

## **NEW PROCUREMENT LOBBYING LAW INTERIM GUIDELINES AND PROCEDURES**

Effective January 1, 2006, a new law was enacted that could impact any DOT employee. This announcement provides a summary of the law's requirements as it pertains to contacts between Department staff and outside parties. Additional guidance is being developed by staff in various program areas and will be distributed ASAP through normal channels. Inquiries should be directed as indicated herein or to your respective program area management.

**During the procurement process, NYSDOT employees must report any contact from which a reasonable person would infer that the communication was intended to influence the procurement. NYSDOT staff will record such contacts using an Intradot application.**

See the following sections as needed for additional details:

- 1] GENERAL
- 2] EXEMPTIONS
- 3] CONSULTANTS
- 4] PROCUREMENTS
- 5] CONSTRUCTION

APPENDIX A : This summarizes DOT staff responsibilities when they are involved in any communication with other than NYSDOT staff and a reasonable person would infer the communication is intended to influence the procurement.

## **NEW PROCUREMENT LOBBYING LAW INTERIM GUIDELINES AND PROCEDURES**

1] GENERAL - Effective January 1, 2006 a new law was enacted that could impact any DOT employee. This announcement provides a summary of the law's requirements as it pertains to contacts between Department staff and outside parties. Additional guidance is being developed by staff in various program areas and will be distributed ASAP through normal channels. Inquiries should be directed as indicated herein or to your respective program area management.

**During the procurement process, NYSDOT employees must report any contact from which a reasonable person would infer that the communication was intended to influence the procurement. NYSDOT staff will record such contacts using an Intradot application.**

Please keep in mind that this message is intended only to provide brief, interim guidance to NYSDOT staff. Details about implementation of many of these new requirements have yet to be developed, negotiated and finalized. Many parties, both inside and outside of NYSDOT, will be involved in that process.

A – The intention of this legislation [SFL 139-j and 139-k] is to impose additional restrictions on lobbying activities and to increase disclosure of such activities. As written, the law throws a very broad net, capturing any activities that are construed as negotiation or an attempt to influence a contract action or decision. The legislation applies to most contracts from their initiation to their completion, including any substantive changes to their value, schedule, terms or conditions, i.e. supplementals and orders-on-contract. This means that NYSDOT is required to report on many activities that we consider to be relatively routine and innocuous.

B – A “contact” may be oral, written or electronic.

C – A “contact person” is one or more individuals identified at a particular phase of a particular contract who have the authority and responsibility to handle external contacts involving contract awards, terms, conditions, schedules, revisions, etc.

D – A “reportable contact” is one which a reasonable person would infer is intended to influence the contract awards, terms, conditions, schedules, revisions, etc. The NYSDOT staff or manager who is contacted must report the required information in accordance with applicable policy and procedure.

E - A “permissible contact” that is “non-reportable” is between an external person and NYSDOT staff [contact persons and all others], and addresses strictly factual matters.

F - A “permissible contact” that is “reportable” is between an external person and NYSDOT “contact persons”, and addresses contract awards, terms, conditions, schedules, revisions, etc.

G - An “impermissible contact” is between an external person and a NYSDOT person other than the designated “contact persons”, before a consultant designation or the identification of the apparent low bidder, and addresses contract awards, terms, conditions, schedules, revisions, etc. Impermissible contacts are always reported to NYSDOT's Ethics Officer or Inspector General.

**NEW PROCUREMENT LOBBYING LAW  
INTERIM GUIDELINES AND PROCEDURES**

2] EXEMPTIONS -

A - Intergovernmental agreements, railroad and utility force accounts, utility relocation agreements and eminent domain transactions are exempt from these requirements. For more information, contact the affected program area, Contract Management Bureau, or the Office of Legal Services.

B - Complaints and protests pertaining to a contract, through designated channels, are exempt from these requirements. For more information, contact the affected program area, Contract Management Bureau, or the Office of Legal Services.

C - [grants, etc. tbd]

**NEW PROCUREMENT LOBBYING LAW  
INTERIM GUIDELINES AND PROCEDURES**

**3] CONSULTANT AGREEMENTS -**

**A - Pre-designation** - For all procurement contracts over \$15,000 and advertised after January 1, DOT must identify contact person(s) – typically, Contract Management Bureau managers and staff. From the moment an ad, RFP or any other form of contract initiation is issued until a tentative designation, these persons are the only individuals who can discuss matters which a reasonable person would infer is intended to influence the procurement (terms, selection, etc.). These permissible contacts must be reported by the contact person and added to the project file. NYSDOT staff will record such contacts using an Intradot application.

It is permissible for all staff [designated contact persons and individuals who are not designated contact person(s)] to provide factual responses regarding the contract (e.g. status; where to find forms, plans, reports; etc.) during the period after notice and prior to designation without reporting the contact.

However, if an outside individual discusses matters that a reasonable person would infer is intended to influence the procurement other than with designated individuals, it is a legal requirement that the DOT individual report that contact to the Ethics Officer (Barbara O’Neill) or the Agency Inspector General (John Samaniuk).

**B - Post-designation** - Once a designation is made and/or a firm is selected, new contact person(s) will be identified and these individuals can negotiate the contract with the designated firm – typically, Contract Management Bureau managers/Consultant Job Managers and staff. These permissible contacts must be reported by the individual and added to the project file. NYSDOT staff will record such contacts using an Intradot application.

The law does not limit who may be contacted during the negotiation process. It is permissible for all staff [designated contact persons and individuals who are not designated contact person(s)] to provide factual responses regarding the contract (e.g. status, where to find forms, plans, reports, etc.) during the period after designation and prior to award without reporting the contact.

However, if an outside individual discusses matters other than with designated contact persons, from which a reasonable person would infer that the communication was intended to influence the procurement, this contact must be reported and added to the contract file using an Intradot application.

**C - Post-execution** - The same basic rules apply to contacts occurring post-execution. Contact person(s) will be named – typically, the assigned project manager and their supervisor. Technical work can progress without reporting. Standard contract administration tasks [progress reports, payments, etc.] can be performed without reporting.

Discussions about supplemental agreements and time extensions that are not factual in nature and that might be construed as “attempting to influence” or “negotiations” must be reported using an Intradot application. A request or proposal for a change or schedule change that has potential cost implications is required to be reported, as are all subsequent related discussions that a reasonable person would infer to be “negotiations”.

**NEW PROCUREMENT LOBBYING LAW  
INTERIM GUIDELINES AND PROCEDURES**

D - Be advised that we are already receiving requests to see information on all such contacts (both permissible and not by outside parties) and we expect the Comptroller's Office will ask to see such information for every contract approval request.

**As general guidance we suggest that at each contact with an outside party, all managers and staff should first ask if the matter to be discussed concerns an active solicitation. If the answer is yes, you should alert the individual to the Procurement Lobbying Law and refer them to the appropriate contact person(s) as applicable.** In most instances that should end that portion of the conversation and eliminate the need to report a contact and/or violation.

Further details and questions and answers regarding this new law will be available. Specific questions may be directed to program managers, Tom Perreault in Legal Services or Turk Albertin in Contract Management.

**NEW PROCUREMENT LOBBYING LAW  
INTERIM GUIDELINES AND PROCEDURES**

4] PROCUREMENT CONTRACTS –

A - Pre-bid - For all procurement contracts over \$15,000 and advertised after January 1, DOT must identify contact person(s) – typically, Contract Management Bureau/Purchase managers and staff. From the moment an ad, RFP or any other form of contract initiation is issued until the bid opening, these contacts are the only individuals who can discuss matters which a reasonable person would infer is intended to influence the procurement (terms, selection, etc.). These permissible contacts must be reported by the contact person and added to the project file. NYSDOT staff will record such contacts using an Intradot application.

It is permissible for all staff [designated contact persons and individuals who are not designated contact person(s)] to provide factual responses regarding the contract (e.g. status; where to find forms; etc.) during the period after notice and prior to the bid opening without reporting the contact.

However, if an outside individual discusses matters that a reasonable person would infer is intended to influence the procurement other than with designated individuals, it is a legal requirement that the DOT individual report that contact to the Ethics Officer (Barbara O’Neill) or the Agency Inspector General (John Samaniuk).

B - Pre-award - After the bid opening, new contact person(s) will be identified and these individuals can handle pre-award activities with the apparent low bidder – typically, Contract Management Bureau/Purchase managers and staff. These contacts [likely infrequent] must be reported by the individual and added to the project file. NYSDOT staff will record such contacts using an Intradot application.

The law does not limit who may be contacted during the negotiation process. It is permissible for all staff [designated contact persons and individuals who are not designated contact person(s)] to provide factual responses regarding the contract (e.g. status) during the period after bid opening and prior to award without reporting the contact.

However, if an outside individual discusses matters other than with designated contact persons, from which a reasonable person would infer that the communication was intended to influence the procurement, this contact must be reported and added to the contract file using an Intradot application.

C - Post-award - The same basic rules apply to contacts occurring post-award. Contact person(s) will be named – typically, the assigned contract manager and their supervisor. Technical work can progress without reporting. Standard contract administration tasks [progress reports, payments, etc.] can be performed without reporting.

Discussions about supplemental agreements and time extensions that are not factual in nature and that might be construed as “attempting to influence” or “negotiations” must be reported using an Intradot application.

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INTERIM GUIDELINES AND PROCEDURES**

D - Be advised that we are already receiving requests to see information on all such contacts (both permissible and not by outside parties) and we expect the Comptroller's Office will ask to see such information for every contract approval request.

**As general guidance we suggest that at each contact with an outside party, all managers and staff should first ask if the matter to be discussed concerns an active solicitation. If the answer is yes, you should alert the individual to the Procurement Lobbying Law and refer them to the appropriate contact person(s) as applicable.** In most instances that should end that portion of the conversation and eliminate the need to report a contact and/or violation.

Specific questions may be directed to program managers, Tom Perreault in Legal Affairs or Turk Albertin in Contract Management.

**NEW PROCUREMENT LOBBYING LAW  
INTERIM GUIDELINES AND PROCEDURES**

**5] CONSTRUCTION CONTRACTS**

A - Pre-bid - For all construction contracts over \$15,000 and advertised after January 1, DOT must identify contact person(s) – typically, Contract Management Bureau managers and staff and the Design Project Manager. From the moment an ad is issued until the bid opening, these permissible contacts are the only individuals who can discuss matters which a reasonable person would infer is intended to influence the procurement (terms, selection, etc.). These permissible contacts must be reported by the individual and added to the project file. NYSDOT staff will record such contacts using an Intradot application.

It is permissible for all staff [designated contact persons and individuals who are not designated contact person(s)] to provide factual responses regarding the contract (e.g. status; where to find forms, plans and reports; etc.) during the period after notice and prior to the bid opening without reporting the contact.

However, if an outside individual discusses matters that a reasonable person would infer is intended to influence the procurement other than with designated individuals, it is a legal requirement that the DOT individual report that contact to the Ethics Officer (Barbara O’Neill) or the Agency Inspector General (John Samaniuk).

B - Pre-award – After the bid opening, new contact person(s) will be identified and these individuals can handle pre-award activities with the apparent low bidder – typically, Contract Management Bureau managers, Office of Construction, Regional Construction Engineer and staff. These contacts must be reported by the individual and added to the project file. NYSDOT staff will record such contacts using an Intradot application.

The law does not limit who may be contacted during the pre-award process. It is permissible for all staff [designated contact persons and individuals who are not designated contact person(s)] to provide factual responses regarding the contract (e.g. status; where to find forms, plans and reports, etc.) during the period after bid opening and prior to award without reporting the contact.

However, if an outside individual wishes to discuss matters other than with designated persons, from which a reasonable person would infer that the communication was intended to influence the procurement, this contact must be reported and added to the contract file using an Intradot application.

C - Post-award - The same basic rules apply to contacts occurring post-award. Contact person(s) will be named – typically, the RCE, assigned Construction Supervisor, EIC, Office of Construction and group managers.

Technical work can progress without reporting. Standard contract administration tasks, such as progress payment accounting and compiling force account records, can be performed without reporting. Discussions about facts, data, interpretation of plans and specifications, interpretation of qc/qa test results and such are also not reportable.



## **NEW PROCUREMENT LOBBYING LAW INTERIM GUIDELINES AND PROCEDURES**

Substantive discussions about potential changes, schedules and related matters that are not factual in nature and that might be construed as “attempting to influence” or “negotiations” must be reported. A request or proposal for a change order or schedule change that has potential cost implications is required to be reported, as are all subsequent related discussions that a reasonable person would infer to be “negotiations”. These discussions would all meet the criteria for recording in the EIC’s daily diary, as well as for record-keeping in the contract files for the RCE and other staff involved. The only exceptions to these criteria are: when the change is accomplished by unit prices, so there is no “negotiation”; when the change and the associated OOC totals less than \$15,000.

D - Be advised that we are already receiving requests to see information on all such contacts (both permissible and not by outside parties) and we expect the Comptroller’s Office will ask to see such information for every contract approval request.

**As general guidance we suggest that at each contact with an outside party, all managers and staff should first ask if the matter to be discussed concerns an active solicitation. If the answer is yes, you should alert the individual to the Procurement Lobbying Law and refer them to the appropriate contact person(s) as applicable.** In most instances that should end that portion of the conversation and eliminate the need to report a contact and/or violation.

Further details and questions and answers regarding this new law will be available. Specific questions may be directed to Jim Tynan in the Office of Construction, Tom Perreault in Legal Affairs, or Turk Albertin in Contract Management.

**NEW PROCUREMENT LOBBYING LAW  
INTERIM GUIDELINES AND PROCEDURES**

**APPENDIX A**

**Consultant Procurements**

**Communications Related to Procurements - Consultant Procurements valued over \$15,000.**

- Communications that only involve factual matters are permissible and need not be recorded.
- The following summarizes your responsibilities when you are involved in any communication with other than NYSDOT staff and a reasonable person would infer the communication is intended to influence the procurement:

Are you the contact person?	Procurement phase	Permissible contact	
Yes	Pre-designation	Y	Record contact
No	Pre-designation	N	Record contact Report contact the DOT individual report that contact to the Ethics Officer (Barbara O'Neill) or the Agency Inspector General (John Samaniuk).
Yes	Negotiation	Y	Record contact
No	Negotiation	Y	Record contact
Yes	Contract executed	Y	Record contact  Discussions about supplemental agreements and time extensions that are not factual in nature and that might be construed as "attempting to influence" are required to be recorded. A request or proposal for a change or schedule change that has potential cost implications is required to be recorded, as are all subsequent related discussions that a reasonable person would infer to be "negotiation".
No	Contract executed	Y	Record contact. (Assumes this is negotiation related and so it is permissible).

**NEW PROCUREMENT LOBBYING LAW  
INTERIM GUIDELINES AND PROCEDURES**

**APPENDIX A**

**Procurement Contracts  
Communications Related to Procurements - Procurement Contracts over \$15,000**

- Communications that only involve factual matters are permissible and need not be recorded.
- The following summarizes your responsibilities when you are involved in any communication with other than NYSDOT staff and a reasonable person would infer the communication is intended to influence the procurement:

Are you the contact person?	Procurement phase	Permissible contact	
Yes	Pre-bid	Y	Record contact
No	Pre-bid	N	Record contact Report contact the DOT individual report that contact to the Ethics Officer (Barbara O'Neill) or the Agency Inspector General (John Samaniuk).
Yes	Pre-award	Y	Record contact
No	Pre-award	Y	Record contact
Yes	Contract executed	Y	Record contact  Discussions about supplemental agreements and time extensions that are not factual in nature and that might be construed as "attempting to influence" are required to be recorded. A request or proposal for a change or schedule change that has potential cost implications is required to be recorded, as are all subsequent related discussions that a reasonable person would infer to be "negotiation".
No	Contract executed	Y	Record contact. (Assumes this is negotiation related and so it is permissible).

**NEW PROCUREMENT LOBBYING LAW  
INTERIM GUIDELINES AND PROCEDURES**

**APPENDIX A**

**Construction Contracts**

**Communications Related to Procurements - Construction Contracts valued over \$15,000**

- Communications that only involve factual matters are permissible and need not be recorded.
- The following summarizes your responsibilities when you are involved in any communication with other than NYSDOT staff and a reasonable person would infer the communication is intended to influence the procurement:

Are you the contact person?	Procurement phase	Permissible contact	
Yes	Pre-bid	Y	Record contact
No	Pre-bid	N	Record contact Report contact the DOT individual report that contact to the Ethics Officer (Barbara O'Neill) or the Agency Inspector General (John Samaniuk).
Yes	Pre-award	Y	Record contact
No	Pre-award	Y	Record contact
Yes	Post - award	Y	Record contact in the EIC daily diary or as otherwise appropriate.  Substantive discussions about potential changes, schedules and related matters that are not factual in nature and that might be construed as "attempting to influence" or "negotiation" must be limited to designated persons and must be recorded. A request or proposal for a change order or schedule change that has potential cost implications is required to be recorded, as are all subsequent related discussions that a reasonable person would infer to be "negotiation". These discussions would all meet the criteria for recording in the EIC's daily diary, as well as for record-keeping in the contract files for the RCE and other staff involved. <u>The only exceptions to these criteria are: when the change is accomplished by unit prices, so there is no "negotiation"; when the change and the associated OOC totals less than \$15,000.</u>  Discussions about changes and time extensions that are not factual in nature and that might be construed as "attempting to influence" are required to be recorded. A request or proposal for a change or schedule change that has potential cost implications is required to be recorded, as are all subsequent related discussions that a reasonable person would infer to be "negotiation".
No	Post - award	Y	Record contact

# Offerer Disclosure of Prior Non-Responsibility Determinations

Name of Individual or Entity Seeking to Enter into the Procurement Contract:

\_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Name and Title of Person Submitting this Form: \_\_\_\_\_

\_\_\_\_\_

Contract Procurement Number: \_\_\_\_\_

Date: \_\_\_\_\_

1. Has any Governmental Entity made a finding of non-responsibility regarding the individual or entity seeking to enter into the Procurement Contract in the previous four years? (Please circle):      No  
Yes

If yes, please answer the next questions:

2. Was the basis for the finding of non-responsibility due to a violation of State Finance Law §139-j (Please circle):      No      Yes

3. Was the basis for the finding of non-responsibility due to the intentional provision of false or incomplete information to a Governmental Entity? (Please circle):      No  
Yes

4. If you answered yes to any of the above questions, please provide details regarding the finding of non-responsibility below.

Governmental Entity: \_\_\_\_\_

Date of Finding of Non-responsibility: \_\_\_\_\_

Basis of Finding of Non-Responsibility: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Add additional pages as necessary)

5. Has any Governmental Entity or other governmental agency terminated or withheld a Procurement Contract with the above-named individual or entity due to the intentional provision of false or incomplete information? (Please circle):      No      Yes

6. If yes, please provide details below.

Governmental Entity: \_\_\_\_\_

Date of Termination or Withholding of Contract: \_\_\_\_\_

Basis of Termination or Withholding: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Add additional pages as necessary)

Offerer certifies that all information provided to the Governmental Entity with respect to State Finance Law §139-k is complete, true and accurate.

By: \_\_\_\_\_ Date: \_\_\_\_\_

Signature

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**Offerer's Affirmation of Understanding of and Agreement pursuant to State Finance Law §139-j (3) and §139-j (6) (b)**

Offerer affirms that it understands and agrees to comply with the procedures of the Government Entity relative to permissible Contacts as required by State Finance Law §139-j (3) and §139-j (6) (b).

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Signature

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Contractor Name: \_\_\_\_\_

Contractor Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_