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A Message from the Chair

Once again I have received several compliments on our Annual Meeting presentation. My thanks go out to the program co-chairs, the executive committee and our subcommittees for their efforts to continually bring timely and interesting programs as well as speakers to these events. We always strive to present a variety of topics and if you missed this year's meeting, I would strongly encourage you to come to our Fall meeting which is also shaping up quite nicely. Attendees practice in many different areas and there is always time to swap war stories and discuss issues of common interest. We also somehow always manage to have a good time as well.

With constant technological advances being made with products such as Blackberries, online research, WiFi, email, etc. there is a greater demand for speed and quantity of service. I know that this is something that troubles me from time to time in that there is a tendency to try and meet such demands but the quality of the work product is sometimes less than satisfactory. It behooves us all to insist on taking a thorough review of all available research and time to think through issues before advising our clients. The key of course is not to sacrifice quality work for expediency. As my old law school professor used to preach, rule one is to read the statute, rule two is to read the whole statute and rule three is to repeat steps one and two.

As a side note, our subcommittees are becoming a greater resource to the executive committee and our Section as their work continually helps to supply articles for this journal and programs and speakers for our meetings. Anyone interested in joining one or more of our subcommittees should reach out to their chairs to see how you can become a more active member of our Section.

Finally, with a new governor in place and new ideas and programs affecting municipalities being proposed, we should all take an active role in assuring that our clients are properly served/protected as these ideas become law. If you are made aware of proposed legislation that may have such an impact, please contact me or any of our executive committee members so that we can vet and comment if appropriate. This is an important service that we are entrusted with and can help our membership tremendously if handled in a timely fashion. We all are ready, willing and able to assist in this regard.

Thomas Myers

Inside

From the Editor

Mingling with my colleagues at the Annual Meeting program in New York City reinforced my appreciation of the diversity of practice areas represented in the Municipal Law Section. On our executive committee, for example, members specialize in land use, real estate, labor and employment and environmental law, public finance, ethics and general municipal law and practice in the public and private sectors and academia.

As emphasized by Tom Myers in his Message from the Chair, our Section prides itself on presenting programs and publishing journals that cater to these divergent interests. At the recently concluded Annual Meeting, attendees earned six (6) continuing legal education credits and heard presentations on compliance with Phase II storm water regulations; federal and state developments in cable franchising and telecommunications law; competitive bidding; recent land use cases; home rule; lobbying and the Public Authorities Accountability Act.

Similarly, the Winter 2007 issue of the *Municipal Lawyer* focuses on issues of labor and employment law, ethics, procurement practices and public finance. Sharon N. Berlin, a partner at Lamb and Barnosky, LLP reviews United States Supreme Court and New York Court of Appeals decisions on unlawful employment retaliation and public sector bargaining respectively and summarizes their impact on public sector labor law. Conflicts of interest and other ethical issues commonly faced by local legislators is the subject of "Ethics and the Municipal Legislator" by Noran J. Camp, Ethics and Employment Counsel in the Office of the General Counsel, New York City Council.

The constitutionality of freezing wages to alleviate a municipal fiscal crisis is examined by A. Vincent Buzard, immediate past President of the New York State Bar Association and a partner at Harris Beach, PLLC. Finally, recent reforms to the government procurement process are the focus of an article by Teneka E. Frost, Post-Graduate Fellow in Government Law and Public Policy at the Government Law Center of Albany Law School. Ms. Frost analyzes the provisions of the Omnibus Lobbying Reform Act, otherwise known as the "Procurement Lobbying Law," which for the first time imposes restrictions on those who attempt to influence procurement contracts in New York.

As always, we welcome your comments on these articles and solicit your submission of similar articles in your area of expertise.

Lester D. Steinman

2006 in Review—Significant Labor and Employment Law Decisions Affecting Municipal Employment

By Sharon N. Berlin

During the 2006 calendar year, the United States Supreme Court issued two significant decisions relating to claims of unlawful employment retaliation and the New York Court of Appeals issued several decisions relating to public sector bargaining obligations. The following article summarizes these decisions and their impact upon employment in the public sector.

I. The Supreme Court Decisions

First, in a decision dated May 30, 2006, the Supreme Court imposed what may become a significant limitation on the ability of a public employee to bring a claim of First Amendment retaliation in violation of 42 U.S.C. section 1983. In *Garcetti v. Ceballos*,[1] the Court explained that, while government employees have a right pursuant to the First Amendment to speak as citizens on matters of public concern, "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the United States Constitution does not insulate their communications from employer discipline." Thus, "restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[2]

The Supreme Court further defined the two-part inquiry it had previously articulated in *Pickering v. Board of Education of Township High School District 205, Will County*[3] and its progeny, for determining whether constitutional protections apply to public employee speech. First, did the employee speak as a citizen on a matter of public concern? If the answer is no, the employee has no First Amendment cause of action based on his/her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises.

Second, does the governmental employer have an adequate justification for treating the employee differently from any other member of the general public? This consideration reflects the importance of the relationship between the speaker's expressions and employment. A governmental entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.[4]

Thus, the *Garcetti* decision appears to have narrowed the types of actionable retaliation pursuant to 42 U.S.C. section 1983 to those claims where the employee's speech is made as a member of the public and the wrongdoing disclosed is outside the employee's official duties.

Just a few weeks later, the Supreme Court issued its decision in *Burlington Northern & Santa Fe Railway Co. v. White*,[5] in which it adopted a broader standard for determining retaliation claims pursuant to Title VII of the Civil Rights Act of 1964. Title VII contains an anti-retaliation provision forbidding discrimination against an employee or job applicant who has made a charge, testified, assisted or participated in a Title VII proceeding or investigation.[6] The Court held that Title VII does not confine the actions and harms it forbids to only those that are related to employment or occur at the workplace, but rather also includes those that would have been "materially adverse" to a reasonable employee or job applicant.

While no definition of the term "materially adverse" was provided, the Court made it clear that this must be something more than trivial harms or minor annoyance. As a practical matter, the Court's decision may make it less likely for summary judgment to be granted in these types of cases because it will be necessary to make a factual inquiry using an objective reasonable employee standard to determine whether an individual was a victim of retaliation.

II. New York Court of Appeals Decisions

The New York Court of Appeals issued several decisions in 2006 concerning bargaining obligations in the municipal context. In *Professional Staff Congress-City University of New York v. New York State Public Employment Relations Board*,[7] the Court determined that a union's waiver of the right to negotiate certain subjects remained in effect after expiration of the parties' collective bargaining agreement. The Court found that, pursuant to the *Triborough* amendment to the Taylor Law,[8] the assumption is that all terms of a collective bargaining agreement remain in effect during bargaining for a successor agreement. The Court specifically noted, though, that it had not resolved the question of whether the obligations imposed by the *Triborough* amendment are reciprocal on a union given that the

Triborough amendment is silent as to whether it is an improper practice for a union to fail to continue the terms of an expired agreement. The Court stated: "Given the structure of the *Triborough* amendment, it may well be that a union cannot be found to have committed an improper practice for failing to adhere to a term of an expired CBA. We need not resolve this question here because this case does not involve a charge against a union; . . . "[9]

In a trilogy of cases, the Court of Appeals also examined whether negotiations over statutory obligations were mandatory subjects of negotiation. In *Poughkeepsie Professional Firefighters' Association v. New York State Public Employment Relations Board*,[10] the Court examined the negotiability of a union proposal for an arbitrator to resolve disputes over a firefighter's underlying claims for General Municipal Law Section 207-a benefits and to decide all allegations and defenses including assertions regarding timeliness; to hold trial-type evidentiary hearings with witnesses; and to assign burdens of proof according to the type of determination at issue. PERB had determined that the proposal was nonmandatory because it did not seek to establish a review procedure but rather a re-determination procedure in delegation of the City's nondelegable statutory right to make initial determinations. The Association commenced an Article 78 proceeding and the Supreme Court granted the petition in its entirety. The Appellate Division reversed the Supreme Court' judgment on the law and dismissed the petition. The Court of Appeals found no irrationality in PERB's conclusion that the disputed demands set forth a re-determination procedure in derogation of the City's nondelegable statutory right to make initial determinations redundant and therefore affirmed the Appellate Division's decision.

Similarly, in *Patrolmen's Benevolent Association of City of New York v. New York State Public Employment Relations Board*, and *Town of Orangetown v. Orangetown Policemen's Benevolent Association*,[11] decided the same day as *Poughkeepsie Professional Firefighters' Association*, the Court of Appeals held that police discipline may not be a subject of collective bargaining under the Taylor Law when the Legislature has expressly committed disciplinary authority over a police department to local officials. Civil Service Law Section 76(4) provides that Civil Service Law Sections 75 and 76 shall not "be construed to repeal or modify" preexisting laws and among the laws grandfathered are several that provide expressly for the control of police discipline by local officials in certain communities. In so holding, the court noted that "[w]hile the Taylor Law policy favoring collective bargaining is a strong one, so is the policy favoring the authority of public officials over the police."[12] The Court went on to state that the New York City Charter and Administrative Code and the Rockland County Police Act state the policy favoring management authority over police disciplinary matters in clear terms and that these "legislative commands are to be obeyed even where the result is to limit the scope of collective bargaining. The issue is not, as the unions argue, whether the enactments were intended by their authors to create an exception to the Taylor Law; obviously they were not, since they were passed decades before the Taylor Law existed. The issue is whether these enactments express a policy so important that the policy favoring collective bargaining should give way, and we conclude that they do."[13]

Finally, the Court of Appeals was scheduled to hear oral argument on January 3, 2007 on an appeal of the decision of the Appellate Division, Second Department in *Transportation Workers Union of America, Local 100 v. New York City Transit Authority.*[14] In *TWU,* the Appellate Division upheld a PERB decision[15] that a public sector employee has the right to union representation during an investigatory interview that may reasonably be expected to lead to discipline. The Court of Appeals' decision will have an important impact on the rights of public employees and employers.

Endnotes

1. 126 S. Ct. 1951 (2006).
2. *Id*. at 1954.
3. 391 U.S. 563, 88 S. Ct. 1731 (1968).
4. The Supreme Court did not decide whether the *Ceballos* analysis would apply in the same manner to a case involving speech related to scholarship or teaching, and specifically left that issue open for future determination. 126 S. Ct. at 1962.
5. 126 S. Ct. 2405 (2006).
6. 42 U.S.C. § 2000e-3(a).
7. 7 N.Y.3d 458, 824 N.Y.S.2d 577 (2006).
8. The *Triborough* amendment is codified at Civil Service Law Section 209-a(1)(e) and makes it an improper practice for an employer to fail to continue the terms of an expired agreement.
9. 7 N.Y.3d at 468, n.3.
10. 6 N.Y.3d 514, 814 N.Y.S.2d 572 (2006).
11. 6 N.Y.3d 563, 815 N.Y.S.2d 1 (2006).
12. 6 N.Y.2d at 575-76, 815 N.Y.S.2d at 6.
13. 6 N.Y.2d at 576, 815 N.Y.S.2d at 6.
14. 27 A.D.3d 11, 811 N.Y.S.2d 71 (2d Dep't 2005).
15. 35 PERB ¶ 3029 (2002).

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Ethics and the Municipal Legislator

By Noran J. Camp

Public officials and employees at all levels of government often face difficult ethical issues. Local legislators are no exception. Over the years, the laws of the State and many municipalities,[1] including New York City, have furthered the public policy that legislators and other government officials should not utilize their positions to advance their private interests. Indeed, as early as 1830, the laws of New York City prevented the Members of the Board of Aldermen from having any interests in contracts funded pursuant to local ordinances.[2] Now some local laws, and to a much lesser extent state laws, address comprehensively the conflicts of interest that local legislators and other municipal employees face.

This article touches upon some of the most common conflict of interest issues that local legislators face and the answers to these ethics questions for legislators—answers which are sometimes different from those that would apply to other municipal employees. In particular, this article examines how ethics laws guide local legislators when their official duties overlap with private interests, when they face decisions on what, if any, employment opportunities and business interests to pursue, on what gifts they may or may not receive, and how to avoid problems with misuse of municipal resources for political purposes, while accommodating the reality that most local legislatures are political bodies.

I. Ethics Laws Applicable to Municipal Legislators

The basic ethics laws applicable to municipal legislators in New York State are found in General Municipal Law §§ 800-813,[3] in the various ethics codes that may have been enacted by individual local governments, including the Advisory Opinions of local ethics boards,[4] and in the case law. The GML itself bars municipal officers and employees from, among other things, having "interests" in municipal contracts,[5] with numerous exceptions.[6] Case law and individual municipal ethics codes address issues such as conflicting or "dual" employments and post-employment restrictions. State or local campaign finance laws govern gifts to legislators' campaigns.

II. Guarding Against Decisions Based on Legislators' Personal Interests

Local legislators in New York State are often asked to vote on or take other official action on a wide variety of matters, ranging from budget and land use matters to tax issues and the enactment of local laws affecting businesses and communities. These legislators make decisions that have consequences for residents throughout their municipality—including their own interests. This would be the case, for example, in a vote on an across-the-board property tax. A legislator who is a property owner would be directly affected by this vote. Yet, these legislators would not face a conflict of interest because of the broad applicability of the measure.[7] Inevitably, however, there are also times when local legislators are in a position to take official action on a matter that more narrowly affects their own private financial or other interest. This would be the case, for example, for a legislator who owned land that was the subject of a narrow rezoning proposal pending before the legislature. Similarly, it would be the case for a legislator whose partner or spouse served on a board of directors of an organization funded by the municipality.

The ethics laws provide a range of guidance to legislators who face the question of what official action they may take when it could affect a narrow personal interest. The range of answers reflects the important yet competing interests at stake. On the one hand, there is a need to ensure that legislators act in furtherance only of their official duties. The laws must protect against the possibility that a legislator's action might be influenced by his or her own prospect of personal gain or loss. On the other hand, the laws must not produce a result that disenfranchises individuals or the entirety of the legislator's constituency.

Various court opinions, informal Attorney General Opinions[8] and local laws have arrived at different conclusions about the restrictions that should be imposed on local legislators with a narrow private interest in a matter. The opinions range from requiring legislators to recuse themselves completely from matters where the legislator has a specific private interest, to a requirement that the legislator simply disclose the private interest on the record.

For example, a New York Court found that a municipal legislator who had an interest in a firm that sought a permit to develop property should be disqualified from voting on that permit.[9] On the other hand, the mere fact that local legislators are employed by an entity with

business before the local legislature will not necessarily require their recusal, especially if their role as employees have nothing to do with the issue before the legislature, and their salaries will not be affected by action of the legislature.[10]

The courts have shown a willingness to look deep into a transaction to find a possible conflict. In *Rose v. Eichhorst*,[11] for example, the Court of Appeals found that the County's tax sale to a member of a Town Board located within the county, was voidable. The Court relied on the reality that the Town Board had the initial duty to pass the budget and collect the needed taxes for itself and for the County, while the County had the responsibility for collecting those taxes when they became delinquent, through the tax sale at issue, among other means.[12] Similarly, informal Opinions by the New York State Attorney General have favored recusal over disclosure in cases where a legislator's vote would affect his or her own personal financial interest in a direct way.[13]

In New York City, the ethics guidance, in appropriate cases, allows for a legislator to disclose his or her private interest and proceed with official legislative action. The New York City Charter recognizes that the power, and the duty, to participate in legislative matters are among the "essential functions they have been elected to perform."[14] Accordingly, the Charter recognizes that there are circumstances where a legislator has a permissible interest in an entity, but that a contemplated official action could directly affect that interest. Rather than adopting a blanket rule requiring a legislator to recuse—the Charter does require the blanket recusal of all other public servants in these circumstances—the Charter permits the legislator in such a case to participate in legislative activity provided that the legislator fully discloses his or her interest at the time he or she engages in it.[15]

Thus, under the New York City law, a legislator who has an interest in land proposed for a rezoning would be able to vote on the rezoning provided that he or she disclosed his or her interest on the record of the New York City Council and to the City's Conflicts of Interest Board at the time of his or her vote.[16] The New York City disclosure rule applies only to legislative activity, however, and not to other official action that a City Council Member might take, because the rule is intended to prevent voter disenfranchisement. The Council Member would not be allowed, for example, to use his or her official position to advance his or her own real estate development project before other municipal agencies or to lobby his or her colleagues in the City Council on the matter.

III. Outside Employment and Positions

Municipal legislators in New York State, because of their part-time status, have the possibility of maintaining outside employment or business interests. Conflict issues arise if legislators' outside employment or business interests relate to government business or otherwise intersect with their responsibilities as legislators. While there are many gray areas for legislators navigating outside employment, there are a number of clear rules for legislators to follow.

First, while no state statute absolutely forbids municipal legislators from working for another arm of municipal government, nevertheless, it is a violation of the state's common law for a person to hold two positions when one is subordinate to the other, or there is some other "inherent" conflict.[17] In addition, numerous state statutes prohibit the dual holding of specific municipal offices, such as a village trustee serving on the village's zoning board or planning board.[18]

Under the common law, it generally would be inappropriate for a local legislator to work for a local agency of the same municipality because of the relationship between the legislative and executive branches, and the authority that a legislator typically has over executive branch agencies and employees. In essence, the broad authority generally exercised by local legislatures over other municipal agencies would leave the legislator in the position of being his or her own boss. In *Dykeman v. Symonds*,[19] for example, a municipal employee was elected to her municipal legislature. The legislature, in turn, had authority over her salary as a municipal employee. The court accordingly required the employee to resign from her municipal post if she wished to serve as a municipal legislator and rejected her argument that she could simply recuse herself from matters relating to her municipal post.

The court determined that "the possibility of wrongdoing and the principle involved" were sufficient to bar her from holding both posts. But the court also made reference to the new legislator's "duty" to participate in the legislature's consideration of matters relating to her post. In other words, a local legislator cannot avoid a conflict of interest simply through routine recusal because the result would disadvantage the municipality and the legislator's constituents. The court further rejected the legislator's argument that making her choose between her municipal post and a seat in the local legislature would disenfranchise the voters of her district. The court made clear that this was a matter of choice, not disenfranchisement, and that "the choice lies with her."[20]

Second, a legislator may not use his or her official position or municipal resources to advance a matter related to his or her private business or employment. For example, a legislator may not call prospective clients using his or her official title, use his or her official stationary for private matters, or try to gain advantage for a client because of his or her official position.

Third, local legislators must be careful before engaging in any outside activities with entities that have busi-

ness dealings with the municipality. For example, a local legislator generally should not engage in private work that will eventually be reviewed by municipal employees over whom he or she has some authority.[21] And, in New York City, a local legislator must seek approval from the Conflicts of Interest Board before accepting a paid position with any organization that has a municipal contract or receives funding from the municipality.[22]

Fourth, legislators may not appear in their private capacity before municipal agencies. Since local legislators generally have some authority over all local agencies, such an appearance would essentially be an appearance before themselves, or before someone they have some authority over. For example, a legislator should not, as part of a compensated private law practice, represent a developer seeking approval from the local city planning agency, nor represent a parent in a family court action involving the local child welfare agency.[23] New York City has gone farther, and bars legislators from appearing as attorneys against the interest of the City regardless of whether they are paid or not.[24]

IV. Gifts to Legislators

New laws and rules severely restrict gifts to legislators by lobbyists and others doing business with municipal governments in the State.[25] The State bans gifts over $75 made by anyone to local legislators (and to all other public servants in the State), if a reasonable person could view the gift as being intended to influence the legislator, or as being a reward for official conduct.[26] A separate provision bans gifts over $75 to public servants if made by *lobbyists* regardless of whether the gift seems intended to influence or reward.[27] New York City now has the same gift structure, although the threshold is lower for non-lobbyist gifts ($50),[28] and the threshold is now zero ($0) in the case of lobbyists.[29] Also, New York City's lobbyist gift ban extends to the spouses, domestic partners and unemancipated children of the lobbyist.[30] Notwithstanding these prohibitions, there are a number of challenging gift questions for legislators.[31]

For example, there are some gifts that are not considered to be gifts to the individual, but rather gifts to the municipality. Furthermore, because of their unique positions as community leaders or elected officials, legislators are expected to attend cultural, civic and other community events.[32] In New York City, the Conflicts of Interest Board has established by rule that elected legislators (indeed, all elected officials) may attend such events.[33]

V. Misuse of Municipal Resources for Campaign or Political Purposes

Legislatures are uniquely political bodies. Their members are there as a result of their civic and political activities. Thus, legislators as a general rule are free to engage in political activities, just like members of the public. When a legislator's work status is officially part-time, there is no legal concern over whether or not the legislator is engaging in political conduct during "work" hours because there would likely be no set working hours.[34]

Nevertheless, state laws prohibit a *state* legislator from using public resources for political activities.[35] This would include the use of government phones to make campaign-related telephone calls, and the use of government supplies and office space for campaign purposes. State law appears to have left the regulation of such activities by *municipal* legislators up to local ethics codes. The New York City code prohibits such conduct as is prohibited state legislators. It also bars local legislators even from *asking* (much less coercing or compelling) a subordinate to participate in a political campaign or to make a political contribution.[36] Additionally, legislative employees are barred from working on political campaigns unless they do so voluntarily and on their own time.

It is worth noting that a critical municipal resource is the time and effort of its employees. Legislators must be careful with this resource too, and cannot put it to work for a private purpose. New York City, for example, flatly bans the practice of assigning non-City work to City employees.[37]

VI. Conclusion

The vast majority of municipal elected officials work diligently to comply with state and local ethics laws and rules. Because these laws are often complex, it is the job of the municipal lawyer to advise legislators on how to avoid conflicts of interest and at the same time fulfill their legislative responsibilities. The rules governing conflicts of interest must balance the local government's interest in having safeguards against undue private influences with the interest of the public in having effective and complete representation, recognizing that legislators are also private citizens with private interests.

Endnotes

1. By "municipal," I am referring to all local governments within New York State, including counties, cities, towns, villages, school districts and the like, as defined at General Municipal Law § 800(4).
2. Laws of 1830, Chapter 22, Section 11, discussed in *Report of the Special Committee on Ethics and Standards, New York City Council* (Feb. 3, 1959), reproduced in *The Board of Ethics of the City of New York: Council Report – Code of Ethics and Related Laws*, at 14 (1963).
3. These provisions do not apply in New York City, GML § 800(4), where municipal officers and employees are governed by the ethics standards set out at Chapter 68 of the City's Charter.
4. GML § 806(1)(a) *requires* each county, city, town, village, school district and fire district to adopt a code of ethics to guide its officers and employees (and *permits* all other municipalities to do so).
5. GML § 801(1).

6. GML § 802. *See generally* Mark Davies, *Legal Developments: Article 18 of New York's General Municipal Law: The State Conflict of Interest Law for Municipal Officials*, 59 Alb. L. Rev. 1321 (1996).

7. *See, e.g., Town of North Hempstead v. Village of North Hills*, 38 N.Y.2d 334, 344, 379 N.Y.S.2d 792, 798 (1975) (ordinance that affects most village property owners does not require recusal of local legislators who are also property owners).

8. The New York State Attorney General's Office from time to time issues Opinions regarding the interpretation of these provisions. But since the AG's Office is not formally charged with interpreting the statute for municipal officers and employees, its Opinions in this area are considered "informal."

9. *See Tuxedo Conservation and Taxpayers Association v. Town Board*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep't 1979). Actually, in this case the legislator did not have an "interest" in the firm as defined by the GML, but the court found that his interest was enough to violate the "spirit" of the law.

10. *See DePaolo v. Town of Ithaca*, 258 A.D.2d 68, 694 N.Y.S.2d 235 (3d Dep't 1999).

11. 42 N.Y.2d 92, 396 N.Y.S.2d 837 (1977).

12. "The [Town Board member's] action, through his membership on the town board, in preparing the town budget and thus initiating the collection of the taxes, must be considered as part of the approval and authorization culminating in the county tax sale." *Rose v. Eichhorst*, 42 N.Y.2d 92, 396 N.Y.S.2d at 837, 840 (1977).

13. *See, e.g.*, Att'y Gen'l Opn. (Inf.) # 97-5 (in an appropriate case in which a city council member's "ability to make decisions solely in the public interest" is compromised, "recusal is the appropriate course of action").

14. *See* COIB Adv. Op. # 94-28 (revised).

15. *See* Charter § 2604(b)(1)(a).

16. *See* COIB Adv. Op. # 94-28 (revised).

17. *See* Att'y Gen. Op. (Inf.) # 2002-21, citing *O'Malley v. Macejka*, 44 N.Y.2d 530, 406 N.Y.S.2d 725 (1978).

18. Village Law §§ 7-712(3), 7-718(3). *See generally* Mark Davies, *Non-Article 18 Conflicts of Interest Restrictions Governing Counties, Cities, Towns, and Villages Under New York State Law*, NYSBA/MLRC Municipal Lawyer, Winter 2006, at 5.

19. 54 A.D.2d 159, 388 N.Y.S.2d 422 (4th Dep't 1976).

20. Some municipalities, including New York City, take care of this problem by flatly prohibiting legislators from holding posts in any municipal agencies. *See* NYC Charter § 23; *see also Held v. Hall*, 190 Misc. 2d 444, 737 N.Y.S.2d 829 (Sup. Ct. Westchester Cty. 2002).

21. *See, e.g.*, Att'y Gen'l Op. (Inf.) # 98-30 (June 29, 1998) ("conflict of interest arises when a [county supervisor], acting in his private capacity, installs septic systems for private individuals and the systems are subject to review by county employees").

22. *See* NYC Charter § 2604(a)(1)(b) & 2604(e) (COIB waiver).

23. *See* GML § 805-a(1)(c) (municipal officer shall not, for compensation, enter into an agreement to render services in relation to any matter before a municipal agency over which he has jurisdiction).

24. NYC Charter § 2604(b)(7). Other such appearances (that is, not in a legal representation), are barred only if they are compensated. NYC Charter § 2604(b)(6).

25. The U.S. Congress and other government entities are also moving to update their conflicts of interest laws and rules, especially in regard to lobbyists and those having business dealings with the governmental body, including bans on so-called "pay to play" practices. *See, e.g.*, H. Res. 6 (Jan. 5, 2007) (adopting new ethics rules for the U.S. House of Representatives); Senate Bill No. 1 entitled "Legislative Transparency and Accountability Act of 2007 (January 18, 2007) (by a vote of 96 to 2, the Senate passed a bill addressing lobbyist gifts and participation in legislators' travel, post-employment restrictions and other matters); Conn. Pub. Act 05-5 (prohibiting "pay to play" practices, among other reforms). And, on January 24, 2007, New York State's new Governor, together with the leaders of both legislative houses, announced that they would pass sweeping ethics legislation to address lobbyist gifts, nepotism, political hiring, solicitation of political contributions, revolving door practices, and other matters.

26. *See* GML § 805-a(1)(a).

27. Legislative Law § 1-m.

28. NYC Charter § 2604(b)(5); COIB Rule 1-01(a).

29. NYC Admin. Code § 3-225 (effective Dec. 10, 2006).

30. NYC Admin. Code §§ 3-213(c)(1) & 3-225.

31. Also, while the burden of compliance with the general gift bans lies with the legislators (no public servant shall receive the gift), the burden of compliance with the lobbying gift ban lies with the lobbyists (no lobbyist shall offer or give the gift).

32. *Cf.* State Ethics Commission Advisory Opinion # 94-16. The State's Public Officers Law bans gifts to state officials, but it is virtually identical in wording to the GML gift ban to municipal officials. This Opinion acknowledges that it would be appropriate for a statewide elected official "to attend a function or event in his or her official capacity sponsored by any person or organization."

33. COIB Rule § 1-01(g) ("a public servant who is an elected official or a member of the elected official's staff authorized by the elected official may attend a function given by an organization composed of representatives of business, labor, professions, news media or organizations of a civic, charitable or community nature, when invited by the sponsoring organization").

34. This is not to say that a legislator who misses important votes or hearings to engage in campaign activities is not neglecting his or her official duties, but the consequences of such activity generally is left to be meted out at the polls.

35. *See* Public Officers Law § 74.

36. *See* NYC Charter § 2604(b)(9)(b) (political activity), and (11)(c) (political contributions).

37. NYC Charter § 1118 ("No officer or employee of the city . . . shall detail or cause any officer or employee of the city . . . to do or perform any service or work outside of the public office, work or employment of such officer or employee"). Similarly, Charter § 2604(b)(2) and (3) and COIB Rule 1-13(b) prohibit the use of City resources for private purposes. *See In re Reid*, COIB Case No. 2002-188 (July 18, 2002) (finding such misuse of city workers to be a violation of NYC Charter § 2604(b)(2) and (3)). *See also* N.Y. Const. art. VIII, § 1 (prohibiting counties, cities, towns, villages, and school districts from giving or loaning any money or property to or in aid of any individual or private corporation, association, or undertaking).

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Second Circuit Upholds Municipal Wage Freeze

By A. Vincent Buzard

On September 21, 2006, the Second Circuit Court of Appeals held for the first time that increases in wages provided for in contracts can be constitutionally frozen as a part of an effort to alleviate a municipal fiscal crisis.[1] Previously, the Second Circuit had held that legislation by the State of New York to freeze or defer wages as a part of a claimed state fiscal crisis was unconstitutional.[2] Because a number of municipal governments in New York are in or near a fiscal crisis, the validity of a wage freeze is naturally of interest to municipalities and the lawyers who advise them. I was privileged to defend the validity of the wage freeze and was pleased to be asked to write this article by the editor.

The wage freeze was imposed upon the employees of the City of Buffalo by the Buffalo Fiscal Stability Authority, which is a public authority created by legislation enacted on July 3, 2003 by the New York State Legislature. In Buffalo, the authority is referred to as the "Control Board" and I will do so here.

The creation of the Control Board was a response by the legislature to a deepening fiscal crisis in Buffalo which had been studied by the New York State Comptroller at the request of the legislature. The Comptroller found that Buffalo had been operating with a structural deficit for several years and was only able to fund its operations with the use of reserves and increasing State aid. The Comptroller found that Buffalo was confronted with ever increasing budget deficits in part due to the City's population decline and poor economy. He further found that Buffalo's fiscal crisis was not likely to be remedied by the City alone and recommended the creation of an authority with the power to freeze wages.

In enacting the legislation, the legislature made specific findings, including finding that the City was in a fiscal crisis and that Buffalo could not remedy its dire financial condition alone; that the welfare of the inhabitants of the City was seriously threatened; and that the crisis could not be resolved absent further assistance from the State.

The Control Board was given oversight of the City's finances, including the power to approve all contracts and monitor four-year financial plans. The Control Board was also given the power to freeze hiring, and to freeze the wages granted under collective bargaining agreements.

Under The Control Board, various belt-tightening measures were instituted, including freezing hiring and layoffs. Even after these measures, the Control Board found that for the 2004/2005 fiscal year, Buffalo projected a budget gap of $20 to 30 million dollars higher than previously estimated and that the budget gap for the next four years would exceed $250 million. As a result, the Control Board invoked the power to freeze wages and determined that a wage freeze was "essential to the maintenance of a financial plan." The statutory standard was that the Board could freeze wages if it found that such a freeze was necessary to the maintenance of a four-year economic plan. The Board so found and froze the wages as of April 21, 2004.

The Buffalo Federation of Teachers brought a lawsuit in Federal Court alleging that the freeze was unconstitutional under the impairment clause of the Constitution and that the freeze also violated equal protection and due process. However, the principle argument was on the question of impairment. The District Court granted our motion for summary judgment finding that the State had acted properly within its police power to address the City of Buffalo's dire financial situation.

While the Constitution prohibits states from passing any "law impairing the obligations of contracts" (U.S. Constitution Article 1, Section 10, Clause 1), the prohibition is not absolute. The Courts have held that the contract clause preserves "the inherent police power of the state to safeguard the vital interest of its people"[3] and that the contract clause must be accommodated to the police power to protect the lives, health, morals and general welfare of the people. The three prong test is (1) whether the impairment is substantial; (2) whether it serves a significant public purpose; and (3) whether the means chosen are reasonable and appropriate.

In the *Teachers* case, all of the contracts had actually expired, but the expired contracts had provided for annual step increases. Because the Taylor Law provides that existing contracts will remain in effect until a new contract has expired, the Courts have held that that statute itself is a part of the contract and therefore even though the increases are provided for by expired contracts, they are a contract right.

The District Court held that the impairment was substantial and we did not argue otherwise on appeal. On the second prong of the test, the plaintiff teachers' union essentially conceded that Buffalo was in a fiscal crisis.

The argument centered on the third test, which was whether the means chosen to accomplish the purpose

were reasonable and appropriate. The teachers' union relied on the cases in which the Second Circuit had found that the State had unconstitutionally impaired the wages of court reporters by "lagging" their pay, that is, by delaying their pay.[4] In both of those cases the Court had held that the State had other alternatives to impairing wages, and that one of the alternatives included the raising of taxes.

In this case, the teachers' union argued that the freeze was really a State-imposed freeze, and because the State had other alternatives, *i.e.*, to raise state taxes, the freeze was self-serving and therefore unconstitutional.

While the union did not contest the nature and extent of Buffalo's crisis, it argued because the State did not have a similar fiscal crisis the legislature could not constitutionally authorize the freezing of wages. Our papers set forth in detail all of the previous steps taken by the Control Board, including the hiring freeze, raising taxes and school closings. We thus demonstrated that the State and the Control Board had not considered freezing wages to be simply another policy alternative.

We also argued that unless the wage freeze was upheld there would be more school closings, more layoffs and more drastic remedies, which the Court relied on in finding that a moderate course would not have served the public purpose equally as well. In finding that that the freeze was reasonable, the Court also relied on the fact that it was temporary.

The Court did not directly deal with plaintiff's primary argument that the State could have raised taxes to solve Buffalo's fiscal crisis. The Court held that to meet a fiscal emergency, taxes conceivably could always be raised, but that is not a legislature's only appropriate response. Further, the Court held that we had shown that Buffalo had already increased taxes to meet its fiscal needs and that raising taxes further would have exacerbated Buffalo's fiscal problem. The teachers union had not argued that the City should further raise taxes, so the Court on this whole finding was not really directly confronting the teachers' union's argument. The Court also held that the teachers union had not shown how any money raised by the State raising taxes would flow to Buffalo. That finding was a variation on the argument we had made, which was that even if the wage freeze were found unconstitutional, there was no guaranty that the State would make up the difference through further aid. Finally, the Court held that it would not second guess the wisdom of picking a wage freeze over other policy alternatives such as layoffs or elimination of essential services.[5]

The Court distinguished *Condell* and *Surrogates,* the teachers' union's primary basis for their arguments, by holding that in those cases the emergency was in doubt and that the payroll lag had been instituted because of "political expediency." The Court contrasted the situation in Buffalo where there was a very real fiscal crisis and no evidence of political expediency or "unjustified welching."

The Court also found the *Subway Surface Supervisors Association v. New York City Transit Authority*[6] decision by the New York State Court of Appeals to be persuasive and relevant because there, as in Buffalo, there was a clear fiscal crisis.

There are a number of lessons for municipalities considering the need for a control board with the power to freeze wages.

First, the fact that the State Comptroller had issued a detailed report confirming the existence of the crisis was critical. Any attempt to freeze wages without such an analysis or demonstration of the reality of the fiscal crisis would be difficult. The fact that the legislature made findings that there was a fiscal crisis also provided an articulated basis for arguing that there was an important public purpose being served. Secondly, the fact that the Control Board adopted other measures first, such as layoffs and tax increases, enabled us to show that there really were no other alternatives except further layoffs that would cut deeply into public safety and educational services. Third, the fact that the City of Buffalo did not try to freeze its own contracts meant that the freeze was not self-serving. The fact that the Control Board was not abrogating its own contract gave it some level of independence. The fact that the freeze was to be regularly reviewed also aided in demonstrating the reasonableness of the freeze. Further, the fact that one union was not singled out for a wage freeze, was also important.

In short, the decision by the Second Circuit was clear that a wage freeze can be imposed on municipal employees in this State where the fiscal crisis is clear and the wage freeze is treated as a last resort.

Endnotes

1. *Buffalo Teachers' Federation v. Tobe,* 464 F.3d 262 (2d Cir. 2006).
2. *Association of Surrogate and Supreme Court Reporters v. New York,* 940 F.2d 766 (2d Cir. 1991); *Condell v. Bress*, 983 F.2d 415 (2d Cir. 1993).
3. *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 434, 54 S. Ct. 231, 78 L.Ed. 413 (1934).
4. *Supreme Court Reporters*, 940 F.2d 766*; Condell*, 983 F.2d 415.
5. *Supreme Court Reporters,* 940 F.2d at 772; *Condell,* 983 F.2d at 418.
6. 44 N.Y.2d 101, 404 N.Y.S.2d 323 (1978).

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Procurement Lobbying Reform May Impact Municipal Practice

By Teneka E. Frost

Introduction

The procurement process supports several public policy functions in New York. It is the method by which public entities purchase commodities, services and technologies to meet the needs of the State and to solve problems on a statewide level, all while contributing to the economy and promoting business development.[1] The need for this process to be open, fair and transparent is tantamount in light of high profile scandals.[2] Many policy analysts and lawmakers believe that subjecting the procurement process to public disclosure, by placing restrictions on procurement lobbying during the State's procurement process, will prevent future scandals and "restore the public's trust in the integrity of the contracting process."[3]

As a result, the procurement process in the State of New York has recently gone through a series of reforms aimed at increasing transparency and accountability in the distribution of government contracts. Under pressure for change which emphasizes a fairer and more open 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.[4] The Procurement Lobbying Law was signed into law on August 23, 2005; the provisions of the State Finance Law took effect January 1, 2006.[5] With the enactment of this law, New York became one of seventeen states to regulate procurement lobbying.[6]

Explanation of Procurement Lobbying

The new Procurement Lobbying Law is a combination of amendments to the Legislative Law (more specifically the Lobbying Act contained therein) and the State Finance Law.[7] It is important to note the differences between these two statutes. 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.

Prior to the recent amendments, the Lobbying Act regulated three types of lobbying activities: legislative lobbying, executive branch lobbying and local government or "municipal" lobbying.[8] The 2005 amendments to the Lobbying Act now incorporate the regulation of procurement contract lobbying.[9] The Lobbying Act defines Procurement Lobbying as any attempt to influence "any determination: (A) by a public official, or by a person or entity working in cooperation with a public official related to a governmental procurement, or (B) by an officer or employee of the unified court system, or by a person or entity working in cooperation with an officer or employee of the unified court system related to a governmental procurement."[10] The New York Temporary State Commission on Lobbying (hereinafter referred to as the "Lobbying Commission"), comprised of six members, is the government body charged with regulating procurement lobbying in addition to the other lobbying activities mentioned above.[11]

A working knowledge of the key definitions in a statute is fundamental and understanding the definitions incorporated in the Procurement Lobbying Law is critical in order to grasp its concept. Both the Lobbying Act and the State Finance Law outline a series of definitions that further explain what constitutes lobbying on procurement contracts. The application of these terms, however, may be different depending on whether one is analyzing them under the Lobbying Act or the State Finance Law.

The first key term is the definition of "Article of Procurement." Traditionally, procurements in New York were understood to be commodities, services or technologies.[12] Under both the Lobbying Act and the State Finance Law, an Article of Procurement means a commodity, service, technology, public work, construction, revenue contract, the purchase, sale or lease of real property or an acquisition or granting of other interest in real property, which is the subject of a Governmental Procurement.[13] As a result, what is considered "procurement" has been expanded to include public works, construction, certain revenue contracts and real property.

"Governmental Procurement" is defined in the Lobbying Act and the State Finance Law as: (i) the preparation or terms of specifications, bid documents, requests for proposals, or evaluation criteria for a pro-

curement contract, (ii) solicitation for a procurement contract, (iii) evaluation of a procurement contract, (iv) 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.[14] One way to view what constitutes a Governmental Procurement is to look at it as that method by which a Governmental Entity implements its assessment of a need which results in an Article of Procurement.

Under the Lobbying Act and the State Finance Law, a "Procurement Contract" means any contract or other agreement, other than a grant, State Finance Law Article 11-B Contract, program contracts between not-for-profit organizations as defined in Article 11-B of the State Finance Law and the unified court system, intergovernmental agreement, railroad and utility force account, utility relocation project agreement/order or an eminent domain transaction, for an Article of Procurement involving an estimated annualized expenditure in excess of $15,000.[15] Where the acquisition is less than $15,000 or falls under one of the exempt categories of Procurement Contracts, the provisions regarding procurement lobbying are not applicable.

It is the term "Contacts," defined in the State Finance Law, which identifies the restrictions placed on communications during the procurement process. Contacts is defined "as any oral, written or electronic communication with a Governmental Entity under circumstances where a reasonable person would infer that the communication was intended to influence the Governmental Procurement."[16] This definition imposes a reasonable person standard to determine if someone communicating with a Governmental Entity is attempting to influence a Governmental Procurement. In other words, factual exchanges of information, such as an inquiry into the timeframe for submitting a bid proposal in response to a Governmental Procurement, would not be considered an attempt to influence the Governmental Procurement and therefore, would not constitute a Contact. Following this reasoning, only communications which a reasonable person could conclude are intended to influence the Governmental Procurement would be considered procurement lobbying.

The Lobbying Act does not contain a definition of Contacts; however, it does identify two types of lobbying activity that lobbyists and/or Offerers are prohibited from engaging in during the Restricted Period, which are referred to as restricted contacts.[17] According to the restricted contacts section of the Lobbying Act, no person or organization subject to the provisions of the Lobbying Act may contact (1) a person within the procuring entity who is not a designated contact or (2) any person in a state agency other than the state agency conducting the Governmental Procurement.[18] Communicating with someone other than the designated contact within a Governmental Entity about an ongoing Governmental Procurement or an employee of a state agency about a Governmental Procurement that is not being conducted by that state agency would be considered violations of the Lobbying Act if such communication does not fall within one of the exceptions.[19]

Procurement lobbying in its simplest form involves an attempt to influence a Governmental Procurement; however, not all attempts to influence a Governmental Procurement are procurement lobbying. Determining whether one is engaging in procurement lobbying starts with an analysis of whether there is a Governmental Procurement which meets the requirements of the definition of Procurement Contract. According to the Lobbying Act, these determinations must be made by a public official or an officer or employee of the unified court system, or by a person or entity working in cooperation with a public official or officer or employee of the unified court system. In addition, the definition of Contacts must be considered as well because it is this term which determines what is an attempt to influence during the procurement process of a governmental entity. Whether one is engaging in procurement lobbying must also be put in the context of the restriction on Contacts contained in the Lobbying Act.

Scope of Application

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). To ascertain to whom the law applies, one must again turn to the defined terms. This is where differences begin to emerge between the application and impact of the Lobbying Act and the State Finance Law. The term "Offerer" is defined differently in each statute. In the Lobbying Act, Offerer refers to "an individual or entity, or any employee, agent or consultant of such individual or entity, that contacts a state agency, either house of the state legislature, the unified court system, a municipal agency or local legislative body about a governmental procurement."[20] The State Finance Law, however, defines Offerer as "an individual or entity, or any employee, agent or consultant of such individual or entity, *that contacts a governmental entity about a governmental procurement during the restricted period of such Governmental Procurement.*"[21] Thus, the application of the State Finance Law begins at a later point in time than the Lobbying Act, having implications for an Offerer only when there is a Restricted Period in place for a particular Governmental Procurement.

The difference in the definition of the term Offerer appears to stem from different statutory focuses of the two laws. The Lobbying Act regulates who must register as a lobbyist with the Lobbying Commission in order to engage in activities which influence a Governmental Procurement. The State Finance Law regulates communications which a reasonable person would infer were intended to influence a Governmental Procurement during the Restricted Period.

The definition of the Restricted Period can be found in the Lobbying Act and the State Finance Law and have essentially the same meaning.[22] According to the State Finance Law, the "Restricted Period" refers to

> the period of time commencing with the earliest written notice, advertisement or solicitation of a request for proposal, invitation for bids, or solicitation of proposals, or any other method for soliciting a response from 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.[23]

An Offerer, as that term is defined in the State Finance Law, needs to be aware of the Restricted Period when contacting a Governmental Entity about a Governmental Procurement as it is this period of time when communications that influence procurement may be deemed a violation of the State Finance Law or considered as lobbying triggering the registration requirements and other obligations under the Lobbying Act.

Another essential term is "Governmental Entity."[24] The definition can be found in the State Finance Law, and it comes into play when determining how the State itself will meet its obligations under the Procurement Lobbying Law. The term Governmental Entity is very broad and comprehensive, encompassing virtually every public entity under the auspices of the State of New York. It includes every state agency, public authority of which at least one member is appointed by the governor, the unified court system, the Legislature, industrial development agency in jurisdictions of 50,000 or more (this is the critical news for municipal attorneys), and public benefit corporation.[25]

With regard to the State Finance Law, practitioners who represent municipalities need to be aware that the provisions relating to the recording of contacts and disclosure of certain information about Offerers during the Restricted Period do not apply to municipalities.[26] It is true that the definition of Governmental Entity contained in the State Finance Law refers to municipal agencies as being included in that definition.[27] However, the reference to municipal agency in the definition of Governmental Entity is actually referring to industrial development agencies and not municipalities.[28] Conversely, practitioners should note that the Lobbying Act requires lobbyists to register and report to the Lobbying Commission when attempting to influence procurement contracts in municipalities with a population of 50,000 or more.[29]

Governmental Entity Obligations under the Law

One of the primary obligations that the State Finance Law imposes on a Governmental Entity is the requirement that it designate a person(s) who may be Contacted by an Offerer about a Governmental Procurement.[30] The designated contact person serves an essential role in the procurement process because it is this person(s) who is always allowed to communicate with an Offerer regardless of the time period or the subject matter of the communication.[31] During the Restricted Period, the Offerer is only allowed to Contact the designated contact person about a Governmental Procurement, with certain statutory exceptions.[32] Offerers need to be aware of who the designated contact person(s) is for the Governmental Entity with which they want to communicate and make sure that Contacts are directed to that person(s) to avoid running afoul of the State Finance Law.

It is important to note that the State Finance Law permits certain kinds of communications between an Offerer and a Governmental Entity to occur during the Restricted Period in addition to the Contacts which are described above.[33] Commonly referred to as "Permissible Contacts," these types of communications are allowed due to the fact that such communications are usually necessary in carrying out a Governmental Procurement. For example, the State Finance Law authorizes the following kinds of communications to be directed to other than the designated contact: the submission of written proposals in response to a request for proposals;[34] submission of written questions to a designated contact when all written questions and responses are disseminated to all Offerers;[35] participation in a properly noticed pre-bid conference;[36] written complaints regarding failure of designated contact to respond in a timely manner;[37] negotiation of a procurement contract after an Offerer is notified of a tentative award;[38] requests for the review of procurement contract award by an Offerer;[39] and certain protests, appeals and allegations of improper conduct.[40]

A Governmental Entity is also required to incorporate a summary of its policy and prohibitions, notice of rules and regulations and applicable Governmental Entity guidelines and procedures regarding permissible contacts during a Governmental Procurement into its solicitation of proposals or bid documents or specifica-

tions for all procurement contracts.[41] Additionally, a Governmental Entity is required to establish a process for review by its ethics officer, inspector general, or other official responsible for reviewing or investigating alleged violations of State Finance Law § 139-j and immediately investigating such allegations.[42]

Upon any Contact in the Restricted Period, a Governmental Entity is required to obtain certain identifying information about the person or entity making the Contact which shall, in addition, include an inquiry as to whether the person or organization making such Contact was the Offerer or was retained, employed or designated by or on behalf of the Offerer to appear before or Contact the Governmental Entity about the Governmental Procurement.[43] The State Finance Law requires the above information be included in the procurement record for that procurement contract.

In short, the obligations of a Governmental Entity include: designating a contact person(s); incorporating the required information into its procurement process; establishing the necessary policies and procedures regarding Contacts and permissible contacts; investigating possible violations and reporting violations; recording all Contacts; and filing recorded Contacts in the procurement record. Governmental Entities are encouraged to consult with their Counsel's office for more information on implementation and compliance with the Procurement Lobbying Law. Additional information may also be obtained from the Advisory Council on Procurement Lobbying website and the New York Temporary State Commission on Lobbying website.[44]

Impact on Offerers

Under the State Finance Law provisions of the Procurement Lobbying Law, there are a number of ramifications for an Offerer.[45] For example, in order to be awarded a Procurement Contract, an Offerer must provide a written affirmation as to his or her understanding of an agreement to comply with the Governmental Entity's procedure relating to permissible contacts during a Governmental Procurement.[46] An Offerer is also required to certify that all the information he or she submits is complete, true and accurate and if such certification is found to be intentionally false or intentionally incomplete, the Governmental Entity has the right to terminate the procurement contract.[47] Moreover, an Offerer is obligated under the State Finance Law to disclose prior findings of non-responsibility made within the previous four years by any Governmental Entity where such prior finding was due to a violation of § 139-j of the State Finance Law or the intentional provision of false or incomplete information.[48]

Absent special circumstances discussed below, an Offerer is prohibited from being awarded a Procurement Contract if he or she fails to timely disclose accurate and complete information,[49] fails to otherwise cooperate,[50] or if he or she is found to be non-responsible for knowingly and willfully violating the requirements of § 139-j of the State Finance Law.[51] This determination can only be made after the Offerer is given reasonable notice and an opportunity to be heard regarding any alleged violation.[52] If the Offerer is ultimately found to be non-responsible and therefore ineligible for the award of contract, the Offerer is placed on a list of Offerers who have been determined to be non-responsible.[53] The list is to be maintained by the Office of General Services and published on its website.[54] If there is a second finding of non-responsibility within four years, the Offerer is then debarred from being awarded a contract by any Governmental Entity for four years and its name will appear on the list of debarred bidders also to be maintained by the Office of General Services and published on its website.[55] If an Offerer is determined to be non-responsible due to violations of §§ 139-j or 139-k of the State Finance Law, the procurement contract may still be awarded to such Offerer if the Governmental Entity finds that the award to the Offerer is necessary to protect public property or public health or safety and that the Offerer is the only source capable of supplying the required Article of Procurement within the necessary timeframe.[56]

Advisory Council on Procurement Lobbying

The Procurement Lobbying Law created a public body to provide advice and guidance in the implementation of the State Finance Law provisions. Established by Section 1-t of the Legislative Law, the Advisory Council on Procurement Lobbying (hereinafter referred to as the "Advisory Council") consists of eleven members[57] whose expertise is centered on the State Finance Law and not the regulations of the Lobbying Act as it pertains to lobbyists. The Advisory Council is chaired by the Commissioner of the Office of General Services, or his or her designee, in apparent deference to that state agency's expertise and historical responsibility in the procurement arena. The Advisory Council is charged with the following duties: (1) to provide advice to the Lobbying Commission with respect to the implementation of the provisions of the Lobbying Act as it pertains to procurement lobbying; (2) to provide annual reports to the Legislature regarding any problems in the implementation of the procurement lobbying law and include in those reports recommended changes to increase the effectiveness of implementation; and (3) to establish model guidelines regarding the restrictions on Contacts during the procurement process for use by Governmental Entities.[58]

In addition, the Advisory Council was charged with submitting a preliminary report to the Governor and Legislature on potential implementation issues arising out of the procurement lobbying law by December 31, 2005.[59] The Advisory Council also released a Supplemental Report dated May 4, 2006 which can also be obtained by accessing the above web address.

Practitioners will also find model guidelines in the form of Frequently Asked Questions (FAQs) as well as model language and forms, a list of covered governmental entities, and helpful statutory references on the Advisory Council website.[60] The Advisory Council continues to work on additional FAQs and other guidance materials to assist further with compliance with the law.[61] Additional guidance information is published on the website as soon as the information is approved by the Advisory Council. The minutes of the Advisory Council meetings may also be obtained online.[62] The Advisory Council was required to submit another report to the Governor and Legislature regarding the implementation of the State Finance Law on December 31, 2006. Further, by October 30, 2007, the Advisory Council is statutorily required to submit a report to the Governor and Legislature regarding the effects of the Procurement Lobbying Law, including but not limited to any changes in the number and nature of Offerers, since the inception of the Procurement Lobbying Law.[63]

Conclusion

In addition to the information from the Advisory Council, the Office of General Services, on behalf of the Advisory Council,[64] has been providing outreach and training on the State Finance Law provisions of the Procurement Lobbying Law, including presentations to state agencies, public authorities, municipal associations and the vendor community.[65] The Lobbying Commission has also been working on a set of guidelines regarding procurement lobbying and holds in-house workshops to educate lobbyists and Offerers regarding the provisions of the Lobbying Act that relate to the Procurement Lobbying Law.[66] Practitioners should consult the information provided by the Lobbying Commission and the Advisory Council so that they are kept up to date with the most recent information to assist their clients in complying with the Procurement Lobbying Law.

Endnotes

1. Patricia A. Salkin and Barbara F. Smith, *Ethics in Government, The Public Trust: A Two-Way Street* 230 (2002).
2. John Kifner, *Velella, Bronx Powerhouse, Is Sentenced to a Year in Jail*, The N.Y. Times, June 22, 2004.
3. "Governor, Senate Majority Leader, Speaker Announce Agreement on Landmark Ethics and Lobbying Reform Legislation" (press release for June 21, 2005) <http://www.ny.gov/governor/press/05/june21_3_05.htm>.
4. Chapter 1 of the 2005 Laws of New York.
5. *Id*.
6. Chip Nielsen et al., *Corporate Political Activities 2005: Complying with Campaign Finance, Lobbying and Ethics Laws* (Practising Law Institute No. 6819, 2005) *available* in Westlaw, 1508 PLI/Corp 657.
7. Chapter 1 of the Laws of 2005.
8. Legislative Law § 1-c(c).
9. Legislative Law § 1-c(v)(a), also added Executive Orders and Tribal-State Agreements.
10. Legislative Law § 1-c(c)(v).
11. Legislative Law § 1-d. Current members of the Lobbying Commission are Chairman Paul L. Shechtman, Vice Chairman Kenneth J. Baer and members Hon. James P. King , Patrick J. Bulgaro, Andrew G. Celli, Jr. and Michael A. Lenz. The chair and vice chair jointly appoint the executive director. Among the powers and duties of the Lobbying Commission is the ability to (1) administer and enforce all provisions of the law, (2) conduct investigations of alleged violations of the law, (3) conduct a program of random audits, (4) conduct hearings, and (5) issue advisory opinions. See Legislative Law § 1-d (c)(1)-(7). The 2005 amendment to the Lobbying Act also included a change in the Lobbying Commission's scope of authority in issuing advisory opinions whereby such opinions are only binding upon the person it was rendered. See Legislative Law § 1-d (c)(6).
12. Salkin, *supra* note 1, at 230.
13. Legislative Law § 1-c(o) and State Finance Law § 139-j(1)(b), 139-k(1)(b).
14. Legislative Law § 1-c(p) and State Finance Law § 139-j(1)(e), 139-k(1)(e).
15. Legislative Law § 1-c(r) and State Finance Law § 139-j(1)(g), 139-k(1)(g). Note: The definition of "Procurement Contract" does not include grants, Article 11-B State Finance Law Contracts, intergovernmental agreements, railroad and utility force accounts, utility relocation project agreements or orders and eminent domain transactions. For guidance on these exemptions, visit the Advisory Council on Procurement Lobbying website at http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html.
16. State Finance Law § 139-j(1)(c), 139-k(1)(c).
17. Legislative Law § 1-n.
18. *Id*.
19. *Id*.
20. Legislative Law § 1-c(q).
21. State Finance Law § 139-j(1)(h), 139-k(1)(h).
22. State Finance Law § 139-j(1)(f), 139-k(1)(f) (*amended* 2006) and Legislative Law § 1-c (m).
23. State Finance Law § 139-j(1)(f), 139-k(1)(f) (*amended* 2006).
24. State Finance Law § 139-j(1)(a), 139-k(1)(a).
25. A current listing of Governmental Entities can be found on the following web address: http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/Entities.htm.
26. State Finance Law § 139-j (1)(a), § 139-k(1)(a).
27. State Finance Law § 139-j (1)(a)(6), § 139-k(1)(a)(6).
28. *Id*.
29. Legislative Law § 1-c(s).
30. State Finance Law § 139-j (2)(a).

31. State Finance Law § 139-j(3)(a)(1)-(7).
32. *Id.*
33. *Id.*
34. State Finance Law § 139-j(3)(a)(1).
35. State Finance Law § 139-j(3)(a)(2).
36. State Finance Law § 139-j(3)(a)(3).
37. State Finance Law § 139-j(3)(a)(4).
38. State Finance Law § 139-j(3)(a)(5).
39. State Finance Law § 139-j(3)(a)(6).
40. State Finance Law § 139-j(3)(a)(7).
41. State Finance Law § 139-j(6)(a).
42. State Finance Law § 139-j(9) and (10)(a).
43. State Finance Law § 139-k(4).
44. See Advisory Council on Procurement Lobbying website at http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html and New York Temporary State Commission on Lobbying website at http://www.nylobby.state.ny.us.
45. This section of the article is limited to the obligations of an Offerer under the State Finance Law. For information on the impact of an Offerer under the Lobbying Act, please consult guidance from the New York Temporary State Commission on Lobbying at the following web address: http://www.nylobby.state.ny.us/.
46. State Finance Law § 139-j(6)(b).
47. State Finance Law § 139-k(5).
48. State Finance Law § 139-k(2).
49. *Id.*
50. *Id.*
51. State Finance Law § 139-j(10)(b).
52. State Finance Law § 139-j(10)(a).
53. State Finance Law § 139-j(10)(b).
54. *Id.*
55. *Id.*
56. State Finance Law §§ 139-j(10)(b) and 139-k(3).
57. The Advisory Council on Procurement Lobbying is composed of eleven members, and is chaired by the Commissioner of the Office of General Services (or his designee). Other members include: the Commissioner of the Department of Transportation or his designee; the Director of the Division of the Budget or his designee; three members appointed by the Governor, one of whom shall be representative of public authorities or public benefit corporations; one who shall be representative of local governments; and one who shall be representative of the contracting community; one member shall be appointed by the Temporary President of the Senate; one member shall be appointed by the Speaker of the Assembly; one member shall be appointed by the Chief Judge of the Court of Appeals; the State Comptroller or his designee; and one member shall be appointed by the Mayor of the City of New York. For more information on the membership and duties and functions of Advisory Council on Procurement Lobbying visit http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/ACmembership.htm.
58. Legislative Law § 1-t(c)-(e).
59. This report was submitted on January 3, 2006, and can be downloaded at the Advisory Council's web page through the OGS website at: http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html.
60. Procurement Lobbying Law Frequently Asked Questions http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/Faq.htm (last visited May 10, 2006).
61. Advisory Council on Procurement Lobbying (Minutes of Meeting, November 17, 2005-April 20, 2006) http://www.ogs.state.ny.us/aboutOgs/regulations/AdvisoryCouncil/MtgMinutes.htm>.
62. Meeting Minutes available at (last visited May 10, 2006) <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/MtgReportTable.htm> (last visited May 10, 2006).
63. Legislative Law § 1-t(f).
64. OGS was named secretariat of the Advisory Council at its November 17, 2005 meeting. Advisory Council on Procurement Lobbying (Minutes of Meeting, November 17, 2005) http://www.ogs.state.ny.us/aboutOgs/regulations/AdvisoryCouncil/ MtgMinutes/Minutes051117.htm.
65. For updates on training and outreach see Advisory Council on Procurement Lobbying website http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html (last visited May 10, 2006).
66. *Guidelines to the Lobbying Act* (last modified March 16, 2006) http://www.nylobby.state.ny.us/guidelines_3_16_06.html. See also *New Outreach and Education* http://www.nylobby.state.ny.us/educationprogram.html.

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Municipal Lawyer Index—2006 Articles

Title	Author	Issue/Year	Page
Non-Article 18 Conflicts of Interest Restrictions Governing Counties, Cities, Towns, and Villages Under New York State Law	Mark Davies	Vol. 20, No. 1 (Winter 2006)	5
Land Use Case Law Update: A Discussion of Significant Recent Land Use Cases from *Bower Associates* to *Lingle*	Henry M. Hocherman Noelle V. Crisalli	Vol. 20, No. 1 (Winter 2006)	13
New York's Information Security Breach and Notification Act	Jennifer L. Reinke	Vol. 20, No. 1 (Winter 2006)	19
Municipal Briefs	Lester D. Steinman	Vol. 20, No. 1 (Winter 2006)	22
PSC Establishes Framework for Increased Competition in Cable; Protects Municipal Role	Steven Otis	Vol. 20, No. 2 (Spring 2006)	4
Second Circuit Upholds City Planning Board's Decision to Deny a Cellular Telephone Provider a Permit to Build a 150-Foot Communications Tower on a Golf Course	Carol L. Van Scoyoc	Vol. 20, No. 2 (Spring 2006)	6
Public Authorities Accountability Act of 2005: Dramatic New Rules – Applicability to Local Agencies, Organizations and Governmental Units	Douglas E. Goodfriend Thomas E. Myers	Vol. 20, No. 2 (Spring 2006)	13
Running a Local Municipal Ethics Board: Glossary of Municipal Ethics Terms	Steven G. Leventhal	Vol. 20, No. 2 (Spring 2006)	20
Special Task Force on Eminent Domain Report	New York State Bar Association Task Force on Eminent Domain	Vol. 20, No. 3 (Summer 2006)	1 – 46
Return to Sender, Addressee Not Home: The *Jones v. Flowers* Decision and New York State's Response	Joseph K. Gerberg	Vol. 20, No. 4 (Fall 2006)	5
Clarity and Confusion: The Court of Appeals Addresses Protest Petitions and the Accrual of SEQRA Claims in *Eadie v. Town Board of the Town of North Greenbush*	Adam L. Wekstein	Vol. 20, No. 4 (Fall 2006)	8
Applicability of the Hatch Act to Municipal Officers and Employees	Sung Mo Kim	Vol. 20, No. 4 (Fall 2006)	15
Municipal Briefs	Lester D. Steinman	Vol. 20, No. 4 (Fall 2006)	18

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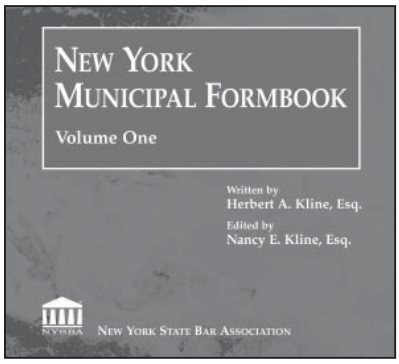

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