

## Guidance Regarding Procurement Communications Reporting Requirement

30 ILCS 500/50-39

Revised December 2016

This guidance was originally issued by the Office of the Governor in February 2011 and has now been revised to reflect changes in the law, policy, and practice of implementing this section of the Illinois Procurement Code. This guidance is meant to help interpret the reporting requirements for the agencies that are subject to the Procurement Code. Please note, the reporting requirements for the Illinois Power Agency differ from those included and discussed below.

Generally, the Illinois Procurement Code provides that *“any written or oral communication received by a State employee who, by the nature of his or her duties, has the authority to participate personally or substantially in the decision to award a State contract and that imparts or requests material information or makes a material argument regarding potential action concerning an active procurement matter, including but not limited to, an application, a contract or a project, shall be reported to the Procurement Policy Board, and, with respect to the Illinois Power Agency, by the initiator of the communication, and may be reported also by the recipient.”* 30 ILCS 500/50-39(a).

### **Who** must report?

The reporting requirement applies to State agency employees who, by the nature of his or her duties, has the authority to participate personally or substantially in the decision to award a State contract. It is only those State employees who may have to report communications when they are involved in discussions with individuals outside of their own agencies concerning procurement decisions presently under consideration or to be considered in the near future (as further explained below). While there are other requirements for determining whether a communication is reportable discussed below, the first threshold question is always whether the State employee involved in the communication has, by the nature of his or her duties, the authority to participate personally and substantially in the decision to award a State contract. Generally, those at an Agency who meet this definition include, but are not limited to, the Agency Director, General Counsel, Chief Financial Officer, Personnel in the Agency Procurement Office, including the Agency Procurement Officer, Procurement Personnel and Buyers, and other Agency staff who are involved in the evaluation or Agency decision regarding a procurement. In addition, the Revolving Door Prohibitions under the Ethics Act at 5 ILCS 430/5-45(c) also refers to employees who “may have the authority to participate personally and substantially in the award of State contracts. . . .” As such, those employees at the Agency who are on the “C-List” are also a reasonable starting reference for determining to whom the reporting requirements might apply.

For purposes of this guidance, a State employee is “(1) any person employed full-time, part-time or pursuant to a personal services contract with the State and whose employment duties are subject to the direction and control of the State with regard to the material details of how the work is to be performed;

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(2) any appointed or elected commissioner, trustee, director or board member of a board of a State agency; or (3) any other person appointed to a position in or with a State agency, regardless of whether the position is compensated.” 2 ILL. ADMIN. CODE §1620.825 (g).

**What** is a reportable communication?

Any **written or oral** communication received by a State employee who, by the nature of his or her duties, has the authority to participate personally or substantially in the decision to award a State contract and that **imparts or requests material information or makes a material argument** regarding **potential action** concerning an **active procurement matter**, including but not limited to, an application, a contract or a project, shall be reported to the Procurement Policy Board. 30 ILCS 500/50-39(a) (emphasis added).

To be reportable under Section 50-39 of the Illinois Procurement Code, all three of the above-emphasized items must be present. The communication must:

- (1) Be material (material information or a material argument);
- (2) Be regarding a potential action; **AND**
- (3) Pertain to an active procurement matter

If all three requirements are satisfied, and none of the exceptions explained below apply, then the communication must be reported. If one of the three requirements is absent, then the communication is not required to be reported.

**(1) What is Material?**

“Material information” is “information that a reasonable person would deem important in determining his or her course of action. It is information pertaining to significant issues, including, but not limited to, price, quantity and terms of payment or performance.” 30 ILCS 500/50-39(g). “Material information” would not include general, public, information or information that is part of the formal procurement process such as the posting of procurement opportunities, the process for approving a Procurement Business Case (“PBC”), submission of bids, and the like.

A “material argument” is “a communication that a reasonable person would believe was made for the purpose of influencing a decision relating to a procurement matter. It does not include general information about products, services or industry best practices, or a response to a communication initiated by an employee of the State for the purpose of providing information to evaluate new products, trends, services or technologies.” 30 ILCS 500/50-39(g).

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In determining whether a communication is material, the State employee should consider (i) whether the information conveyed is new or already known to the State agency (or repeated or restated privately) and other participants in the communications; and (ii) the likelihood that the information would influence a pending procurement matter. 2 ILL. ADMIN. CODE §1620.825 (B)(1)(c). Information that is already in the State agency's possession is not material.

### **(2) What is a Potential Action?**

A "potential action" is one that a reasonable person would believe could affect the initiation, development or outcome of a pending procurement matter. 2 ILL. ADMIN. CODE §1620.825(B)(2). A "potential action" is not a matter that has already occurred.

### **(3) What is an "Active Procurement Matter"?**

"Active procurement matter" means "a procurement process beginning with requisition or **determination of need** by an agency and continuing through the publication of an award notice or other completion of a final procurement action, the resolution of any protests, and the expiration of any protest or Procurement Policy Board review period, if applicable. "Active procurement matter" also includes **communications relating to change orders, renewals, or extensions**. 30 ILCS 500/50-39(g) (emphasis added).

"Procurement processes" includes the processes of procuring specific goods, supplies, services, professional or artistic services, construction, leases of real property (whether the State is the lessor or lessee), or capital improvements, and includes master contracts, contracts for financing through use of installment or lease-purchase arrangements, renegotiated contracts, amendments to contracts, and change orders. Active procurement matters include:

- A) drafting, reviewing or preparing specifications, plans or requirements, including determining the method of source selection;
- B) drafting, reviewing or preparing any Invitations for Bid, Requests for Information, Requests for Proposals, sole source procurement justifications, emergency procurement justifications or selection information;
- C) evaluating bids, responses and offers, other communications among an evaluation team and any technical advisors to the team relating to the evaluation of a procurement not yet awarded;
- D) letting or awarding a contract;
- E) resolving protests;
- F) determining inclusion on prequalification lists or prequalification in general;

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G) identifying potential conflicts of interest or voiding or allowing a contract, bid, offer or subcontract for a conflict of interest;

H) allowing a conflict or subcontract pursuant to Section 50-60 of the Illinois Procurement Code [30 ILCS 500]; and

I) determining, drafting, preparing, executing, denying or approving change orders or the renewal or extension of an existing contract.

2 ILL. ADMIN. CODE §1620.825 (b)(3). Procurement matters are activities that begin when the time an agency has identified a need for a procurement. While the Chief Procurement Officer may designate a document for an agency to use in documenting a determination of need, it is likely this decision will occur before any formal procurement documentation, like a PBC or its equivalent, has been completed. The point of reference is when the Agency determined it had a need for a good or service requiring a procurement, regardless of how that need might be documented. It remains an active procurement matter continuously through to the publication of an award notice or other completion of a final procurement action, the resolution of any protests, and the expiration of any protest or Procurement Policy Board review period, if applicable. A delay in completing a PBC, or otherwise initiating the procurement process, once the Agency has determined it has a need for a good or service will not avoid these communication reporting requirements.

If the communication meets the three requirements of being material to a potential action in an active procurement matter, it still may not need to be reported if it is solely a communication regarding one or more of the following exceptions (*See, generally*, 30 ILCS 500/50-39(a)):

(1) Statements publicly made in a public forum. “Public forum” includes “any meeting that satisfies the notice requirements contained in Section 2.02 of the Open Meetings Act [5 ILCS 120/2.02], but also includes other public events that are advertised and generally open to the public. A meeting may be a public forum even if a reasonable fee is required, such as educational seminars and conferences.” 2 ILL. ADMIN. CODE §1620.825 (h).

(2) Statements regarding matters of procedure and practice, such as format, the number of copies required, the manner of filing, due dates, general process questions, and the status of a matter. Remember that sometimes information is confidential and cannot be shared as a result.

(3) Intra-Procurement Staff statements. This includes statements made amongst those personnel involved, by the nature of their official duties, in the procurement. This would include statements made amongst Agency procurement staff or to the agency head or other employees of that agency, to or from Chief Procurement Office staff, or to or from an employee of another State agency who, is either (a) exercising his or her experience or expertise in the subject matter

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of the particular procurement in the normal course of business, for official purposes, and at the initiation of the purchasing agency or the appropriate State purchasing officer, or (b) exercising oversight, supervisory, or management authority over the procurement in the normal course of business and as part of official responsibilities.

(4) Unsolicited communications from third parties providing general information about products, services, or industry best practices before those products or services become involved in a procurement matter.

(5) Communications received in response to the procurement process provided that the communications are made in accordance with the instructions contained in the procurement solicitation, procedures, or guidelines. This includes communications received in response to solicitations, including, but not limited to, vendor responses to a request for information, request for proposal, request for qualifications, invitation for bid, or a small purchase, sole source, or emergency solicitation, or questions and answers posted to the Illinois Procurement Bulletin to supplement the procurement action.

(6) Communications that are privileged, protected, or confidential under law.

(7) Communications that are part of a formal procurement process. These include the formal procurement processes set out by statute, rule, or the solicitation, guidelines, or procedures, including, but not limited to, the posting of procurement opportunities, the process for approving a procurement business case or its equivalent, fiscal approval, submission of bids, the finalizing of contract terms and conditions with an awardee or apparent awardee, and similar formal procurement processes.

(8) Communications regarding the administration and implementation of an existing contract do not have to be reported unless and until there are communications regarding change orders or the renewal or extension of a contract. Communications regarding the decision to renew, extend a contract, or the need for a change order are reportable. Communications that occur after the decision to renew, extend a contract, or proceed with a change order are not reportable so long as those communication are part of the applicable formal procurement process for a renewal, contact extension or change order.

(9) Communications regarding matters exempt from the Illinois Procurement Code are not reportable.

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## **When** must the report be filed?

As soon as practicable, but in no event more than 30 days after receipt of the communication or the first in a series of related communications. The 30 days begins to run once the first communication is received.

## **Where** do I report?

Reports are made on the Procurement Policy Board (PPB) website at:

<http://www2.illinois.gov/ppb/Pages/default.aspx>

The website has a form which walks through the details required by statute. Keep in mind that the point of the information is to be able to locate those persons involved in the communication. As such, general contact information is sometimes more useful than, for example, the precise minute-by-minute location of where the person was when the call was received.

Generally, there are three categories of information must be reported:

Public Information	State Employee Information	General Details
<ul style="list-style-type: none"><li>• Identity of each person issuing the written or oral communication.</li><li>• Identity of the individual or entity represented by the person issuing the communications, if applicable.</li><li>• Description of the action required or recommended by the person issuing the communication.</li><li>• Phone number of the person issuing the communication (if the communication occurred by phone).</li><li>• The location of the person issuing the communication.</li></ul>	<ul style="list-style-type: none"><li>• Identity of employee(s) receiving the communication.</li><li>• Job title of the employee(s) receiving the communication.</li><li>• Identity of the employee(s) responding to the communication.</li><li>• Job title of the employee(s) responding to the communication.</li><li>• The location of the employee(s) involved in the communication.</li><li>• Phone number of employee(s) involved in the communication (if the communication occurred by phone).</li></ul>	<ul style="list-style-type: none"><li>• Summary of the points made by each person involved in communication.</li><li>• Duration of the communication.</li><li>• Date of communication.</li><li>• Time of communication transmission.</li><li>• Communications should be reported within 30 days.</li></ul>

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### General Questions:

- What are the penalties for non-compliance?

State employees who knowingly and intentionally fail to comply with the reporting requirements will be subject to suspension or discharge. 30 ILCS 500/50-39(e)

- What if the communication is not reportable, but I feel as though something was inappropriate and that it should be reported anyway?

State employee must report any communication that imparts or requests material information or makes a material argument regarding a potential action concerning an active procurement matter if (1) that communication attempts to influence through duress, coercion or the direct or indirect offer or promise of anything of value to any person or entity in consideration for any benefit or preference in the procurement process; or (2) if the employee reasonably believes the communication was made for any improper purpose, including, but not limited to, providing an improper benefit, monetary or non-monetary, to any person or entity. 2 ILL. ADMIN. CODE §1620.825 (d)-(e).

- If the communication of one party is exempt while communication from the other party is not exempt, must the non-exempt communication be reported?

Yes, only the non-exempt portion of the communication is required to be reported.

- Are communications conducted during contract negotiation and before contract execution exempt from disclosure?

Yes, these communications are part of the formal process and are not reportable.

- Are communications that are already published on a public medium, such as the Procurement Bulletin, exempt from the disclosure requirement?

If the information is published as part of the formal procurement process then, Yes, it meets one of the exemptions and does not have to be reported.

- What communications about renewals, contract extensions and change orders must be reported?

The communications which identify the Agency need for the renewal , contract extension, or change order must be reported. Subsequent communications about processing the renewal, contract extension, or change order through the formal procurement processes for those items do not have to be reported.

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- If I am on a conference call with multiple people, is everyone required to file a separate communication report?

Only those State employees who are personally and substantially involved in the decision to award the State contract are required to report. Of that subset, it is acceptable for one person who was a party to the communication to be designated to file the communication report on behalf of all the attendees. The communication report should list all the attendees. Other attendees may review the report and file separate reports if necessary.

- If I have several phone calls or emails about one topic, can I file one communication report to cover all of the communications or does each communication require a separate report.

Multiple communications on the same topic can be combined and contained in one report. However, the 30-day reporting requirement will start from the date of the first in the series of the communications. If the series continues up to the 30-day deadline a report will need to be filed at that time and another filed at a later date when the communications conclude.