



MEMORANDUM

TO: Clients and Friends
FROM: Lawyers Alliance for New York
RE: Important Changes to the New York State Lobbying Act—Including Lobbying on Procurement Contracts
DATE: December 19, 2005

The New York State Lobbying Act (the “Act”) requires individuals and corporations, including nonprofits, that are attempting to influence certain decisions of agencies and officials in New York to register and file periodic reports of their lobbying expenditures and revenues to the New York Temporary State Commission on Lobbying (the “Commission”). In August 2005 Governor Pataki signed into law several significant amendments to the Act. The most significant amendment is the expansion of the definition of lobbying to include communications intended to influence decisions on procurement contracts.

Existing Law. The Act requires individuals and entities, including nonprofits, that lobby state and local legislative entities or administrative agencies with respect to legislation or administrative rulemaking or regulations *and* spend greater than \$2,000 on lobbying in a calendar year to register and report their lobbying expenditures with the Commission. The Act does not impose any limits on lobbying activities but does require biennial registration for lobbyists and periodic disclosure of lobbying expenditures and revenues for both lobbyists and clients of lobbyists. Failure to register or report timely with the Commission can result in significant financial penalties.

Amendments. The recent amendments deem communications with government officials intended to influence decisions on procurement contracts to be lobbying communications, which is not necessarily the case under the existing law. This could result in many more nonprofits having to register and report under the Act, especially with respect to their procurement contracts. Although many amendments of the Act were effective as of this summer, the more significant changes, including the provisions on procurement lobbying, are effective beginning January 1, 2006. This memorandum is intended to alert New York City nonprofits to the key provisions of the new law.

I. Key Changes in the Act

1. *Threshold for Registration is Increased.* As of January 1, 2006, the threshold for registration under the Act has been increased from \$2,000 to \$5,000. Any lobbyist or client that expends and/or receives (or anticipates expending and/or receiving) in excess of \$5,000 of reportable expenses and revenues in a single calendar year must register as a lobbyist, and must file periodic lobbyist and/or client reports with the Commission.

2. *Definition of Lobbying is Expanded.* As of January 1, 2006, the definition of lobbying is expanded to include attempts to influence--
 - a. Gubernatorial orders and mayoral executive orders.
 - b. Decisions relating to State and City governmental procurements, such as State and City contracts. (We discuss the details of the procurement lobbying provisions in Section II below of this memorandum.)
3. *Imposes a Prohibition on Procurement Lobbying During a "Restricted Period" for Certain Types of Procurement Contracts.* As of January 1, 2006, during a "Restricted Period" (which is defined below), registered lobbyists and clients are prohibited from engaging in conduct that constitutes lobbying on state or unified court system governmental procurements or a governmental procurement by an industrial development agency or public benefit corporation. This prohibition on procurement lobbying does *not* apply to governmental procurements by municipalities, such as New York City or its agencies.
 - a. The prohibition during the Restricted Period means that a registered lobbyist or client cannot (i) contact a person within a state agency, unified court system, industrial development agency or public benefit corporation who has not been designated pursuant to the State Finance Law to receive communications relating to the governmental procurement or (ii) contact a person in any other state agency other than the state agency conducting the governmental procurement regarding the contract.
 - b. The Restricted Period begins at the earliest written notice of a request for proposals or any other method of soliciting a response from offerers that are intended to result in a procurement contract, and ends when a final award and governmental approval is given.
 - c. Notably, the prohibition on procurement lobbying during the Restricted Period does *not* prohibit contacts with members of the state legislature regarding governmental procurements of a state agency, unified court system, industrial development agency or public benefit corporation.
4. *Records Must be Retained for 3 Years.* The Act requires lobbyists and clients to retain checks and receipts relating to expenses greater than \$50.00 for a period of three years. This provision has been effective since the amendments were signed into law on August 22, 2005.
5. *Changes to Penalties for "Knowing and Willful" Violations of the Act.* As of January 1, 2006, the penalties for "knowing and willful" failures to comply with the Act under Section 1-o (which were located in Section 1-n) have been changed. Note that these changes do not affect the Commission's ability to impose fines for late filings on registrants under other sections of the Act (*e.g.*, if a lobbyist report is filed 5 days late, the Commission may impose a late filing fine without regard to the new provisions):

- a. Newly registered lobbyists and clients will have 15-day grace period for first-time “knowing and willful” failures to file a statement of registration or report without being subject to the fine or penalty that would otherwise be imposed for knowing and willful failure to make such filings. Failure to file the statement or report within the 15-day period subjects the lobbyist or client to civil penalties.
- b. Before imposing a penalty under this section, the Commission will be required to consider as a mitigating factor that the lobbyist or client has not previously been required to register and to consider as an aggravating factor the fact that the lobbyist or client has had fines or penalties in the past. The Commission must also consider the proportionality of the penalty to the amount the lobbyist or client expends or receives.
- c. Knowingly and willfully engaging in prohibited procurement lobbying during the Restricted Period will subject a lobbyist or client to a fine of up to \$10,000 and if the Commission finds two violations of the ban on procurement lobbying within a four-year period, the Commission may increase the penalty to \$25,000 and may ban the lobbyist or client from lobbying on procurement contracts for a period of four years. Lobbying during the four-year prohibition can result in penalties up to \$50,000.
- d. Knowing and willful failure to retain required records for the requisite three-year period can result in fines up to \$2,000 per violation.
- e. The legislation clarifies that any assessment of a penalty under these new provisions will only be made after the Commission sends a notice by certified mail of the intent to assess a penalty, the basis for the penalty and offers the party an opportunity to appear, present evidence and be heard at a hearing on the merits.

II. Procurement Lobbying

The expansion of the Act to include procurement lobbying on city and state procurement contracts is perhaps the most significant amendment for New York City nonprofits. It means that effective January 1, 2006, organizations that are not currently registered with the Commission because they are not involved in legislative or administrative lobbying may well be required to register simply based on their procurement lobbying.

Keep in mind that under the Act, the only procurement contracts covered are those of estimated annual expenditure greater than \$15,000, and that government grants are not considered procurement contracts. Although the Act does not distinguish between a government grant and government contract, a nonprofit that receives funds by contract from a government agency through a bidding process and is given a set of deliverables pursuant to an agreement should consider the funds a contract.

It is important to remember that not all communications regarding governmental procurements are considered lobbying communications. The following actions are NOT considered lobbying:

- Submitting a bid or proposal, whether orally, in writing or electronically, in response to a request for proposals (“RFP”), invitation for bids (“IFB”) or any other method for soliciting a response from offerers intending to result in a procurement contract (“Other Solicitation”).
- Participating in a conference provided for in an RFP, IFB or Other Solicitation.
- Communications solely for the purpose of negotiating the terms of a procurement contract *after* being notified of an award or for the purpose of negotiating the terms of a purchase under an existing procurement contract.
- Communications made by an offerer or its employee *after* the award of a procurement contract when such communications are in the ordinary course of providing the services under the contract for the individual making the communication, except that the individual communicating with the procuring entity cannot have as his/her primary responsibility lobbying on procurement contracts.
- Participating in a protest, appeal or other review process of a procurement contract before the government entity conducting the procurement seeking a final administrative determination or in a subsequent judicial proceeding or bringing complaints of an alleged improper conduct in a governmental procurement.
- Submitting written questions to a designated contact at the procuring entity who is identified in the RFP, IVB or Other Solicitation, when all written questions and responses are to be disseminated to all offerers who have expressed an interest in the RFP, IVB or Other Solicitation.

Pursuant to the new legislation, Office of General Services has convened an Advisory Council on Procurement Lobbying (the “Advisory Council”), which just met for the first time in November. The Advisory Council is tasked with submitting a preliminary report by December 31, 2005 to the Governor and the State legislature on potential implementation issues arising out of the procurement lobbying provisions and with advising the Commission on the implementation of provisions of the Act relating to procurement lobbying. The Advisory Council is also authorized to issue model guidelines for contacts between offerers and agencies during and prior to the Restricted Period.

Thus far, the Advisory Council has not issued any such guidelines or report, nor, to our knowledge, has it provided the Commission with advice on implementation of the procurement lobbying provisions. Although David Grandeau, the Commission’s executive director, recently announced that the Commission will devote the next year “to education, not enforcement,”¹ the Act remains effective in all respects beginning January 1, 2006 and,

¹ Michael Cooper, *Chief of Lobbying Panel Says Enforcement of Law Must Wait*, N.Y. TIMES, Dec. 8, 2005.

as Grandeau himself acknowledges, enforceable against those who violate it. Further, Grandeau indicates that the Commission will enforce the Act against well-known lobbyists for significant violations of the Act.

The Act raises more questions than it answers and there are many nuances to understand with respect to procurement lobbying. For updates on Advisory Council and Commission guidelines on implementation of the Act, please check the Office of General Services website, <http://www.ogs.state.ny.us/psg/defaultitpur.html>, and the Commission's website, <http://www.nylobby.state.ny.us/>, respectively. The full text of the Act is available on the Commission's website as well.

Lawyer Alliance offers a dozen workshops each fall and spring and included among them is a three-hour workshop on Lobbying and Political Activity by Nonprofits. In this workshop, we cover the federal, state and local regulation of lobbying activity, including the registration and reporting obligations under the Act, and federal regulation of electoral activity by nonprofits. Our workshops are geared towards nonprofit managers and are open to all who are interested. Please see the Lawyer Alliance website, <http://www.lawyersalliance.org>, for our workshop schedule and to register for a workshop.

If you have questions about the amendments or this memorandum, please contact Staff Attorney Sunita Subramanian at 212/219-1800, ext. 232.