



Administrative/Legislative/ Regulatory Alert

March 2006

Bond, Schoeneck & King, PLLC

New York

Albany ■ 518-533-3000
Buffalo ■ 716-566-2800
Ithaca ■ 607-330-4000
Long Island ■ 516-267-6300
New York City ■ 646-253-2300
Oswego ■ 315-343-9116
Syracuse ■ 315-218-8000
Utica ■ 315-738-1223

Kansas

Overland Park ■ 913-234-4400

Bond, Schoeneck & King, P.A.

Florida

Bonita Springs ■ 239-390-5000
Naples ■ 239-659-3800

NEW YORK'S LOBBYING ACT AMENDED TO INCLUDE PROCUREMENT LOBBYING

The State of New York, and its municipalities, purchase many goods and services. In the past, some of those purchases have been influenced by lobbying. Now, amendments have been enacted to the New York State Lobbying Act to regulate, for the first time, what has become known as "procurement lobbying". These amendments, which became effective on January 1st, are broad enough that people who would never consider themselves lobbyists may fall within the new broad definition of lobbying. The definition of "lobbying" has been expanded to include attempts to influence any procurement-related determination of a public official, or a person or entity working in cooperation with a public official. Conventional marketing activities of contractors, engineers, consultants and vendors could constitute lobbying under the expanded definition if \$5,000 or more is expended in any year. If an entity submits a bid or proposal on its own behalf in response to a solicitation for a Request for Proposal (RFP) it is not lobbying. Follow-up communication on the RFP, however, may be deemed lobbying, requiring the contractors, engineers, consultants or vendors to register as lobbyists.

Not only does the new law greatly expand the definition of lobbying, it also greatly restricts the period and manner in which a lobbyist may contact a governmental entity during a government procurement. During the so-called "restricted period", Offerers can make contact only with governmental staff that have been designated by the governmental entity to receive communications. "Contacts" include 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. The "Restricted Period" starts with the "earliest attempt" by the governmental entity to solicit a response with regard to a Procurement Contract and ends with the "final contract award".

- The "earliest attempt" may include, but is not necessarily limited to, the release of written notices, advertisements, RFPs, invitations for bids, solicitations of proposals, or any other method for soliciting a response with regard to a procurement contract.
- Requests for Information ("RFIs") do not start the Restricted Period because these are merely tools used to collect information about the possible options and solutions available in the marketplace.
- "Final contract award" means that all parties that must approve the contract have granted the approval. For instance, some contracts may require only agency approval, but most state contracts require the additional approval of the State Comptroller and Attorney General. Many municipal contracts require the approval of the local legislative body, such as the county legislature or city council.

The amended law reaches most all governmental procurements over \$15,000. These include the purchase of: commodities; services; technology; public works; construction; revenue contracts; purchase, sale or lease of real property; and acquisition or granting of another interest in real property.

BS&K publications are for clients and friends of the firm and are not intended to substitute for professional counseling or advice.

For information about our firm, our practice areas and our attorneys, please visit our interactive web site, www.bsk.com.

© 2006 Bond, Schoeneck & King, PLLC
All Rights Reserved

Printed on recycled paper

BOND, SCHOENECK & KING, PLLC
ATTORNEYS AT LAW ■ NEW YORK FLORIDA KANSAS



An "Offerer" is the 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. Any lobbyist or client, if making contact with a governmental entity, will be considered an Offerer.

The law exempts:

- Contracts with an estimated annualized expenditure under \$15,000;
- Grants;
- Article XI-B State Finance Law contracts (certain contracts with not-for-profit organizations);
- Intergovernmental agreements;
- Railroad and utility force accounts and utility relocation project agreements; and,
- Orders and eminent domain transactions.

The procurement lobbying law is applicable to municipalities having a population of more than 50,000, which includes 44 Counties, 17 Cities, 21 Towns and 1 Village.

On June 16, 2003, Governor George E. Pataki issued Executive Order #127 which provides for additional state procurement disclosure. That order became effective on August 16, 2003, and is still in full force and effect.

Permissible Contacts

The law provides for certain permissible contacts. As is most often the case, the exceptions to the rule are best understood when trying to apply the rule. We can discuss with you the permissible contacts.

Penalties

In addition to the new restrictions imposed on procurement lobbying, the Legislature has also imposed new penalties for violations, including:

- A violating Offerer will be determined a non-responsible bidder and will not be awarded the contract. In addition, a violating Offerer may be fined up to \$10,000 for an initial violation of the Restricted Period contact prohibition.
- A violating Offerer may be debarred from procurement lobbying for a period of four years for a second violation committed within four years of the first violation and may be fined up to \$25,000.
- If debarred, an Offerer that lobbies on Governmental Procurements during the debarment period may be subject to a fine not to exceed \$50,000 plus the value of any compensation received.
- \$2,000 per violation for failure to retain records.

There is a "Get out of Jail free card" that permits persons or organizations that have never filed a statement or report with the Lobbying Commission a period of 15 days to cure any failure to file a report or statement after receiving a notice of intent to assess a penalty from the Lobbying Commission.

The New York Temporary State Commission on Lobbying is expected to issue final guidelines within the next four to five months.

If there is sufficient interest, Bond, Schoeneck & King, PLLC will host a briefing in the future to further explain these requirements. If you are interested in attending a briefing, please contact Richard L. Smith, Esq., Chair of the Legislative/Administrative/Regulatory Practice Group, at 518-533-3000 or rsmith@bsk.com.

BS&K Administrative/Legislative/Regulatory Practice Group

BS&K has been providing New York State administrative, legislative, and regulatory representation to our clients for more than 70 years. We understand how the Legislature and the regulatory agencies work. With that knowledge, we chart action plans to meet our client's individual needs. If a client's problem requires a legislative solution, we will draft a bill, and shepherd it through the Legislature. Sometimes a regulatory solution is available, in which case we will seek the adoption of an appropriate regulation. Other times, the client's needs may require negotiation with a state agency. And there will be those instances when, despite best efforts, litigation against the agency must be pursued.

- Monitoring bills introduced during legislative session
- Drafting and amending legislation
- Reviewing and tracking progress of bills on a daily basis
- Preparing and filing bi-monthly lobbying reports
- Production of legislative reports
- Working with State agencies and authorities in the preparation and promulgation of rules and regulations
- Representation of clients before regulatory agencies and in administrative proceedings
- Representation in licensing, permitting, and ethics matters
- Challenging agency actions in court
- Representation of clients against governmental actions in court
- Negotiation of government contracts
- Contract challenges
- Face to face meetings with the Governor's Office, legislators, cabinets and staffs
- Preparing memoranda in support of or in opposition to legislation