



STATE OF NEW YORK
OFFICE OF THE STATE INSPECTOR GENERAL
Final Report
March 4, 2010

SUMMARY OF FINDINGS/RECOMMENDATIONS

The Inspector General found that Robert Kelsey, an Account Manager with Ajilon Consulting, communicated with Stephen Warner, an employee of the New York State Chief Information Officer/ Office for Technology (CIO/OFT), during the period of a procurement when such contact was specifically prohibited. This action appears to violate State Finance Law §139-j, commonly referred to as the Procurement Lobbying Law. Specifically, Kelsey, a bidder on an OFT computer services mini-bid, submitted candidates' writing samples to Warner for review during the restricted period, despite the fact that Warner was not the designated contact person at OFT.

The Inspector General referred Kelsey's actions to the Office of the State Comptroller, the Advisory Council on Procurement Lobbying for its consideration in providing guidance to state agencies, public authorities, public benefit corporations and other covered public entities, and to CIO/OFT for appropriate action. Furthermore, Warner's actions were referred to CIO/OFT for appropriate disciplinary action and the Commission on Public Integrity for review.

ALLEGATION

On September 9, 2009, the Inspector General received a complaint from CIO/OFT alleging that Ajilon had submitted a letter of protest pertaining to a computer services procurement, and that the letter contained information about internal procurement matters that had not been disseminated by CIO/OFT's designated contact personnel. CIO/OFT expressed concern that the information had been unlawfully released by CIO/OFT personnel providing Ajilon with an advantage not shared by other vendors competing for the contract.

SUMMARY OF INVESTIGATION

Background

In 2005, the Legislature enacted measures designed to protect the integrity of state procurements that, among other provisions, prohibit potential contractors from acquiring inside knowledge from state employees that would afford them an undue advantage over

their competitors. Accordingly, the Procurement Lobbying Law requires state agencies and certain public authorities to collect and record information from contractors seeking procurement contracts and from those who lobby on their behalf to influence procurement contracts which exceed \$15,000 per year. In addition to requiring that all such contacts be documented, the individual state employees who may be contacted by a bidder during the procurement's "restricted" period are strictly limited: all contacts regarding procurement (defined in the law as "any oral, written or electronic communications with a governmental entity under circumstances where a reasonable person would infer that the communication was intended to influence the government procurement") may only be made to the agency's "designated contact(s)".¹ This restricted period commences when a governmental entity first solicits a response from bidders (i.e., issues a written notice, advertisement or solicitation of a request for proposals or invitation for bids) and ends when the contract has been awarded and approved by the governmental entity, and if applicable, the New York State Office of the State Comptroller (OSC).

"Impermissible contacts" occur when a bidder contacts a person in a governmental entity who is not a designated contact person in an attempt to influence the procurement during the restricted period. The law mandates that employees of governmental entities have ethical obligations to contact their agency's ethics officer or agency inspector general (where applicable) when they become aware of impermissible contacts. The Procurement Lobbying Law further provides that if a bidder is found to have "knowingly and willfully" violated the permissible contacts provisions of State Finance Law §139-j(3), there will be a determination of non-responsibility and the bidder will not be awarded the contract unless certain facts are established. If a subsequent non-responsibility determination is made within a four-year period, the bidder will be debarred from state contracts.

The Procurement in Question

Ajilon Consulting, a subsidiary of Adecco, SA, is an information technology staffing organization headquartered in Melville, New York, with 64 locations worldwide. Robert Kelsey, an Ajilon Account Manager, has been employed by Ajilon for approximately nine years and is the company contact for New York State contracts.

CIO/OFT contracts with private consultants who are assigned as installers in its Customer Networking Solutions (CNS) offices in Albany. Installers perform computer equipment installation, relocation, and removal at various locations within New York State. In December 2008, CIO/OFT began preparations to conduct a mini-bid procurement to hire up to six installers for approximately one-year terms because the then-in-effect contracts were due to expire in July 2009.

¹ State Finance Law §139-j(3)(a)(1-7) allows for contact with employees other than the Designated Contact(s) in certain limited situations referred to as "Permissible Subject Matter Communications." In the instant matter, as pertinent to Warner, these statutory exceptions are inapplicable.

CIO/OFT Director of Contract and Procurement Services Mary McGinty and Contract Management Specialist Justin Engel managed this procurement for CIO/OFT. Information Technology Specialist 4 William Burkhard, a CNS Business Office manager, provided oversight for the CNS unit. CNS unit employees Warner and Information Technology Specialist 3 Michael Genevick were initially assigned to interview installer candidates. Warner, the CNS Project Manager who supervised the six incumbent installers (all Ajilon consultants who had been working in the CNS unit for the last several years), was slated to continue as supervisor of installers hired following the new procurement.

During or about the last week of February 2009, the CIO/OFT Contract and Procurement Services office requested that the CNS Business Office supply a job description, “mandatory” and “desirable” attributes of installer candidates, as well as a scoring scheme by which to evaluate them. The Contract and Procurement Services office assesses candidates for “best value” in terms of quality, cost, and efficiency. Based on candidates’ mandatory and desirable attributes, their “technical score” would be assessed by the CNS unit.

Over the following 10 weeks, the Contract and Procurement Services office and CNS attempted to design an appropriate means by which to assess candidates’ technical qualifications. All involved in the procurement reported difficulties with the process at this stage, particularly with regard to how technical experience would be scored. A questionnaire was ultimately drafted by the CNS unit and approved by the Contract and Procurement Services office for use during the candidate interviews. Genevick reported to the Inspector General that he crafted the questions based on prior procurements.

On May 21, 2009, the installer procurement solicitation was released to potential bidders. The solicitation described the positions, terms and not-to-exceed rates of the contracts, among other things. In addition, the solicitation delineated McGinty as the “Designated Agency Contact for this Procurement” and Engel as the designated “Solicitation Contact for this Procurement.” The solicitation further read:

Please note that from the issue date of this Solicitation Document, until a contract is awarded and approved by OSC, a Restricted Period is in effect for this Mini Bid. During the Restricted period ALL communications shall be directed, in writing, solely to either the CIO/OFT Designated Agency Contact or CIO/OFT Solicitation Contact, as applicable and shall be in compliance with the Procurement Lobbying Law, the instructions in this Mini Bid and the “**NYS Office for Technology Procurement Lobbying Guidelines for Vendors,**” . . . which all Vendors are required to read, understand and comply with. (Emphasis original)

Appendix A to the solicitation, entitled “Standard Clauses for NYS Contracts,” contained a Procurement Lobbying Law Certification requiring the vendor to affirm that it understands and will comply with OFT Procurement Lobbying Guidelines for Vendors.

According to the solicitation, bidders were to submit proposed candidates to Engel in the Contract and Procurement Services office by June 3, 2009. Sixty candidates from 14 firms submitted responses to the solicitation. Their resumes were forwarded on June 4, 2009, to the CNS unit, and Genevick and Warner began a review to determine which candidates possessed the mandatory requirements. The resumes reflecting candidates with appropriate mandatory requirements were further reviewed against the desirable qualifications, and a list of 54 technically ranked candidates (six either failed to submit required documentation or did not meet minimum requirements) was returned to the Contract and Procurement Services office on June 8, 2009.

On June 10, 2009, in response to an e-mail from Genevick asking if any incumbent candidates had made the interview list, Engel sent Genevick a list containing the names of the 14 top-scoring candidates so that interviews could be arranged. This assessment is known as a short list of candidates who are “susceptible to award.” None was an incumbent installer or an Ajilon consultant. McGinty testified that the six incumbent installers were not among the 14 to be interviewed; indeed, the incumbents were at the bottom of the candidate list because they had the highest price-per-hour cost. Warner responded in an e-mail to Engel the following day:

Mr. Engel, I sent you a spreadsheet of 60 scored candidates and you return 14 candidates. I want the complete list of qualified candidates and I want it today. Mr. Warner.

You, Mr. Burkhard, as well as others, have applied undue influence over the technical requirements and scoring of this RFP and it must stop. I have an ethical responsibility in this process. I have been strong armed by many and overridden on much of this process. Any further influence will require me to take other responsible steps.

Engel testified that he complied with Warner’s demand and, although the Contract and Procurement Services office did not typically interview all candidates for a position, allowed the CNS unit to interview 54 candidates.

Also on June 11, 2009, Warner and Genevick signed “Procurement Team Member Code of Ethics-Responsibilities” forms acknowledging their receipt and understanding of the responsibilities pertaining to the restriction period covered under the Procurement Lobbying Law and ethical obligations as found in the Public Officers Law. This document reads, in pertinent part:

You are prohibited prior to contract approval from discussing the Procurement with any vendor or bidder/offeror, unless otherwise fulfilling your responsibilities in accordance with the evaluation process/procedures
.....

The following day, June 12, 2009, Deborah Jackson, Warner’s and Genevick’s supervisor, alerted them that, “Effective immediately, all communications with the

[Contract and Procurement office] must go through Bill Burkhard” and that any correspondence “becomes part of the official record.” Also that day, and continuing through June 18, 2009, Genevick, Warner, and a third CIO/OFT employee who was included to serve as an independent party interviewed 45 candidates (nine candidates declined to be interviewed or withdrew). Using the questionnaire, the candidates’ technical scoring was assessed and provided to the Contract and Procurement Services office.

According to Engel, it was upon his review of the candidates’ interview scoring that he became aware for the first time that the CNS unit had added two physical pass/fail tests to the pre-approved questionnaire. One test required a candidate to lift a 100-pound object from the floor to chest height; all candidates passed. The other test asked a candidate to identify, by visual or manual inspection, six different cables or fibers brought into the interview area. If the candidate was unable to identify each of the six, the candidate failed the test, thus making the candidate ineligible for the position. Of the 45 candidates interviewed, only seven passed the cable identification test, including the six incumbents from Ajilon.

According to McGinty and Engle, once they recognized that this single, unapproved test had resulted in the disqualification of all candidates but the Ajilon incumbents and one other, they immediately halted the procurement process and removed Warner and Genevick from further involvement. Genevick and Warner contradicted this account of the questions’ approval. Genevick testified that in early June 2009 he telephoned Engel while at work and orally requested and received permission from Engel to include both physical tests in the interview process. Genevick was questioned about this exchange:

Question: Can you describe this telephone call? Literally, what did you tell him?

Genevick: [I said] “I’d like to put these two questions in, let me run them past you.” One of them was a lifting exercise . . . I said, “We lift stuff all the time. If an individual can’t lift a hundred pounds . . . from the floor to chest height, that’s a requirement that we need because we do that every day . . . Can I put that in there?” [He answered] “Yes, you can.”

Question: And he was aware that it wasn’t going to be a question? Can you lift a hundred pounds? But . . . a physical action. “Here’s a hundred pounds. Lift it from floor to chest.”

Genevick: He laughed about it . . . and gave the approval.

Genevick testified similarly about his conversation with Engel regarding the second physical test. “My question to Justin [Engel] was, ‘I want to do a cable identification where [the candidates] actually have to physically identify the cables that I

would present to them and can I do that?” Genevick said that Engel approved this test as well.

Warner similarly testified that it was his understanding prior to the interviews that Genevick had been given permission by Engel for the tests. Warner stated, however, that he was on vacation when the conversation between Genevick and Engel took place. Deborah Jackson, Warner’s and Genevick’s supervisor, also testified, “My recollection is that Justin [Engel] knew about [the two tests] before we actually did the interviews,” but she was uncertain if Engel knew they would be physical tests.

The Contract and Procurement Services office undertook a review of the original resumes and found, according to McGinty, candidates that did not meet the mandatory requirements, yet had been advanced to the interview portion of the bid process by the CNS unit. Wishing to salvage the suspended procurement, CIO/OFT contacted OSC on June 23, 2009, requesting advice on how to proceed. McGinty proposed to OSC that a different set of evaluators review the resumes for mandatory and desirable skills. McGinty testified that OSC agreed and further required that CIO/OFT telephonically interview each eligible candidate and request a writing sample in order to determine their written and communication skills.

Also on June 23, 2009, Warner met with CIO/OFT Counsel Susan Beaudoin. According to Beaudoin, Warner expressed dissatisfaction with the bid process and reported that because he would be their supervisor, he should play a larger role in evaluating candidates. Beaudoin related that she explained to Warner that the bid process must conform to procurement law.

Over the next six weeks, the procurement evaluations continued as specified by OSC. Under the monitoring of the Contract and Procurement Services office, a new group of evaluators assessed the resumes, writing samples were requested and reviewed, and telephone interviews were conducted. On August 10, 2009, Engel testified that he telephoned Kelsey and informed him that the original technical scoring for the Ajilon candidates had been discarded and that no Ajilon consultants had been selected in the subsequent re-evaluation. On the same day, Warner, among others, received an e-mail from the CNS Business Office that read:

Attached are 3 [Purchase Requests] for the CNS installers, along with their associated AC 340s from [the Contract and Procurement Services office].
Cost is summarized: Nfrastructure - \$306,000.00, Tailwind - \$78,000.00,
C&C Computer Solutions - \$56,000.00.

Shortly thereafter, Engel learned that the candidate from the firm Tailwind was no longer available to fill the position. Choosing the next highest evaluated candidates, all Ajilon consultants, Engel, on August 21, 2009, contacted Ajilon and requested that four of their consultants submit writing samples so as to be considered for the current procurement. Engel testified that he did not inform Kelsey during this conversation that the Ajilon candidates would be competing for only a single position.

Violations of the Procurement Lobbying Law

As set forth above, by May 2009, the restricted period barring a potential bidder from contacting any state employee other than the agency's designated contact had commenced. Kelsey and Warner were fully aware of this fact and that the "designated agency contact" for this procurement was McGinty and the designated "solicitation contact" was Engel. Despite this knowledge, CIO/OFT e-mails reveal, and Kelsey confirmed, that on August 24, 2009, Kelsey obtained writing samples from four Ajilon candidates and e-mailed them to Warner at CIO/OFT for review. One candidate wrote in the e-mail chain, "Bob [Kelsey] / Stephen [Warner] – Attached is my write up describing what my duties were. If anything else is needed or if you want me to change anything, let me know." Warner responded to each of the requests: "Read it earlier today! Didn't like it as much as the others but that Andy!," "Bob, I read Scott's this morning. Other than what I think is grammatical errors it is just fine. 'An' instead of 'A'. Bob, if you have someone to review them for grammar that would be appreciated. I'm not the best for that task" and "Looks good to me!" Kelsey, within hours, e-mailed those writing samples to Engel, the designated solicitation contact for the procurement.

In an interview with the Inspector General, Kelsey acknowledged that he knew both that this contact was made within the restricted period of the procurement and Warner was not the designated agency contact: "I do remember sending this to Steve [Warner] . . . to see if this is what they were looking for because I got no direction from Justin Engel, he just said send a writing sample." Kelsey claimed that this contact with Warner was the only instance he recalled during the restricted period. Kelsey stated that as Ajilon has placed consultants at CIO/OFT under Warner's supervision since 2001, Warner had become his main day-to-day managerial contact with regard to the consultants.

Although when initially questioned by the Inspector General, Warner averred, "I don't talk to [vendors] until . . . after the selection has been made by the Comptroller's Office and my procurement office says this is who you are, up until that point I don't talk to any vendors," he later admitted to the e-mail exchange and that he had reviewed the candidate's writing sample. Warner advanced several arguments in his defense: (1) that the restricted period had ended, relative to Warner, once he was removed from the procurement process in late June 2009; (2) that he believed the procurement had concluded on August 10, 2009, when he received the aforementioned e-mail which spoke to awards; and (3) that Kelsey had asked that he review the writing samples but had not indicated the purpose of this review.

Warner's explanations lack merit. As stated above, Warner testified that he was aware the restricted periods end only after OSC awards the contracts. Moreover, in regard to this specific procurement, Jackson and Genevick testified that Warner was notified after the August 10 e-mail that further evaluations were being conducted and the procurement remained open. According to Jackson, "I feel pretty confident that I can say that I had some conversation with Stephen that this was still in the process and it was not decided yet." Genevick testified that he and Warner were informed by Jackson on

August 13 or August 14, 2009 that the candidates should not be contacted for a start date as the Contract and Procurement Services office “pulled those names back.” Lastly, it strains credulity to believe that Kelsey would request that Warner review Ajilon candidates’ writing samples during this period out of pure coincidence, unrelated to the ongoing procurement. As Jackson opined, “I don’t see why they would have ever asked him to read [the writing samples] unless there was still something going on.” Genevick too stated, “The procurement, I would say, still had to be open if he was, if they [were] requested to provide that.

On August 27, 2009, CIO/OFT submitted the installer procurement to OSC for review and approval. Of the six installer positions available, one Ajilon consultant had been selected.

On September 1, 2009, Ajilon filed a written procurement protest with CIO/OFT. As noted above, the Contract and Procurement Services office believed this letter contained information regarding internal CIO/OFT procurement matters that should not have been released to a bidding consultant, including the method used by CIO/OFT to re-evaluate and score candidates’ resumes. Shortly thereafter, on September 9, 2009, CIO/OFT contacted the Inspector General. On November 18, 2009, OSC awarded the six consultant positions in the installer procurement.

FINDINGS AND RECOMMENDATIONS

The Inspector General found that Robert Kelsey, an Account Manager with Ajilon Consulting, had impermissible contact with Stephen Warner, an Information Technology Specialist 4 employed by CIO/OFT, during the restricted period of a procurement. Specifically, Kelsey, a bidder on a CIO/OFT computer services procurement, knowingly submitted writing samples to Warner for review during the restricted period, despite the fact that Warner was not the CIO/OFT “designated contact” on the procurement. Within a few hours of Warner’s review, the writing samples were then submitted by Kelsey to the designated CIO/OFT contact.

Kelsey’s request that Warner review the writing samples for several Ajilon candidates appears to be an attempt to influence the procurement process by Kelsey, and thus, an impermissible contact. This action appears to be in violation of State Finance Law §139-j, the Procurement Lobbying Law.

The Inspector General referred Kelsey’s actions to the Office of the State Comptroller for review and to the Advisory Council on Procurement Lobbying for its consideration in providing guidance to state agencies, public authorities, public benefit corporations and other covered public entities. These findings were also referred to CIO/OFT for appropriate action.

The Inspector General also found that Warner’s review of consultant writing samples during the restricted period of a procurement is in disregard of procurement provisions. The Inspector General discovered no other impermissible contacts by Warner

with Kelsey, or evidence of personal gain by Warner. Warner's actions were referred to the CIO/OFT for appropriate disciplinary action and to the Commission on Public Integrity for review of possible violations of the state's ethics laws.

Regarding the two physical tests administered to the candidates, as the two parties to a purported conversation, Engel and Genevick, differ as to the substance of what was discussed and what approvals were granted relative to these tests, and lacking any other evidence to bolster or refute either's claims, the Inspector General will make no finding on this matter.

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The response to the Inspector General's report by Melodie Mayberry-Stewart, Chief Information Officer and Director of the Office for Technology, appears on the following pages.

DAVID A. PATERSON
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MELODIE MAYBERRY-STEWART, Ph.D.
CHIEF INFORMATION OFFICER
DIRECTOR OF OFFICE FOR TECHNOLOGY

March 1, 2010

The Honorable Joseph Fisch
State Inspector General
Office of the Inspector General
Empire State Plaza
Agency Building 2, 16th Floor
Albany, NY 12223-1250

Re: Final Report Pending Agency Response Dated February 16, 2010

Dear Inspector General Fisch:

Thank you for the Inspector General's draft report referenced above. The report documents an apparent violation of the Procurement Lobbying Law by a vendor, and possible procurement and ethics violations by a CIO/OFT staff member, during a computer services procurement.

In furtherance of its mission to provide centralized technology policies and services to other New York State governmental entities, CIO/OFT regularly engages in significant procurement activity. In order to preserve and maintain the integrity of the procurement process, CIO/OFT expects of its staff and the vendor community nothing less than full compliance with all applicable procurement and ethics laws.

CIO/OFT is committed to ensuring that its personnel comply with the Public Officers and Procurement Lobbying Laws. Our agency requires all new employees to undergo ethics training within thirty (30) days of their employment, and for that training to be refreshed at least every other year thereafter. Last year, all agency personnel underwent mandatory on-site training delivered jointly by the NYS Public Integrity Commission and the Office of the Inspector General. Each month, information is provided to agency staff on the front page of our agency intranet, highlighting a particular ethical issue to foster continuous learning.

Additionally, our website contains a link to all the procurements in a restricted period, with a notice to vendors of their responsibility to comply with the Procurement Lobbying Law, as well as other information concerning the law. Staff involved in procurements are regularly instructed to refrain from improper contact with vendors during a restricted period and the agency intranet links to an application to collect information concerning vendor contact.

In light of this incident, as well as the report and findings of the Inspector General, CIO/OFT intends to take the following remedial measures to address the inappropriate activity described in your report:

1. Initiate appropriate action against the vendor under the Procurement Lobbying Law to address the apparent violation of the prohibition on impermissible contacts. Such action may include a termination of the contract, a determination of vendor non-responsibility, and a report of that determination to the Office of General Services and Office of State Comptroller;
2. Direct the CIO/OFT Office of Human Resource Services to immediately commence an investigation into the conduct of Mr. Warner;
3. Publish a reminder to all CIO/OFT staff of their responsibility to comply with the Procurement Lobbying Law, and conduct refresher training on the law for staff who are specifically involved in procurements; and
4. Cooperate fully with any inquiries or investigations undertaken by the Commission on Public Integrity, the Office of the State Comptroller and the Advisory Council on Procurement Lobbying.

Thank you for the thorough and professional manner in which this investigation was conducted, and for this opportunity to respond to the report.

Sincerely,

A handwritten signature in cursive script that reads "Melodie Mayberry-Stewart". The signature is written in black ink and is positioned above the printed name and title.

Melodie Mayberry-Stewart, Ph.D.
NYS Chief Information Officer and OFT Director

cc: Cathy Durand, Deputy CIO
Susan Beaudoin, Counsel