



OFFICE OF THE CHIEF PROCUREMENT & COMPLIANCE OFFICER
ONE WEST STREET, 1ST FLOOR
MINEOLA, NEW YORK, 11501

MEMORANDUM

To: All Departments

From: Robert Cleary, Chief Procurement & Compliance Officer

Re: Low Vendor Participation Policy Revision

Date: August 2, 2023

I. INTRODUCTION

The Countywide Procurement and Compliance Policy #CE-01-2021 Section III-G(7), Vendor Outreach, includes requirements regarding investigation and evaluation of vendor responses to a solicitation when fewer than three responses are received. The intent of this section is to ensure that maximum practicable competition has been obtained in the solicitation. This policy revision is introduced to clarify and enhance the information collected, reported, and evaluated, and also to enhance the application and reporting of any findings with respect to the competitiveness of a given solicitation. This revised policy is effective immediately.

II. SCOPE

This policy revision clarifies the procedure to collect, record, evaluate, apply and report vendor input regarding the process employed by the County to solicit goods and/or services with respect to obtaining maximum practicable competition and best value for the County.

III. LOW VENDOR PARTICIPATION POLICY--REVISED

- 1) Single or low vendor response analysis is necessary to determine whether a solicitation may have received more responses if it had been specified, structured, and/or advertised differently. To make this determination a low vendor response analysis shall be documented in writing by the DCCO and included in the Recommendation For Award for all formal solicitations (over \$10,000) as follows to ensure maximum practicable competition was obtained when only one or two responses were received:
 - Review the specification to ensure that it is not unduly restrictive so as to limit

competition. Some factors to consider in this regard include: 1) Is any component of the solicitation so restrictive that only one or a small number of vendors can respond to the solicitation? 2) If so, were those vendors notified of the solicitation?

- Was the solicitation advertised and posted on the County website as required?
- Would the County be likely to obtain greater vendor participation by advertising in other venues (e.g. New York State Contract Reporter, trade journals, other local media, etc.)?
- Was the commodity code used to conduct the solicitation appropriate? Were appropriate vendors registered with the County for that commodity code or otherwise notified?
- Is the market for the specified goods or services structurally limited (i.e. are there geographic, capital, vendor capacity, service schedule, or other requirements) that may inhibit greater vendor participation?
- Was the solicitation conducted in a manner consistent with this Policy?
- Survey vendors that received notice of the solicitation but did not respond to determine why the vendor chose not to do so. Questions to be asked include:
 - Why did the vendor decline to bid or propose?
 - Was there anything in the County's specifications, terms or conditions that caused them not to bid? If so, what?
 - What changes, if any, could the County make to the solicitation to encourage competition?

If a vendor indicates that they did not bid or propose due to the specifications, terms or conditions, or if one indicates a change to the solicitation could enhance competition, then such feedback must be conveyed in writing to the subject matter expert responsible for the specification and the DCCO for consideration prior to recommending an award or reissuing the solicitation.

- 2) A summary of the above findings including specific responses to the above questions must be documented by the DCCO as part of the Recommendation For Award to the proposed vendor and included in the contract package for review by oversight entities. A record of each vendor survey including the vendor's name, individual surveyed, date of contact, and responses to the above questions shall be maintained in the procurement file.
- 3) Prior to reissuing a solicitation due to low vendor participation, the above analysis must be conducted, and all relevant vendor feedback must be considered and applied to the solicitation's specifications, structure, and advertising method as applicable to ensure that maximum practicable competition is obtained.

FURTHER INFORMATION

Questions regarding compliance with the Low Vendor Participation policy may be directed to this office.



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MEMORANDUM

To: All Departments

From: Robert Cleary, Chief Procurement & Compliance Officer

Re: Procurement Lobbying Law Policy

Date: August 2, 2023

I. INTRODUCTION

In the conduct of a solicitation, there are occasions in which a vendor contacts the County regarding the solicitation in a manner that violates the New York State Procurement Lobbying Law / New York Finance Law Section 139-j. This policy is introduced to ensure that all such vendor contacts are recorded, reported, evaluated and addressed as required by that law. This policy is effective immediately.

II. SCOPE

This policy establishes the procedure to record, report, evaluate and address vendor contacts during the course of a solicitation regarding that solicitation that are made in a manner other than that specified in the solicitation.

III. PROCUREMENT LOBBYING LAW POLICY AND PROCEDURES

The New York Finance Law (NYFL), sections 139-j and 139-k, establishes limitations on lobbying communications in regard to governmental procurements, including those of Nassau County. Among other things it restricts certain contacts during the procurement process, and requires the County to make a record of any such restricted contacts and include them in the procurement record. The provisions make a distinction between permissible and impermissible contacts between potential vendors or a person acting on behalf of the vendor, and government employees. Section 139-j covers the permissible and impermissible contacts and section 139-k covers the disclosure responsibilities of vendors. These provisions are collectively referred to as the Procurement Lobbying Law. Violations must be reported to the appropriate official and investigated accordingly.

As detailed below, in accordance with the NYFL, Nassau County employees and officials must report in writing any communication by an “offerer,” occurring during the “restricted period” of the procurement process, which a reasonable person would infer was intended to influence the procurement.

The NYFL also requires each governmental entity to develop a policy on permissible contacts, and to inform offerers about that policy.

APPLICABILITY

Consistent with the NYFL, this policy applies to all procurements with an estimated annualized expenditure in excess of \$15,000.

This policy applies to all articles of procurement, including 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, or license, concession or franchise agreement, that is the subject of a Nassau County procurement.

The term “governmental procurement” is as defined in NYFL sections 139-j and 139-k and includes but is not limited to Nassau County public announcements of a determination of a need for a procurement, notifications, solicitations, evaluation of a procurement contract, the award, approval, denial or disapproval of a procurement contract, the approval or denial of an assignment, amendment, renewal or extension of a procurement contract.

The term “procurement contract” includes any Nassau County contract, purchase order, or other agreement, including an amendment, extension, renewal or change order to an existing contract. It does not include intergovernmental agreements.

DEFINITIONS

Contact: Under NYFL section 139-k, “contact” is any oral, written or electronic communication by an “offerer” with a governmental entity, such as Nassau County:

1. with respect to a procurement, and
2. *where a reasonable person would infer that the communication was intended to influence the County’s conduct or decision.*

For purposes of this policy, “contact” does not include the actions enumerated in NYFL section 139-j(3)(a), including submission of a written proposal in response to a solicitation, submission of written questions by the method set forth in the solicitation, participation in a conference open to all bidders, complaints of alleged improper conduct to the Inspector General, District Attorney or State Comptroller’s office, or award protests seeking a final administrative determination. See NYFL section 139-j(3)(a) for the full list of such exceptions.

Note that an “*impermissible contact*” is a contact, as defined above, which:

1. occurs during the restricted period; and
2. is with someone other than the designated contact person.

Contact Person: The NYFL requires that the County designate a point of contact (also

known as the contact person) at the beginning of each procurement’s “restricted period.” This requirement is also reflected in Section 2.01 of the Vendor Code of Ethics.

The contact person is a County employee identified by the procuring department and should be someone knowledgeable about the solicitation who has the authority and responsibility to answer questions or handle external contacts, subject to other applicable policies (see, e.g., County Wide Procurement & Compliance Policy, Appendix J, Requests For Proposals).

The point of contact will be specifically named in the solicitation documents.

As a general rule, it is permissible for offerers to contact the designated point of contact during the restricted period. The point of contact shall make a record of all such contacts and include them in the respective procurement’s file.

Offerer: The term offerer means a vendor, individual or entity, or any employee, agent or consultant or person acting on behalf of such individual or entity, that contacts any Nassau County employee or official about a governmental procurement during the restricted period of such governmental procurement¹ or bids or proposes on a County procurement.

Impermissible Contact: Any contact by an offerer with any County employee or official that:

1. Is during the restricted period; and
2. Is with someone other than the designated contact person; and
3. A reasonable person would infer is designed to influence the procurement process.

Restricted Period: The restricted period commences with the earliest date of written notice, advertisement, publication or solicitation of a request for proposals, invitation for bids, solicitation of proposals or price quotations, or any other method for soliciting a submission or response from potential offerers.

For contract amendments, the restricted period begins when the contractor/consultant is first contacted by the County for new pricing or terms.

The restricted period ends when the contract, purchase order, or modification is awarded and approved by the County.

SOLICITATION REQUIREMENTS

The Department Chief Contracting Officer (DCCO) will ensure that the appropriate contractual provisions are included in the solicitation for such procurements. The required provisions include the following:

- The designated point of contact is named in the solicitation documents.
- A brief summary of the Procurement Lobbying Law’s requirements.
- A Procurement Lobbying Law form which includes the bidder’s/proposer’s affirmation of its understanding of an agreement to comply with the Procurement Lobbying Law, and a certification that all information provided to Nassau County with

¹ A Nassau County or state agency or its employees which communicates in the exercise of its oversight duties, such as the Inspector General’s Office or the Comptroller’s Office, regarding a governmental procurement, is not considered to be an offerer.

respect to that Law is true, accurate and complete.

- A disclosure of the bidder's/proposer's prior non-responsibility determinations, if any, made within the previous four years by any governmental entity, where such prior finding of non-responsibility was due to: (a) a violation of NYFL section 139-j, or (b) the intentional provision of false or incomplete information to a governmental entity.
- A statement of the right of Nassau County to find the vendor non-responsible and/or terminate the contract in the event that an offerer filed an intentionally false or intentionally incomplete certification.

All offerers must submit completed Procurement Lobbying Law forms for any procurement covered by the Procurement Lobbying Law, for their bid or proposal to be considered responsive, although submission of those completed forms is not a condition of responsiveness at the time of bid opening.

A statement as to Procurement Lobbying Law compliance is required in the Staff Summary.

VIOLATIONS

Offerers may only make permissible communications with County employees and officials. Communication by offerers, during the restricted period about a procurement covered by the Procurement Lobbying Law, with any County employee or official *other than the designated contact person, in an attempt to influence* the conduct or decision-making about the procurement, is an "impermissible contact" and violates the NYFL.

By law, offerers may not contact other County employees or officials about a procurement during the restricted period, unless the type of contact falls under one of the exceptions listed in NYFL §139-J(3)(a). For example, strictly factual exchanges of information, such as a vendor requesting missing pages of an RFP, are permitted under the law, although these communications must also be memorialized and made part of the record.

It is County policy that during the restricted period of a procurement all communications by an offerer should be made only with the designated point of contact.

PENALTIES

There are severe consequences for making impermissible contacts, including non-award of the contract, a determination of vendor non-responsibility, and potentially debarment.

Additionally, in the event that the offerer's certification to Nassau County with respect to NYFL section 139-k is found to be intentionally false or intentionally incomplete, the County may terminate the associated contract.

Preventing Violations

Per County policy all vendor communications during procurement restricted periods should be directed to the designated contact person. It is recommended that if you are contacted by a vendor, or other offerer or outside party, you should first ask if the matter to be discussed concerns an active procurement solicitation. If the answer is yes, and you are not the designated point of contact for the procurement, you should alert the individual to the Procurement Lobbying Law and refer that person to the designated point of contact for that solicitation.

REPORTABLE CONTACTS – WHAT MUST BE REPORTED

During the restricted period, County employees and officials must report any contact from an offerer (see definition above), which a reasonable person would infer was a communication intended to influence the procurement.² All attempts at influencing the procurement process, regardless of who in the County government receives the contact, must be recorded in writing by the contacted employee, on the prescribed Record of Contact form.

In addition, certain other contacts must also be reported on the Record of Contact form. The person receiving a reportable contact (see the four categories below) must record it via the prescribed Record of Contact form, within the below-specified time frames.

In all cases, a copy of the completed Record of Contact form shall be kept in the procurement file.

Record of Contact forms must be prepared in the following situational categories:

1. An offerer contacts a Nassau County employee or official, *other than* the designated contact person, during the restricted period, and a reasonable person would infer that the communication was intended to *influence* the conduct of or decision about, the procurement or contract award. This type of communication is deemed an “impermissible contact” which must be immediately reported, via the Record of Contact form, to the Inspector General’s Office and to the DCCO, and to the Chief Procurement and Compliance Officer (CPCO).
2. An offerer contacts a Nassau County employee or official *other than* the designated contact person, during the restricted period, and *only poses factual questions* about the contract award, or the contract terms, conditions, schedules, revisions, etc. This contact must be reported, via the Record of Contact form, to the designated contact person and the DCCO within two business days of the contact.
3. An offerer contacts *the designated contact person*, during the restricted period, and a reasonable person would infer that the communication is either intended to *influence* the conduct of or decision about the procurement or contract award. This contact must be reported, via the Record of Contact form, to the DCCO and the CPCO within two business days of the contact.
4. An offeror contacts *the designated contact person*, during the restricted period, and *only poses factual questions* about the contract award, or the contract terms, conditions, schedules, revisions, etc. This contact must be documented by the contact person via the Record of Contact form and placed in the procurement file within five business days of the contact.

Procedures for Reporting Contacts

The designated point of contact will ensure that the completed form is included in the file for that procurement.

² Offers of gifts or other benefits will be deemed to be a form of communications intended to influence the procurement. Additionally, they will be handled as contacts requiring immediate reporting to the Inspector General’s Office.

All Reports of Contact forms shall be submitted to the DCCO as well as be retained in the procurement file.

Contacts that appear to be "impermissible contacts" (see category 1 above) must also be immediately reported to the Inspector General's Office by the person who received the contact.

If there is any doubt as to whether a communication was "intended to influence," it *shall be treated as* being intended to influence, and handled as such.

Similarly, if there is any doubt as to whether a communication was an "impermissible contact," it will be treated as being an impermissible contact, to include making immediate notification to the Inspector General's Office and the CPCO.

Note that any Nassau County employee or official who becomes aware that an offerer has made an impermissible contact must immediately notify the Inspector General's Office.

INVESTIGATION OF CONTACTS

All Reports of Contact which appear on their face to reflect or suggest an impermissible contact – an attempt to influence involving contact with a person who is not the designated contact (see situational category 1 above) – shall immediately be forwarded to the Inspector General's Office for its investigation in accordance with NYFL §139-j (10). The Inspector General will apprise the CPCO of the results of its investigation, including whether it appears that there was a knowing and willful violation of the Procurement Lobbying Law.

VENDOR RESPONSIBILITY DETERMINATION

The CPCO will review the results of the Inspector General's investigation and render a determination as to whether a knowing and willful violation of the Procurement Lobbying Law occurred.

1. Any violation by an offerer of the Procurement Lobbying Law provisions regarding either contacts or disclosure requirements (including the failure of an offerer to timely disclose accurate and complete information or otherwise cooperate with Nassau County), must be considered in the responsibility determination of that offerer.
 - a. There must be a determination of non-responsibility if it is found that the offerer knowingly and willfully violated the Procurement Lobbying Law either by making an impermissible contact or failing to timely disclose accurate and complete information or otherwise cooperate in providing information required by the County pursuant to the Procurement Lobbying Law[, subject to the exception in subparagraph 2.a., below].
2. The first finding (determination) that an offerer has violated the Procurement Lobbying Law's restrictions on contacts shall result in a non-responsibility determination, rendering the offerer, its subsidiaries, and any related or successor entity with substantially similar function ineligible for award unless:
 - a. the County determines that the award of the procurement to the offerer is necessary to protect public property, health or safety, and the offerer is the only source capable of fulfilling the procurement within the required timeframe. Such finding must be documented in the procurement file, and cited in the Staff Summary.

3. Any subsequent determination of non-responsibility due to a violation of the Procurement Lobbying Law restrictions on contacts, within four years of a prior determination of non-responsibility for such a violation, will render the offerer ineligible for bidding or proposing on a procurement, or from being awarded any contract, for a period of four years from the date of the second determination.

4. Additionally, in the event that the offerer's certification to Nassau County with respect to section 139-k is found to be intentionally false or intentionally incomplete, the County may terminate the associated contract.

FURTHER INFORMATION

Questions regarding compliance with the Procurement Lobbying Law or this policy may be directed to the County Attorney's Office or this office.

Record of Contact
Procurement Lobbying Law

To: _____ (Copy to the procurement file)

From: _____ Department: _____

Designated Contact Person? Yes No

Subject: Record of Contact under State Finance Law §139-k(4)

Impermissible Contact Received? Yes No

Procurement Description: _____

RFP/RFQ/Contract # (if applicable): _____

.....

Date(s) of Contact: _____ Method of Contact:¹ _____

I was contacted by the following individual: _____

Occupation / Position: _____

Place of Principal Employment: _____

Name of Offerer Firm / Organization: _____

Caller's Telephone Number: _____

The person making the contact:

Was an Offerer in the procurement: Yes No

Was retained/employed/designated by or on behalf of the Offerer: Yes No

.....

Description / content of the contact(s), including what the contacting party said (attach written communications, if any):

¹ Telephone, email, letter, text, or in-person conversation.