

STATE ETHICS COMMISSION

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TO: Procurement Agencies, Vendors, Lobbyists

**SUBJECT: Ethics Law – Lobbying Provisions Applicable to Executive Branch
Lobbying and Procurement**

The purpose of this memorandum is to review significant aspects of the Public Ethics Law addressing lobbying registration requirements applicable to procurement and business grants or loans. Unless otherwise specified, the statutory references in this memorandum are to the Public Ethics Law, Maryland Code Annotated, General Provisions Article, Title 5, Subtitle 7.

ETHICS LAW SUMMARY OF LOBBYING PROVISIONS

1. **Lobbying Registration - Procurement:** A person, group, organization or business entity compensated for purposes of obtaining a procurement contract for the employer is required to register as an executive branch lobbyist **if either of the following elements of the registration requirements is met:**
 - a. The person or entity communicates with any official or employee in the executive branch for the purpose of influencing executive action during the reporting period, and the person or entity **expends a cumulative amount of \$100 or more during a six-month lobbying reporting period on one or more officials or employees of the Executive Branch** for meals, beverages, special events or gifts in connection with or **for the purpose of influencing any executive action.** Section 5-101(l) defines executive action as “an act for which the Executive Branch of State government is responsible and that is taken by an official or employee of that branch”; or
 - b. A person or entity is compensated to influence executive action in any **procurement contract that exceeds \$100,000.00, even if not in the presence of an official or employee,** unless the person or entity is a bona fide salesperson or commercial selling agency employed or maintained by the employer. (§§ 5-702(a)(4) and 5-702(b)(4)).

2. **Lobbying Registration – Business Loan or Grant**
 - a. If the person or entity **engages in no other acts during the reporting period that require registration,** a person who **seeks to secure a business grant or loan for the purpose of locating, relocating, or expanding a business in or into the State** is **not** required to register as a lobbyist.
 - b. Persons who engage in activities requiring registration and who are not bona fide full-time officials or employees of the entity are required to register as lobbyists.

3. **Contingent Compensation** (Section 5-714) - **The law prohibits any executive action lobbying for contingent compensation.** It is important to note that this prohibition prohibiting compensation (or additional compensation) based on success covers all lobbyist activities directed at executive action, not just procurement or business grant or loan activity.

ETHICS LAW - QUESTIONS AND ANSWERS

The questions and answers below provide general guidelines. As the particular facts of each situation are important, specific questions about the Ethics Law should be referred to the office of the State Ethics Commission.

1. **In order for a person to be considered to be an executive branch lobbyist, do the procurement provisions require the person to be both in the presence of an official or employee and attempt to influence an executive procurement action in excess of \$100,000?**

Answer: **No.** Physical presence before the official or employee is not required. Registration is required if the standards for registration are met even if the contact with officials and employees is by electronic means for the purpose of influencing executive procurement action in excess of \$100,000.

2. **Is registration as a lobbyist required if the person influencing executive procurement action in excess of \$100,000 receives limited compensation for that purpose?**

Answer: **Registration is required** even if no gifts are made and compensation in any amount is received, if the person tries to influence a procurement of \$100,000 or more, unless the person seeking to secure the procurement is a bona fide salesperson or bona fide commercial selling agency or is a full-time official or employee of a business entity seeking to secure the procurement.

3. **What is a bona fide salesperson or a bona fide commercial selling agency?**

Answer: Generally, a bona fide salesperson is a **regular full-time employee of the vendor paid to engage primarily in sales activity on behalf of the vendor.** However, other full-time regular employees of the vendor may also be considered bona fide salespersons if they are engaging in sales activity as part of a procurement process. A commercial selling agency is generally a sales entity whose business is product sales rather than, for example, government relations, and it regularly functions in the role of a sales agent for one or more vendors.

4. **What does "influence executive action in a procurement" mean?**

Answer: Generally, these are **significant efforts aimed at influencing State purchasing,** primarily by attempting to influence the specifications or the choice of a vendor. Although specific factual situations may require close analysis, there is generally a distinction between the provision of limited information at the request of the procuring agency and the affirmative action of trying to influence executive procurement action.

5. **Does the current vendor's activity in influencing the implementation details of an ongoing contract constitute the influencing executive action in a procurement?**

Answer: If the activity involves contract change, such as an expansion of the contract that would itself require competitive or sole source procurement, it could be the subject of lobbying registration requirements. The extent to which attempts were made to change the terms and conditions of contracts could require lobbying registration and would depend on the specific facts involved. If, however, the activity were limited to clarification of a contract provision or a contract dispute, generally, lobbyist registration would not be required.

6. **If a vendor's salesperson or business employee is exempt under the \$100,000 or more procurement registration criterion, but is required to register as an executive branch lobbyist under the other executive action lobbying registration criteria (for example, where there are gifts to officials or employees in the amount of \$100 or more in a six-month lobbying reporting period), is it permissible to make compensation contingent on making the sale or getting the grant or loan?**

Answer: **No.** The Law prohibits a registered lobbyist (based on any lobbying registration criteria) from receiving compensation contingent on executive action, including all procurement action. Therefore, if contingent compensation for salespersons or other exempted person is anticipated, then gifts of meals, beverages or entertainment for officials and employees that would bring these people within the lobbying registration requirement should be avoided. (Note: Entertainment and related expenditures may also be prohibited under the provisions of the procurement law or other provision of the Ethics Law.)

7. **Does the contingent fee prohibition for executive branch lobbyists apply to all types of executive action?**

Answer: **Yes.** Executive action and legislative action lobbying both must be conducted without any compensation or level of compensation contingent on the executive or legislative action.

8. **If an attorney is retained to challenge a procurement decision as part of a formal procurement protest and appeal, would the attorney be required to register as a lobbyist, and, if the attorney's compensation is contingent on his or her success, would this trigger the contingent fee or compensation prohibitions?**

Answer: Depending on the facts, the action to challenge specifications or the selection process prior to an award could trigger the registration requirement. One factor that must be considered is whether the action is limited to presenting technical legal challenges or whether it also includes sales or other influencing activities. Once an award is made, a challenge to a procurement through the regular legal process generally does not trigger the registration requirement, unless part of this work also includes, for example, a separate decision as to who would be selected as a result of a successful appeal. Another factor to be considered is whether the activity is taking place outside of the formal setting, where these kinds of challenges would be expected to occur.

9. **If a person represents an employer who is pursuing a business plan that incorporates its desire to locate the business in Maryland, is this activity exempt from the requirement to register as a lobbyist?**

Answer: If the person or entity engages in no other acts during the reporting period that require registration, the person or entity is exempt from the registration requirement. If, however, the person or entity, for any other reason, is required to register as a lobbyist, then his or her activity on behalf of the employer pursuing a business plan that incorporates its desire to locate the business in Maryland would be required to register as lobbyist for that employer.

- 10. If a person or entity seeks to inform an Executive Branch official about its products or services at a time when there is no active procurement underway, could those actions be viewed as sufficient to trigger the requirement to register as a lobbyist? What if the efforts by the person or entity could influence a decision by the Executive Branch official to undertake a procurement action that would exceed \$100,000?**

Answer: No to both questions. The trigger pertaining to executive action on a procurement contract that exceeds \$100,000 requires efforts to influence an actual procurement, not merely promoting the capabilities of the company, even if in response to that promotion an agency might decide to initiate a procurement action. The State Finance and Procurement Article defines "procurement" as including "the solicitation and award of procurement contracts and all phases of procurement contract administration." If there is no procurement underway, this trigger is not met. Persons considering taking actions as described in this question should also seek guidance concerning the possible application of the State's procurement laws. The Commission cautions that this answer is limited to the lobbyist registration requirement under the Ethics Law only.