STATE REGULATION OF PROCUREMENT LOBBYING

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At the right side of your screen, there is space for you to post questions, which we will address at the end of the presentation, time permitting. Please post your questions to both the host and the presenters.

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OVERVIEW

- Attempts to influence government contracting and purchasing decisions may constitute “procurement lobbying”
- Federal, state-by-state and local regulatory variations
- Definition of “procurement lobbying”
  - Covered activities
  - Key exceptions
- Registration requirement
- Reporting obligations
OVERVIEW

- Other consequences
  - Subject to broader gift bans
  - Effect on contingent compensation (*i.e.*, commission) agreements

- Additional issues
  - Pay-to-play laws
  - Government contracting ethics generally

- Penalties and compliance
§ 1602. Definitions

As used in this Act:

(8) Lobbying contact.

(A) Definition. The term "lobbying contact" means any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to—

(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);
(ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
(iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
(iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.
STATE-BY-STATE AND LOCAL VARIATIONS

- The following states regulate procurement lobbying:

  Arkansas  Connecticut  Delaware  Florida  Georgia  Idaho  Illinois  Indiana  Kansas

  Kentucky  Louisiana  Maryland  Massachusetts  Michigan  Mississippi  Missouri  New Hampshire  New Jersey

  New York  North Carolina  Ohio  Pennsylvania  Rhode Island  Tennessee  Texas  Vermont
STATE-BY-STATE AND LOCAL VARIATIONS

- Registration thresholds and reporting requirements vary from jurisdiction to jurisdiction
  - Some state lobbying statutes also cover local lobbying, others do not
  - Some localities have their own lobbying laws
- Substantive restrictions and prohibitions (e.g., gift bans, contingent compensation laws, and “pay-to-play” schemes) also vary widely
DEFINITION OF PROCUREMENT LOBBYING

- Procurement lobbying: An attempt to influence a government contracting or purchasing decision
- Oftentimes, applies only to a company’s contracts over a certain dollar value
- Also, for individual lobbyists, minimum time, compensation or contact thresholds sometimes apply
DEFINITION OF PROCUREMENT LOBBYING

OFFICIAL CODE OF GEORGIA ANNOTATED
TITLE 21. ELECTIONS
CHAPTER 5. ETHICS IN GOVERNMENT
ARTICLE 4. PUBLIC OFFICIALS CONDUCT AND LOBBYIST DISCLOSURE


§ 21-5-70. Definitions

As used in this article, the term:

(5) "Lobbyist" means:

(A) Any natural person who, for compensation, either individually or as an employee of another person, undertakes to promote or oppose the passage of any legislation by the General Assembly, or any committee thereof, or the approval or veto of legislation by the Governor;

(G) Any natural person who, for compensation, either individually or as an employee of another person is hired specifically to undertake influencing a public officer or state agency in the selection of a vendor to supply any goods or services to any state agency but does not include any employee of the vendor solely on the basis that such employee participates in soliciting a bid or in preparing a written bid, written proposal, or other document relating to a potential sale to a state agency; or
ANOTATED LAWS OF MASSACHUSETTS
PART I ADMINISTRATION OF THE GOVERNMENT
TITLE I JURISDICTION AND EMBLEMS OF THE COMMONWEALTH, THE GENERAL
COURT, STATUTES AND PUBLIC DOCUMENTS
Chapter 3 The General Court
[LOBBYING]


§ 39. Definitions.

As used in sections thirty-nine to fifty, inclusive, the following words shall, unless the context clearly indicates otherwise, have the following meanings:

"Executive lobbying," any act to promote, oppose, influence, or attempt to influence the decision of any officer or employee of the executive branch or an authority, including but not limited to, statewide constitutional officers and employees thereof, where such decision concerns legislation or the adoption, defeat or postponement of a standard, rate, rule or regulation promulgated pursuant to any general or special law, or any act to communicate directly with a covered executive official to influence a decision concerning policy or procurement; provided further, that executive lobbying shall include acts to influence or attempt to influence the decision of any officer or employee of a city or town when those acts are intended to carry out a common purpose with executive lobbying at the state level; and provided further, that executive lobbying shall include strategizing, planning, and research if performed in connection with, or for use in, an actual communication with a government employee, and provided, further, that "executive lobbying" shall not include providing information in writing in response to a written request from an officer or employee of the executive branch or an authority for technical advice or factual information regarding a standard, rate, rule or regulation, policy or procurement for the purposes of this chapter.
DEFINITION OF PROCUREMENT LOBBYING

- Exceptions:
  - Mere monitoring
  - Submitting a bid or responding to an RFP
  - Participating in a bid conference
  - Taking or filling orders
  - Requesting technical or procedural advice, assistance or clarification
  - Providing technical advice, assistance or clarification – if done in response to a written request from the government official or agency
DEFINITION OF PROCUREMENT LOBBYING

 COVERED ACTIVITIES:

- “Door opening” (“goodwill lobbying”)
- Product demonstrations
- Attempting to influence contents of an RFP
- Campaigning for your product/service or against your competitors
REGISTRATION REQUIREMENTS

- Lobbyists, including procurement lobbyists, are required to register with state/local regulatory authorities
  - Registration requirements for employers, employees and consultants
  - Registration form ([http://ethics.gov.state.md.us/forms/form3.doc](http://ethics.gov.state.md.us/forms/form3.doc))
  - Registration fee
  - Renewable annually
  - Some jurisdictions require annual training
REPORTING OBLIGATIONS

- Registered lobbyists are required to file regular reports
  - Reporting requirements for employers, employees and consultants
  - Contents: Compensation, contacts, activities, contributions and other gifts ([http://ethics.gov.state.md.us/forms/form4.doc](http://ethics.gov.state.md.us/forms/form4.doc))
  - Certification requirements
  - Reports are public documents
OTHER REQUIREMENTS: Gift Bans

- General government contractor gift prohibition: No gifts to agency or officials while seeking official action
- Registered lobbyists are often subject to a much broader gift ban – on all gifts to all state officials
OTHER REQUIREMENTS: Gift Bans

- **Gift:** Anything of value
  - Food, beverage, travel, lodging, and entertainment (including “personal hospitality”)
  - Product samples
  - Loans or discounts on commercially-unavailable terms

- **Exceptions**
  - Food and beverage of nominal value, not offered as part of a meal
  - Widely-attended events and charitable events (including admission, food and beverage)
  - Items of nominal or little intrinsic value
OTHER REQUIREMENTS: 
Contingent Compensation

- Contingent compensation: Payment to a lobbyist that depends on the outcome of governmental action or decision

- The following states prohibit or restrict contingent compensation of registered lobbyists:
  - Prohibited: AR, CT, GA, IL, MI, MS, NJ, NY, TN
  - Restricted: DE, FL, ID, KY, MD, MA, NC, OH, PA
OTHER REQUIREMENTS: Contingent Compensation

- Restrictions
  - Sales employees in the usual and ordinary course of business
  - Bona fide contractual arrangement
  - Specified minimum term (e.g., six months)
  - Same compensation plan for business-to-business and business-to-government sales employees
ADDITIONAL ISSUES: “Pay-to-play” laws

“Pay-to-play” laws prohibit or limit political contributions and gifts given by government contractors and certain affiliated persons to public officials

- State laws: CA, CT, FL, HI, IL, IN, KY, LA, MD, MO, NE, NJ, NM, OH, RI, SC, VA, VT, WV
- Local laws include: Cook County and Chicago, IL; Los Angeles County, Oakland and San Francisco, CA; Philadelphia, PA; Houston and San Antonio, TX; New York, NY; Denver, CO
ADDITIONAL ISSUES: “Pay-to-Play” Laws

- Preliminary considerations:
  - No-bid and/or competitive bid contracts
  - State and/or local contracts
  - Minimum contract values

- Restricted donors: Contracting entity; owners; directors and officers; employees; family members; other affiliated entities (parents/subsidiaries, PACs, charitable organizations)

- Restricted recipients: Public officials involved in the contracting process (and candidates)
ADDITIONAL ISSUES: “Pay-to-Play” Laws

- Restricted amounts
- “Look back” and “cooling off” periods
- Certification/reporting obligations
- Cures
ADDITIONAL ISSUES: Government Contracting Ethics Generally

- Federal: 41 USC 423, 18 USC 201-209, FARs
- Avoid financial or personal conflicts of interest
  - Financial conflicts can arise when shareholders, part-time employees, former employees, and spouses work for the government agency awarding the contract
  - Personal conflicts are non-financial relationships that could call the government agency’s impartiality into question
- Gifts from current or prospective government contractors to agency officials are generally prohibited
  - Common exceptions: Modest food and refreshments, items of nominal value, gifts based on familial or pre-existing personal friendship, generally-available discounts
ADDITIONAL ISSUES: Government Contracting Ethics Generally

- Discussing post-government employment
  - Discussions regarding non-government employment between contractors and agency officials may have to be reported
  - The agency official may have to reject the non-government employment or be disqualified from the matter

- “Cooling off periods” for former agency employees
  - Short-term bans on accepting compensation from government contractors (e.g., one year)
  - Bans on representing another person before the government on the same matter on which the former agency employee worked
  - Bans on representing clients before a government agency for which the former agency employee previously worked
PENALTIES AND COMPLIANCE

- Penalties for violations of:
  - Lobbyist registration: Civil monetary fines
  - Reporting requirements: Civil monetary fines
  - Gift bans: Civil monetary fines, criminal penalties
  - Contingent compensation prohibitions: Civil monetary fines
  - Pay-to-play laws: Civil monetary fines, disqualification and debarment, criminal penalties
  - Contracting ethics generally: Civil monetary fines, disqualification and debarment, criminal penalties

- Key factor: “Knowing and willful”
PENALTIES AND COMPLIANCE

Key elements of a compliance program:

- High-level “buy-in”
- Assessment
- Policy
- Education and training
- Data collection, analysis and retention
- Registration and reporting
- Audit and re-assessment
THANK YOU

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