. Courts will uphold findings of non-responsibility in commodities or service contracts due to prior criminal conduct, indictments and moral turpitude such as where a low bidder was acting as a "front" company, i.e., same office, telephone, management, of a company indicted for perjury and bid rigging, or when the low bidder was indicted for bid rigging in another state.[20] The submission of false or misleading statements on uniform questionnaires as well as general hostility and lack of cooperation have also been upheld as constituting non-responsibility on the part of the bidder by various New York City agencies.[21]

The final factor to be assessed, and one that agencies feel is most important and the greatest indicator of future performance and responsibility, is the past performance history of the contractor in providing services to governmental entities, whether it be providing goods and services to a small town or village in upstate New York or providing technology services to the federal government. Inquiry must be made as to unsatisfactory performance issues, contract termination for cause, contract abandonment, and overall performance on prior state contracts. Courts have upheld non-responsibility determinations based on failures in past performance by the contractor. While the majority of the cases decided have related to decisions by local government entities,[22] the courts have also upheld state agency determinations of non-responsibility based on poor past performance.[23] Agencies must be certain to provide due process to the competing vendor.

Throughout the responsibility evaluation process, we must remain mindful of the fact that the extent of the responsibility review has long been a risk-based approach, with a much greater level of detail required when

assessing a contract valued, for example, in the tens of millions of dollars per year than is required for a contract with an annual value less than a million dollars. That is not to say the issue of responsibility is less important in a lesser value contract; it is not. However, the impact of a later finding of non-responsibility or default by the contractor on a low-dollar contract may be a much lower risk for the state. In light of the continued reduction in the state workforce, while maintaining and in some agencies increasing the number and scope of state contracts, the agencies must focus on the high-dollar, high-risk and important health, safety and welfare contracts when targeting agency resources to conduct vendor responsibility reviews. Of course, in all cases, no matter how low the contract value, when adverse contractor information is brought to the reviewing agency's attention, the agency will research the issue and seek additional information or clarification from the contractor prior to making the final responsibility determination.

Since January 1, 2005, all state contracts with an anticipated value equal to or in excess of $100,000 and which must be approved by OSC to be effective need a written vendor responsibility questionnaire to accompany that contract.[24] The agency reviews the responses provided, checks various resources to ensure the contractor provided accurate information, and once satisfied there is no significant adverse information, makes a determination that the contractor is responsible for contract award. Of course, the agency must also assess the contractor's responsiveness to the bid solicitation. After making the contract award recommendation, the agency forwards the contract to OSC for approval. OSC has ninety days to approve the contract and can also extend that period unilaterally up to fifteen days.[25]

Upon contract review, OSC may determine it has have additional questions for the agency including but not limited to the background research performed by the agency, the agency's failure to identify issues it reviewed, or the agency's determination of insignificant issues. OSC will contact the agency with these concerns and require the state agency to obtain additional clarifications from a contractor and reassess that additional information. The agency must state on its resubmitted profile to OSC that the agency is aware of these additional issues and makes a "responsible" determination in light of the assessment of these additional factors. Failure to address the concerns expressed by OSC most often results in a return of the contract by OSC to the state agency, advising it is returning the contract "unapproved," pending further responsibility review and resubmittal by the contracting agency.

There are times when the state agency and OSC disagree as to what factors should be assessed as part of the responsibility determination. For example, Bulletin G-221 refers to an assessment of a contractor's organizational capacity as part of the responsibility determination, with consideration given to factors such as the contractor's equipment, facilities, personnel, resources and expertise. In October of 2005, this issue was brought before the Procurement Council and it was determined that such factors relate to the issue of responsiveness to the bid solicitation, and not to the issue of responsibility. The issue of responsiveness relates to whether the contractor has what it takes and is needed to meet the contract terms and conditions, without interruption or delay. A determination that the contractor does not have the equipment or personnel or experience sought in the solicitation should not equate to a finding of non-responsibility; rather the proper determination should be one of responsiveness. As such, the Procurement Council voted to remove the organizational capacity requirement from its procurement Bulletin on Determining Vendor Responsibility.[26]

OSC may also undertake its own review of the proposed contractor's responsibility. According to a press release issued by OSC on March 8, 2006, it has, since January 1, 2005, reviewed vendor responsibility determinations for approximately 17,000 contracts submitted for approval and conducted a more detailed review for 5,000 of those contracts.[27] Among those 17,000 contracts, OSC mentions only four denied approvals after a finding of responsibility had been issued by the contracting entity. Is this second level of review by OSC's VendRep Unit really warranted in light of the increased expenditure of state time and resources for that effort? Time alone will tell.

What we do know is that the responsibility review process imposed on state agencies by OSC has led to a much longer contract review process and is redundant for state agencies, verifying the same information for repeat contractors. Agencies may also require input from other state agencies, and oftentimes the company's legal counsel needs to get involved to obtain up-to-date information for the contractor from a control agency. This process increases, for both the state and the contractors, the cost and time of doing business. At a minimum, a state agency will check the DOS website for the contractor's authority to do business in the state, for outstanding tax liabilities and for current license status. The State Education Department site will be checked for certain other licenses. Both the state and federal Departments of Labor are checked for debarments and the Federal Occupational Safety & Health Act (OSHA) website is checked for prior and current OSHA violations. In all cases a broad-based Internet search is performed, often with key words such as "breach," "indictment," "fraud," "termination" and "lien" included. The results of the Internet search are then examined, oftentimes leading the reviewer to articles which are repetitious and in some instances are simply unsubstantiated allegations set forth in an old newspaper article.

Any issue which may be deemed significant to a responsibility determination will then be explored further, and if it took place within the last five years and the contractor failed to disclose the information in response to the written questionnaire, the contractor must explain why and provide details about the issue upon request. In most instances, the contractor advises that it did not understand the nature of the question, or in companies with a large number of divisions, business units or subsidiaries, the person responding to the bid solicitation confirms that he or she was unaware of the issue as it related to a different branch or division or perhaps even the parent company. Gathering and evaluating this information takes time, and the long-standing principle that state procurement contracts must deliver mission-critical commodities and services in a *timely* manner is being stretched to the breaking point, with little documented measurable gain for the effort. The Procurement Services Group at the Office of General Services is responsible for managing almost 3,000 statewide contracts. As a result of the vendor responsibility requirements imposed upon them by OSC, this unit has had to add three additional months to the lead time for renewing, rebidding or otherwise establishing these critical contracts.

The number of contractors that have been found non-responsible over the past two years is believed to be significantly fewer than 1% of all contracts awarded by the state on an annual basis. Therefore, we must once again question whether the level of detail required by OSC to make a determination of responsibility is really in the state's best interest.

OSC is proposing to implement a new centralized database of information about the vendors in the fall of 2006. OSC claims this will help make the contracting process more efficient both for state agencies and for businesses seeking state contracts. Vendors will be able to complete one on-line questionnaire, regardless of the number of bids they respond to or state agencies they contract with. However, what cannot be lost during the roll-out of this database is the fact that state law still requires a state agency to make a new responsibility assessment each and every time a contractor is in line for a contract award. State agencies may not simply rely upon another agency's determination without performing its own investigation, as the contractor may have taken steps to remove a rogue employee or to implement business improvement processes to ensure the "prior bad acts" will not be repeated.[28] While it is anticipated the database will save the contractor time, as it won't have to submit a questionnaire and supporting documentation to numerous state agencies, the lengthy review process required of the state agencies remains the same until such time that OSC can upload control agency information into the database, reducing agencies' redundant searches.

It is important to note that while some contractors support the concept of a proposed statewide database, many contractors have expressed concerns. They question the confidentiality of such a system; particularly they have questioned how Freedom of Information Law (FOIL) requests will be handled and what information will be made available to their competitors. Publicly traded and large multi-divisional corporations and partnerships have questioned their own ability to provide accurate and current information for their numerous divisions, business units, subsidiaries and parent corporations as requested by OSC. Additionally, the Sarbanes-Oxley Law requirements impose significant accountability on vendors such that if someone should have known about a situation and does not, he or she is accountable, thereby raising concerns about signing certifications to the best of one's knowledge, especially in organizations doing business globally.

To meet licensing requirements, some companies must meet the criteria of their regulating industry. An additional concern relevant to the vendor responsibility process centers on repeating or challenging the work of the regulated industry. OSC has required state agencies to conduct full responsibility assessments for companies that are licensed and regulated by the Federal Aviation Administration, the Public Service Commission and the Department of State, among others. To perform such an assessment of a regulated entity, the agency procurement officials must spend time and effort becoming experts in these regulated industries and question the regulated contractor to determine if the reported violations are within industry standards. The rhetorical question becomes, is it really in the state's best interests to be questioning the licensing and review powers granted to regulating entities?

Most large international manufacturing corporations will have, as part of their normal course of business, OSHA violations, discrimination and labor law claims brought by disgruntled employees, small tax liens or environmental violations. Requiring disclosure of each item is a time-consuming process for the bidding corporations, taking them away from focusing on their own mission's critical obligations. Many companies have expressed concern with the implications of their innocent failure to disclose in this database and agencies are experiencing many "false positive" hits where it turns out the contractor satisfied a lien, corrected a violation or registered their personnel as required; however the data has simply been delayed in being entered into the enforcement agency's computer system. How such mistakes will be handled by the VendRep unit remains an open question, but what we do know is that it takes a great deal of time to investigate and resolve these mistakes, with little gain to the agency or the contractor.[29]

The final key element of vendor responsibility is the actual determination by a state agency. Agencies must

apply the hallmarks of due process: notice and an opportunity to be heard. No formal process is mandated, but it is good practice to retain documents upon which the determination is made, as well as a narrative describing the analysis used and conclusion reached. These writings will then become a part of the procurement record. Courts give broad latitude to the governmental entity in establishing the criteria to determine bidder responsibility, provided the criteria are rational and reliance on the criteria is for the good of the taxpayers, the intended beneficiaries of the law.[30]

"The vendor responsibility review process imposed by OSC upon state agencies is much more rigorous than any other state that is a member of the National Association of State Purchasing Officials."

Keep in mind that while a low bidder does not acquire a property right in a contract,[31] the stigma of identifying a contractor as non-responsible due to lack of integrity does imply a liberty interest when affecting a contractor's ability to carry on business. Although a formal type of hearing is not required, the contractor should be given notice of the agency's concern over responsibility and the reasons for its concern. Due process is satisfied if the contractor is given an opportunity to rebut the charges both in writing and at an informal hearing.[32]

Pre-bid disqualification also requires due process. Due process requires that a bidder be given an opportunity to address the issue of responsibility prior to a determination of disqualification. Disqualification without an opportunity to be heard has been held to be arbitrary and capricious. Before any bidder can be found non-responsible, the contractor must be notified in writing, specifying the reasons for the finding of non-responsibility, and afforded the opportunity to appear at an informal hearing and to present any information relevant as a rebuttal.[33]

What effect does the state's vendor responsibility review process have on the state resources and the cost to contractors to continue doing business with the state? Has the process changed the type of companies we are able to contract with? Has this process increased or decreased competition among contractors? Do bidders with prior responsibility issues withdraw from bidding competitively? Must contractors challenge the responsibility determinations in the courts? Is it right to make every contractor prove they are responsible to each state agency they contract with? Do contract costs increase or decrease based on the increased level of review and response required of the contractors to be awarded a contract? Where competition is limited, and many of the companies are in the same questionable financial position, i.e., most airlines are in or have been in bankruptcy, is there more risk to the state by entering into a contract with such a company, under our terms and conditions rather than purchasing on the open market?

While answers to these questions have been and continue to be debated, it is hoped that the future will better reveal the practical issues of the state's vendor responsibility process. The vendor responsibility review process imposed by OSC upon state agencies is much more rigorous than any other state that is a member of the National Association of State Purchasing Officials. No one disputes that the awarding of state contracts and the expenditure of state taxpayer dollars to responsible vendors is a good policy. However, to date, we have seen no evidence to support actual savings (in time, performance or dollars) by the state which equal or outweigh the vast amount of money and time the state agencies and business community are expending to prove a contractor is responsible in the first instance.

The question therefore remains: "Is the vendor responsibility review process imposed by OSC the most practical and economical alternative for an agency's determination of vendor responsibility?" Only the reader can make the final assessment.

Endnotes

1. *See* N.Y. State Fin. Law § 163, subd. 9, par. f (McKinney's 2006).
2. N.Y. Comp. Codes R. & Regs. tit. 9, § 250.11 (2006).
3. *See* § 163, subd. 3, par. a, subpar. iii, and subd. 4, par. b.
4. *See* § 163, subd. 3, par. a.
5. *See* § 163, subd. 10.
6. *See* Pub. Bldgs. Law § 8, subd. 6 (McKinney's 2006).
7. *See* Gen. Mun. Law § 103, subd. 1 (McKinney's 2006).
8. *See* N.Y. State Fin. Law § 161 (McKinney's 2006).
9. § 161, subd. 2 par. b.
10. New York State Procurement council, Procurement Guidelines (Mar. 2001), http://www.ogs.state.ny.us/procurecounc/pdfdoc/guidelines.pdf at page II-2.
11. N.Y. Comp. Codes R. & Regs. tit. 9, subtitle A § 4.170.1 (2006).
12. New York State Office of the State Comptroller, Bulletin G-221, Vendor Responsibility: Standards, Procedures, and Documentation Requirements (Nov. 2004), http://nysosc3.osc.state.ny.us/agencies/gbull/g221.htm.
13. The threshold for OSC review at the time G-221 was issued was $50,000.
14. New York State Office of the State Comptroller, Bulletin G-221, Vendor Responsibility: Standards, Procedures, and Documentation Requirements (Nov. 2004), http://nysosc3.osc.state.ny.us/agencies/gbull/g221.htm.
15. OSC has stated they forward some but not all contracts with a value in excess of $100,000 to this unit. The specific basis for such referral is dependent upon prior experience, high-profile issues, newspaper articles or other independent research information obtained by OSC.

16. Procurement Council, New York State Procurement Bulletin: Best Practices, Determining Vendor Responsibility (Oct. 2005), http://www.ogs.state.ny.us/procurecounc/pdfdoc/BestPractice.pdf.

17. *E.g., Application of P. J. Panzeca, Inc.*, 56 Misc. 2d 460, 288 N.Y.S.2d 813 (Sup. Ct., Nassau Co. 1968), *aff'd*, 30 A.D.2d 640 (2nd Dep't), *appeal den.* 22 N.Y.2d 648 (1968) (lowest bidder rejected on grounds of absence of proper bond and failure to meet financial standards set forth in bid documents, i.e., working capital requirements, grounds for finding bidder not responsible).

18. *Adelaide Environmental Associates v. State of New York Office of General Services*, 248 A.D.2d 861 (3rd Dep't 1998).

19. *See LaCorte Elec. Constr. & Maintenance v. County of Rensselaer*, 195 A.D.2d 923 (3rd Dep't 1993).

20. *Arglo Painting Corp. v. Board of Education*, 47 Misc. 2d 618 (Sup. Ct., Kings Co. 1965); *Lord Electric Co. v. Litke, Comm. of Dep't of General Services*, 122 Misc. 2d 112, 469 N.Y.S.2d 846 (Sup. Ct., N.Y. Co. 1983).

21. *Dentom Transp., Inc. v. New York City Human Resources Admin.* 155 Misc. 2d 31, *588 N.Y.S.2d 713,* (1992); *see also Dairymen's League Co-op Assn. v. Perrini*, 54 Misc. 2d 400 (1967) (low bidder on contract to furnish and deliver milk deemed non-responsible when management of corporation refused to answer questions on alleged collusive bids, resulting in disqualification from bid award).

22. *Limitone v. Galgano*, 21 Misc. 2d 376, 189 N.Y.S.2d 738 (Sup. Ct., Westchester Co., 1959) (lowest bidder deemed not "lowest responsible bidder" when prior unsatisfactory service, i.e., unsatisfactory garbage removal considered); *Meyer v. Board of Educ.*, 31 Misc. 2d 407, 221 N.Y.S.2d 500 (Sup. Ct., Nassau Co., 1961) (architect directed by school district determined that lowest bidder was not "lowest responsible bidder" on electrical contract upheld); *W.J. Gaskell, Inc. v. Maslanka*, 33 Misc. 2d 88, 225 N.Y.S.2d 94 (Sup. Ct., Nassau Co., 1962) (engineer directed by Board of Trustees to review qualification of lowest bidder rejected lowest bidder as "not responsible" upheld); *Monoco Oil Co. v. Collins*, 96 Misc. 2d 631, 409 N.Y.S.2d 498 (Sup. Ct., Erie Co., 1978) (lowest bidder failed to properly explain index price for oil price and delivery problems with other customers supported finding of non-responsibility); *Lauvas v. Bovina*, 86 A.D.2d 694, 446 N.Y.S.2d 516 (3rd Dep't 1982) (low bidder on operation of refuse station deemed non-responsible based on equipment which was unsatisfactory and relationship to prior contractor who had performed inadequately).

23. *Patrick R. Brereton & Assoc., Inc. v. Regan et al.*, 94 A.D.2d 886, 463 N.Y.S.2d 319 (3rd Dep't 1983) (low bidder not awarded contract based on determination that furniture quality was inferior and failed to conform to specifications); *Bortle v. Tofany et al.*, 42 A.D.2d 1007, 348 N.Y.S.2d 215 (3rd Dep't 1973) (low bidder denied contract for stenographic services based on prior poor service and high fees charged to the public).

24. The extensive written questionnaire is not required for contracts with a value under $100,000; however, the law still requires an agency to make a responsibility assessment prior to contract award.

25. *See* State Fin. Law § 112, subd. 2, par. (a) (McKinney's 2006).

26. Procurement Council, New York State Procurement Bulletin: Best Practices, Determining Vendor Responsibility (Oct. 2005), http://www.ogs.state.ny.us/procurecounc/pdfdoc/BestPractice.pdf.

27. Press Release, Alan G. Hevesi, Comptroller's Reforms to State Contracting Will Help Ensure Contracts Are Awarded Only to Responsible Vendors (Mar. 8, 2006) http://www.osc.state.ny.us/press/releases/mar06/030806.htm.

28. *Lord Elec. Co. v. Litke, Comm. of Dep't of Gen'l Serv.*, 122 Misc. 2d 112, 469 N.Y.S.2d 846 (Sup. Ct., N.Y. Co. 1983).

29. For more information about the current status of OSC's proposed database project and the proposed questions, visit OSC's Vendor Responsibility website *at* http://nysosc3.osc.state.ny.us/vendrep/index.htm.

30. *Bay Harbour Elec. v. County of Chautauqua*, 210 A.D.2d 919, 621 N.Y.S.2d 259 (4th Dep't 1994).

31. *Callanan Indus. v. City of Schenectady*, 116 A.D.2d 883, 498 N.Y.S.2d 490 (3rd Dep't 1986).

32. *Schiavone Constr. Co. v. Larocca*, 117 A.D.2d 440, 503 N.Y.S.2d 196 (3rd Dep't 1986); *R.W. Granger & Sons v. State Facilities Dev. Corp.*, 207 A.D.2d 596, 615 N.Y.S.2d 509 (3rd Dep't 1994).

33. *New York State Asphalt Pavement Assoc. v. White*, 141 Misc. 2d 28, 532 N.Y.S.2d 690 (Supreme Ct., Albany Co. 1988).

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New York State's Contracting Process Strengthened by Increasing Focus on Vendor Responsibility

By Joan M. Sullivan

Contracting in New York State

One of the most fundamental operations of New York State government is the purchasing of goods and services. From the construction of roadways, to maintaining the security of our public buildings and college campuses, to enjoying the beauty of our State parks, citizens rely on the fiscal, program and policy staffs of State agencies to meet their needs. Contracting for these goods and services in New York is an open and public process, subject to scrutiny by the Legislature, the media and the general public. Our State has a critically important system of checks and balances in place to ensure that the award of contracts is proper, the processes are fair, and taxpayers receive the best value possible.

Through its oversight role, the Office of the State Comptroller (OSC) is responsible for reviewing and approving contracts and purchase orders for goods and services valued in excess of $50,000.[1] Last fiscal year alone, State agencies entered into 42,000 new and amended contracts valued at $48,418,404,087. Payments to vendors made by the State pursuant to these, and previously awarded, contracts exceeded $77.8 billion for the same fiscal year. *(See inset for a listing of the many types of contract transactions reviewed by OSC).*

The requirement that the Comptroller review and approve State agency contracts is set forth in section 112 of the State Finance Law, which states:

> Before any contract made for or by any state agency, department, board, officer, commission or institution shall be executed or become effective whenever such contract exceeds fifty thousand dollars, it shall first be approved by the comptroller and filed in his or her office.

The intent of New York's contract review and approval process is to:

- Conduct a completely independent examination of transactions that have a financial impact on the State;
- Determine whether the method used to select the vendor complies with applicable statutory, regulatory, and policy requirements;
- Ensure that errors and unreasonable transactions are corrected before a financial obligation is incurred or an expenditure is made;
- Ensure that sufficient funds are committed to the contract; and,
- Ensure that there are reasonable assurances that the vendor is responsible.

What Does Being a "Responsible" Vendor Mean?

New York State procurement laws require that agencies award contracts only to responsible vendors.[2] Additionally, the State Comptroller must be satisfied that a proposed vendor is responsible before approving a contract award under section 112 of the State Finance Law. The courts, in examining vendor responsibility, have

The Office of the State Comptroller, as part of its contract review and approval process, reviews a large and unique variety of transactions from State agencies. Some procurement examples include:

- Commodities
- Construction
- Consulting, maintenance, printing and temporary personnel services
- Licensed professional services such as medical, architectural, engineering, nursing and legal
- Equipment acquisition
- Grants
- Leases
- Real estate acquisitions (including those acquired through eminent domain)
- Complex financial transactions
- Agreements between governmental entities
- Agreements that generate revenue for the State, such as concession agreements and land sales

held that responsibility is "an elastic word." Whether a vendor is "responsible" is a question of fact to be determined separately for each contract for which a vendor is proposed for award.[3] However, based upon existing legal precedents, determining a vendor's responsibility should involve the following four major inquiries:

1. **Does the vendor possess the integrity to perform the contract?** Factors to be considered include criminal indictments, criminal convictions, civil fines and injunctions or orders imposed by courts or other governmental agencies, anti-trust investigations, ethical violations, tax delinquencies, debarment by the federal government and prior determinations of integrity-related non-responsibility.[4]
2. **Has the vendor performed at acceptable levels on other governmental contracts?** Factors to be considered include reports of less than satisfactory performance, early contract termination for cause, contract abandonment and judicial determinations of breach of contract.[5]
3. **Is the vendor legally capable of performing the contract?** Factors to be considered include authority to do business in New York State (under the Business Corporation Law or Not-for-Profit Corporation Law), licensing (e.g., with the Education Department or Department of State) and debarment by the State Labor Department due to a Prevailing Wage Law violation.[6]
4. **Is the vendor financially and organizationally capable of performing the contract?** Factors to be considered include assets, liabilities, recent insolvency, equipment, facilities, personnel resources and expertise, availability in consideration of other business commitments and existence of appropriate accounting and auditing procedures for control of property and funds.[7]

Since entering office in 2003, New York State Comptroller Alan Hevesi has been working to ensure that the State contracting process is as fair, open and competitive as possible. A key component of this undertaking involves improving vendor responsibility determinations—the determination that agencies, by law, are required to make that proposed contractors do not have any outstanding tax liabilities, criminal convictions, or other circumstances that would impair their ability to receive State contract awards. To underscore the importance of only engaging in business with responsible vendors, Comptroller Hevesi has taken administrative action to improve the integrity of the State's contracting process. In November 2004, the Comptroller released Bulletin G-221—Vendor Responsibility: Standards, Procedures and Documentation Requirements. This Bulletin reminds State agencies of their legal obligation to undertake an affirmative review of the responsibility of any vendor to whom an agency proposes to make a contract award and instructs agencies that this review should be designed to provide reasonable assurances that the proposed vendor is responsible. In undertaking a responsibility review, agencies must comply with the following standards:[8]

- In all cases, agencies must consider any information that has come to its attention from the proposed vendor or any other source that would raise questions concerning the proposed vendor's responsibility.
- In the case of any contract valued at $100,000 or more, agencies must affirmatively require disclosure by the proposed vendor of all information that the agency reasonably deems relevant to a determination of responsibility.

The same standards used to determine the responsibility of a proposed vendor should also be applied to the proposed vendor's affiliated businesses, as well as to any business entity to which the proposed vendor is a subsidiary and to the owners and officers of the proposed vendor.

If an agency makes a preliminary determination that a proposed vendor is non-responsible, it must provide the proposed vendor with due process.[9] Due process generally requires the agency to (i) notify the proposed vendor in writing and provide sufficient detail of the reasons for the determination; and (ii) afford the vendor a reasonable time and a meaningful opportunity to be heard and to rebut the allegations.[10] After this process, the agency must make a final determination regarding the responsibility of the vendor.

Bulletin G-221 also served to outline the Comptroller's new procurement record requirements. Agencies must now include in the official procurement record submitted to OSC evidence that the contracting agency has determined that the proposed vendor is responsible. Specifically, the contracting agency must document in the procurement record the basis for the responsibility determination, including any information provided by the proposed vendor, any analyses or determinations concerning the responsibility of the proposed vendor prepared by agency staff or made by the agency, and any other information compiled in the course of the responsibility review.

Additionally, if the original low bidder or best value offerer was determined by the agency to be non-responsible, resulting in the award of a contract to a vendor that was not the lowest bidder or best value offerer, the agency must document the basis for the agency's determination that the lowest bidder or best value offerer was non-responsible and the process that was followed in making that determination.

As part of its review of the contract pursuant to section 112 of the State Finance Law, OSC reviews the

procurement record prepared by the contracting agency to verify that the agency has affirmatively documented its responsibility determination. If OSC is not satisfied that there is adequate documentation, OSC may either return the contract unapproved to the agency for further consideration of the proposed vendor's responsibility or undertake its own responsibility review.[11]

The Importance of a Responsibility Determination

A responsibility determination is a critical part of the overall procurement process, promoting fairness in contracting and protecting the contracting agency and the State against failed contracts or providing public funds to unscrupulous vendors. The award of a contract to a non-responsible vendor can have serious and detrimental consequences for an agency and its constituents, including poor performance and/or failure to satisfy contractual requirements. A non-responsible vendor may also lack the legal capacity required (e.g., failure to obtain required licenses) or may have engaged in activities that call the vendor's integrity into question. The vendor responsibility determination process gives agencies an opportunity to pro-actively solve and mitigate problems or, if necessary, avoid contracting with such vendors. It also promotes fairness in the procurement process by limiting unfair competition.

Since January 2005, OSC staff members have reviewed vendor responsibility determinations for 69,381 contracts and performed a more detailed review for 4,882 of these transactions. Of the contracts that were subjected to an extra level of review, 170 were subsequently returned non-approved, with *Worth Construction*[12] being the hallmark decision to date *(see inset on the* Worth Construction *case and other notable transactions on pages 51-52).* These efforts have enabled State agencies to enter into contracts with more knowledge of their vendors and to be better able to mitigate risks that if left unaddressed could adversely affect an agency's programs.

Streamlining the Process

One of OSC's most important discoveries since the release of Bulletin G-221 is that there is, in fact, little consistency among contracting agencies in the methods and tools used to determine vendor responsibility. The variety of forms and lack of a central repository for information has created a serious burden for vendors seeking State contracts. The primary concern has been that a completed vendor responsibility disclosure questionnaire must be submitted, in hard copy format, to the procuring State agency every time a vendor submits a bid or proposal. Another concern is that while many State agencies use a form designed by OSC, others use pre-existing forms, or their own customized forms. This means that a vendor may be supplying essentially the same information in various formats to the many State agencies it seeks to do business with. To address these disparities, OSC instituted an extensive collaborative effort with stakeholders to seek input on how the process could be improved and to identify best practices. And, since January of 2005, OSC staff members have surveyed 118 State agencies and 847 vendors, and conducted 71 outreach sessions involving 2,995 State agency participants and 153 companies that do business with the State, all in an effort to improve the responsibility process.

The most significant outcome of these meetings was a request by both State agencies and the vendor community for OSC to streamline the process by creating a consistent, standard format for submitting information used to determine that a vendor is responsible, and to develop a single repository for information that can be submitted and updated electronically.

In support of these requests, on March 8, 2006, Comptroller Hevesi announced OSC's plans to develop an electronic clearinghouse called "VendRep" to capture and manage information related to responsibility, including vendor disclosures (i.e., questionnaires) as well as links to other relevant data stores. VendRep, which will be accessible through a new Internet portal, is being implemented in multiple phases, beginning in late 2006. This new system will make it easier for vendors to submit information to State agencies and for State agencies to review the information as they award billions of dollars worth of State contracts each year.

OSC seeks to accomplish three main objectives in building the VendRep System:

1. to collect appropriate levels of vendor information allowing a State contracting agency to make a reasonable decision that a proposed vendor is responsible;
2. to make it easier for a vendor to fulfill its disclosure responsibilities each time it competes for a State contract award, and particularly for repeat procurements; and,
3. to the extent possible, to allow State contracting agencies to find all of the information needed for a responsibility determination in one place.

Since the Comptroller's announcement of the VendRep initiative, much work has been completed in development of the system, due, in large part, to the outstanding support OSC received from State agencies and the vending community. Standardized questionnaires have been developed, which will replace the multiplicity of existing hard copy questionnaire forms. The new questionnaires, created by OSC with direct input from State agencies and the vendor community, have been designed to follow New York State law, which defines the components of responsibility as (1) financial and organizational capacity; (2) legal authority to do business in the State; (3) integrity; and (4) performance on prior contracts. In

addition, system architecture and functional requirements have been documented, and actual system programming is well underway.

The roles played by contracting agencies and OSC with respect to vendor responsibility will remain unchanged as the system is implemented. Agencies will continue to be legally required to make a determination as to the responsibility of the vendor, and OSC will continue to review the processes agencies use to make their determinations and the documentation in support of these decisions.

Below is a description of the major VendRep phases.

Phase I

In the first release of the VendRep System, vendors will be able to submit basic vendor data and to complete, certify and submit online a questionnaire that is tailored to their specific business types and activities. Vendors, who will only have access to their own records, will also be able to update responses and re-certify their completed questionnaires online and will have access to current and historical records of their completed questionnaires. Vendors will be able to manage their own users in the system, providing access to their staff members as appropriate and allowing multiple individuals to participate in completing the online questionnaires. Vendors will be able to notify selected users that a completed and certified vendor responsibility questionnaire is on file in the VendRep system. State agencies and OSC will be able to review a vendor's completed responsibility questionnaire online by logging into VendRep through OSC's Internet portal. In addition, vendors will be able to check the status of contracts that have been approved by OSC since April 2003 through an interface with OSC's Contract Management System. Contracting agencies and OSC users may also view this contract information when reviewing a vendor's completed responsibility questionnaire.

Phase II

Subsequent phases of the system will introduce additional sources of information and tools to support agencies' review and documentation of vendor responsibility. Interfaces to other data sources relevant to vendor responsibility will be added over time, broadening the scope of information available through the centralized system. For example, the system will link to data maintained by other State agencies, such as the Department of State, the Office of the Attorney General, the Department of Taxation and Finance and the Department of Environmental Conservation. Contracting agencies will be able to access customizable resource checklists to record sources of information used in a particular responsibility review. They will be able to generate, sign and submit the Vendor Responsibility Profile online and identify specific vendor issues and resolutions. Issues specific to vendors will, upon appropriate review, be made available on the system for review by the vendor and access by authorized state agency users.

Later phases of the system will be integrated with OSC's new Central Accounting System. The systems will be integrated so that vendor data will be maintained in one place and shared with multiple systems, improving the accuracy and consistency of data and easing the burden of data maintenance.

Since 2003, Comptroller Hevesi has strengthened the focus on vendor responsibility in State contracting activities. As this article demonstrates, the release of Bulletin G-221 reminding agencies of their legal obligations in conducting responsibility reviews, coupled with additional procurement record requirements and the development of the shared VendRep System, have resulted in the realization of significant, positive outcomes which have made the procurement process more transparent and accountable. With the introduction of the VendRep System, the trend will continue, to the benefit of not only contracting agencies and vendors, but all the people of the State. These efforts send a positive message to bidders who play by the rules that they will not be at a competitive disadvantage to those who do not.

To learn more about VendRep, visit OSC's Internet site at: www.osc.state.ny.us/vendrep.

Endnotes

1. *See* N.Y. STATE FIN. LAW § 112(2) (McKinney 2002 & Supp. 2006). A higher threshold is provided for contracts awarded by the Office of General Services, and sections 355 and 6218 of the Education Law permit the Comptroller to approve higher thresholds for State University of New York and City University of New York contracts.
2. *See, e.g.*, N.Y. STATE FIN. LAW § 163 (McKinney 2002 & Supp. 2006), which generally requires that contracts for goods and services be awarded to responsive and *responsible* bidders; N.Y. PUB. BLDGS. § 8 (McKinney 1996), which generally requires that awards be made to *responsible* and reliable bidders.
3. *Schiavone Constr. Co. v. Larocca*, 117 A.D.2d 440 (3d Dep't 1986).
4. *Konski Eng'rs, P.C. v. Levitt*, 69 A.D.2d 940 (3d Dep't 1979), *aff'd*, 49 N.Y.2d 850 (1980) (upholding Comptroller's non-responsibility determination based on an ongoing grand jury investigation); *Prote Constr. Co. v. New York City Sch. Constr. Auth.*, 248 A.D.2d 693 (2d Dep't 1998) (upholding non-responsibility determination based on misrepresentations regarding prequalification status).
5. *Callanan Indus. v. White*, 118 A.D.2d 16 (3d Dep't 1986) (upholding non-responsibility determination based on vendor's failure to fulfill affirmative action obligations on previous contracts and noting that a government agency should consider past conduct in making a responsibility determination); *Anchor Equip. Co. v. State of New York*, 66 A.D.2d 987 (4th Dep't 1978) (upholding non-responsibility determination based on inferior performance on a previous State contract).
6. *See* N.Y. LAB. LAW § 220-b (McKinney 2002 & Supp. 2006).
7. *Adelaide Envtl. Health Assocs. v. New York State Office of Gen. Servs.*, 248 A.D.2d 861 (3d Dep't 1998) (upholding non-responsibility determination based on vendor's Chapter 11 bankruptcy and holding that financial stability is a relevant factor in responsibility determinations); *B. Milligan Contracting, Inc. v. State*, 251

A.D.2d 1084 (4th Dep't 1998) (upholding non-responsibility determination where vendor failed to establish that it had sufficient working capital to complete the project).

8. OSC Bulletin G-221.

9. *LaCorte Elec. Constr. and Maint., Inc. v. County of Rensselaer*, 80 N.Y.2d 232 (1992); *Schiavone Constr. Co.*, 117 A.D.2d 440.

10. A formal hearing is not required. However, an agency may determine, after review of submitted documents, that a hearing is required, at which time a hearing place and time should be granted to the vendor. *See R.W. Granger & Sons, Inc. v. State of N.Y. Facilities Dev. Corp.*, 207 A.D.2d 596, 597 (3d Dep't 1994); *Tully Constr. Co., Inc. v. Hevesi*, 214 A.D.2d 465, 466 (1st Dep't 1995); *Schiavone Constr. Co.*, 117 A.D.2d at 443.

11. With the enactment of Chapter 1 of the Laws of 2005 (the "Procurement Lobbying Law") (ch. 1, 2005 N.Y. Laws 1), additional criteria have been added to vendor responsibility determinations, including (1) a vendor's observance of new rules governing permissible contacts with contracting agencies to discourage attempts to influence procurement determinations improperly (*see* N.Y. STATE FIN. LAW § 139-j (McKinney 2005)); and (2) a vendor's compliance with new rules requiring disclosure of any non-responsibility determinations based on violations of the permissible contact rules (*see* N.Y. STATE FIN. LAW § 139-k (McKinney 2005)).

12. *See Worth Constr. Co., Inc. v. Hevesi*, 807 N.Y.S.2d 558 (Sup. Ct. 2006). The *Worth* case involved the Comptroller's review of a New York State Thruway Authority contract pursuant to a Thruway resolution requesting review "in the same manner" as a "regular State agency." Since the Thruway is a public authority, rather than a State agency, the Comptroller's review of Thruway Authority contracts is analogous to the review of State agency contracts under State Finance Law § 112. N.Y. STATE FIN. LAW § 112 (McKinney 2002 & Supp. 2006).

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Worth Construction—A Hallmark Case

The New York State Thruway Authority conducted a thorough responsibility review of Worth Construction in conjunction with the procurement (valued at $46 million) for reconstruction of the I87-I84 interchange near Newburgh in Orange County. In accordance with its 1950 board resolution, the Thruway Authority required the Comptroller's approval of the contract before it became effective. After OSC's review, OSC had significant concerns regarding the responsibility of Worth Construction, and had identified new concerns not previously addressed by the Thruway Authority.

Issues of concern for OSC included the following:

- The existence of an active federal investigation in Connecticut into allegations of bribery and municipal corruption involving Joseph Pontoriero, owner of Worth Construction, and the former mayor of Waterbury, Phil Giordano.
- Numerous instances of Worth's and Mr. Pontoriero's apparent connections to criminal organizations.
- Several instances where Worth had withdrawn from a potential contract to avoid inquiries into apparent organized crime connections.
- Worth's failure to make full disclosures in response to the Thruway's Uniform Contracting Questionnaire.
- The manner in which Worth presented itself in its financial statements.

In October 2005, OSC staff members met with Worth representatives to provide an opportunity to be heard in response to OSC's questions and concerns. In November 2005, Worth submitted a number of additional documents for OSC review.

In light of the ongoing federal investigation, in which Mr. Pontoriero was repeatedly and personally implicated; in light of the vendor's pattern of refusing to answer fully and truthfully questions about associations with organized crime and known members of criminal organizations; in light of the failure to disclose the existence of other corporate officers and at least eight other companies owned or controlled by Mr. Pontoriero or in which he served as an officer; and in light of the significant financial concerns raised by OSC's independent review of the corporation's financial statements, in November 2005 Worth Construction was found not to be a responsible bidder by OSC.

Immediately following OSC's determination of non-responsibility, Worth Construction sought judicial review, arguing that the Comptroller's determination was beyond his legal authority, was affected by an error of law, and was arbitrary and capricious and an abuse of discretion. In dismissing the suit, the court held (1) that the non-responsibility determination was well within the Comptroller's constitutional discretion, under Article 10, section 5 of the New York State Constitution, to perform a review and approval function with respect to the Thruway Authority's contracts, and (2) that the determination had a rational basis in the extensive investigation conducted by the Thruway and OSC. The Supreme Court decision has been affirmed by the Appellate Division, Third Department.

Department of Taxation and Finance—Queens District Office Lease

OSC's review of a proposed Office of General Services (OGS) lease revealed that the principal owner of the landlord company was also the principal in an affiliated business that had an outstanding State income tax liability. The intended occupant of the space was the Department of Taxation and Finance's Queens District Office, the entity charged with collecting the debt. It was OSC's opinion that a landlord who has not fulfilled State tax obligations should not receive rental income from the State of New York. Therefore, the lease was returned to the contracting agency for an additional responsibility review. As a result of OGS's added diligence, the landlord satisfied the outstanding tax liability and the lease was subsequently approved by OSC.

Mobile PET Scanning for a SUNY Teaching Hospital

A contract amendment that would have extended and expanded a contract that provided mobile Positron Emission Tomography (PET) scanning services came to the attention of OSC because the vendor was not properly registered with the Department of State. OSC's review, which included information publicly available on the Securities and Exchange Commission website and a Dunn and Bradstreet report, revealed that the company was experiencing severe financial stress and was at risk of losing the leased equipment required to fulfill the terms of the contract. The contracting agency was grateful for the information OSC's review provided and, as a result, rebid the contract sooner than was originally planned.

Not-for-Profit Providers

The most common responsibility issue found for not-for-profit vendors is delinquent registration with the Attorney General's (AG) Charities Bureau. As a result of the Comptroller's vendor responsibility review requirements, the Department of Agriculture and Markets and the AG's Charities Bureau worked collaboratively to clarify the registration requirement for the not-for-profit corporations that organize and manage county fairs across the State. It was found that most were not properly registered and as a result of the efforts of these two agencies, a significant number have come into compliance with State law.

Charities Bureau registration was also an issue documented by the Office of Children and Family Services (OCFS), which recently found two not-for-profit vendors non-responsible and decided not to renew previous long-standing service provider agreements. The agency's determination was based on responsibility review findings that also included a U.S. Department of Treasury lien for failure to pay payroll taxes, an open State Department of Labor warrant for non-payment of State payroll taxes, and failure to submit required program reports. Additionally, one of the vendors was found to have such a high level of debt that the loan repayment obligations made it virtually impossible for the vendor to provide program services.

Changing Business Name to Avoid Tax Liabilities

The low bidder for waste carting services for a large facility operated by the Office of Mental Health (OMH) was a newly formed corporation with a name very similar to a previous State contractor that had been dissolved by proclamation of the Secretary of State for failure to file State tax returns. A further research of public records found the dissolved corporation had been the subject of bankruptcy proceedings, Department of Labor warrants for unpaid wages and outstanding State tax liabilities. The new company's completed vendor responsibility questionnaire did not disclose any affiliation with the dissolved corporation, but it was signed by the same individual who was the principal shareholder of the former company. OSC alerted the contracting agency to the suspected relationship between the two companies. While the contracting agency attempted to clarify a potential relationship directly with the vendor, OSC's independent research continued. OSC found no public records of the new company by name, employee identification number, address, principals, telephone number, or fax number. OSC then sent staff from its Division of Investigations to the vendor's reported address and found no evidence that a business was operating from that location. After consideration of OSC's findings, the contracting agency asked that the contract be returned non-approved. OSC worked with the contracting agency to award an emergency contract to ensure vital waste removal service was provided while the agency determined the next steps related to the procurement.

Procurement: A Local Government's Perspective

By Karen Storm

There is a growing demand on local governments to provide additional services to taxpayers in a more effective and efficient manner. As local government spending continues to rise, the issue of procurement reform becomes increasingly important. Procurement reform creates opportunities to reduce costs and improve the efficiency of local government agencies. Local governments would benefit from greater flexibility in procurement law and regulations as well as from training and certification for procurement professionals.

Current bidding dollar thresholds, established in 1991 with the intent to save taxpayers' dollars and to prohibit fraud and corruption, have not kept pace with inflation and are no longer practical for large local government agencies.[1] These limits apply to all local governments in New York without consideration of the varying size of budgets and expenditures. The level and complexity of services provided by a county are vastly different from those provided by a small town or village. Lower bidding thresholds are administratively costly to manage and enforce and put more emphasis on the process rather than the results.[2]

"Current bidding dollar thresholds, established in 1991 with the intent to save taxpayers' dollars and to prohibit fraud and corruption, have not kept pace with inflation and are no longer practical for large local government agencies."

Although the bidding thresholds have already been raised for New York State agencies, these changes have not trickled down to local governments. This inconsistency impedes local governments' ability to function efficiently and forces municipalities to squander their administrative resources on comparatively low-dollar-value purchases, rather than concentrating their efforts on the large expenditures and complex service contracts where opportunities for savings are greater.

A trend that would benefit local governments is "best value" analysis in awarding bids and contracts. New York State agencies currently have the authority to use this type of analysis since the New York State Finance Law was amended in 1995; however, this authority was not extended to local governments. Best value analysis allows governments the ability to use factors other than the lowest price to make a contract award. Life cycle costs, past performance of the vendor and timeliness of the completion of projects are considered in the selection process.[3] Utilizing best value analysis can help to avoid awarding contracts for goods and services that are of inferior quality and do not meet the needs of local government.

Another method, which would increase efficiency and flexibility in local government procurement, is the authorization of the use of existing federal contracts and government group purchasing alliances, as exceptions to competitive bidding requirements under the General Municipal Law.[4]

Federal contracts, such as General Services Administration (GSA) Schedule 70, take advantage of collective bidding power and could save local governments money through lower purchasing costs and administrative expenses.[5]

Government purchasing alliances such as the U.S. Communities Government Purchasing Alliance and the Western States Contracting Alliance combine bidding requirements across state lines. Local governments could benefit from these cooperative bids by being able to take advantage of aggregate volumes to obtain more favorable pricing, and in being able to access a wider variety of products and services. Use of collective bids also increases government efficiency and expedites the purchasing process by pooling municipalities' administrative resources in compiling specifications, issuing, and soliciting bids.[6]

While the prices offered on these contracts may not always be the lowest cost, having the ability to use these contracts provides local governments another option to obtain the best value at the time a purchase is made. For instance, in event of a natural disaster or other emergency, the use of these contracts can guard against price gouging and can assist the local government in obtaining the items quickly.

Current trends in government purchasing practices are moving toward e-procurement. One such example is the reverse Internet auction process. This is a procedure by which a local government can post product specifications on the Internet and invite vendors to bid against each other. The bidding process is live and the current low bid price is displayed online at all times.[7] This dynamic informal bidding method increases competition among vendors and will often drive the price of products down.

It should be noted that price alone is not the controlling factor; quality and past performance are also given consideration in awarding these bids.[8]

Current New York State Law does not allow for the reverse Internet auction process. Making this option available would benefit state and local government agencies by giving them yet another tool to becoming more effective and efficient in serving the taxpayers.

"Training and certification are imperative to encourage procurement professionals' continued growth and development and to ensure a level of competency worthy of the public's trust."

An effective purchasing tool currently being utilized by local governments is the procurement cards for small-dollar purchases. A procurement card program can often take the place of an existing petty cash system. The petty cash system is traditionally a manual process, making it difficult to track and appropriate purchases. An electronic accounting process associated with procurement cards provides greater ability to track small purchases by individual departments. Use of procurement cards reduces administrative expenses by streamlining and simplifying the requisitioning, purchasing and payment process for small dollar purchases, while end users enjoy the convenience of being able to make time sensitive purchases quickly. This more flexible purchasing method also provides immediate payment to vendors, which can be very important to small businesses that often work with local governments.

Public procurement professionals are entrusted with spending billions of state and local taxpayer dollars annually. Non-compliance with procurement regulations identified in many of the audits conducted by the Office of the State Comptroller may likely be associated with a lack of training and understanding of the existing regulations. Regular training and professional certification are necessary to ensure that these employees are knowledgeable in current procurement practices and ethics.[9]

Although many procurement practices exist today that offer opportunities to reduce costs and improve government efficiency, these initiatives depend on the local procurement professional's understanding and expertise for successful implementation. Training and certification are imperative to encourage procurement professionals' continued growth and development and to ensure a level of competency worthy of the public's trust.[10]

Endnotes

1. New York State Ass'n of Mun. Purchasing Officials, *Local Government Procurement Reform in New York State* (2003-2004).
2. *Id.*
3. *Id.*
4. Office of the State Comptroller, *Strengthening State Procurement Practices: Producing the Best Results for New Yorkers* (Apr. 2005).
5. *Id.*
6. *Id.*
7. Kimball H. Carey, *Reverse Internet Auctions—A Better Way to Buy?* 15 Finley's Ohio Mun. Serv. (Nov./Dec. 2003).
8. *Id.*
9. *Why New York Needs Certified Public Procurement Professionals*, The Legislative Gazette (2006).
10. *Legislative Memorandum in Support*, ch. 596, 2005 N.Y. Laws, (A.8994/S.5918).

Karen Storm has been a member of the Albany County Department of General Service Purchasing Division for over 20 years. Karen has taken numerous Purchasing courses through the National Institute of Governmental Purchasing (NIGP) to increase her skills, education and further her career in Public Purchasing. In March of 1997 she received her designation as a CPPB (Certified Public Professional Buyer) from NIGP and in February of 2002 was recertified.

Oversight of Public Authority Contracts by the State Comptroller

By Kim Fine

Public authorities were created to (i) finance, construct and operate revenue-producing facilities for the public benefit; (ii) assist the public sector with projects intended to spur economic development; (iii) provide financial support for non-profit sector projects that serve public needs; and/or (iv) coordinate the development or management of resources that transcend traditional political boundaries. The benefits of public authorities to New York State include their ability to finance public improvements without increasing taxes, to assess fees on users to cover the costs of construction or operation, to avoid the use of broad-based dedicated revenue streams, to finance the public takeover of private enterprises, to remove entities and associated operations from the direct control of elected officials, and to provide a more flexible management environment than is typical of government.[1]

New Yorkers pay for public authorities in the form of rates, tolls, fees and taxpayer-funded subsidies. Revenues pay the debt service on authority-issued bonds. In most cases, New Yorkers use authority facilities because bridges, roads, subways, water systems and universities are granted monopoly status in the name of the public interest. As a result of the lack of oversight assigned to these entities, some have developed a culture of mismanagement and experienced a history of unethical and, at times, illegal activity.

While the intended benefits of the independent operation of public authorities described in the 1967 study by the Office of the State Comptroller should not be curtailed by treating these entities exactly like State agencies, it is clear that additional oversight of authority operations is needed. As evidenced by audits conducted by the Office of the State Comptroller and other revelations, the award of contracts by public authorities is an operational area that would benefit from improved processes and increased scrutiny.

New York State Comptroller Alan G. Hevesi and Attorney General Eliot Spitzer have offered a proposal that achieves the necessary balance between maintaining the independence of authority operations and strengthening accountability for public funds expended by authorities pursuant to contracts. It relies on the beneficial experience of State agency procurement practices and, in selected cases, would provide additional oversight for the award of contracts by public authorities.

State Agency Contracts

New York State agencies are subject to a procurement process through which commodities and services are obtained. This procurement process, established in the State Finance Law, generally governs State agencies only.[2] Local governments must follow procedures outlined in the General Municipal Law,[3] but there are limited rules governing procurements by public authorities in the Public Authorities Law.[4]

Article 5, section 4 of the New York State Constitution designates the Comptroller as the head of the Department of Audit and Control. In 1925, Article 5, section 1 of the Constitution was amended to specify the Comptroller's functions, and these functions included the duty to "audit all vouchers before payment and all official accounts." This constitutional amendment followed Chapter 342 of the Laws of 1913, which already required the State Comptroller to approve State contracts valued at more than $1,000.

> Before any contract made for or by any state charitable institution, reformatory, house of refuge, industrial school, officer, department, board or commission, shall be executed or become effective, when such contract exceeds one thousand dollars in amount, it shall first be approved by the comptroller and filed in his office.[5]

The State Finance Law has been amended several times since 1913, but the requirement for pre-approval of contracts by the State Comptroller has remained an important part of the system of checks to avoid impropriety in the awarding of State contracts.

The seminal case regarding the Comptroller's discretion to approve or disapprove contracts under section 112 of the State Finance Law is *Konski v. Levitt*,[6] in which the Third Department held that the Comptroller had the independent power to find a vendor non-responsible and that the Comptroller's refusal to approve a contract was justified, in view of his knowledge that the vendor was under Grand Jury investigation for possible involvement with political corruption in the award of public contracts. This decision established two basic principles for future review of State contracts by the Office of the State Comptroller:

- The Comptroller's discretion to approve a contract under section 112 of the State Finance Law is wide ranging. It is not simply limited to determining whether a contract is fair and reasonable.
- The Comptroller's decision to approve or disapprove a contract will be upheld if the Comptroller has a rational basis for his actions.

Currently, section 112(2) of the State Finance Law generally requires review and approval by the Comptroller of all State contracts valued in excess of $50,000.[7] The purposes of this requirement include protecting the public from governmental misconduct and improvidence, and ensuring that contracts are fair and reasonable.[8] The Comptroller's review ensures State agency compliance with a number of statutory procurement requirements, the most comprehensive of which are set forth in section 163 of the State Finance Law, which was added by the "Procurement Stewardship Act" (PSA).[9] The PSA established operating principles "to facilitate each state agency's mission, while protecting the interest of the state and its taxpayers and promoting fairness in contracting with the business community."[10] The Office of the State Comptroller follows the operating principles of the PSA and considers various other factors in its review of State agency contracts.

To ensure that parties to a contract are aware that it cannot be effective until approved by the Comptroller, standard language required for all State contracts stipulates:

> In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 6218 of the Education Law), if this contract exceeds $50,000 or (the minimum thresholds agreed to by the Office of the State Comptroller for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds $10,000, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office.

Public Authority Contracts

Unlike State agency contracts, with few exceptions, public authority contracts are not subject to approval by the State Comptroller before they become effective. In general, public authorities are governed by boards of directors that are intended to provide oversight of operations including procurement. In addition, section 2879 of the Public Authorities Law requires public authorities to develop comprehensive procurement guidelines and to submit annual procurement reports to the State Comptroller and other officials.

To supplement its review of these annual summaries of procurement-related activity, the Office of the State Comptroller, pursuant to Article 10, section 5 of the Constitution,[11] conducts audits of public authority contracting procedures and results. The weaknesses in public authority procurement practices identified through audits can be divided into three categories: (1) procurements for which rules are disregarded, (2) poor quality procurements resulting in waste or inefficiency, and (3) examples of apparent abuse.

Of the 109 public authority audit reports issued by the Office of the State Comptroller since 2003, 66 have addressed, in some way, procurement and contracting practices. Several audits show authority weaknesses in a variety of areas important to ensuring the integrity of the procurement process.

- Twenty-seven audits demonstrate a disregard for procurement rules. For example, 13 audits show a disregard for competitive bidding requirements and 11 illustrate procurements that were not approved in advance by either the board or other authorized officials. Some of these audits, as well as at least one more, demonstrate failure to comply with Executive Order 127,[12] a lack of commitment to achieving minority and women-owned business enterprise (MWBE) contracting goals, inconsistent treatment of vendors, and a lack of required reporting.
- Thirty-seven audits demonstrate poor quality procurements resulting in apparent waste or inefficiency. For example, 18 reveal purchase payments made with little or no supporting documentation to justify the amount and purpose of the purchase and 10 expose inadequate procurement guidelines or lack of written procedures. The remainder reveals weaknesses, such as procurements not made in an economical manner, inconsistency in vendor selection process, no documentation retained on bids received, inadequate separation of duties, lack of rules governing relationships with subcontractors and ambiguous contract terms or errors in the original contract amounts resulting in change orders.
- Ten audits demonstrate apparent abuses of procurement authority. For example, 7 describe improper use of credit cards or use of credit cards to avoid competitive bidding, and 3 show authorities adding unrelated work to existing contracts instead of undertaking a new procurement.

The major public authorities whose contracts are, either by statute or by board resolution, subject to pre-audit approval by the State Comptroller in order to become effective are the Long Island Power Authority (LIPA) and the New York State Thruway Authority, along with its subsidiary corporation, the New York State Canal Corporation.

Section 1020-cc of the Public Authorities Law provides that all contracts of LIPA shall be subject to the provisions of the State Finance Law relating to contracts made by the State. As a result, LIPA contracts exceeding the threshold found in section 112 of the State Finance Law must be submitted to the Comptroller's Office for review and approval before they can become effective.[13]

Unlike LIPA, the New York State Thruway Authority was not required by legislation to comply with the contracting provisions of the State Finance Law or to submit its contracts to the Office of the State Comptroller for pre-approval in order for its contracts to become effective. Shortly after the Authority was established in 1950, however, its governing board adopted Resolution Number 19, requesting that the Comptroller "audit the funds of the Authority in the same manner as funds of a regular State agency are audited." That resolution, together with Article 10, section 5 of the Constitution, has consistently been interpreted by the Authority, the Office of the State Comptroller and, most recently, the courts[14] as authorizing the Comptroller to perform an approval function with respect to Thruway Authority contracts.

Resolution Number 757, adopted by the Thruway's board in 1965, held Authority procurements to the standards set forth in its own procedures, instead of those prescribed by the State Finance Law. Although this changed the standards by which the Thruway conducted its procurements, the Authority continued to require the Comptroller's approval of its contracts before they became effective. When the New York State Canal Corporation was established as a subsidiary of the Thruway Authority in 1992, its contracts also became subject to review and approval by the Office of the State Comptroller before they become effective.

Contracts of various other smaller public authorities are submitted for the Comptroller's review and approval because of the nature of the entity, the nature of the contracts entered into or in response to scandals uncovered at the entity. The Attorney General opined that the Natural Heritage Trust, for example, possesses attributes of a State agency and, therefore, should be treated as a State agency.[15] Rentals and concessions (other than for exhibition purposes) entered into by the New York Convention Center Operating Corporation (Jacob Javits Convention Center) are expressly required by statute to be subject to prior approval by the State Comptroller.[16] The Hudson River Black River Regulating District has requested approval of its contracts by the Office of the State Comptroller for some 40 years, apparently in response to a procurement-related scandal.

Volume of State Agency and Public Authority Contracts

In State fiscal year (SFY) 2005-06, the Office of the State Comptroller reviewed 18,709 contracts valued at nearly $43.4 billion. In addition, it reviewed 25,632 contract amendments, for a total of 44,341 transactions valued at $59.6 billion.

These statistics include 614 public authority contracts valued at $1.034 billion and 1,507 public authority contract amendments, for a total of 2,121 transactions valued at more than $1.5 billion. Of the 614 new public authority contracts reviewed, 543 were approved, at a value of $916 million.

In 2004-05,[17] the 46 public authorities and subsidiaries that submit annual procurement data to the Comptroller entered into 10,404 contracts valued at $5.5 billion. These same entities made payments of $4.8 billion pursuant to contracts in 2004-05. Dozens of other entities, however, entered into contracts without reporting their procurement activities to any independent oversight body.

Proposed Reform

The omnibus Public Authority Reform legislation advanced by Comptroller Hevesi and Attorney General Spitzer in 2004, and expanded upon in 2005, included a provision to increase oversight of public authority contracts. The legislation,[18] which passed the Assembly in 2005, would improve procurement practices at public authorities and subject more contract awards to approval by the Comptroller before they become effective.

In February 2006, Comptroller Hevesi again proposed legislation to achieve these objectives and to otherwise improve authority contracting practices. That legislation was introduced by Assembly Member Richard Brodsky, chairman of the Committee on Corporations, Authorities and Commissions, as Assembly Bill Number 10346 in March 2006. The bill would require a public authority to submit its contracts (or a specified category of contracts) to the Comptroller's Office for approval before they become effective, if the Comptroller determines that there is a need for increased oversight.[19] In making those decisions, the Comptroller would consider factors such as the size of a contract, the past practices of an individual public authority, and comments or complaints from vendors and the business community.

The bill would also strengthen current requirements for public authorities to establish and enforce procurement guidelines by (i) requiring the guidelines to be at least as stringent as the requirements applicable to State agency contracts and (ii) requiring approval by two-thirds

of a public authority's board of directors for exemptions from competitive bidding requirements. Further, it would require each authority to designate a procurement officer and each authority governing board to establish a committee on procurement policy.[20]

Given the findings of audits of public authority procurement practices, and other revelations about the award of contracts by public authorities, it is time for a more comprehensive, yet balanced, approach to improving public authority procurement practices. The approach proposed in the public authority reform plan advanced by Comptroller Hevesi, Attorney General Spitzer and legislative sponsors provides a practical solution. It concentrates responsibility for authority procurements in a single officer and increases board accountability for deviations from defined practices. At the same time, it puts every public authority on notice that it may be required to submit contracts for the Comptroller's review and approval in order for those contracts to become effective if the Comptroller determines there is a need for such increased oversight. Such review will allow for contracting experts in the Office of the State Comptroller to use their experience with State agencies and select public authorities to educate public authority staff in the conduct of fair, competitive procurements.

Endnotes

1. Office of the State Comptroller, study No. 4, Public Authorities in New York State; A Financial Study, Comptroller's Studies for the 1967 Constitutional Convention (1967) (citing to the *Report of the Temporary State Commission on Coordination of State Activities* (1956)).
2. See N.Y. State Fin. Law §§ 135-146 (McKinney 2002 & Supp. 2006); §§ 160-168; §§ 179-d-179-p; §§ 179-q-179-ee. *See also,* N.Y. High. Law § 38 (McKinney 2001 & Supp. 2006); N.Y. Pub. Bldgs. Law § 8 (McKinney 1996) (provisions governing the award of highway construction and other public works contracts).
3. N.Y. Gen. Mun. Law §§ 100-109-b (McKinney 1999 & Supp. 2006).
4. N.Y. Pub. Auth. Law §§ 2875-2880-a (McKinney 2002 & Supp. 2006).
5. *See* former ch. 342 § 2, 1913 N.Y. Laws 637.
6. *Konski Eng'rs, P.C. v. Levitt*, 415 N.Y.S.2d 509 (App. Div. 1979).
7. N.Y. State Fin. Law §§ 112(2)(a), 163(6) (McKinney 1997) (increasing the threshold limits to a minimum of $50,000).
8. *City of New York v. State of New York*, 87 N.Y.2d 982, 985 (1996); *Parsa v. New York*, 64 N.Y.2d 143, 147 (1984); *Konski Eng'rs, P.C. v. Levitt*, 415 N.Y.S.2d 509 (App. Div. 1979).
9. *See* former ch. 83, 1995 N.Y. Laws 527.
10. N.Y. State Fin. Law § 163(2) (McKinney 2002 & Supp. 2006).
11. N.Y. Const. art. 10 § 5. Article 10, section 5 vests in the Comptroller the power to "supervise" the "accounts" of certain "public corporations," including most public authorities. *Id.*
12. Procurement Lobbying Act, ch. 1, 2005 N.Y. Laws 1, superseded the need for Exec. Order No. 127 on June 30, 2006. The Order required the recording of lobbying activities intended to influence the outcome of a procurement, was rescinded following a recommendation by the Advisory Council on Procurement Lobbying.
13. N.Y. State Fin. Law § 112 (McKinney 2002 & Supp. 2006). Currently, the State Finance Law approval threshold for the purchase of goods and services is $50,000. *Id.*
14. *Worth Constr. Co. v. Hevesi*, 2006 N.Y. Slip Op. 6178 (App. Div. Aug. 10, 2006).
15. 1974 N.Y. Op. Att'y Gen. 9 (1974).
16. N.Y. Pub. Auth. Law § 2654 (McKinney 2002).
17. Since public authorities have different fiscal years, and different reporting dates, this is the most recent complete fiscal year for which data could be compiled.
18. Assemb. B. No. 5626 (N.Y. 2005).
19. *Patterson v. Carey*, 41 N.Y.2d 714, 724 (1977). This approach was carefully crafted by legal staff in the Office of the State Comptroller and the Legislature to avoid violating the limits of the Legislature's authority, since the Court of Appeals has held that in exercising his discretionary authority to supervise the accounts of public authorities the Comptroller is guided solely "by his personal responsibility and commitment to his oath of office" and that the "Legislature is powerless to mandate how the Comptroller, an independently elected official, is to exercise his constitutional discretion." *Id.* The Third Department's recent decision in *Worth Constr. Co. v. Hevesi*, 2006 N.Y. Slip Op. 6178 (App. Div. Aug. 10, 2006) (*see supra*, note 14) recognizes the Comptroller's authority to voluntarily undertake the function of approving public authority contracts.
20. Additional information about the specific provisions of the bill can be found in the Bill Summary and actual bill text *available at*: http://www.assembly.state.ny.us/leg/?bn=A10346.

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Blueprint for Change: Recent Developments in New York City Procurement

By Marla G. Simpson

Introduction

Each year, the City of New York spends approximately $11 billion, from its expense and capital budgets, through contracts that enable the City to obtain goods and services to meet public needs. In these transactions, City agencies make the widest possible range of purchases, including business equipment and supplies, construction services for buildings and infrastructure, and critical services that help feed, shelter and protect New Yorkers. Some City procurement is done through recurring contracts that address ongoing needs, while other expenditures are made via one-time contracts to meet specific goals.

"In practical terms, the guiding principle of the laws and rules governing City purchasing is to obtain fair and reasonable prices for goods and services that achieve high quality performance and are delivered on a timely basis."

Based on its size and complexity, New York City procurement is governed by a variety of City, state and federal laws and regulations. Primary among these statutes and rules is New York State General Municipal Law Section 103 ("GML 103"), which requires that most contracts for public work and goods be awarded to the lowest responsive, responsible bidder through a competitive sealed bid process.[1] In addition, City purchasing is shaped by Chapter 13 of the New York City Charter, which established a Procurement Policy Board (PPB) to promulgate rules for City contracting, and by various local laws, such as those described in this article. Finally, City procurement is also governed by Mayoral Executive Orders, most notably, Executive Order No. 48 of 2004, by which the Mayor assigned primary responsibility for procurement policy to the City Chief Procurement Officer (CCPO) and the Mayor's Office of Contract Services (MOCS).[2]

In practical terms, the guiding principle of the laws and rules governing City purchasing is to obtain fair and reasonable prices for goods and services that achieve high quality performance and are delivered on a timely basis.[3] Since tax dollars fund the City's purchases, agencies must strive to achieve best value *and* to ensure that vendors are responsible, from the standpoint of business integrity, financial capacity and performance ability. Agencies must also treat vendors fairly, recognizing that City procurement represents an important opportunity for economic development and business growth in New York City and the surrounding region.

Within this framework, the City has recently implemented several new programs and initiatives to promote competition in City purchasing, help ensure worker and citizen safety and health, and encourage a more efficient and effective procurement system in New York City. These initiatives, created through legislation, Executive Order, rule changes and policy initiatives, impact City government on all levels, and demonstrate the depth of the City's purchasing power. This article will survey five such new programs, including the Minority- and Women-Owned Business Enterprise (MWBE) program, the Environmentally Preferable Purchasing (EPP) program, an effort to strengthen enforcement of prevailing wage compliance, an initiative aimed at promoting equal access to health care coverage for spouses and domestic partners of vendors' employees, and a program to permit vendors who have had past problems to demonstrate their rehabilitation and suitability for future business.

Minority- and Women-Owned and Emerging Business Enterprises

On December 29, 2005, Mayor Michael R. Bloomberg signed Local Law No. 129 of 2005 ("LL129"), to promote greater participation by Minority- and Women-Owned Business Enterprises ("MWBEs"). On July 1, 2006, he also signed Local Law No. 12 of 2006 ("LL12"), similar legislation benefiting Emerging Business Enterprises ("EBEs"), in municipal procurement. In establishing the new MWBE program, the City Council stated the goal as follows:

> It is the policy of the City to seek to ensure fair participation in City procurement; and in furtherance of such policy to fully and vigorously enforce all laws prohibiting discrimination, and to promote equal opportunity in city procurement by vigorously enforcing the city's contractual rights and pursuing its contractual remedies. The program established pursuant

> to this section is intended to address the impact of discrimination on the City's procurement process, and to promote the public interest in avoiding fraud and favoritism in the procurement process, increasing competition for city business, and lowering contract costs.[4]

Prior to the enactment of LL129 and LL12, the Bloomberg Administration had developed an earlier version of the MWBE program, pursuant to Executive Order No. 36 of 2003 (EO36) and Executive Order No. 71 of 2005 (EO71).[5]

In order to implement any procurement program that includes race- and gender-conscious remedies, the United States Supreme Court has determined that local or state governments must first conduct a disparity study to determine if such a program can be empirically justified.[6] In 1989, the Supreme Court held in *City of Richmond v. J.A. Croson Co. ("Croson")* that in order for a governing body to authorize a race-conscious program, there must be evidence of a "significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors."[7] Furthermore, the Court held that a municipality must show that its own spending practices must contribute to the causation of racial disparity in contracting.[8]

In 2005, the City Council published a disparity study it had commissioned in order to support potential legislative enactment of an MWBE program in New York City.[9] The study evaluated City contracting practices for the period from July 1, 1997 to June 30, 2002, and identified a significant statistical underutilization of MWBEs in City contracting for goods, construction, architecture and engineering, professional services and standard services. Further, the disparity study concluded that, within the various industries reviewed, there was underutilization of businesses owned by Black Americans and Hispanic Americans in all categories of contracts and subcontracts, and of Asian Americans and women in most, but not all, of the industry categories.

Within the parameters established by the disparity study, the Bloomberg Administration and the City Council developed LL129 and LL12. The initiative established Citywide "participation goals" to be met in four industry categories for contracts valued at less than $1 million, the level at which the disparity study had found evidence of sufficient MWBE capacity.[10] The Citywide goals represent the percentage of municipal contracting at such dollar values that the City anticipates will be obtained by MWBEs during the course of the year. The four industry categories subject to such prime contract goals are: (1) construction contracts; (2) professional services contracts (which includes architecture and engineering services contracts); (3) standard services contracts; and (4) goods contracts.[11] At the prime contract level, the participation goals are aspirational in nature; agencies will conduct outreach and training to endeavor to build MWBE and EBE capacity, but procurements are awarded in accordance with State and City competitive bidding laws.

In addition to the Citywide goals for prime contracts, the law establishes participation goals for subcontracts under $1 million in two industry categories, construction and professional services.[12] Under LL129, if a vendor is awarded a construction or professional services contract, and the City agency awarding that prime contract determines that there will be construction and/or professional services subcontracting opportunities valued at less than $1 million, the vendor must strive to meet the MWBE subcontracting participation goals established by the City agency.[13]

The program requires City agencies to establish a "target subcontracting percentage," representing the percentage of the contract the agency anticipates that the successful vendor undertaking the type of work covered by the prime contract would, in the normal course of business, subcontract in amounts valued at less than $1 million (to construction or professional services subcontractors).[14] Based on the prime contract's target subcontract percentage, the agency must then establish participation goals representing the percentage of the total eligible subcontracting (*i.e.,* the amount that will go out to construction or professional services subcontractors in amounts valued at less than $1 million), which the agency anticipates will be awarded to MWBEs and EBEs, in keeping with the agency's "utilization plan."[15] Bidders and proposers on each contract for which an agency establishes participation goals are then required to submit their own utilization plan indicating how they intend to meet the MWBE and EBE subcontracting goals.[16]

The MWBE program also includes a waiver provision addressing the fact that not all contractors within an industry distribute subcontracts in a uniform manner.[17] If a City agency has established subcontracting goals for a construction or professional services prime contract, it may grant a full or partial waiver of the target subcontracting percentage, subject to CCPO approval, when a bidder demonstrates that it has a legitimate business reason for subcontracting at an overall level that is less than the established target subcontracting percentage.[18] This does not result in a waiver of the MWBE or EBE participation goals, but rather amounts to a recognition of the differences that exist in the business models followed by prime contractors on the matter of subcontracting.

If a vendor is performing work under a contract that is subject to the MWBE subcontracting rules, but cannot meet the participation goals established for the contract, the vendor may be eligible for a modification of its utilization plan. A City agency may grant a modification if the

contractor demonstrates that it has made all reasonable, good faith efforts to meet the participation goals for the contract.[19] Included among the considerations of whether a vendor has made good faith efforts to meet the participation goals for the contract are demonstrations that the vendor has advertised the subcontracting opportunities in appropriate publications, distributed written notices to eligible firms inviting their participation, made efforts to negotiate with MWBE firms to perform specific work under the contract, or requested assistance from the City in meeting the goals.[20]

An essential element of the new program is the establishment of a centralized certification program for MWBEs and EBEs to ensure that participating businesses are properly identified.[21] However, only contracts with firms that have been certified by DSBS may count toward the achievement of MWBE or EBE participation goals.[22]

In order to be certified as an MWBE under LL129, a vendor must be authorized to do business in the State of New York, be at least 51% owned by women or by minority group members (as defined by the Voting Rights Act of 1965), and have a real and substantial business presence in the market area of the City.[23] In order to be certified as an EBE under LL12, a vendor must meet similar criteria, and also be at least 51% owned by a person who can demonstrate that he or she has been socially and economically disadvantaged.[24] Social and economic disadvantage is defined to include "disadvantage in American society as a result of causes not common to persons who are not socially disadvantaged, . . . [where one's] ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[25] Only certified EBEs are counted toward the achievement of the Citywide participation goals.[26]

Under the new law, each agency is required to submit an annual plan to document the steps it will take to achieve the Citywide goals established for the year. Such utilization plans must include: (1) the agency's participation goals for the upcoming fiscal year; (2) an explanation for any agency goal which is different from the citywide goals; and (3) the methods and relevant activities proposed for achieving the agency's participation goals.[27] In addition, every agency head is required to designate an officer to be directly accountable to the agency head for the agency's compliance with LL129 and LL12.[28]

Each agency is required to make all reasonable efforts to meet the goals set forth in its plan.[29] Every agency must, *inter alia*: (1) engage in outreach activities to encourage MWBEs and EBEs to participate in the procurement process and complete the certification process; (2) provide information in solicitations to potential bidders directing them to certified firms; (3) prior to soliciting bids for contracts valued at over $10 million, submit the proposal to the CCPO for a determination of whether it is practicable to divide the proposed procurement into smaller contracts in order to facilitate greater competition and participation by MWBEs and EBEs; (4) arrange quarterly meetings with vendors, including MWBEs and EBEs, to discuss agency procurement priorities; and (5) encourage prime contractors to enter joint venture agreements with MWBEs and EBEs.[30]

Environmentally Preferable Purchasing

In December 2005, New York City enacted a series of environmentally preferable purchasing ("EPP") laws affecting City procurement. The aim of the EPP program is to procure goods and services that have fewer adverse environmental and human health impacts, at fair and reasonable prices, while continuing to achieve quality and performance.

Prior to the enactment of the EPP laws, environmental purchasing was already well integrated into many of the City's procurements and certain construction activities. The City's central goods purchasing agency, the Department of Citywide Administrative Services ("DCAS"), spent $175.4 million to obtain environmentally preferable goods in Fiscal Year 2005, including Energy Star-certified products, various products and materials with recycled content and ultra-low-sulfur diesel fuel.[31] The City also has one of the largest alternative fuel vehicle fleets in the nation. Specifically, the City has 3,693 alternative fuel vehicles, representing approximately 46% of the City's vehicles.[32] Similarly, in 1999, the Department of Design and Construction ("DDC"), which is responsible for managing many City construction projects, developed guidelines for environmentally preferable building techniques, which it has since employed in many projects.[33]

The five EPP laws enacted in late 2005 expand the City's environmental efforts to include City expenditures on goods and smaller construction projects. Specifically, the new laws create an oversight office for the program, and set substantive standards on energy and water efficiency, recycled content, hazardous materials and the use of green cleaning products.[34]

Local Law No. 118 of 2005 ("LL118") establishes the basic framework for the operation of the EPP laws, with a Director of Citywide Environmental Purchasing to oversee the new program.[35] The Director is given the responsibility to implement the EPP laws, update the EPP standards as needed every two years and promulgate new EPP standards.[36] In addition, the Director is required to issue an annual report.[37] Under the law, each agency must also designate an Environmental Purchasing Officer who will be responsible for reporting directly to the Director.[38]

The EPP laws apply to products purchased or leased by City agencies after January 1, 2007: (1) directly from

vendors; (2) through certain City construction contracts (i.e., where products are supplied by vendors providing construction services); and (3) pursuant to any other contract designated by the Director.[39]

Local Law 118 provides for various exemptions from the EPP mandates, such as small purchases (up to $100,000), emergency procurements and intergovernmental purchases (i.e., purchases made by City agencies from state or federal contracts).[40] In addition, the EPP standards do not apply where they are found to unduly limit competition or interfere with City agencies' ability to comply with other applicable laws.[41] Construction contracts that are already subject to LL86 and those that involve work affecting less than 15,000 square feet of space are also exempt.[42] Agencies can apply for waivers from the EPP requirements in the interest of public health or safety.[43] Finally, the Director can issue blanket exemptions for $100 million worth of contracts in 2007 and 2008, an amount that declines to $50 million for 2010 and all subsequent years.[44]

Local Law No. 119 of 2005 ("LL119") addresses the efficiency of energy- and water-consuming products purchased by the City. Since much of the electricity used in the City is also generated within City limits, local energy use is directly tied to local air pollution. Similarly, water conservation is critical to the City's ability to protect its water supply.

The central provision of LL119 requires the City to purchase goods that are compliant with Energy Star[45] and certain standards of the Federal Energy Management Program ("FEMP").[46] While the City must follow Energy Star for all product types certified under the program, the City is only required to follow FEMP for water-using products, lighting products and chillers.[47] LL119 requires the City to purchase computers equipped with energy-efficient power supplies and to ensure the energy-saving features of its computers, printers, facsimile machines and copy machines are all activated.[48] The law also prohibits the City from purchasing incandescent light bulbs when more efficient lighting alternatives exist.[49]

Another important focus of the EPP laws is the reduction of hazardous materials, especially heavy metals and volatile organic compounds ("VOCs"). Electronic waste is a growing source of hazardous pollution, including lead, cadmium, chromium and mercury. Local Law No. 120 of 2005 ("LL120") prohibits the City from purchasing electronic devices, including computers and devices with a cathode ray tube, that contain certain heavy metals and other toxic materials.[50]

LL120 also addresses VOCs, harmful compounds which are found, among other places, in furniture and many building materials. VOCs contribute to smog, as well as to a number of severe health problems. LL120 requires the City to enact rules on the maximum allowable chemical emissions from carpet products, architectural coatings (such as paints) and other construction materials and building furnishings.[51]

Finally, LL120 addresses lighting products containing mercury, a neurotoxin also known to cause serious health damage. Under the law, City agencies are required to purchase energy-efficient fluorescent bulbs exhibiting the lowest amount of mercury.[52]

Recycling reduces landfill congestion and assists the City's effort to diminish air pollution and groundwater contamination. Local Law No. 121 of 2005 ("LL121") requires City agencies to follow the Environmental Protection Agency's Comprehensive Procurement Guideline ("CPG") on the minimum recycled content of various products.[53] The City is required to comply with the CPG for certain products enumerated in the law and must determine by January 1, 2008 whether to adopt CPG standards for other, non-enumerated products.[54] The local law contains a separate requirement mandating that the City purchase recycled copy paper, assuming it can do so within reasonable price constraints.[55]

LL121 requires the City to follow similar standards in its printing services contracts and mandates various measures aimed at reducing paper usage.[56] Documents and reports prepared by City agencies must be printed double-sided and on recycled paper.[57] Moreover, publications and preprinted paper, such as letterhead and reports, are required to include a statement indicating their recycled content.[58] In addition, new high-speed printers and photocopiers must be capable of double siding and be set to do so by default.[59]

Finally, Local Law No. 123 of 2005 ("LL123"), the "Greening Our Cleaning Act," requires the City to develop a pilot program to test environmentally preferable or "green" cleaning products. Under the law, the City is required to test certain enumerated cleaning products, and to consider testing others, in a representative sample of City facilities.[60] The City must develop and publish a pilot program plan in December 2006 and must complete testing by June 2009.[61] At that time, the City is required to promulgate permanent standards mandating the use of those green cleaning products shown to be effective and feasible under the pilot program.[62]

Taken in totality, the City's EPP laws define one of the most comprehensive green procurement programs of any municipality. These laws will not only reduce adverse environmental impacts, but will also produce a healthier environment for City workers and all those who occupy City buildings. By the end of 2006, the City will promulgate the first set of rules to implement the EPP laws, with additional rules expected in 2007.

Prevailing Wage Enforcement

In 2005, to better ensure the fair treatment of workers on municipal contracts, the Bloomberg Administration implemented citywide guidelines to strengthen agencies' enforcement of applicable prevailing wage requirements. Executive Order No. 73 of 2005 ("EO73"), entitled "Prevailing Wage Requirements in City Contracts," promulgated a series of requirements and initiatives designed to secure prevailing pay rates in City contracting.

Sections 220 and 230 of the New York State Labor Law ("Labor Law") provide the foundation for EO73. Section 220 mandates that all contracts for public work contain provisions requiring contractors and subcontractors to pay employees "wages at not less than the prevailing rate for the same trade or occupation in the location where the work is being performed."[63] Section 230 mandates that all contracts for building service work contain provisions requiring contractors and subcontractors to pay each building service employee "wages at not less than the prevailing rate for the craft, trade, or occupation in the location where the work is being performed."[64] The Labor Law and the New York City Administrative Code mandate the payment of prevailing wage rates, on New York City public works and building services contracts, respectively, established by the New York City Comptroller.[65] All City contracts for public works and building services projects contain these provisions, as well as provisions subjecting contractors to remedies and civil penalties should they fail to comply.[66]

EO73 was designed to provide City agencies with additional training, resources and oversight, to support their efforts to strengthen enforcement of prevailing wage requirements and, more fundamentally, to establish compliance as a priority in the procurement process.[67]

EO73 established guidelines for "due diligence" reviews of vendors' assurances of compliance with prevailing wage laws. Under the City's procurement regulations, most prevailing wage contracts are let through competitive sealed bidding and are awarded to the lowest responsible bidder.[68] Within that structure, the City's new prevailing wage initiative requires that agencies undertake substantial due diligence reviews when unusually low bids are submitted, relative to other competitors. Specifically, when a difference of 10% or $300,000 (whichever is greater) between the lowest and second lowest bids exist, the winning bidder must document its intention and ability to pay prevailing wage rates to its employees.[69] The City agency procuring the contract must obtain the required information from the bidder, and must submit the results of its review to MOCS for approval.[70] Only then may the bid be accepted.

In addition to these bid-by-bid reviews, EO73 requires that City vendors, prior to commencing a project, enter into written agreements with their subcontractors, with those written agreements specifying the corresponding mandate for subcontractors to pay prevailing wages.[71] The EO mandates that prevailing wage compliance be treated as a material term of the contract, and that violations render a contractor liable to the City for the costs of enforcement.[72] Finally, the new EO directs MOCS to assist agencies in training their prevailing wage investigators.[73]

Equal Access to Spouse/Domestic Partner Health Insurance Coverage

In 2005, the Bloomberg Administration also launched a new program to document City vendors' provision of health care coverage to their employees, with a view toward determining if such policies treat employees' spouses and domestic partners on an equal basis.

On October 6, 2005, Mayor Bloomberg signed Executive Order No. 72 ("EO72"), directing MOCS to collect from vendors, on a voluntary basis, data concerning health insurance coverage. This data collection applies to all vendors with two or more employees who provide construction or services in annual cumulative amounts exceeding $100,000, as well as to those providing goods in such amounts, provided that they have reached the $100,000 threshold in each of the preceding three fiscal years.[74] The goal of the new program is to provide incentives and identify opportunities "to make health insurance coverage available on an equal basis to all New Yorkers and their families, including those families with same- and opposite-sex domestic partners."[75]

Historically, the private health insurance market in New York City had only offered plans covering domestic partners of employees to businesses with more than fifty employees.[76] Until recently, health insurance coverage of employees' domestic partners was generally not available to the so-called small group market, i.e., businesses with between two and fifty employees, a group that includes approximately 74% of the City's vendors.[77] Just prior to implementing EO72, the Bloomberg Administration successfully ensured that vendors who were interested in providing coverage to domestic partners would have options within the existing market of health insurance providers in New York City by securing commitments from several leading health insurers to begin offering the product in this market; the remaining insurance provider is currently evaluating whether to offer it as well.[78]

Under the new initiative, MOCS has begun to collect data documenting whether vendors are providing health insurance coverage access to employees generally and, if so, whether their insurance options treat employees' domestic partners and spouses equally. This data is obtained by MOCS through a questionnaire distributed following contract award to all City vendors covered by the dollar value thresholds. Once the information is obtained by MOCS, the information on vendor health insurance

practices will be made publicly available by the Office of Citywide Health Insurance Access ("OCHIA").[79]

In addition to collecting information about health insurance practices among City vendors, the goals of EO72 include vendor education as to the social and economic benefits resulting from decisions to offer health insurance to employees, spouses, domestic partners and dependents.[80] Through OCHIA, the City will provide vendors with appropriate information about health insurance providers that offer domestic partner coverage in the small group category.[81] OCHIA will also collaborate with health insurers and the New York State Insurance Department to promote availability of same- and opposite-sex domestic partner coverage in both the large and small group insurance markets.[82]

DSBS will also distribute information regarding the importance of health insurance access at its Business Solution Centers and through other entities that assist businesses.[83] In addition, not-for-profit vendors will be apprised by the City of their option to obtain domestic partner health insurance coverage, as well as coverage for employees' spouses and dependents, through the City's Central Insurance Program.[84]

Vendor Rehabilitation

Recognizing the need for robust competition and opportunity, while maintaining strict standards for vendor performance and integrity, the City implemented a new program pursuant to PPB Rule § 2-08(p) (entitled "Rehabilitation of Vendors") in the beginning of 2004. This program enables City vendors that had experienced prior problems to document how they had addressed and corrected such performance and integrity issues to demonstrate their current fitness as responsible business partners for the City.[85]

Under the applicable laws and rules, City agencies may award contracts only to "responsible" bidders.[86] The concept of "responsibility" envisions that prospective vendors demonstrate "the capability in all respects to perform fully the contract requirements, and the business integrity to justify the award of public tax dollars."[87] Among the factors to be considered by an agency in determining responsibility are the vendor's financial resources, technical qualifications, experience, organizational resources and its prior performance record.[88]

A key source that City agencies are required to consult in determining responsibility is the Vendor Information Exchange Database ("VENDEX").[89] The VENDEX database is a repository of performance and business integrity information on vendors that have received public contracts.[90] When an agency makes a negative finding against a vendor, including determinations of non-responsibility or unsatisfactory performance evaluations, those findings become "cautionary information" on the VENDEX system.[91] Cautionary information may also include external information such as civil judgments, sanctions, criminal history, and/or outstanding liens or tax warrants.[92] Cautionary information remains in the VENDEX system for ten years and may result in vendors being found non-responsible and therefore ineligible to obtain City contracts when they submit the lowest bids (or would otherwise be entitled to secure a procurement opportunity).[93]

An eligible vendor may apply to the CCPO for a Declaration of Rehabilitation ("Declaration") if: (1) a City agency has found the vendor to be non-responsible and it has exhausted or declined the process for appealing such a finding; or (2) it is the subject of cautionary information in the VENDEX database, which has impeded its ability to obtain City contracts.[94]

Through the vendor rehabilitation program, the City then assesses whether a vendor has satisfactorily resolved its performance and integrity problems. If so, the CCPO then renders an official determination reflecting the fact that prior problems have been satisfactorily resolved and should no longer discourage agencies from awarding new contracts to the now-rehabilitated vendor.[95]

A Declaration does not eliminate cautionary information from the VENDEX system.[96] Rather, the declaration adds new information to VENDEX indicating that the vendor's problems have been adequately addressed.[97] As part of the rehabilitation process, the vendor must affirmatively acknowledge that the problems reflected in the VENDEX system occurred and demonstrate that the issues have been addressed and will not recur.[98]

Once the full range of a vendor's integrity and performance issues have been identified, MOCS, in consultation with the Department of Investigation ("DOI"), determines what steps the vendor must take to warrant issuance of a Declaration.[99] For example, to address performance problems, MOCS may work with the vendor to implement a Corrective Action Plan ("CAP") outlining improved staffing, training and/or reporting practices.[100] In other instances, particularly with issues relating to business integrity, the City may require Responsibility and/or Certification Agreements, containing specific promises outlining the preventative measures a vendor has taken, such as by making changes in its staffing or financial procedures, limiting the type of work it may pursue with the City, agreement to have an independent monitor to review its books and records and/or the adoption of a binding Code of Business Ethics.[101]

Upon successful completion of these required steps, the vendor is directed to complete its formal application, attesting under penalty of perjury to the factual circumstances underlying the integrity and/or performance issues.[102] The application is reviewed by both the CCPO

and DOI, and, if satisfactory, results in a Declaration.[103] The CCPO has wide latitude in deciding whether to grant rehabilitation and may consider other relevant factors such as public policy, the contractor's ability to perform and the amount of time elapsed since the event(s) that gave rise to the cautionary information.[104]

The CCPO's Declaration is registered in the VENDEX database and shared with the City Comptroller.[105] Once in VENDEX, the Declaration assures agencies that the vendor has resolved all prior issues concerning vendor non-responsibility to the satisfaction of the City, and that the agency may now more readily determine that the vendor is "responsible" and eligible to receive City funds.[106] City agencies retain autonomy in making their responsibility determinations and are not required to approve a rehabilitated vendor if an alternative basis exists for rendering non-responsibility determinations.[107] The Declaration indicates that the agency *may* find the vendor responsible, all else being equal, based on its rehabilitation.

Endnotes

1. N.Y. GEN. MUN. L § 103 (McKinney 2006).
2. Executive Order No. 48 of 2005, § 2.
3. 9 RCNY § 1-03(a)(1)(i).
4. N.Y.C. ADMIN. CODE § 6-129(b).
5. The initial MWBE program was to be implemented by the Department of Small Business Services ("DSBS"), with assistance from MOCS. Major provisions of EO71 included: establishing criteria for certifying eligible MWBEs; implementing a streamlined certification process; maintaining a MWBE directory to be used by all City agencies; establishing standards and procedures for use by City agencies to aid in the inclusion of MWBE participation goals into agencies' procurement plans; and increasing opportunities for businesses whose owners have experienced social and economic disadvantage. Additionally, the EO directed DSBS to work toward increased contracting and subcontracting opportunities for MWBEs, provide assistance to MWBEs in obtaining New York State Office of General Services contracts, and to maintain and consult with an MWBE advisory board comprised of local businesses and trade groups.
6. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
7. *Id.* at 509.
8. *Id.* at 504.
9. Mason Tillman Associates, Ltd., *City of New York Disparity Study* (January 2005), *available at* http://www.nyccouncil.info/pdf_files/newswire/01_25_05_disparitystudy.pdf.
10. Under the new laws, the City will update the disparity study data every two years, and will adjust participation goals accordingly.
11. N.Y.C. ADMIN. CODE § 6-129(c)(18).
12. N.Y.C. ADMIN. CODE § 129(d)(1).
13. N.Y.C. ADMIN. CODE § 6-129(i)(5).
14. N.Y.C. ADMIN. CODE § 6-129(i).
15. *Id.*
16. N.Y.C. ADMIN. CODE § 6-129(i)(5).
17. N.Y.C. ADMIN. CODE § 6-129(i)(11).
18. *Id.*
19. N.Y.C. ADMIN. CODE § 1304(i)(iv)(12).
20. *Id.*
21. N.Y.C. ADMIN. CODE § 1304(e)(6)(a).
22. N.Y.C. ADMIN. CODE § 6-129(a).
23. N.Y.C. ADMIN. CODE §§ 1304(e)(6)(b), (c).
24. N.Y.C. ADMIN. CODE § 1304(e)(6)(b).
25. *Id.*
26. N.Y.C. ADMIN. CODE § 6-129(j)(6).
27. N.Y.C. ADMIN. CODE § 6-129(g)(1).
28. N.Y.C. ADMIN. CODE § 6-129(f).
29. N.Y.C. ADMIN. CODE § 6-129(h)(1).
30. N.Y.C. ADMIN. CODE § 6-129(h)(2).
31. As of this date, the latest year for which DCAS purchasing information is available is Fiscal Year 2005.
32. This percentage does not take into account emergency and heavy-duty vehicles.
33. During 2005, prior to enacting the five procurement laws that are the subject of this section, the City of New York adopted other measures to improve environmental purchasing and building. To address concerns about air pollution, the City enacted Local Laws Nos. 38 through 42 of 2005. These laws improved the existing alternative fuel law for light-duty vehicles and required the use of ultra-low-sulfur diesel fuel and the employment of emissions reduction technology for the City's diesel vehicles, waste haulers contracted by the City, school buses and sight-seeing buses. Also, Local Law No. 86 of 2005 ("LL86"), known as the "Green Building Law," required new and substantially renovated City buildings to be constructed according to the U.S. Green Building Council's green building rating system, known as Leadership in Energy and Environmental Design ("LEED"). LL86 of 2005 applies to new construction, additions and substantial renovations costing over $2 million dollars and to certain energy and plumbing projects. This law is expected to affect $12 billion in planned construction over the City's 10-year capital plan.
34. N.Y.C. ADMIN. CODE § 6-304(a).
35. *Id.*
36. N.Y.C. ADMIN. CODE § 6-304(b).
37. N.Y.C. ADMIN. CODE § 6-304(f).
38. N.Y.C. ADMIN. CODE § 6-305(a).
39. N.Y.C. ADMIN. CODE § 6-302. Construction projects are required to comply with EPP provisions on energy and water efficiency pursuant to Local Law No. 119 of 2005 and volatile organic compounds in paints, carpets and other building materials pursuant to Local Law No.120 of 2005.
40. N.Y.C. ADMIN. CODE § 6-303(a).
41. *Id.*
42. *Id.*
43. N.Y.C. ADMIN. CODE § 6-303(b).
44. N.Y.C. ADMIN. CODE § 6-303(d).
45. Energy Star is a certification program that was created by the Environmental Protection Agency and Department of Energy in 1992 to promote purchasing of energy efficient products in the areas of electronics, lighting, appliances and heating/cooling equipment. The City was first required to purchase Energy Star products under Local Law No. 30 of 2003. The provisions of that law were then incorporated into Local Law No. 119 of 2005.
46. N.Y.C. ADMIN. CODE § 6-306(a). FEMP incorporates Energy Star and includes additional standards, primarily for water-using products and for commercial chillers, boilers and lighting equipment.

47. N.Y.C. ADMIN. CODE §§ 6-306(b), (c).
48. N.Y.C. ADMIN. CODE § 6-307.
49. N.Y.C. ADMIN. CODE § 6-306(f).
50. N.Y.C. ADMIN. CODE § 6-312(a).
51. N.Y.C. ADMIN. CODE § 6-313.
52. N.Y.C. ADMIN. Code § 6-314.
53. N.Y.C. ADMIN. Code § 6-308(a). The CPG standards for recovered-material content apply to the following types of products: paper, vehicular, construction, transportation, park and recreation, landscaping and non-paper office. *See* http://www.epa.gov/cpg/about.htm.
54. N.Y.C. ADMIN. Code § 6-308(b).
55. *See id*. at § 6-308(c).
56. *See id*. at § 6-309(a).
57. *See id*. at § 6-309(b).
58. *See id*. at § 6-309(c).
59. *See id*. at § 6-310.
60. *See id*. at § 6-316.
61. *See id*. at § 6-316(a).
62. *See id*. at § 6-316.
63. N.Y. LAB. LAW § 220 (2005).
64. *See id*. at § 230(2) ("building service work" or "service work" means work performed by a building service employee, but does not include work performed for a contractor under a contract for the furnishing of services by radio, telephone, telegraph, or cable companies; and any contract for public utility services, including electric light and power, water, steam and gas).
65. *See id*. at § 220(3); N.Y.C. ADMIN. CODE § 6-109.
66. Exec. Order No. 73 of 2005.
67. *Id*.
68. 9 RCNY §§ 3-02(o)(1) and (3).
69. Exec. Order No. 73 of 2005, §§ 1(a)(1).
70. *Id*.
71. *Id*. at § 1(d).
72. *Id*. at § 1(e).
73. *Id*. at § 1(f). The EO contains a number of further enforcement-related provisions: it allows prevailing wage investigators to embargo vendors' payments until they prove they are paying prevailing wages; it requires vendors and subcontractors to pay employees by check, to facilitate agencies' auditing/ monitoring efforts; it mandates use of automated payroll services for most contracts and subcontracts; and it requires vendors and subcontractors to maintain employee work logs and to submit such logs to the agency or the City Comptroller upon request. *Id*. at §§ 1(g) and (h).
74. Exec. Order No. 72 of 2005, §§ 1(a) and (b).
75. *Id*.
76. Exec. Order No. 72 of 2005.
77. Press Release No. 384-05, *Mayor Bloomberg Secures Commitments from Four Leading Health Insurers to Make Domestic Partner Coverage Widely Available in New York City, available at* http://www.nyc.gov/portal/site/nycgov/menuitem.b270a4a1d51bb3017bce0ed101c789a0/index.jsp?doc_name=/html/om/html/archive_2005.html (Oct. 6, 2005).
78. *Id*.
79. Exec. Order No. 72 of 2005, § 4.
80. *Id*. at § 3.
81. *Id*. at § 7.
82. *Id*.
83. *Id*. at § 5.
84. *Id*. at § 6.
85. Domingo, Dominic, *Mayor's Office of Contract Services: Three Companies Win Rehabilitation Declarations*. 10 City Law 97 (September 4, 2004), *available at* http://www.citylaw.org/cl_citylaw/04_septoct/feature.php.
86. GEN MUN LAW § 103
87. 9 RCNY § 2-08(b)(1).
88. 9 RCNY §§ 2-08(b)(2)(i)-(v).
89. 9 RCNY § 2-08(g).
90. N.Y.C. ADMIN. CODE § 6-116.2.
91. 9 RCNY § 2-08(h)(3).
92. *New York City Procurement: A Blueprint for Change*. Report on procurement reform plans and accomplishments issued by Mayor Michael R. Bloomberg (October 21, 2003) *available at* http://www.nyc.gov/html/selltonyc/html/contractors.html.
93. *Id*. *See also* 9 RCNY § 3-02(t).
94. 9 RCNY § 2-08(p).
95. 9 RCNY § 2-08(p)(5).
96. 9 RCNY § 2-08(p).
97. *Id*.
98. 9 RCNY § 2-08(p)(2).
99. 9 RCNY § 2-08(p)(5).
100. 9 RCNY § 2-08(p)(3).
101. 9 RCNY § 2-08(P)(3)(IV).
102. 9 RCNY § 2-08(p)(2).
103. 9 RCNY § 2-08(p)(5).
104. *Id*.
105. 9 RCNY §§ 2-08(p)(5) and (6).
106. 9 RCNY § 2-08(p).
107. 9 RCNY § 2-08(p)(7).

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Procurement Lobbying Disclosure in New York State: Form over Substance

By Steve Hensel and Cara Romanzo

I. Introduction

Attempting to influence the award of government contracts is a long-standing practice with a potentially lucrative pay-off, and the need for additional transparency in the decision-making process has long been apparent to the state and the public. Thus, the amendments to the New York State's Lobbying Act enacted on August 23, 2005 subjecting procurement lobbying to state oversight were heralded as a means of promoting transparency and accountability in the process by which billions of state taxpayers' dollars are spent.[1] The Senate press release following the bill's passage described it as a comprehensive and landmark reform legislation that represented "the most sweeping reform and overhaul of the State's lobbying law in generations."[2]

In practice, however, the recently enacted provisions do little to accomplish the lofty goals that provided the impetus for their enactment. The changes to the law have left both the lobbying community and governmental entities seeking interpretive guidance on certain critical points, such as: (1) *What* constitutes procurement lobbying under the Lobbying Act? (2) *Who* is a procurement lobbyist subject to the registration and reporting requirements of the Lobbying Act? and (3) *How* do the procurement provisions of the Lobbying Act interact with those of the State Finance Law, amended on the same date? [3]

This article discusses the experience of the Commission in attempting to implement the amended law in the first seven months following the effective date of the procurement provisions,[4] and considers the law in light of the stated expectations that accompanied its passage. Section II contains a brief overview of the state's historical regulation of lobbying. Section III summarizes the purpose and expectations articulated by public officials for the procurement lobbying reform legislation. Section IV explains the definition of procurement lobbying under the Act, and then examines the numerous exceptions to the registration and reporting requirements. Section V explores the relationship between the Lobbying Act and State Finance Law. Section VI examines the experience of applying the law to specific fact patterns. Section VII discusses a broad exemption to the definition of lobbying that allows members of the legislature to make contacts with governmental entities during the course of a procurement that need not be recorded in the procurement record.

II. Historical Overview

Amendments to the lobbying laws in New York have gradually but consistently expanded the scope of regulated activities and the associated reporting requirements. Prior to 1977, the law was a paper tiger containing only a minimal requirement for registration by certain lobbyists with the Secretary of State. The Secretary of State had no regulatory or enforcement authority, nor could it conduct investigations.

In 1977, the state enacted legislation that marked an important shift from the mere requirement of registration to the actual oversight of lobbying conduct and compensation. It created an independent state agency known as the New York Temporary State Commission on Regulation of Lobbying, with the mandate to administer and enforce the public disclosure of the identities, activities and expenditures of those seeking to influence legislation, rules, regulations and rate-making actions of the state. The law imposed quarterly and annual report obligations on lobbyists for the first time. It also provided the Commission with broad enforcement powers, including the authority to conduct investigations, compel disclosure, hold hearings and issue advisory opinions.

The Regulation of Lobbying Act was amended in 1981 to include exceptions to the definition of lobbying and to rename the agency the New York Temporary State Commission on Lobbying ("Commission").[5,6]

In 1999, the state enacted a new Article 1-A that replaced and strengthened the existing lobbying law.[7] It retained many of the provisions of its predecessor,[8] but expanded the definition of lobbying to include lobbying at the local level.[9] It also created new administrative late fees, higher civil penalties, gift restrictions, and stricter criminal sanctions, more frequent reporting, and random audits.[10]

In 2005, various bills attempting to amend the Lobbying Act and the State Finance Law were proposed to the New York State Legislature. Ultimately, Senate Bill 5873 ("SB 5873") passed the 2005 legislative session and was signed by Governor Pataki on August 23, 2005.[11] The amendments provide that lobbying on procurement contracts, Executive Orders and Tribal-State agreements shall be subject to regulation by the Lobbying Commission.[12] The amendment also provided new penalties for violations of the lobbying law.[13] Portions of the amendments became effective immediately, whereas the amendments related to procurement became effective on January

1, 2006.[14] The legislation enacted on August 23, 2005 also amended certain provisions of the State Finance Law pertaining to procurement, in addition to the Lobbying Act. The State Finance Law amendments provide for the recording and reporting of contacts and the restriction of certain contacts during the procurement process.[15]

III. Expectations Accompanying the 2005 Amendments

Expectations were high leading up to the passage of the amendments. This article will consider whether the law as written provides a regulatory framework that allows for the fulfillment of these high expectations.

In his 2005 State of the State address, Governor Pataki listed lobbying reform as the first of his seven major goals, stating that he wanted to work with the legislature to enact legislation imposing a "smart and effective ban on procurement lobbying."[16]

In a June 22, 2005 press release announcing the Senate's passage of SB 5873, Senate Majority Leader Joseph Bruno announced that state government was shining a light on the practice of lobbying for government contracts by requiring disclosure and transparency.[17] The Majority Leader's press release also states that the legislation would "curtail lobbying for government contracts and for the first time require contractors seeking state business to contact only designated contract officers at state agencies and authorities."[18]

In a June 24, 2005 press release following the passage of the companion bill A.8964, Speaker of the Assembly Sheldon Silver announced that procurement lobbying was an absolute legislative priority.[19] The Speaker said that the legislation will make the billions of taxpayer dollars spent on government contracts subject to more accountability and greater scrutiny and in the end would "go a long way to restoring the public's confidence in our state government."[20]

The Senate Sponsor's Memorandum proclaims, "this bill would enact a smart, but effective, ban on procurement lobbying by providing that contractors may contact only certain designated personnel within a procuring governmental entity about a governmental procurement."[21] It also stated that the bill "would ensure that all contacts during the procurement lobbying process are recorded so the public knows who is contacting governmental entities about procurements."[22]

The decision to include attempts to influence governmental procurement-related determinations in the definition of lobbying was a significant one. In fiscal year 2004/2005, the Office of the State Comptroller reported that it reviewed and approved 41,298 contract transactions valued at over $28 billion.[23] While the awards of these contracts in many instances are based upon the objective standard of lowest price, very often they are based upon subjective criteria that are subject to influence by lobbyists and interested parties.

IV. Understanding What Is Not Covered Is More Important Than Understanding What Is

The Lobbying Act requires lobbyists to register with and report to the Commission; a lobbyist is anyone who engages in lobbying or lobbying activity. Procurement lobbying is defined as any attempt to influence any determination by a public official relating to a governmental procurement.[24] Public officials include members and employees of the legislature, the Governor and his staff, state agency officers and employees, municipal officers and employees, and officers and employees of public authorities and public corporations.[25]

After reading these definitions, it may appear that the procurement lobbying provisions are sufficiently broad in scope and breadth, and are well designed to provide the disclosure and transparency critical to meaningful reform. Immediately following in the Act, however, are a number of exceptions to the definition of procurement lobbying that limit the application of the procurement lobbying provisions and create significant practical problems in their application.[26] It has become apparent to many interested in understanding the 2005 amendments that it is more important to know what is *not* lobbying activity rather than what is.

The first significant exception to the definition is that there can be no lobbying or lobbying activity in the absence of a governmental procurement, which is the process of acquiring goods and services by a governmental entity. As will be discussed later in this article, this exemption has generated much interest and comment as to when a governmental procurement commences.

Once a governmental entity has begun the procurement process, there are a number of communications and activities that are specifically exempted from the definition of lobbying activity. These exemptions relate to activities and communications that are an integral part of the established procurement processes of governmental entities. Included among them are participating in a bidders' conference, negotiating the terms of the procurement contract, filing a protest with the appropriate governmental officials, submitting the bid, submitting written questions and providing technical services requested by the governmental entity.[27]

Incorporating provisions exempting these activities and communications, which obviously are attempts to influence public officials, indicates recognition on the part of the legislature and Governor that the oversight of lobbying activity should not interfere with or hinder the procurement policies and procedures that were in place when the law took effect. Stated differently, these activities are a normal and necessary part of the procurement process.

Requiring that lobbying activity be related to a governmental procurement and allowing exemptions for communications and activities routinely associated with the procurement process should effectively limit the scope of oversight of the procurement lobbying provisions to those contacts that are intended to influence the decisions of public officials yet are outside the established procurement policies and procedures of governmental entities.

There have been numerous comments and questions relating to the Commission's interpretation of the beginning point of a governmental procurement, as well as the ability of governmental entities to effectively communicate that information to interested parties. There is also significant lack of awareness of the existence and interpretation of the stated exemptions to lobbying activity, resulting in the mistaken belief that participants in the procurement process are engaging in lobbying activity when they are simply following established procedures.

With regard to the exemptions found in the amended Act, many parties to date remain unaware of their existence. It is apparent from phone calls and written requests received by the Commission that many of the parties contacting the agency are concerned that they are required to register as procurement lobbyists, and are surprised to learn that their activities and communications are covered by one of the numerous exemptions.

V. Problems Created by the Relationship between the Lobbying Act and State Finance Law as They Pertain to Procurement Lobbying

The simultaneous amendments made to the Lobbying Act and State Finance Law were presumably made to promote a situation where the laws would work hand in hand to facilitate policing the process whereby billions of dollars in state contracts are awarded. However, certain tensions continue to exist between the two laws, fueled in part by the different focus and purpose of the Lobbying Law versus the State Finance Law.

A. There Can Be Lobbying Activity Covered by the Lobbying Act that Is Not Subject to the Recording and Reporting Requirements of the State Finance Law

1. Lobbying of Larger Political Subdivisions Is Subject to the Provisions of the Lobbying Act, but Is Not Required to Be Recorded and Reported by the State Finance Law

The State Finance Law sections apply to governmental entities, which as defined do not include political subdivisions of the state.[28] This is significant because the Lobbying Act applies to lobbying activity directed to jurisdictional subdivisions of the state, including counties, towns, cities and villages with a population of more than 50,000.[29] As a result, the lobbying of larger political subdivisions is subject to the provisions of the Lobbying Act but not required to be recorded and reported by the State Finance Law. In addition to creating confusion, this difference between the two laws leaves the Lobbying Commission without any guarantee that the political subdivisions excluded by the State Finance Law will have any records of contacts available for review.

2. The Lobbying Act Jurisdiction Begins Prior to the Restricted Period

The amended Lobbying Act expands the definition of "lobbying" to include "any determination of a public official with respect to a governmental procurement."[30] In both the Lobbying Act and the State Finance Law, the definition of governmental procurement includes, in part, the preparation of the specifications, bid documents, request for proposals or evaluation criteria for a procurement contract, *all of which take place prior to the commencement of a period of time referred to as the restricted period*.[31]

The restricted period, in both laws, is defined as the period of time beginning with the first solicitation issued by a covered governmental entity anticipating a response resulting in a procurement contract and ending with the final award of the contract.[32] However, here is where a critical disconnect between the Lobbying Act and State Finance Law occurs: the State Finance Law restrictions and the imposition of recording and reporting requirements for contacts related to a governmental procurement are effective only during the restricted period.[33] Thus, contacts with governmental entities prior to the commencement of the restricted period are not covered by the State Finance Law provisions and need not be recorded and reported.

Since the definition of a governmental procurement under the Lobbying Act includes activities that may occur prior to the restricted period, i.e., the preparation of the specifications, bid documents, request for proposals or evaluation criteria for a procurement contract, this means that lobbying activity covered by the Lobbying Act commences prior to the State Finance Law trigger for the recordation and reporting of contacts related to a governmental procurement.

The difference in coverage between the two laws has also created confusion for lobbyists. Many lobbyists are now familiar with the concept of the restricted period and are comfortable with the fact that the period has easily identifiable beginning and ending dates. The Commission's position that a governmental procurement, and therefore the period during which lobbying activity can take place, begins prior to the restricted period has resulted in numerous comments from the lobbying and business communities that the timing of that determination is not readily discernable. Lobbyists are concerned that they can inadvertently be found to be in violation of the Act because they were not aware that a governmental

procurement was in progress when they contacted governmental entities.

3. The Lobbying Act Jurisdiction Begins with the Determination of Need

The Commission determined that it was imperative to define the commencement of a governmental procurement in such a way as to capture lobbying activity during the entire procurement process. Indeed, according to a Guideline of the State Procurement Council entitled "Selecting a Procurement Technique," the determination of need relating to an article of procurement is the first step in the procurement process, and should be the first entry in the procurement record.[34] Thus, for the purposes of the Lobbying Act, the scope of the Act as it pertains to procurement lobbying commences simultaneously with a determination of need by a governmental entity relating to an article of procurement.

The question of when and how the determination of need is actually made can only be answered by the individual governmental entity embarking on procurement. While each governmental entity will have its own policies and procedures governing its procurement process, at some point the entity must make a decision that there is a need to be filled, and what procurement technique will be utilized to fill that need. That decision is the determination of need, the beginning of the governmental procurement, and the beginning of the Commission's jurisdiction over lobbying activity.

Given that the timing of the determination of need may not be clearly delineated or known outside the governmental entity, the Commission recommends that an interested party contacting a governmental entity first ask whether the governmental entity has made a determination of need and is presently working on a governmental procurement relating to the interested party's product or service. If the answer is no, there can be no lobbying activity because there is no governmental procurement. If the answer is yes, the interested party may choose not to continue the communication, or may continue the communication knowing that he or she may be engaging in lobbying activity.

A. Commission's Experience in Attempting to Obtain Pre-Restricted Period Contact Information from Governmental Entities

It has been difficult for the Lobbying Commission to convince governmental entities, especially those subject to the State Finance Law sections, that they should provide the Commission with records of contacts made during a period of time prior to the commencement of the restricted period. This difficulty results from the fact that the Lobbying Act imposes no obligation on any governmental entity to record and report such contacts, and the State Finance Law requires recording and reporting, on a slightly different category of governmental entities, only during the restricted period. As a result, after numerous instances of being advised that a governmental entity will not comply with the Lobbying Commission's request for contact information because it was not required to do so, the Commission has responded by emphasizing that it was seeking the cooperation of the governmental entity in lieu of any obligation. This response has often been met with the continued refusal to comply because it would be too burdensome. As a result, the Commission is not always able to acquire contact information critical to its mission of overseeing the registration and reporting requirements imposed by the Act on parties engaging in procurement lobbying.

VI. Interpreting and Applying the Procurement Provisions

In attempting to draft guidelines to provide instruction concerning the application of the procurement lobbying provisions of the Act, the Commission has found it necessary to interpret terms used in the statute. As a result, the Commission has received numerous telephone and written inquiries concerning its interpretations. Questions commonly relate to the Commission's position on the beginning point of a governmental procurement or the application of exemptions in the law to the definition of lobbying and lobbying activity.

The issue of who qualifies for the commission salesperson exemption contained in the Act is particularly illustrative of the problems faced by the Commission in applying the procurement lobbying provisions of the law to actual fact patterns. This issue also highlights concerns expressed by the business and lobbying communities that the procurement lobbying provisions have the potential to require registration and reporting by individuals who would never consider themselves to be lobbyists, and whose activities would not be generally regarded as lobbying.

The Act states that lobbying shall not include "the activities of persons who are commission salespersons with respect to governmental procurements."[35] Therefore, if an individual qualifies as a commission salesperson, there is no requirement that the individual register as a lobbyist. On its face, this exemption appears to be commonsense recognition by the legislature and the governor that the oversight of lobbying activity should not interfere with existing business relationships between salespeople and governmental entities. It also reflects a practical understanding that salespeople should generally not be considered lobbyists, and that lobbyists are generally not salespeople.

The question of who qualifies as a commission salesperson is probably the most frequently asked of the Commission by lobbyists, clients, business associations and others. The definition in the Act has several stated requirements for determining the status of a commission

salesperson; however, the use of general terms has led to difficulty in applying the requirements to specific employment arrangements. The most common criticism of the attempts the Commission has made to interpret the commission salesperson status is that much of what the Commission proposed to include in the guidelines was not in the law.

For example, the definition states that a commission salesperson is an employee or an independent contractor *for a vendor.*[36] In an early attempt to interpret this requirement, the Commission stated that a commission salesperson could only be associated with one vendor. It was subsequently learned that this requirement did not reflect actual current relationships between commission salespersons and vendors.

The definition in the Act also provides that a commission salesperson must be compensated, *in whole or in part,* by the payment of *a percentage amount* of all *or a substantial part* of sales.[37] An early proposed interpretation of this requirement stated that the amount of compensation a salesperson earns from commissions had to exceed the non-commission compensation. After reviewing comments on this proposed interpretation, the Commission learned that trying to put a number or percentage on this balance does not allow vendors enough flexibility in relation to their method of compensating salespersons. It also allows for the inconsistent possibility that a person could qualify as a commission salesperson in a good year but not in a bad year.

The Commission has not as yet addressed the questions of whether there should be a stated maximum percentage of commission payable or what constitutes a substantial part of sales.

A better approach to interpreting the commission salesperson exemption, as well as any other term or provision that seems to require explanation, would be to emphasize the most important factors in the law as written. For the commission salesperson exemption, the primary consideration should be whether the individual is a salesperson, not a customer representative, a sales manager or supervisor. Secondly, the salesperson must receive a commission on all or a substantial part of sales, and a substantial part should mean almost all.

It should be noted that there have been several suggestions that the law be changed to apply to salespersons, rather than commission salespersons, the idea being that the method of compensation should not matter if the person is primarily employed as a salesperson.

As stated above, the Commission's attempt to produce a guideline interpreting the commission salesperson exemption is illustrative of the problems encountered with attempting to interpret and apply the law as written to existing fact patterns.

VII. The Legislative Exemption

While the focus of the Lobbying Act has been reporting and disclosing of lobbying activity, the 2005 amendment, which added the procurement lobbying category, has for the first time created a restriction on lobbying activity. During the restricted period, lobbying activity can only be addressed to the designated contact in the procuring governmental entity.[38] A first violation of this restriction can result in a civil penalty of $10,000, and a second violation within four years of the first, in a $25,000 penalty, as well as a prohibition against engaging in procurement lobbying activities for a period of four years.[39]

The restriction and penalties created by the 2005 amendment should provide a significant deterrent to engaging in lobbying activity in violation of the statute. However, they fail to affect an extremely significant category of lobbying activity because of an exception to the restriction provided for in the statute. That exception provides that the restriction shall not prohibit a lobbyist from contacting a member of the state legislature about a governmental procurement at any point in the process.[40] The exception does not relieve the lobbyist from reporting the lobbying activity, but it does allow for contacts during the period of time in which the governmental entity is deciding the award of the contract.

As stated above, the exception to the procurement lobbying restriction does not relieve the lobbyist from reporting his or her contacts with members of the state legislature. The real significance of this exception is found in the corresponding 2005 amendment of the State Finance Law.[41] The State Finance Law requires governmental entities to record all contacts received during the restricted period and to report them in the procurement record that supports the award of the resulting contract. Following this requirement in the statute is a provision that states that communications received from members of the state legislature or their staffs, acting in their official capacity, shall not be considered contacts and need not be recorded in the procurement record.[42]

As a result, a lobbyist is allowed to contact a member of the state legislature about a governmental procurement, and the legislator or his or her staff may contact anyone in the procuring governmental entity concerning the procurement at any time, and the second communication need not be reported or recorded.

This exception is ironic in view of the near universal support of all those involved in the passage of the 2005 amendment for full disclosure and transparency in the procurement process. Of interest is the fact that the Senate sponsor's memorandum, the document designed to summarize the purpose and provisions of the bill, fails to make any specific mention of the highly significant exception for contacts with and by members of the legislature during the restricted period.

The legislative exception is even more ironic in light of a highly publicized event that was an important impetus for the passage of the procurement lobbying amendment. In 2002, State Senator Guy Velella ("Velella")[43] was charged in a 25-count count indictment that alleged Vellela had accepted money in return for steering lucrative state contracts to bribe-payers from late 1995 through June 2000.[44] On the day he was scheduled to start trial on bribery charges, Velella pleaded guilty to a felony charge of fourth-degree conspiracy in exchange for a sentence of one year in jail.[45] In his plea statement to the court, Valella admitted that he called and met with government officials to help clients get contracts to work for various state agencies.[46]

While the inclusion of procurement lobbying in the Lobbying Act is not intended to prevent criminal activity as described above, it was intended to provide full disclosure of any attempts to influence decisions by public officials related to governmental procurements. By exempting contacts made by legislators with governmental entities during the restricted period, the goals of full disclosure and transparency are much less likely to be attained.

VIII. Conclusion

In the first seven months of 2006, there have been 161 lobbyist/client registrations under the category of procurement lobbying, and 359 under the category of both, which includes procurement and non-procurement lobbying. It is unclear at this time whether those numbers are greater or less than what should be expected. There has been speculation on both sides of the argument: that more interested parties are registering because they are being cautious or fewer are registering because they are unsure of the registration requirements. Only additional time and tracking of registrations will disclose what should be the correct level of procurement lobbying registration.

It is evident, however, that the stated goals of lobbying activity being addressed only to procurement professionals in contracting entities, and recording of all such contacts during the procurement process cannot be met, because those requirements apply only during the restricted period. Lobbying activity prior to the restricted period may be addressed to anyone in a governmental entity and need not be recorded. Also, the legislative exemption further erodes the obligation to record contacts that was intended to produce the much proclaimed and anticipated transparency and openness in the procurement process.

It is also evident that the new provisions are not a ban on procurement lobbying, contrary to some of the public statements made in the time leading up to the passage of the legislation. While it is true that the Act now contains a limited restriction on lobbying activity during the restricted period, the remaining procurement lobbying provisions are consistent with the historical purpose of the Act: to achieve full registration and disclosure of lobbying activity. It remains to be seen whether the Act as written will provide an adequate mechanism to achieve those objectives.

It is imperative that the Commission continue and intensify its efforts to provide guidance regarding procurement lobbying to lobbyists, clients, governmental entities and other interested parties. The Commission has attempted to address the application of the procurement provisions by stressing the need for awareness and understanding of the many communications and activities that are part of a company's normal business activity but are not considered lobbying activity because they are not related to a governmental procurement or specifically exempted by law. The Commission holds weekly training sessions open to all interested parties, and has conducted numerous on-site training sessions at the request of interested organizations. The Commission has drafted guidelines intended to provide interpretation of statutory provisions, which may not be self-explanatory. The Commission has also received and replied to numerous written and telephone requests for staff or Commission opinions interpreting the procurement provisions. The Commission is aware that its educational efforts relating to the issues discussed in this article must continue and expand.

Endnotes

1. N.Y. Legis. Law §§ 1-a et seq. (McKinney Supp. 2006) (amended c. 1, § 1, eff. Jan. 1, 2006; c. 1, §§ 2, 3, eff. Aug. 23, 2005) ("Lobbying Act" created by Chapter 2 of the Laws of 1999, as amended by Chapter 32, Laws of 2003 and as amended most recently by Chapter 1, Laws of 2005).
2. Press Release, The Senate Republican Majority, *Senate Passes Procurement Lobbying Legislation* (June 22, 2005), *available at* http://senate.state.ny.us/pressreleases.nsf.
3. N.Y. State Fin. Law §§ 139-j, 139-k (McKinney Supp. 2006) (established by Chapter 1 of the Laws of 2005). In pertinent part, Chapter 1 adds two new sections to the State Finance Law that took effect on January 1, 2006; namely, N.Y. State Finance Law § 139-j, "Restrictions on Contacts During the Procurement Process," and State Finance Law § 139-k, "Disclosure of Contacts and Responsibility of Offerers." Both sections of law use defined terms to establish new restrictions on procurement lobbying.
4. Specifically, this article covers the period from January 1, 2006 through July 31, 2006.
5. Ch. 1040, § 1, 1981 N.Y. Laws 2690 (known as "The Regulation of Lobbying Act").
6. Note that in October 1994, then-Governor Mario Cuomo issued Executive Order No. 189 to restrict contact of state agency personnel during any procurement process, and requiring that all procurement awards be based on the merits of the proposal. This Order prohibited "preferential, unequal or favored consideration of a proposal submitted for a procurement contract award, based on considerations other than the merits of the proposal" but lacked

an enforcement mechanism. In 2003, Governor George E. Pataki issued Executive Order No. 127 mandating covered agencies to record and maintain the name, address, phone number, and place of employment of anyone attempting to influence the award of a procurement contract. However, this also lacked teeth, and excluded from the definition of procurement contract those contracts issued to the lowest responsible bidder or based on the lowest price pursuant to a competitive bid process.

7. N.Y. LEGIS. LAW, art. 1-A (McKinney Supp. 2006).
8. The historical derivation of the 1999 law is summarized as follows: L.1983, c. 946, §§ 1 to 8; L.1985, c. 50, § 5; L.1987, c. 813, §§ 22 to 24; L.1995, c. 299, § 5, eff. July 26, 1995; L.1997, c. 435, § 42, eff. Aug. 20, 1997; repealed by L.1999, c. 2, § 1, eff. Jan. 1, 2000.
9. N.Y. LEGIS. LAW § 1-c(c) (McKinney Supp. 2006) (Specifying that lobbying activities on the local level included attempts to influence the passage or defeat of any local law, ordinance or regulation by any municipality or subdivision thereof or adoption or rejection of any rule or regulation having the force and effect of law.).
10. *Id.*
11. S.5873, Ch. 1, 2005-2006 Leg., Reg. Sess. (N.Y. 2005) (Introduced by N.Y. Senator George Winner (R-Elmira) at the request of Governor Pataki).
12. Lobbying Act § 1-c.
13. Lobbying Act § 1-o.
14. Ch. 1, § 16, 2005 N.Y. LAWS 18.
15. N.Y. STATE FIN. LAW §§ 139-j, 139-k (McKinney Supp. 2006).
16. State of the State Address, Gov. Pataki (Jan. 5, 2005), transcript *available at* http://www.ny.gov/governor/keydocs/sos_address_2005.html; *see also* Press Release, Governor Pataki, *Governor Introduces Series of Sweeping Government Reform Measures* (Mar. 10, 2005), *available at* http://www.ny.gov/governor/press/05/march10_1_05.htm; *see also* 2005 Legislative Report from New York State Assembly Committee on Governmental Operations, 10/6/2005, U.S. St. News (not available online), WLNR 23139611; *see also* John Caher, *Governor Says Lobbying Law Reform Is a Priority for 2005*, N.Y.L.J., Jan. 6, 2002, at 1.
17. Press Release, The Senate Republican Majority, *Senate Passes Procurement Lobbying Legislation* (June 22, 2005), *available at* http://senate.state.ny.us/pressreleases.nsf.
18. *Id.*
19. Press Release, Assembly Speaker Sheldon Silver, *Statement on Assembly Passage of Procurement Lobbying Reform Legislation* (June 22, 2005), *available at* http://assembly.state.ny.us?Press?20050624b/.
20. *Id.*
21. N.Y. State Senate Introducer & Memorandum in Support, S.5873, Ch. 1, 2005-2006 Leg., Reg. Sess. (N.Y. 2005), *available at* http://public.leginfo.state.ny.us/menugetf.cgi.
22. *Id.*
23. Report, N.Y. State Office of the State Comptroller, Alan G. Hevesi, "Strengthening State Procurement Practices—Producing the Best Results for New York Voters" (April 2005) at 3; *see also* Report, N.Y. State Office of the State Comptroller, Alan G. Hevesi, "Vendor Responsibility" (March 2006) at 3, both *available at* http://nysosc3.osc.state.ny.us/press/releases/apr05/procurement.pdf.
24. Lobbying Act § 1-c(c)(v).
25. Lobbying Act § 1-c(l).
26. Lobbying Act § 1-c(c)(G)-(Q).
27. *Id.*
28. N.Y. STATE FIN. LAW § 139-k(1)(a)(6) (McKinney Supp. 2006), referring to municipal agency as defined in § 1-c(s)(ii).
29. Lobbying Act § 1-c(k).
30. Lobbying Act § 1-c(c)(v).
31. Lobbying Act § 1-c (p); N.Y. STATE FIN. LAW § 139-j(1)(e).
32. Lobbying Act § 1-n; N.Y. STATE FIN. LAW § 139-j(1)(f).
33. N.Y. STATE FIN. LAW § 139-k(4).
34. N.Y. State Procurement Council, *Procurement Guidelines: Selecting a Procurement Technique* (Mar. 2001), *available at* http://www.ogs.state.ny.us/procurecounc/pdfdoc/guidelines.pdf.
35. Lobbying Act § 1-c(c)(O).
36. Lobbying Act § 1-c(u).
37. *Id.*
38. Lobbying Act § 1-n.
39. Lobbying Act § 1-o(d).
40. N.Y. STATE FIN. LAW § 139-k.
41. N.Y. STATE FIN. LAW § 139-k.
42. N.Y. STATE FIN. LAW § 139-k(6).
43. Guy Velella was a state senator for 18 years and was in the State Assembly for 10 years before that, representing the 34th Senate District, which covers the northern Bronx and southern Westchester County.
44. *In re Velella*, 11 A.D.3d 50, 782 N.Y.S.2d 85, 2004 N.Y. Slip Op. 06824 (Sept. 30, 2004). Specifically, Velella was charged in the Supreme Court, New York County, with conspiracy in the fourth degree in violation of Penal Law § 105.10(1), four counts of bribe receiving in the second degree in violation of Penal Law § 200.11, and numerous violations of Public Officers Law §§ 73(2), (7)(a)(iv) and 77. *See also* CBS News Online, http://216.239.51.104/search?q=cache:8_mfJf1AiD8J:cbsnewyork.com/topstories/topstoriesny_story_138100531.html+indictment+velella&hl=en&gl=us&ct=clnk&cd=7.
45. *Id.*
46. CBS News Online, http://216.239.51.104/search?q=cache:8_mfJf1AiD8J:cbsnewyork.com/topstories/topstoriesny_story_138100531.html+indictment+velella&hl=en&gl=us&ct=clnk&cd=7.

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Practical Implementation of New York's Procurement Lobbying Law: Issues, Solutions and Lessons Learned

By Marie A. Corrado and William A. Howe

Introduction

Marie A. Corrado

The budget of the State of New York was $106.5 billion last year.[1] Of that amount, $30 billion was spent in procuring goods and services.[2] As one of the state's largest agencies, the New York State Department of Transportation (NYSDOT) has an annual budget of approximately $8.7 billion.[3] In fiscal year 2005-2006, NYSDOT spent $2 billion on the purchase of goods and services through contracting mechanisms of different types.[4]

Public concern that governmental decisions may be improperly influenced, spurred by various well-publicized scandals, led to sweeping amendments to the New York Legislative Law and State Finance Law[5] last year which were meant to bring closer scrutiny to the area of lobbying in connection with government contracting for goods and services, called procurement lobbying. The new laws are far-reaching and put in place complex reporting requirements for lobbyists and restrictions on activities, as well as recording and policing responsibilities for governmental agencies. Since NYSDOT's expenditures are so large, changes to the procedural requirements of procurement necessarily have huge practical impacts, not necessarily fully understood or contemplated in the development of the new provisions.

This article will examine the implementation of and impacts on the work of NYSDOT of the new requirements set forth in the most recent amendments to the New York Legislative Law and State Finance Law, which will be referred to in this article as the Procurement Lobbying Law. It will describe some practical problems the agency has encountered and addressed and will give recommendations for future fine-tuning of the statute.

Background

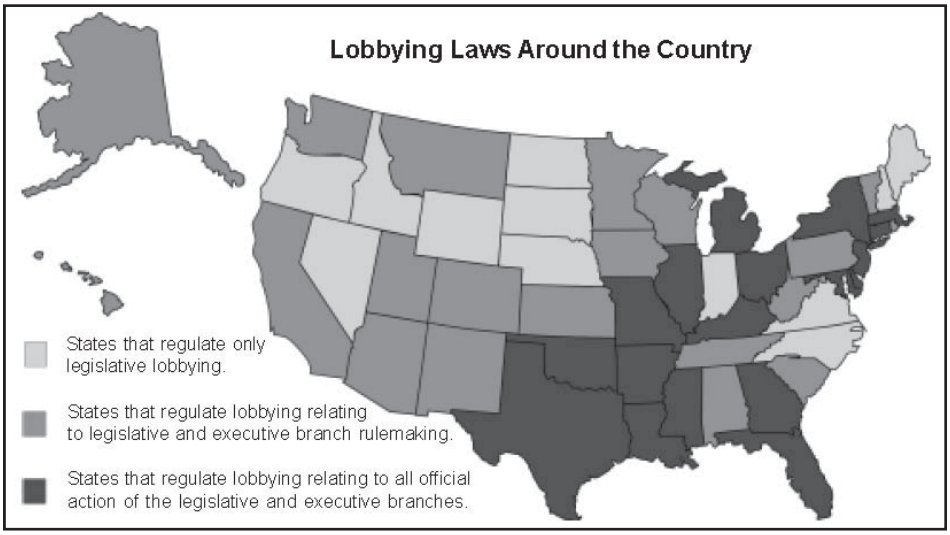
Government lobbying is big business. Lobbyists spend about $1 billion a year in attempts to influence the work of the government.[6] In New York, lobbyists reported expenditures of $149 million in 2005.[7] The federal government[8] and all 50 states have instituted some form of control over lobbying activities.[9]

William A. Howe

Government procurement is very big business. The United States government spends over $230 billion per year on procurement.[10] Combined annual procurement spending for state and local governments is well over $1 trillion.[11] It is no surprise that public anxiety concerning possible improper influence over government spending decisions has led to attempts at increased regulation of lobbying and procurement activities.

On the federal level, the United States Senate passed the Lobbying Transparency and Accountability Act of 2006[12] on March 29, 2006, which would establish a variety of new restrictions and disclosure requirements for lobbying activities. Supporters and opponents have divergent views on the effectiveness of this bill, and, as of the date of the submission of this article, it has not yet been taken up by the United States House of Representatives.

States have also moved to control lobbying activities in connection with government spending. Procurement lobbying is addressed by the laws or executive orders of eighteen states.[13] The following map printed in the March 2005 *Legisbrief* of the National Conference of State Legislatures, shows the status of state lobbying laws as of March 2005.[14]



In New York State, traditional lobbying relating to legislative actions has been regulated by law since 1977, with provisions relating to procurement lobbying added by the most recent amendments in 2005.[15] Governor George E. Pataki had previously acted to regulate procurement lobbying by enacting Executive Order 127.[16] The Executive Order directed state agencies to collect and record information about contacts by persons or organizations attempting to influence the procurement process. Certain types of contracts were exempted, most notably those that were required by law to be awarded to the lowest bidder. Agencies were required to collect information from prime contractors and subcontractors in connection with persons or organizations retained, employed or designated by the companies to attempt to influence a procurement, and also to record any contacts by persons or organizations not so named that attempted to influence a procurement. In addition, each procurement contract subject to the Executive Order was required to include a certification from the awarded vendor that information provided was complete, true and accurate.

Overview of the Procurement Lobbying Law

The Procurement Lobbying Law added detail and complexity to the previously existing requirements. The law covers two related aspects of procurements: (i) activities by the business and lobbying community seeking procurement contracts (through amendments to the Legislative Law)[17] and (ii) activities involving governmental agencies establishing procurement contracts (through amendments to the State Finance Law).[18] The law modified the governance and powers of the Temporary State Commission on Lobbying to give it responsibility for administration and enforcement;[19] established an Advisory Council on Procurement Lobbying to advise the Commission on implementation of the law's provisions;[20] set forth strict penalties for lobbyists who violate the law;[21] adopted provisions for debarment of vendors that violate the law;[22] and provided complex requirements for state agencies to follow in their procurement processes.[23]

NYSDOT Procurements

In order to illustrate the effort that NYSDOT took to come into compliance with the Procurement Lobbying Law, some basic information on the agency's procurements is offered. In state fiscal year 2005-2006, NYSDOT entered into over 2,500 contracts.[24] That year NYSDOT executed 298 construction contracts totaling approximately $1.2 billion. Award of construction contracts is governed by the Highway Law, which allows award only after public advertisement, public bid opening and an agency determination of the lowest responsible bidder.[25] NYSDOT entered into 306 consultant agreements or supplements totaling approximately $250 million. Procurement of engineering, architectural and surveying services is governed by section 136-a of the State Finance Law and other services are governed by section 163 of the State Finance Law. NYSDOT executed 180 contracts and purchase authorizations for commodities and non-professional services totaling approximately $175 million. There were a total of 1,373 contracts or supplements with local governments, industrial development agencies and other miscellaneous entities, and 210 grant agreements were also executed with miscellaneous entities. Finally, roughly 200 agreements with railroads and utilities were processed. These agreements are necessitated by the location in the state right-of-way of rail or utility facilities which will conflict with agency work in that area. The agreements are usually paid on a time and material basis with no bidding or other procedural requirements.[26]

NYSDOT's Compliance with the Procurement Lobbying Law

With the help of the Advisory Council on Procurement Lobbying, NYSDOT's General Counsel, Thomas D. Perreault, the Commissioner of Transportation's designee on the Council, and contracting professionals in the agency addressed the first question in connection with the Procurement Lobbying Law, which was to determine which types of contract transactions are subject to the law.[27] The statute exempts seven types of transactions: contracts for less than $15,000, grants, contracts with not-for-profit corporations, intergovernmental agreements, railroad and utility force accounts, utility project relocation agreements or orders, and eminent domain transactions.[28] A significant change from the requirements of the governor's prior executive order[29] is that construction contracts and other types of contracts which must be awarded to the low bidder are no longer exempt. Most of the exemptions are defined in the law, except for railroad and utility agreements. The nature of railroad and utility agreements, as NYSDOT uses them and as described above, makes the possibility of improper influence negligible. Accordingly, the law's exemption for such agreements is appropriate.

On construction contracts alone NYSDOT executes approximately 1,500 change orders every year affecting $140 million, which made the second most important issue the definition of the types of contract amendments which are subject to the Procurement Lobbying Law. The statute states that its provisions apply to "government procurements" and defines them to include

> 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 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 offerer.[30]

Contract professionals know there are many different types of contract amendments. To use construction contracts as an example, many change orders simply reflect adjustments based on field conditions, and the terms of payment are fully detailed in the original specifications (e.g., structural support piles have to be driven 50 feet deep rather than the 40 feet estimated in the contract, and the specifications provide for payment at the original price bid per foot up to a 100% quantity increase). These changes could result in a substantial cost increase or decrease. Other changes involve adding an item of work that the agency feels is necessary or desirable (e.g., replacing a section of guide rail that is damaged; installing sidewalks on a road paving project upon request and payment by the local municipality). In some cases these types of changes can be paid at the original unit price bid; in others the price must be negotiated with the contractor. A third type of change order would be one that extends the term of the contract and adds new work to the contract (e.g., an extension of an "as-needed" bridge repair contract for an additional year and an additional $1 million).

The broadest interpretation could have been that if the original contract allows amendments in any fashion, all such amendments are authorized and payable and therefore not subject to the Procurement Lobbying Law. The narrowest interpretation would be that no amendments are authorized and payable until they are formally executed and therefore all are subject to the Procurement Lobbying Law. The present working interpretation is somewhere in the middle.

For consultant contracts, amendments are subject to the Procurement Lobbying Law if they increase the contract by $15,000 or more. For construction contracts and for commodities and services contracts, all change orders and amendments are exempt from the Procurement Lobbying Law.[31]

With those two issues addressed, in response to NYSDOT's responsibilities under the Procurement Lobbying Law, NYSDOT prepared a plain language summary of the requirements of the law. The summary was posted on NYSDOT's internal website for broadest agency exposure. Briefings were held with the Commissioner, his staff and high-level managers and training was conducted for Regional Construction Engineers, Regional Design Engineers, Regional Administrative Officers and other contract professionals in the agency. In an effort to educate the construction contracting community, an article was submitted to and published in the New York State Chapter, Inc. Associated General Contractors' magazine.[32]

The remainder of this article will paraphrase ten of the key steps NYSDOT took under the law, discuss the ramifications of each and provide recommendations and comments, as appropriate.

1. NYSDOT must identify a contact person or persons for procurements greater than $15,000.[33]

NYSDOT has modified its advertisements for contract bids or proposals to include at least two contact persons in each advertisement: the employee coordinating the procurement, his or her supervisor, and in most cases, a person in the program area requesting the procurement who can be contacted directly for technical questions. To reduce the work of customizing advertisements for each procurement and since staffing is subject to change, contact persons are identified by their functional title—for example, Supervisor of Construction Contract Unit, currently John Smith at (phone number) or Project Manager in Regional Design Office at (phone number). If no name is provided (not uncommon for the technical contact), vendors are directed to call the general office number provided and ask for the contact person by contract number and functional title.

In theory, no one but the contract professionals in NYSDOT will be contacted in an effort to influence a procurement since NYSDOT personnel at every level have been uniformly trained to immediately direct any caller to the designated contact person. This aspect of the law seems to be the most clearly aimed at the heart of the issue and seems most likely to help bring new focus to interaction between the vendor community and NYSDOT.

2. Bid documents and solicitations must be revised to reflect the Procurement Lobbying Law, must include a summary of agency policy and prohibitions and incorporate guidelines and procedures.[34]

NYSDOT has included these in different ways for different types of advertisements. Where space is readily available (e.g., on NYSDOT's website), extensive guidelines are provided in each advertisement. For advertising media where length must be limited (e.g., newspapers and magazines), the Procurement Lobbying Law requirements are noted briefly in the advertisement with the detailed guidance incorporated by reference to the documents on NYSDOT's website.

3. NYSDOT must seek written affirmation from vendors that they understand the provision of the Procurement Lobbying Law governing contact with agencies in connection with procurements and that they will comply with the law.[35]

This affirmation is required from all vendors that respond to an advertisement for a procurement, not just the vendor that is ultimately awarded the work. NYSDOT collects this affirmation in two different ways. For most contract types, the Procurement Lobbying Law affirmation was added to the list of certifications in the jurat clause on the signature page of the bid or proposal. This consolidation with other required affirmations simplifies the process for vendors and avoids the need for separate

forms with separate signatures. Other contracts must include a separately signed form created for this purpose.[36]

4. Responsibility determinations must consider compliance with the Procurement Lobbying Law as part of vendor responsibility reviews.[37]

Reviews of the responsibility of a contractor or vendor, that is reviews of whether the contractor has the requisite ability and integrity to be awarded an agency contract, have been formalized in NYSDOT since 1986.[38] NYSDOT's Contract Review Unit process is flexible enough to provide for review of the compliance of NYSDOT's vendors with all applicable laws and rules. The Procurement Lobbying Law gives added emphasis to compliance with its provisions, but the agency did not have to change its official orders or procedures to accommodate the new review.

5. Employees must notify the agency's ethics officer or inspector general of any suspected violations of the Procurement Lobbying Law by vendors.[39]

NYSDOT's internal Procurement Lobbying Law procedures and guidelines instruct staff to report all contacts they believe are impermissible to one or both of these individuals.

6. NYSDOT must investigate alleged violations of the Procurement Lobbying Law by vendors and provide them with notice of the investigation and an opportunity to be heard.[40]

NYSDOT's procedures call for an investigation, notice to the vendor if appropriate, and, if it appears a violation has occurred, a determination by NYSDOT's Contract Review Unit.

7. If a knowing and willful violation of the Procurement Lobbying Law is found, the statute requires a finding of non-responsibility and does not permit award of the contract.[41]

The agency's discretion to award a contract if a violation of the Procurement Lobbying Law is found is severely limited. The law allows award under such limited circumstances that a finding of violation amounts to a directed decision. Upon a second violation of the law within four years, the law provides for a four-year debarment of the violator, subsidiaries, and related entities. It is noteworthy that the strict directions given in the Procurement Lobbying Law mirror those in the Labor Law and perhaps are more restrictive.[42] As of the date of this article, no violations of the law have been identified by NYSDOT.

8. NYSDOT must require written disclosure of past violations of the Procurement Lobbying Law in bid solicitation. Failure to timely and accurately disclose information in connection with the Procurement Lobbying Law must be part of any responsibility review.[43]

Initially, NYSDOT believed that this requirement was adequately addressed by the requirement for vendors to submit disclosure questionnaires which call for the notation of any finding of non-responsibility. NYSDOT requires submittal of a Uniform Contracting Questionnaire for construction contractors.[44] All other vendors are required to submit a Standard Vendor Responsibility Questionnaire.[45] The questionnaires are detailed and are submitted annually with a requirement that the vendor update the form whenever significant changes occur. Unfortunately, though, it is possible that an entity submitting a bid or proposal will not have a questionnaire on file, since the forms are only required and closely reviewed in anticipation of a contract award. The wording of the Procurement Lobbying Law forced NYSDOT to conclude that it must require all vendors to submit an additional form with their bid or proposal. The new form, which must also be signed, asks specifically and solely for disclosure of prior findings of non-responsibility due to Procurement Lobbying Law violations.

The collection of new forms from each offerer or bidder does not seem burdensome until the magnitude of the effort and possible consequences are considered. Generally, strict compliance with previously existing paperwork provisions was not required of any vendor unless and until the agency was contemplating award to the vendor. There can be literally dozens of proposals or bids submitted in connection with any one procurement. Theoretically, collecting affirmations and other information from all vendors might be important to focus the business community's attention on the new law. In practice, however, if the award of a contract cannot proceed without forms from unsuccessful bidders, whose motivation to comply will naturally be minimal, the working of the agency will be unnecessarily slowed. Especially at this point in time, when everyone knows there have been no findings of violations of the law, no findings of non-responsibility, and that, therefore, every attestation will be true and accurate, this aspect of the statute adds nothing to the integrity of the process.

9. If a communication with the agency can reasonably be inferred to be an attempt to influence selection of a vendor or terms of procurement, the employee contacted must document the name, address, phone number, principal place of business of the person contacting NYSDOT and note whether the communicator is retained, employed, or designated to contact the agency about procurement and include the record of contact in the procurement record.[46]

Documentation of contacts has been the most burdensome requirement for NYSDOT. The law does not limit

the recording of contacts to ones that are impermissible (i.e., lobbying of someone other than a designated contact person). Permissible contacts to the designated contact person must also be documented if they can be considered an attempt to influence the selection of vendor or the terms of the procurement. This definition is so broad that routine communications between staff-level individuals which occur on every single contract must in many cases be recorded.

"It is necessary for government to continue to assure the public that its funds are being spent in a fair manner and that procurements are not tainted by improper influence."

For example, in the procurement of architectural, engineering and surveying services, firms must be selected solely on the basis of qualifications, with cost negotiated after a firm is selected.[47] Negotiation has been interpreted as affecting "the preparation or terms of the specifications, bid documents, request for proposals, or evaluation criteria for a procurement contract," which makes these routine negotiations reportable under the law.[48] NYSDOT staff have had to document more than 2,000 reportable contacts since the Procurement Lobbying Law was implemented, the vast majority of which are these routine, staff-level contacts. Unfortunately, to the extent the law meant to capture a record of activities defined as lobbying, those contacts may be obscured in a flood of paperwork.

10. Contracts must be amended to include the right of NYSDOT to terminate the contract in the event false certifications under the Procurement Lobbying Law are submitted.[49]

All NYSDOT contracts now contain this reservation.

Conclusion

It is necessary for government to continue to assure the public that its funds are being spent in a fair manner and that procurements are not tainted by improper influence. The Procurement Lobbying Law is formulated to meet that laudatory goal and makes important strides. Since the provisions of the law related to state agency responsibilities expire on December 31, 2007,[50] perhaps amendments can be anticipated. It is hoped that this article has illustrated that future amendments to the law should be specifically targeted at eliminating paperwork exercises that do not add commensurate value. Otherwise, the danger is that the public may become further disillusioned with efforts to prevent wrongdoing that are perceived as simply further slowing the useful workings of government with no reasonable expectation that government integrity has been improved.

Endnotes

1. George E. Pataki, Governor & John F. Cape, Director of Budget, *New York State 2005-2006 Enacted Budget Report*, April 18, 2005, *available at* http://www.budget.state.ny.us/archive/fy0506archive/enacted/FinalEnactedBudget.pdf.
2. *Id.*
3. Ch. 55, 2005 N.Y. LAWS 1419.
4. Statistics are gathered from various databases maintained by NYSDOT and other internal agency sources.
5. Ch. 1, 2005 N.Y. LAWS 1#.
6. Rebecca Randall, *Procurement Lobbying within State Government: An Emerging Trend*, National Association of State Procurement Officials Issue Brief, December 2005.
7. *2005 Annual Report of the New York State Temporary Commission on Lobbying*, *available at* http://www.nylobby.state.ny.us\ann_rept05\annrept.html.
8. *Id.* The primary federal statute governing lobbying activities is the Lobbying Disclosure Act of 1995, which requires lobbyists to register and file semiannual lobbying activity reports. The Act defines a lobbyist as "any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a six month period." There is an exemption if the lobbying income is less than $5,000 (for a particular client) or the total expenses are less than $20,000 (for an organization), and these monetary thresholds are periodically adjusted for inflation.
9. An internet link to all states' laws on lobbying can be found at www.ncsl.org/programs/ethics/ethicsbills.cfm.
10. Rebecca Randall, *Procurement Lobbying within State Government: An Emerging Trend*, National Association of State Procurement Officials Issue Brief, December 2005.
11. *Id.*
12. S. 2349, 109th Cong. (2006).
13. Peggy Kerns & Nicole Moore, *Regulating Vendor Lobbyists: A New Trend*, National Conference of State Legislatures Legisbrief, vol. 13, no. 18, March 2005.
14. *Id.* In Randall's article cited in endnote 6, a list of Internet links to the procurement lobbying statutes or executive orders of the eighteen states with such regulations is provided in its Appendix I. Some of the other useful links provided therein are repeated in this article for easy reference.
15. For a history of lobbying legislation, see Hensel & Romanzo, *Procurement Lobbying Disclosure in New York State: Form over Substance*, Government, Law and Policy Journal, Fall 2006. The Lobby Law was enacted by Chapter 2 of the Laws of 1999, as amended by Chapter 32 of the Laws of 2003, as amended by Chapter 1 of the Laws of 2005.
16. N.Y. Gov. Exec. Order No. 127, *reprinted in* N.Y. Comp. Codes R. & Regs. tit. 9, § 5.127 (2003). This order has since been rescinded.
17. N.Y. LEGIS. LAW §§ 1-c, 1-d, 1-e, 1-h, 1-k, 1-n, 1-o, 1-t, 1-u (McKinney 2005).
18. N.Y. STATE FIN. LAW §§ 139-i, 139-j, 139-k (McKinney 2005).
19. N.Y. LEGIS. LAW §§ 1-d, e (McKinney 2005).
20. N.Y. LEGIS. LAW §§ 1-t, u (McKinney 2005).
21. N.Y. LEGIS. LAW §§ 1-o(d)–(f) (McKinney 2005).

22. N.Y. STATE FIN. LAW § 139-j(10)(b) (McKinney 2005).
23. N.Y. STATE FIN. LAW § 139-j(1)–(11) (McKinney 2005).
24. Numbers of contracts and estimates of dollar amounts are gathered from various databases maintained by NYSDOT and other internal agency sources.
25. N.Y. HIGH. LAW §§ 38(1), (3) (McKinney 2000).
26. N.Y. HIGH. LAW § 10(24-c) (McKinney 2000 & Supp. 2005) (railroad agreements); N.Y. HIGH. LAW § 10(24-b) (McKinney 2000 & Supp. 2005) (utility agreements).
27. The Advisory Council's guidance is *available at* https://www3.ogs.state.ny.us/legal/lobbyinglawfaq/default.asp.
28. N.Y. LEGIS.LAW § 1-c(r) (McKinney 2005).
29. N.Y. Gov. Exec. Order No. 127, *reprinted in* tit. 9 N.Y. Comp. Codes R. & Regs. § 5.127 (2003).
30. N. Y. LEGIS. § 1-c(p)(v) (McKinney 2005).
31. Advisory Council on Procurement Lobbying, *supra* note 27.
32. Richard Albertin, *Procurement Lobby Law: What Does it Mean to You?* Low Bidder, May/June, 2006. Mr. Albertin has been NYSDOT's director of the office of contract management since 2003.
33. N.Y. STATE FIN. LAW § 139-j(2)(a) (McKinney 2005).
34. N.Y. STATE FIN. LAW § 139-j(6)(a) (McKinney 2005).
35. N.Y. STATE FIN. LAW § 139-j(6)(b) (McKinney 2005).
36. The separately required form can be found *at* http://dot.state.ny.us/cmb/consult/css/files/offers_affirmation_&_agreement_form.pdf. 37. N.Y. STATE FIN. LAW § 139-j(7) (McKinney 2005).
37. N.Y. STATE FIN. LAW § 139-j(7) (McKinney 2005).
38. Official Order of the Commissioner of Transportation number 1524, issued July 28, 1986, creating the Contract Review Unit and giving it authority over contract awards and responsibility determinations.
39. N.Y. STATE FIN. LAW § 139-j(8) (McKinney 2005).
40. N.Y. STATE FIN. LAW §§ 139-j(9), (10)(a) (McKinney 2005).
41. N.Y. STATE FIN. LAW § 139-j(10)(b) (McKinney 2005).
42. N.Y. LAB. LAW § 220-b(1)–(5) (McKinney 2002).
43. N.Y. STATE FIN. LAW §§ 139-k(2), (3) (McKinney 2005).
44. Form CCA-1 can be found *at* http://dot.state.ny.us/cmb/contract/files/cca-1.doc.
45. The form developed in consultation with state agencies and the Council of Contracting Agencies, created by Governor's Executive Order 125, is required by the State Comptroller and can be found *at* http://dot.state.ny.us/cmb/consult/formpt1.html.
46. N.Y. STATE FIN. LAW § 139-k(4) (McKinney 2005).
47. N.Y. STATE FIN. LAW § 136a (McKinney 2005).
48. N.Y. STATE FIN. LAW § 139-k(1)(e)(i) (McKinney 2005).
49. N.Y. STATE FIN. LAW § 139-k(5) (McKinney 2005).
50. Ch. 1, § 16, 2005 N.Y. LAWS 1.

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Glossary

Provided by the New York State Office of General Services

1. **Agency Specific Contract**—A contract where the specifications for the product and/or service are described and defined, by the customer, in order to meet the needs of one or more state agencies. These contracts are often limited by the number of participants, quantities and delivery points. (NYS Finance Law § 163(3)(c))

2. **Attorney General ("AG")**—The Attorney General of the State of New York. The duties of the office are set forth in Executive Law § 63. With respect to procurement, the Attorney General, among others, reviews complaints of improper conduct and may also conduct examinations into the performance of a contract.

3. **Backdrop Contract**—A contract with an entity who is part of a pool of qualified vendors who are eligible to participate in a secondary Mini-Bid Award Process or other specified selection process. These are multiple award, centralized contracts where the Office of General Services ("OGS") defines the specifications for a product or services to meet the needs of Authorized Users. A vendor may pre-qualify so that their firm can be among the firms eligible to bid on work initiated by authorized users through a mini-bid award process in which the authorized user develops a project definition outlining the specific requirements of the acquisition, soliciting proposals from the backdrop contractors pre-qualified in the area of expertise called for in the project definition. Selection of a contractor is either made through the mini-bid process or on a single or sole source basis where justification for the same can be made.

4. **Best Value**—The basis upon which bids are evaluated and contracts are awarded for services. This involves a determination which weighs price against the quality and efficiency of the vendor, through the use of objective and quantifiable criteria, developed in advance of the receipt of offers. (NYS Finance Law § 163(1)(j))

5. **Bidder, Offerer or Proposer**—Any individual or other legal entity, or any employee, agent, consultant or person acting on behalf thereof, which submits a bid in response to a bid solicitation or contacts a governmental entity about a governmental procurement during the restricted period. (NYS Finance Law §§ 139-j(1)(h) and 139-k(1)(h) and NYS Legislative Law § 1-c(q))

6. **Bid**—An offer or proposal submitted by a bidder to furnish a described product or service at a stated price for the stated contract term.

7. **Centralized Contract**—Single or multiple award contracts where the specifications for a product or general scope of work are described and defined by OGS to meet the needs of authorized users. Centralized contracts may be awarded on a sole source, single source, emergency or competitive basis. Once the contract is established, procurements may be made from selected contractor(s) without further competition or mini-bid unless otherwise required by the bid specifications or contract award notification. (NYS Finance Law § 160(1)) Centralized contracts have second priority in purchasing pursuant to NYS Finance Law § 163(3).

8. **Commissioner of OGS ("Commissioner")**—The head of OGS. The duties of this office are defined in Executive Law § 200. In the case of bid specifications issued by an authorized user, this term also includes the head of such authorized user or their authorized representative. OGS, through the Commissioner and his staff, provides support services to state agencies, public authorities, municipalities, and other entities during the procurement process by providing centralized contracting and procurement services, developing detailed specifications, evaluating bids and monitoring vendor performance.

9. **Commodity**—Material goods, supplies, products, construction items or other standard articles of commerce (other than printing or technology) which are the subject of any purchase or exchange. (NYS Finance Law § 160(3))

10. **Contacts**—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 procurement. (NYS Finance Law §§ 139-j(1)(c) and 139-k(1)(c))

11. **Contract Award**—The choosing of a contract recipient. Contracts for commodities are awarded on the basis of lowest price to a responsive and responsible offerer. Contracts for services are awarded on the basis of best value to a responsive and responsible offerer. (NYS Finance Law § 163(10))

12. **Costs**—The total dollar expenditure. Article 11 of the NYS Finance Law requires costs to be quantifiable; taking into account, among other things, the price of the given good or service being purchased; the administrative, training, storage, maintenance or other overhead associated with a given good or service; the value of warranties, delivery schedules, financing costs and foregone opportunity costs associated with a given good or service; and the life span and associated life cycle costs of the given good or service being purchased. (NYS Finance Law § 160(5))

13. **Discretionary Buying Thresholds**—Statutory amounts under which agencies may purchase services and commodities, pursuant to § 163 of the NYS Finance Law, without a formal competitive process as long as such purchases are done in compliance with guidelines established by the State Procurement Council. Currently, state agencies may now purchase services and commodities in an amount not exceeding fifty thousand dollars without a formal competitive process; OGS may now purchase services and commodities in an amount not exceeding eighty-five thousand dollars without a formal competitive process and state agencies may now purchase recycled or remanufactured commodities or technology or services or commodities from small business concerns or those certified pursuant to Article 15-A of the Executive Law in an amount not exceeding one hundred thousand dollars without a formal competitive process. (NYS Finance Law § 163(6))

14. **Emergency**—An urgent and unexpected situation where health and public safety or the conservation of public resources is at risk. Such situations may create a need for an emergency contract. (NYS Finance Law § 163(1)(b)) Pursuant to the Procurement Council guidelines, an agency's failure to properly plan in advance which then results in a situation where normal practices cannot be followed does not constitute an emergency.

15. **Emergency Contract**—A contract that is necessary due to an emergency. In such cases, a waiver of the competitive bidding requirements can be approved by the agency head or their designee. These transactions must be documented in the Procurement Record. (NYS Finance Law § 163(10)(b) and § 9A-3 N.Y.C.R.R. 250.10(b))

16. **Invitation for Bids ("IFB")**—A form of solicitation used for procurements where the needed commodities, services or technology can be translated into exact specifications and the award can be made on the basis of lowest price or best value when the best value determination can be made on price alone. (NYS Finance Law § 163(7) and Procurement Guidelines)

17. **Lowest Price**—The basis for awarding contracts for commodities among responsive and responsible offerers. (NYS Finance Law § 163(1)(i))

18. **Minority and Women Owned Business Enterprise ("MWBE")**—Businesses certified under Article 15-A of the Executive Law which are independently owned, operated and authorized to do business in NY; and are owned and controlled by at least fifty-one percent women or minority group members who are citizens of the U.S. or permanent resident aliens. Such ownership must be real, substantial and continuing; and the minorities or women must have and exercise the authority to control independently the day-to-day business decisions of the enterprise. Under § 313 of the Executive Law, state agencies are required to award a fair share of state contracts to these businesses. In addition pursuant to § 163(6) of the State Finance Law, state agencies may purchase services and commodities in an amount not exceeding one hundred thousand dollars from these businesses without a formal competitive process.

19. **Multiple Awards Contract**—A contract that is awarded to more than one responsive and responsible bidder who meets the requirements of a bid specification in order to satisfy multiply factors and needs of authorized users as set forth in the bid document. These factors may include complexity of terms, various manufacturers, differences in performance required to accomplish or produce required end results, production and distribution facilities, price, compliance with delivery requirements and geographic location. A multiple award may be made as a result of a single IFB (i.e., books) or as the result of issuing a single contract for multiple IFBs for similar products (i.e. PCs). NYS Finance Law § 163(10)(c) and § 9A-3 N.Y.C.R.R. 250.10(c)).

20. **Non-State Agency Authorized User**—An entity authorized by New York State Law, contract or the Commissioner to participate in NYS centralized contracts (including but not limited to political subdivisions, public authorities, public benefit corporations, and certain other entities). A complete list of non-state agency authorized users can be found on the OGS website at http://www.ogs.state.ny.us\purchase\snt\othersuse.asp

21. **OGS Procurement Services Group ("PSG")**—The entity within OGS that establishes contracts for commodities, services, technology and telecommunications. PSG is divided into nine teams that focus on various contracting areas such as computer hardware & software, building supplies, vehicles and heavy equipment, clothing & furniture communications services and others.

22. **Preferred Sources**—Entities which have been granted first priority contracting status by statute in order to advance special social and economic goals. The acquisition of commodities and services from these entities that are in the form, function and utility required by a state agency, political subdivision or public benefit corporation (including most public authorities) are exempted from statutory competitive procurement requirements. The entities that have been granted preferred source status are: the Department of Correctional Service's correction industries program; workshops for the blind approved by the Commissioner of the Office of Children and Family Services; special employment programs operated by facilities within the Office of Mental Health and approved by the Commissioner of Mental Health which serve the mentally ill; and workshops for other severely disabled persons approved or incorporated by the Commissioner of Education). (NYS Finance Law § 162)

23. **"Piggyback" Contract**—A contract which is let by any department, agency or instrumentality of the United States government and/or any department, agency, office, political subdivision or instrumentality of any state or states which is adopted and extended for use by the Commissioner in accordance with the requirements of NYS Finance Law (NYS Finance Law § 163(10)(e) and § 9A-3 NYCRR 250.10(e))

24. **Price**—The amount set as consideration for the sale of a commodity or service. This may include, but is not limited to, when applicable and when specified in the solicitation, delivery charges, installation charges and other costs. (NYS Finance Law § 160(6))

25. **Procurement**—The process through which state agencies and other authorized users contract for commodities and services. This process includes the (i) preparation of terms of the specifications, bid documents, request for proposals, and/or evaluation of criteria for a procurement contract; (ii) solicitation for a procurement contract; (iii) evaluation of bids for 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 a procurement contract, or any other material change in the procurement contract resulting in a financial benefit to the offerer. (NYS Finance Law §§ 139-j(1)(e) and § 139-k(1)(e) and NYS Legislative Law § 1-c(p))

26. **Procurement Lobbying**—Any attempt to influence any determination: by a public official, or by a person or entity working in cooperation with a public official, related to a governmental procurement. (NYS Legislative Law § 1-c(c))

27. **Procurement Record**—The documentation that must be kept relating to a procurement by an authorized user. Documentation should include, but not be limited to, the justification for a single, sole or emergency purchase, competitive methodology used, reasonableness of price and contacts during the restricted period. (NYS Finance Law §§ 163(1)(f), 139-j and 139-k)

28. **Proposal**—A bid, quotation, offer or response to a governmental entity's solicitation relating to a procurement. (NYS Finance Law §§ 139-j(1)(d) and 139-k(1)(d))

29. **Recycled Commodity**—A product that is manufactured from secondary materials as defined in subdivision one of § 261 of the economic development law. (NYS Finance Law § 165(3)(a)) NYS Finance Law § 165 creates a preference for purchases of recycled commodities when they meet the form, function and utility of the authorized user after the cost of the commodity has been considered. In addition, pursuant to State Finance Law § 163(6) state agencies may now purchase recycled commodities in an amount not exceeding one hundred thousand dollars without a formal competitive process.

30. **Remanufactured**—A commodity that has been restored to its original performance standards and function and is thereby diverted from the solid waste stream, retaining, to the extent practicable, components that have been through at least one life cycle and replacing consumable or normal wear components. (NYS Finance Law § 165(3)(a)) NYS Finance Law § 165 creates a preference for purchases of remanufactured commodities when they meet the form, function and utility of the authorized user after the cost of the commodity has been considered. In addition, pursuant to State Finance Law § 163(6) state agencies may now purchase remanufactured commodities in an amount not exceeding one hundred thousand dollars without a formal competitive process.

31. **Request for Proposal ("RFP")**—A type of bid document that is used for procurements where factors in addition to cost are considered and weighed in awarding the contract on the basis of best value. (Procurement Guidelines)

32. **Responsibility**—A determination of vendor responsibility must be made by the contracting agency prior to an award of contract pursuant to NYS Finance Law § 163(9). A bidder is determined to be responsible, pursuant to the procurement guidelines, if they have skill, judgment and integrity and are found to be competent, reliable and experienced as determined by the Commissioner. In addition, the bidder must also be determined to be in compliance with §§ 139-j and 139-k of the State Finance Law relative to the restrictions on contacts during the procurement process and the disclosure of contacts and prior findings of non-responsibility under those statutes.

33. **Responsive**—Meeting the minimum specifications or requirements as prescribed in a bid document or solicitation. (NYS Finance Law § 162(1)(d))

34. **Restricted Period**—The period of time commencing with the earliest written notice, advertisement or solicitation of an RFP, IFB or other solicitation from offerers intending to result in a procurement contract with a governmental entity and ending with the final contract award and approval by the governmental entity and, where applicable, the state comptroller. (NYS Finance Law §§ 139-j(1)(f) and 139-k(1)(f)) During this period, NYS Finance Law § 139-k requires a governmental entity to collect and record certain information pertaining to those who contact it in an attempt to influence a procurement and restricts the time frame and manner in which the business community may contact a governmental entity with regard to attempting to influence a procurement. Under the law, the business community is obligated to make only permissible contacts during the restricted period and may only contact those who are designated by the governmental entity regarding a procurement.

35. **Reverse Auction**—A fixed-duration bidding event hosted by a single buyer, in which multiple suppliers compete for business by submitting proposals and competing to offer services or supplies in an open environment via the internet. It is a tool used in industrial business-to-business procurement in which the roles of the buyer and seller are reversed, with the primary objective being to drive purchase prices downward. In an ordinary auction, buyers compete for the right to obtain a good. In a reverse auction, sellers compete for the right to provide a good.

36. **Service**—The performance of a task or tasks, including material goods, which is the subject of any purchase or other exchange. For the purpose of Article 11 of the NYS Finance Law, technology shall be deemed a service. Services, as defined in Article 11 of the NYS Finance Law, shall not apply to those contracts for state printing, architectural, engineering or surveying services, or those contracts approved in accordance with Article 11-B of the State Finance Law. (NYS Finance Law § 160(7))

37. **Single Source**—A procurement in which although two or more offerers can supply the required commodities or services, the Commissioner or state agency selects one vendor over the others for reasons such as expertise or previous experience with similar contracts. The Commissioner or state agency is required to document in the procurement record the circumstances leading to the selection of the vendor, including the alternatives considered, the rationale for selecting the specific vendor and the basis upon which the cost was determined to be reasonable. (NYS Finance Law § 163(1)(h))

38. **Small Business**—A business which is resident in this state, independently owned and operated, not dominant in its field and employs one hundred or fewer persons. This also may be referred to as a "small business concern." (NYS Finance Law §§ 160(8) and 135-a)

39. **Sole Source**—A procurement in which only one offerer is capable of supplying the required commodities, technology or services. (NYS Finance Law § 163 (1)(g))

40. **Specifications**—A description of the physical or functional characteristics or the nature of a commodity or construction item, the work to be performed, the service or products to be provided, the necessary qualifications of the offerer, the capacity and capability of the offerer to successfully carry out the proposed contract, or the process of achieving specific results and/or anticipated outcomes or any other requirement necessary to perform the work. This may include a description of any obligatory testing, inspection or preparation for delivery and use, federally required provisions when the eligibility for federal funds is conditioned upon the inclusion of such provisions and conditions. (NYS Finance Law § 163(1)(e))

41. **State Agency** –All state departments, boards, commissions, offices or institutions but excludes, however, for the purposes of subdivision five of § 355 of the education law, SUNY, and excludes, for the purposes of subdivision a of § 6218 of the education law, CUNY. Furthermore, such term shall not include the legislature or the judiciary. (NYS Finance Law § 160(9)) This term is also defined in NYS Finance Law § 4-a(1)(i) as any department, board, bureau, division, commission, committee, council, office of the state, or other governmental entity with statewide jurisdiction. In addition, NYS Finance Law § 2-a defines the term as any state department, SUNY, CUNY, board, bureau, division, commission, committee, council, office or other governmental entity performing a governmental or proprietary function for the state, or any combination thereof as provided in subdivision two of § 951 of the Executive Law, except any public authority or public benefit corporation, the judiciary or the state legislature.

42. **State Comptroller ("Comptroller")**—The Comptroller of the State of New York (NYS Finance Law § 213(6)) In accordance with § 112 of the NYS Finance Law (or, if this contract is with the State University or City University of New York, § 355 or § 6218 of the Education Law), if a contract exceeds $50,000 (or the minimum thresholds agreed to by the Office of the State Comptroller for certain SUNY and CUNY contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds $10,000, it shall not be valid, effective or binding upon the State until it has been approved by the Comptroller and filed in his office. Comptroller's approval of contracts let by OGS is required when such contracts exceed $85,000 (NYS Finance Law § 163(6)).

43. **State Procurement Council ("SPC")**—A body chaired by the Commissioner which meets at least quarterly and consists of nineteen members (including the Commissioner of OGS, the Comptroller, the Director of Budget and the Commissioner of Economic Development, or their respective designees; heads of other large and small state agencies chosen by the Governor, or their respective designees; and other members appointed by the Governor and the Legislature representing a range of public and private sector interests). The Council is responsible for advancing and continuously improving the state procurement system and developing procurement policy as a means for more efficient and economic government, for social changes, for business development and the promotion of New York State. (NYS Finance Law § 161)

44. **Technology**—A good, either new or used, or service or a combination thereof, that results in a technical method of achieving a practical purpose or in improvements in productivity. (NYS Finance Law § 160(10))

45. **Term**—A specified time period which sets forth the duration of the contract.

46. **Vendor**—The responder to an IFB or an RFP. (Procurement Services website)

Join a Subcommittee

The New York State Bar Association Committee on Attorneys in Public Services (CAPS) invites all interested NYSBA members to consider joining one or more of its subcommittees. The following are brief descriptions of the work of CAPS subcommittees. If you are interested in joining any subcommittee, or would like more information, contact the committee chairs listed below or send an e-mail to CAPS@nysba.org . You may also call the NYSBA Membership Services Department at 518-487-5578.

Administrative Law Judge Subcommittee

This subcommittee focuses on the issues of concern and provision of services to the administrative law judges and hearing officers ("ALJs") that conduct administrative hearings in federal, state, and local agencies in New York State. The subcommittee is the only one of its kind in the New York State Bar Association.

This year, the subcommittee is working on two major projects. First, the subcommittee has developed and is presenting a Continuing Legal Education program on administrative adjudicatory procedures in New York. The CLE program is geared towards the general practitioner and covers administrative adjudication before various state and local agencies. Second, the subcommittee is considering the adoption of a Code of Conduct for state ALJs.

Although the subcommittee is devoted to the interests of ALJs, its membership is not limited—anyone interested in the issues concerning the implementation of administrative justice in New York State is welcome to join.

Hon. Catherine M. Bennett cbennett@nysdta.org
Hon. James T. McClymonds jtmcclym@gw.dec.state.ny.us

Annual Meeting Subcommittee

The Annual Meeting Subcommittee develops and implements continuing legal education programs for presentation at the NYSBA Annual Meeting. The Subcommittee strives to provide programs with broad appeal to attorneys in all areas of government service on timely issues. Recent programs include an annual United States Supreme Court Review, protecting civil liberties during the fight against terrorism, ethics in government and government reform.

Donna Case djcase@nynd.uscourts.gov

Awards Subcommittee

The subcommittee on awards facilitates CAPS' recognition of outstanding efforts by public service attorneys. The subcommittee's primary function is to coordinate the annual presentation of CAPS' Award for Excellence in Public Service. Each year, subcommittee members solicit nominations for the award, review all nominations received, and identify the most worthy nominees. The subcommittee presents a list of finalists to the full CAPS committee, from which the award recipients are chosen. The Award for Excellence is presented each January at the State Bar Association's Annual Meeting.

This year, the subcommittee is also working to expand CAPS' recognition of public service attorneys. The subcommittee is developing a process that will enable CAPS to highlight achievements by public service attorneys who would not likely be considered for the annual award for excellence.

Anthony T. Cartusciello, anthony.cartusciello@sic.state.ny.us
Robert J. Freeman, rfreeman@dos.state.ny.us

Education Subcommittee

The Education Subcommittee coordinates continuing legal education programs, other than the programs for the NYSBA Annual Meeting. In the fall of 2006, the Subcommittee worked on a program on "Administrative Hearings Before New York State Agencies." This program took place at four locations throughout the state and presented information on the administrative hearing process at five state agencies that conduct high-profile or high-volume hearings: the Workers' Compensation Board, the Division of Tax Appeals and the Departments of Health, Environmental Conservation and Motor Vehicles. We welcome the involvement of other NYSBA members interested in coordinating other educational programs.

Hon. James F. Horan, ALJ jfh01@health.state.ny.us
Ira J. Goldstein ira.goldstein@tlc.nyc.gov

Publications Subcommittee

This subcommittee will identify topics and plan to produce books of interest regarding the practice of law before government agencies to inform government and private sector lawyers concerning the policies, processes and precedent set.

Currently, an update of the 2002 *Ethics in Government* Book is underway. Future projects may include books on technology law for government lawyers; procurement in New York; and special projects on particular offices, such as the Office of Counsel to the Governor.

Barbara F. Smith bfsmith@courts.state.ny.us

Government, Law and Policy Journal

Serves as ex-officio members of the *Government, Law and Policy Journal*'s editorial board and liaisons between editorial board and the full Committee on Attorneys in Public Service.

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Legislative Policy Subcommittee

The Legislative Policy Subcommittee serves as a forum for the development of policy affecting the practice of public law and the interests of public service attorneys in all branches and levels of government. This Subcommittee supports the policy program of the New York State Bar Association and develops its own policy positions, including legislation and legislative memoranda as warranted.

This year, the Legislative Policy Subcommittee is working to advance reform of the collateral source rule (CPLR 4545); clarify the public sector attorney-client privilege (CPLR 4503); support equal benefits for same-sex partners of public sector employees, and make public service more economically feasible by enhancing loan forgiveness opportunities. We welcome participation, including referrals of draft legislation and policy issues, from all public sector constituencies in New York State.

David Evan Markus dmarkus@courts.state.ny.us
Lori Mithen-DeMasi mithen@nytowns.org

Special Programs Subcommittee

The Special Programs Subcommittee creates, coordinates and participates in unique initiatives of interest to government lawyers. This new Subcommittee strives to provide programs of interest to those in public service. We are looking for ideas and welcome members who would like participate in a wide range of special initiatives and events.

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Web Subcommittee

Our general goal for the year is to expand the content of the CAPS website, i.e., by providing links to various sites of interest to government lawyers and to make the website more interactive by posting articles and FAQs, while soliciting responses to the articles, other questions to be answered by CAPS members, etc. We welcome the involvement of other NYSBA members interested in developing online resources for government attorneys.

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