

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL
GOVERNMENT LAW ONLINE

**EVALUATING NEW YORK PROCUREMENT
LAW AS THE SUN SETS: AN ANALYSIS OF THE
EXPERIENCE OF THE PAST TEN YEARS**

APRIL 1, 2005



80 New Scotland Avenue
Albany, NY 12208
www.als.edu

GOVERNMENT LAW ONLINE publications are available at www.governmentlaw.org

EVALUATING NEW YORK PROCUREMENT LAW AS THE SUN SETS: AN ANALYSIS OF THE EXPERIENCE OF THE PAST TEN YEARS

**A Symposium Presented by the
GOVERNMENT LAW CENTER of
ALBANY LAW SCHOOL**

APRIL 1, 2005

These materials are copyright by Albany Law School (ALS) on behalf of its Government Law Center or ALS licensors and may not be reproduced in whole or in part in or on any media or used for any purpose without the express, prior written permission of Albany Law School or the licensor. Neither Albany Law School, the Government Law Center or any licensor is engaged in providing legal advice by making these materials available and the materials should, therefore, not be taken as providing legal advice.

All readers or users of these materials are further advised that the statutes, regulations and case law discussed or referred to in these materials are subject to and can change at any time and that these materials may not, in any event, be applicable to a specific situation under consideration. The information provided in these materials is for informational purposes only and is not intended to be, nor should it be considered to be, a substitute for legal advice rendered by a competent licensed attorney or other qualified professional. If you have any questions regarding the application of any information provided in these materials to a particular situation, you should consult a qualified attorney or seek advice from the government entity or agency responsible for administering the law applicable to the particular situation in question.

EVALUATING NEW YORK PROCUREMENT LAW
AS THE SUN SETS

An Analysis of the Experience of the
Past Ten Years

A Symposium Presented by the
GOVERNMENT LAW CENTER of
ALBANY LAW SCHOOL

April 1, 2005

Albany Law School

80 New Scotland Avenue

Albany, New York

PROCEEDINGS

DEAN SALKIN: Good morning. Thank you for coming. In addition to thanking the Government Law Center staff, I would like to thank the wonderful Planning Committee that helped us to put this program together. It includes representatives from our co-sponsoring entities, the Government Law Center Advisory Board, the Office of General Services, and the Comptroller's Office. Our co-sponsoring entities were more than just co-sponsors in name. They actually participated in the program development, and in helping us to get the word out about the program, thus helping to ensure that today's program covered as many bases as possible.

I'd like to bring your attention to the materials and thank all of our speakers for really making sure that everybody leaves with a thick set of information, including a lot of great historical information about the Procurement Stewardship Act. I also want to draw your attention to a paper that's in the introductory materials written by Bill Snyder from the Government Law Center, with the help of students from Siena College and Albany Law School.

We have a lot to cover today. In fact, I think our first two speakers are going to share with us, among other things, how yesterday's budget vote impacts on the procurement law and policy discussion we're about to have. To get us started, it's my pleasure to introduce Tom Sanzillo, who was appointed First Deputy Comptroller for New York State on January 1st of 2003. He served in the state Comptroller's office since 1994 and was appointed to the position of Deputy Comptroller in October of 2001. Prior to his work with the State Comptroller, Mr. Sanzillo served as Assistant Deputy Comptroller for Policy Management in the New York City Comptroller's office, and he served in the New York State Department of Social Services. Prior

to that, he was the Executive Director of the Mount Vernon Community Action Group. Mr. Sanzillo oversees the Divisions of State Services, Local Government and Economic Development, Budget and Policy Analysis, Office of the State Deputy Comptroller for New York City, Pension Investment and Public Finance, and Intergovernmental Relations.

(Applause)

MR. SANZILLO: Thank you all for being here this morning. On your materials for today's symposium, Comptroller Hevesi is listed. I'm obviously not Comptroller Hevesi. I give you my apologies, and the Comptroller sends his apologies. New York State has an on-time budget this year. This is a phenomenon for the Comptroller's Office and it confuses us a little bit, but it's a delightful surprise.

Today, I've been asked to talk for 45 minutes on a complicated topic. However, before I begin, I would like to know, how many of you are familiar with Father Guido Sarducci? Father Sarducci had a good way of looking at a speech like this. He started something called "The Five-Minute University", with the idea being that in five minutes you can learn what the average college student forgets five years after they've been there. For example, he takes the Spanish language and teaches it this way: He says, "Coma esta usted", which means, How are you, and he answers "Mui bien", which is very well. That's it.

In economics, it's all about supply and demand. You get the idea. You don't have to waste time with things you're going to forget anyway. He also teaches religion and other subjects, but, I won't bore you with those details. Anyway, I've adopted Sarducci's model for this 45 minute speech. I've divided the speech into nine parts, each with a simple lesson; I have

a list of the participants at today's symposium, and in five years you'll get a pop quiz.

Lesson one: be polite. I would like to thank the Government Law Center and Dean Guernsey for putting together two conferences this year of critical importance. What I found interesting was that as the Center began planning for last year, the Comptroller's Office began planning our year and highlighted Authority reform and procurement reform as two of our chief priorities. In the beginning of this year we received a telephone call from the Center and immediately gave whatever support we could to these critical state government issues. Thank you to the Government Law Center and its staff for your efforts. Thank you also to Patty Salkin, your Associate Dean, for her hard work, patience and good humor with the Comptroller's scheduling. Patty, I want to thank you for bringing Bill Snyder to New York State. He is the Center's resident scholar on both authorities and on procurement, and the Comptroller's Office has had a great time working with Bill. He has added a lot to the process and we thank him. I also would like to congratulate Dan Hogan, who was recently appointed Commissioner of the Office of General Services. Dan is a long-time public servant who brings the right mix of skills to a complicated agency, at a very complicated time. I also would like to thank the staff at OGS. We don't always agree amongst ourselves, but there's one thing we have and that's respect for our colleagues and a commitment to public service and hard work.

Today, we're asked to reflect on our work as partners, as state agencies, authorities, businesses, lobbyists, and consultants, as to how we carry out the state's business. The rules regarding how the state exercises its market power or procures goods and services needs to be constantly rethought. Public programs and policies are changing all the time, every day.

Local government officials need our support, encouragement and advice on how to carry out their responsibilities with tough budgets. Staffing and skill levels in state agencies change, just as the rest of the population changes, posing constant challenges. The needs of our constituencies and consumers change all the time too, and our resource levels fluctuate sometimes at maddening levels. This is just our world of government. Market pressures create constant change for our not-for-profit, profit and institutional partners. Regulatory factors, trends, technological innovations, economic forces and global events all shape what it costs government agencies to procure items, and the methods by which the business community provides goods and services. The Office of the State Comptroller has a broad and far reaching perspective of these changes and challenges. We review an average of 44,000 contracts and contract amendments worth about \$25 billion annually. We audit and pay 28 million transactions worth an additional \$25 billion annually. And, if that isn't enough, we're asked to audit an additional 212 million transactions worth \$38 billion from the state's Medicaid program.

So the charge of this symposium is to step back and consider what we do and how we do it, what the procurement laws are and how they impact us, and for staff present here today to continue their ongoing education on this important topic.

Lesson two is what I call "watchdog and puppydog," and that's got two roles. On the one side, you are pretty familiar with the Comptroller's role as a "watchdog". I want to spend a minute discussing this role, because at the broadest level, these experiences shape how we look at the state's procurement processes. We review and approve state contracts, as I just said. When we engage in this activity, we're essentially checking to see if we're getting a good price

and doing business with reputable vendors. Both things the taxpayers and the public demand, and both things are part of the state law.

In our post audit role we look to see whether we got what we paid for or whether legislative intent has been adhered to by the agencies that carry out the programs. Oversight role in the budget area tests whether budgets are balanced, whether revenues are real, expenditures are stated correctly, and whether budget plans have integrity. Our oversight role extends to pre-audit and approving of all state expenditures. We look, not only to see whether the "i"s are dotted and the "t"s are crossed, but at patterns of payments that might suggest fraud or waste or abuse. Our oversight role on debt looks at whether or not we're being overcharged by lawyers and financial advisors, whether the deal looks good for the state overall. Our accounting role ensures the integrity of the state's financing. Our testing of controls makes certain that financial transactions are accurately presented and the books of the State of New York are in good order.

This is an increasingly important "watchdog" role for us and one that is relatively new compared to others. Nevertheless we have a "watchdog" role as shareholder in the management of the \$120 billion pension fund. We're invested in almost every major corporation in the world. As such, we must watch the companies that we do business with; we're also obligated under certain provisions of federal law, to speak out when we see corporate corruption. Comptroller Hevesi, as many of you may know, and the current retirement fund are the lead plaintiff in the WorldCom suit. These "watchdog" functions make the Office of State Comptroller an interesting place to work, but what really makes life interesting for our 2,200 member staff is our "puppydog" role. We are responsible for facilitating the operations of state government, and

each of these functions has a flip side. On the one hand enforcing rules and, on the other hand we engage in a decision-making process with state agencies and with the public authorities in order to make sure that the business needs of the state are met.

For example, in contracting -- every contract represents a compromise and a negotiation, to which procurement laws are applied. These laws are created by the Legislature, struggled through, and often limited in how a changing business world is approached. Some of our suggestions for procurement reform revolve directly around this topic. OSC sees every contract, so we know the limitations of the law and work often with agencies to make sure that we can still meet the needs of the state. The standards we use for auditing and the recommendations made as a result of an audit need to make operational sense to agencies and authorities in order to serve as good management tools. Every day we seek to make distinctions between when things simply go wrong, as they do in complicated organizations like ours, and where “mistakes” are really conscious acts of fraud or intended abuse. Judgments are applied every day when we approve payments. They are also applied when audit studies are issued. These judgments serve very much as a practical part of our jobs at OSC. Our budget oversight extends to 1,600 units of local government and school districts in this state. Making budgets balance in a tough economic environment is challenging, and challenges the standards of fiscal integrity we are here to uphold. Our judgments in this area must be practical but must also uphold the standards of the integrity the public demands. We also sign off on many of the state and authority debt deals. We sign off on deals that we would not normally recommend, but do so in order to meet the business needs of the state. During our review of these debt deals, we engage in a constant

healthy dialogue with the institutions that are involved with our debt policies to try to determine what is the best course of action.

OSC is also in the business of caring for 964,000 members of the State Retirement System, and administers a complicated set of rules to ensure retirement security. Compassion for our members is always being weighed against the rules and the costs. We run a \$120 billion pension fund, and financial targets have to be met or taxes go up. That's pretty simple. We have some 300-plus business partners who run the fund with us. This requires us to be constantly engaged in the process of negotiation and review and presents us with our own set of struggles with procuring in changing markets. None of these issues, however, take us away from our fundamental commitment to make sure the bills get paid on time.

Many of you witness the playing out of these roles when you interact with us. Some of it is frustrating for your operations; however, the tension in the end is really about working through our institutional checks and balances, without which none of us would last very long.

Lesson three is, this is serious business. We bring our full agency experience to our job of procurement oversight and we add two other levels of experience which I would like to talk about. First, we are professionals committed by law and by our professional judgment to an ethic of competition as we meet the state's business needs. We ask a lot of questions as we perform due diligence on state contracts. Yes, the corporate scandals have caused us to think longer and harder about who we do business with and how we do business. Our pension fund lost \$30 billion dollars, and we are more sensitive now across our organization as to who we do business with and how our business transactions are structured.

Surrounding states are in trouble over procurement issues and we do not wish to see similar problems here. This morning, the B-1 section of the Times has another unnerving article on New Jersey's procurement processes. The scandals are bad for us, all of us, government and business alike. If they occur, the public expects real action if we're to retain their trust.

Historically, New York City has had its fair share of scandals. While New York State has been in the news less, we have had our problems as well, like the Canal Corporation, for example. We also devote a lot of time to providing training and engaging in discussions with state agencies on how OSC conducts business, all in an effort to try and help entities conduct their own business in a fair and efficient way. These training and outreach opportunities allow us to identify best practices which can, in turn, be applied in other agencies to help improve operations. We work hard with agencies across the state to get to "yes", to make sure that our contracts are in place and on time. As I said, OSC reviews an average of 44,000 contracts a year and ultimately approves over 90 percent of these. Some of you may hear about the instances when we say "no", or may be irritated by the questions we ask during the review process. It is important to note that most of our resources are devoted, however, both to getting to "yes" and protecting the state at the same time. Comptroller Hevesi has made it clear to us that professionalism means no politics when carrying out our intergovernmental responsibilities.

We reject some 2,000 contracts per year with state agencies and authorities. You very rarely hear about these rejections in the newspapers because we usually work things out quietly. If there is press or a public discussion to be had we will have it. If OSC initiates it, it's usually done with the agency's support because we're trying to make a broader point. All of the work

coming out of our office, incidentally, is not bad news when we engage in our oversight and reporting responsibilities. For example, we recently released a review of a contract audit at the Port Authority on the reinstatement of the PATH trains after 9-11. What we found and what was reported, although through very small articles in the newspaper, was that these trains were on time, actually ahead of schedule and below budget. We thought that was newsworthy. The second area of experience that OSC brings here, is our general view which is shaped by the office as a whole, and by one factor -- who the Comptroller is. Alan Hevesi was a long time member of the State Assembly, and served for eight years as the City Comptroller. He brought these experiences with him to OSC in setting our priorities. When he took over as the City Comptroller in 1994, it was just as they began implementing a major city charter of reforms. In fact, most of these reforms, in large part, were enacted as a result of several procurement scandals that occurred in the late Koch administration. A vendor system was created in New York City. There were mistakes made, and these are being corrected. The City charter introduced for the first time the concept that the City Comptroller should be concerned with the issue of corruption. This does not exist in our state law, but it existed in the City charter, so when he became State Comptroller he brought keen experience in dealing with procurement issues in the city of New York. Comptroller Hevesi took a look at our office and identified some things that needed to be changed: Better information and tracking within our Bureau of Contracts which we are involved in and we're proud of, staff up-grades, better training for OSC and agency staff, and more attention to the underlying contract policy matters, many of which are the focus of today's symposium. So overall, we use all of these levels of experience to shape how we

react to our business partners and how we expect our staff to interact with men and women in state agencies and authorities.

Now, lessons four through nine will address what OSC believes should be changed in the procurement process. These ideas were developed by our staff, the Comptroller, through meetings with the Business Council and the New York City Partnership, meetings with the Senate and Assembly staff and with the help of many of you here today. The Comptroller has talked with Senator Bruno and Speaker Silver about these issues as well. As a result, we've come up with what we believe are a series of recommendations for changes both in the law and administration. Before I discuss the details, I would like to thank the staff who have been involved in developing these recommendations, Lynn Canton, who is Deputy Comptroller for State Services; Joan Sullivan, who is the Assistant Comptroller for the State Financial Services Group, who manages our Bureau of Contracts and Bureau of State Expenditures; Kim Fine who is the Deputy Comptroller for Budget and Policy Analysis who has managed much of the organization and coordination of our efforts; Alan Leibowitz, who is our General Counsel; Bill Murray, Associate Counsel for Legislative Affairs; and Kathleen Dillman. These individuals have all worked very, very hard to put these ideas and concepts into action.

The fourth lesson for today is competition is good. Our state law assumes that vendor competition for goods and services is the cornerstone of how taxpayers obtain the best deal for the best price. The Comptroller and his office of professionals also believe that competition is vital and improves the deals that state agencies and local governments engage in. We're constantly assessing how we oversee the competitive process. With that being said, here are a

few things we think are worth changing: Currently 23 percent of new contracts that come to OCS for approval are between \$15,000 and \$50,000. That translates to high contract volume at very low values. These contracts amount to less than one percent of the value of all contracts. And, the numbers are similar for local governments. As such, our office is currently researching how competition can be maintained while saving resources for state agencies and OSC during the procurement process and contract review. Our staff is here today to listen and to discuss the current state of the law on competitive thresholds and those pertaining to the Comptroller's review and approval authority that are related to these thresholds. We're similarly interested in entertaining somewhat higher thresholds than have been historically extended for women and minority-owned businesses and small businesses.

Now, before I go on to the next set of lessons I'd like to review the first four lessons with you to see if you're still awake. So, lesson number one - be polite; lesson number two - the watchdog and the puppydog; lesson number three - this is serious business, and lesson number four - competition is good. The fifth lesson is if you have a problem, build a bridge. Earlier this year, OSC began collecting information from agencies on how each addresses the issue of vendor responsibility. I want to thank all of you here today who participated in this effort. I'm particularly grateful to Commissioner Boardman at the Department of Transportation and Commissioner Hogan for his support and that of his staff in this area. Everyone involved has been very helpful to us in moving this agenda forward, and despite their skepticism and concern over our respective institutional roles, we're working well together to finalize some new procedures between OSC and agency procurement officers. All this was accomplished by going

slow and listening. Efforts have garnered excellent suggestions and feedback on how to shape the type of vendor responsibility questions that should be asked. This collaborative effort has added definite value to the state procurement process. To underscore the importance of these beginning conversations, a project devoted to vendor responsibility is being undertaken by Assistant Comptroller Joan Sullivan and her staff, Diane Taylor, the Vendor Responsibility Project Director. I want to thank Joan and Diane very much for their diligence, patience and willingness to spend long hours on making a critical project successful.

Now, on a personal note, I started in state government in 1983 and worked for the City of New York long before that. I also worked for the Department of Social Services, Homeless Housing and Assistance Program which managed the award and distribution of grant money to not-for-profit organizations that constructed housing for the homeless population. The last people I ever wanted to see regarding my procurements were the people from the Comptroller's office. At the time, the only image about bridges I could think of was throwing a few of the OCS staff off, or, on particularly bad days maybe jumping off a bridge myself. But what I learned over time is that OCS staff assisted me in my work. The checks and balances OSC provided became very important to me and to the Homeless Housing and Assistance Program, especially as real estate transactions became increasingly complex. Taking a break from negotiations and learning how the Comptroller's office managed and created innovative solutions to sophisticated land transactions was key to helping improve the quality and type of real estate deals. We were ultimately able to get involved with these transactions and, quite frankly, OCS kept me from getting into an awful lot of trouble. I also learned during my time at Social

Services that the concern for fairness in the process has a very big impact on the businesses we are involved with. The trust that develops between state officials and not-for-profit directors and businessmen and women is an unquantifiable asset that we just cannot do without. Fairness in word and deed is the essential ingredient of that trust. That's what our vendor responsibility process is about -- professionalism, trust, integrity and honesty. And for all of us who have been in public service for a while, it's about the pride we feel in doing a good job day after day and very often with little recognition. We all know one thing after being in public service for a while, first the public remembers one screw-up and second no good deed goes unpunished. So with these two lessons in mind, we're moving forward in improving the vendor responsibility questionnaire mentioned previously which will incorporate the improvements suggested largely from state agencies. We're also moving toward creating a centralized vendor database, again largely as a result of the conversations we've had with agencies, and legislative and business leaders on this topic.

Some agencies, like the Office of Children and Family Services have developed their own system, and we're very grateful for the lessons that they've taught our staff and that we're able to share these with other state agencies who are involved with us in this initiative. Another area we're examining centers around high value contracts. After initial review, we've concluded that we need to take a closer look at the 3,000 plus centralized contracts that are entered into by state agencies and used by others to procure goods and services. These models of contracting create enormous deficiencies for state agencies and state operations. We believe that we need to understand these centralized contracts a little bit better to ensure that agencies are using them

properly, that the pricing agreements negotiated are being adhered to and that quality received under these centralized contracts is the kind of quality we all would expect. We're currently working with the agencies that are involved in these contracts in an effort to understand how these are used to identify potential operational improvements and to obtain some answers to questions that I think we need to resolve. In the area of building bridges to solve problems, we're also interested in working with the Executive arm of government and creating some renewed energy behind employing technology in the procurement process, most specifically paper-less procurements. We've had some fits and starts over the years in this area, but we need to catch up with other states. Our goal -- you'll hear a little bit more about this in the future -- is that by fiscal year '07-08 we will have developed a comprehensive plan to transition the state to a paperless procurement system.

Lesson six: You're not stupid – this is confusing. This lesson applies to three areas of the law, that if clarified, could improve things. First, we think that debriefing rules need to be clarified so that vendors who have lost competitive procurements have better access to information on how that procurement took place, and why they were not chosen. Second, when one agency piggybacks off another's contracts, clearer rules should be in place. Third, split order contracting should not be used to circumvent application of procurement rules; the competitive bidding process should be preserved.

Now, this particular part of my presentation will make a number of agency folks grumpy, but good things will come so please bear with me. Right now, vendors that lose out on a bid are treated differently by different agencies. Some vendors receive a full explanation of the bid and

bid process, including why their proposal didn't succeed, and others do not. This creates confusion for the vendors, for OSC staff, and I believe frustration for many of the state agencies, especially when we are involved in disagreements with vendors. We have to make sure that the debriefing process is fair and work even harder to make sure that the perception of the process is fair. It's better for vendors to know why they were not accepted before contract documents are submitted to the Comptroller's office because this reduces the likelihood that agency staff will have to communicate to us yet again how decisions were derived at. Debriefing at first instances also removes the risk that the Comptroller's office will be given one set of facts from the agency side and one set of facts from the vendor side, which confuses and delays the successful resolution of any disputes. With regard to piggybacking of one agency on another's procurement, we are convinced that the model provides important efficiencies. However, we're looking for clearer standards and documentation for when this procurement method is used. I'd like to provide you an example because this can get sort of abstract and dense. A state agency appropriately wished to buy off of a contract let by a New York City agency. The same service, the same vendor, it was a good idea. The City anticipated, when it negotiated the contract, that it would be for about a million dollars, and the state agency was thinking that they needed to garner about 12 million underneath the same contract for the same services. The City contract didn't contemplate any vendor discounts, and because it was a million dollars, why would it want to negotiate those things, but the contract could have been for a larger value of business. The documentation requirements become a matter of disagreement between the agency and the Comptroller's Office, and we think some clarification would have been helpful here. We're also

interested in clearly defining the rules with regard to split ordering. Some agencies enter into contracts with the same vendor for amounts just below the threshold levels in order to circumvent the bidding process. To remedy this, we're seeking legislation that would tie together a number of contracts to the same vendor for a similar purpose within the same year to the state's spending thresholds. Again, let me give you an example. An agency might let two contracts to the same vendor for similar goods and services at \$10,000 a piece. That's \$20,000. The actual competitive threshold is \$15,000, but if two separate contracts are entered into, an agency can get around this requirement. As we consider raising the threshold levels, we think some accountability needs to be built into the process.

Lesson number seven, and here's the good stuff I promised – repair that which is broken. And if you're still with me, I'll try and review the three important areas that we think need to be addressed. One, we want to see a broader process for program bidding. One of the changes that has occurred over the years is that non-profits and for-profits are increasingly competing for many of the same contracts and goods and services. Although this is a good thing, current law requires separate standards for each type of vendor. We believe that flexibility is needed to allow for program bidding for projects usually funded through grants. The idea would be to allow judgments to be made between the Comptroller and the agencies regarding technical competence and public benefits while ensuring that costs remain reasonable. We're also looking for authority to waive minor deviations in the bid process when minor problems have occurred, but that the overall integrity of the procurement has been clearly demonstrated. Again, we think the law is a little restrictive in these areas and we would propose some flexibility while

maintaining accountability.

The Comptroller also believes that authority should be granted to pilot procurements that try to address a new need. OSC is currently engaged with the Long Island Power Authority. LIPA is trying to test whether wind power and natural gas or other forms of energy can be used to provide resources for electricity in Long Island. The current procurement law makes accomplishing this very difficult, if not impossible. We run across a very similar set of challenges in procuring technology contracts. As the world changes before our very eyes, even the best efforts to get an RFP out and back in for review is often confused by the constant market changes occurring at a blinding pace.

Lesson eight, when you see a parade get in front of it. Speaker Silver, Assembly members Destito, Tokasz and Grannis all have offered a lobbying procurement bill, and the Governor has offered one that covers similar ground. We're hoping for a common understanding among all of us on this issue in the coming weeks. Each bill requires those who are lobbying on a procurement to register and also requires agency staff to document contracts with lobbyists. Each bill restricts contacts with agency officials during certain parts of the procurement process where we think it is inappropriate. These bills reflect similar provisions that are part of the Comptroller's authority reform bill sponsored by Assemblymen Brodsky and Silver and passed by the Assembly recently. We're also supporting Assemblyman Bing's prompt contract legislation that has the endorsement of the United Way, United Jewish Appeal and the Catholic Conference. Research shows that 53 percent of contracts are approved over 120 days after the start of the contract. We think the practice of non-profits having to automatically waive interest

in order to get contracts should be ended. Our hope is that with the passage of an on-time budget this year and maybe next year, that this issue may not be as urgent, but regardless the need to pass the bill is evident.

Lesson number nine is, use time wisely. As part of the passage of the on-time budget this year, the Legislature passed a one-year extension of the Procurement Stewardship Act. The Comptroller is pleased with the passage of the extension and believes that the law needs to be reassessed periodically due to the changing conditions that I've talked about here, and that we'll all talk about at today's symposium. As is obvious from my presentation this morning, we think that the law could use some fine tuning, and we plan to bring these items forward through the legislative process.

Lesson ten is -- after a while, the same joke is just not funny. So, after teaching Economics and Spanish and Religion in five minutes, Father Sarducci wonders if maybe he could start a law school and does anyone have a minute?

(Applause)

DEAN SALKIN: Thank you very much, Tom. Our next speaker, and we were really thrilled that he was able to be with us this morning, is Daniel Hogan, who was appointed Commissioner of the Office of General Services in December of 2004. Previously, he served as Director of the Governor's Office of Regulatory Reform. Commissioner Hogan has a distinguished public service record, including service as the Governor's Director of Special Projects, Senior Policy Adviser, Acting Chief of Staff of Lt. Governor Mary Donohue, Executive Deputy Commissioner of the Office of Temporary Disability and Director of Public Information at the former

Department of Social Services. In the Legislative Branch, Commissioner Hogan served on the staffs of former Senator Michael Hoblock and Senator John Daly. He also worked with the Joint Legislative Commission on Toxic Substances and Hazardous Wastes. His local government service includes Assistant and later Deputy County Executive in Albany County. He is a native of Niagara Falls.

COMMISSIONER HOGAN: Thanks, Patty. I want to thank you for holding this forum today, and one of the things that you've gotten probably from my resume is that I haven't done a very good job of keeping these jobs. There's been 13 of them in 20 years in public service, and each one of them has been a different adventure. And I want to thank Tom Sanzillo today for his remarks because, Tom, one of the things I think you mentioned is that you approve 90 percent of the contracts that come to you. I agreed with about 90 percent of what you said. The other thing I wanted to point out is, when I came in here today, it being April 1st, I wondered if it was really a joke, whether Comptroller Hevesi would be here or not. I found out, in fact, he was here and he did a great job. I want to point out that Tom is one of the first people who reached out to me when I became Commissioner to offer a hand of friendship and to work together, and he came to see me and I took that sincerely. Now that he's mentioned all these things in his speech, knowing the specifics, it kind of takes the speech that I brought and kind of throws it out the window. So what you have there today, I'm not going to use it. Instead, I'm going to talk about what I think are the basic questions that are being asked here today and, if you look at the mailing that we all got when we were asked to be here, there were a number of questions. The first was, the current Procurement Stewardship Act, does it work? What's worked over the last

ten years? The second is what should be changed. After that, we have the role of vendor responsibility, how it should apply to public authorities. We also have e-commerce, e-government, what role it plays. Finally, there's disclosure of lobbying and what role that plays. As Tom mentioned, one of the nice things is that the Legislature gave us a breather. We've got a year now to basically take a look at the Procurement Stewardship Act and decide what changes we think need to be made. But I think that if we're going to look forward, we also have to look back to 1995 when this Act first passed, because before that time, I think a lot of us know that there were a lot of general provisions in the law, particularly for the Commissioner of General Services, where there were a number of different procurement vehicles that could be used, but they weren't codified. So, as Tom said and other people said, there was a need to look at the changes that were happening in the environment, and I think a lot of things were happening. Government was changing, technology was changing, and we knew that we had to do things with fewer employees, and that we were making a transformation in government from an era where it was a government by the clerks to the point where we were now going to government by data and how to manage it. Computers, technology, services, those were new things, and I think what happened back in 1995 was the Governor and Legislature said we've got to take a look at that. We've got to look at the best practices that we've seen, and we've got to bring them together and we've got to put them into law, something we could all agree with, something we can live with and something that five years later we're going to take another look at; and I agree with Tom that we do need to take a look, because the only constant is change. So taking this look in 1995, we came up with the Procurement Stewardship Act.

VOICE: You all got a little handout today which is this flow chart.

COMMISSIONER HOGAN: This actually is more reflective of the year 2000. Basically you took the common sense principles that my mother used, because one thing that's not in my bio is that I'm the fifth of 11 children. My mother was the procurement agent for the Hogan family. She knew a lot about best value, because when she was feeding us – and I mean look at me, 6 foot 3, 250 pounds – she knew what she was doing. She had to get the best value. She also had to put it to the best use, so she had to be a good cook. She had to prepare meals for us every day. I always wanted to wear Levis. She always bought us Wranglers. I said, "Mom, Levis are cooler." "Wranglers last longer, Dan." O.K.? You know, we drove station wagons except for the one time my father, in 1965, came home with a Triumph Sunbeam Tiger, two-seat car. My mother said, "John are you nuts?" "Go buy a station wagon." He did. Two, he bought, two station wagons. But these are the basic things that we all know. We have to do a needs assessment of what we want to buy. My mother, when she would go out and buy a washer and dryer, she wouldn't buy the cheapest one. She would buy the heavy duty, large capacity model, things that are going to last, and aren't going to break down after ten loads of wash a day, because that's how many there were in our house, ten loads a day in order to be able to keep up.

So basically the principles that my mother knew about best value – when you have to consider all the costs involved with your procurement, not just the cost of procuring something, but what it's going to cost you to maintain, to train, and to replace it – those decisions were taken into account and they were put into law. So when they came back in the year 2000 and took a look at this, they said, should we let it go; should we make improvements? The decision

was we should make improvements and the improvements basically for us at OGS come down to this flow chart which I think anybody, even an attorney, could understand. It's pretty simple. It starts with a complete needs assessment. It says, "preferred source," if "yes" you go to preferred source, and if not you go down the chart, and I've left this for you all so you can have a visual aid you can take home with you and you can understand how the Procurement Stewardship Act works right now.

I'd like to talk now about public authorities. They have been around a long time, and I would suggest to everybody that you go read "The Power Broker," Robert Caro's book. You go back and you read about Robert Moses and you read about the formation of the Triborough Bridge Authority, and you also read about the constitutional changes made to the budget process when he worked in government because here we are 70 years later, and they're still in place. We have all these interconnections right now, so when we're talking about public authority control and procurement, what we have to remember is that those public authorities, many of them, have a lot of debt. It's not general obligation bonds, but they have a lot of debt that we have a moral obligation to pay. When we're looking at public authorities, I always get confused by these hearings that the Legislature has because on the one hand, we hear they're the rogue elephant of government; they're not controlled by anyone, and on the other hand we hear the Governor controls them, and we often hear that at the same hearings, so I'm confused by what it is, but I think we need to take a historic perspective and, if we do, the procurement rules should be applied across the board, simple as that.

Later on today, my counsel Rich Reed is going to be there and he's going to talk about

lobbying disclosure, EO 127, the Governor's plan and the Assembly plan, and I think clearly I'll leave that for then.

But one of the things I do see is, like everything, there's a little bit of good and a little bit of bad. Is there a need for lobbyists? Are there a need for specialists? Yes, sometimes there are, because some of the things that we do have become increasingly technical and the layperson can't understand them, and some people want to go forward and do business. Well, they say, I'm not sure how to go about this, even though I've got this great chart, product and service. How do I go about it? So I think there is, in fact, a need for lobbyists. I do think there should be some disclosure. I agree with the Governor's EO 127, and I think that the disclosure should be worked into the law. It's something we should talk about and dialogue about over the next year.

The next area, and I don't want to talk about my mother again, but I'm going to talk about my mother again, has to do with vendor responsibility. I have this philosophical difference with some of the things that the Comptroller is doing with vendor responsibility and it's got a couple specific reasons and it's got one broad reason. If you're purchasing something, you have to live with the purchases you make. So when my mother went out and bought that washer and dryer, if it broke down two weeks later after ten loads a day, she had to live with that. So as Tom also said, I think by and large, most state employees are proud of what they do, are professional and most of them are civil servants. They come to work every day and they want to do the right thing and they're making purchases that they are going to use themselves. They're making purchases that are going to be used for public health and safety. They're making the purchases that are going to feed our kids in school. They're making purchases for our library, and I think in

the vast majority of cases, they're going to do the right thing, and I've seen it over 20 years.

So philosophically I think vendor responsibility is and has been with the procuring agency. OGS does lots of it; we've always done it. We want to get good contracts. Nobody wants to have something that fails. Nobody wants to be tied to a failure, so we're going to go through and we're going to use the law, and we're going to make sure that we do dot those "i"s, cross those "t"s, and we're going to try and do what my mother did, which is get the best value. We want that best value. We want to get the best product we possibly can, and we want to take pride in what we do and we want to have a legacy that we did the right thing, and I think by and large that happens.

The second is when the Comptroller came out with his vendor responsibility guidelines, I had a couple specific problems with the guidelines. The first was in the bullet items on the web site. It said that when we're considering the procurement and vendor responsibility, we have to look at any issue that might impact on vendor responsibility. Well, "any" is an absolute. I learned that in English class, and from an English teacher who told me, "never use absolutes!" I'm wondering, does that include rumors, innuendo? Does that mean that a competitor can send a letter in that I've got to put in the contract record? And I think that as practice has gone forward, there's been more common sense about that, but you have to look at it not from the view of us in the state, but the people looking to do business with the state. They see that, and they're going to say, My God, anything? My neighbor can say something about me, and I don't get the contract? So I have a little bit of a problem with that specifically.

The last of the provisions in there talks about what I call the viability of the business. Do

you have the right team? Do you have the resources you need to do the job? And I think that makes common sense, but I think it also conflicts with some of the public policy that we've got out there, particularly in regard to Article 15-A of the Executive Law, which is the preference of minority and women businesses. We want to do business with small businesses, because you know, it might be a small business person who has an innovation; it might be the person who comes up with a better mouse trap, and when they develop that better mouse trap, you can bet state agencies are going to buy it. I know from personal experience in the Tower, we're going to buy it.

So what I want to say in terms of that is if we're dealing with small businesses, they may become viable by getting their first state contract. Their experience with that first state contract, if they deliver on time and they do the right thing, they're going to get more state business, and particularly though, if we look at financial viability for women and minority businesses, you know, I think that the goals that we have right now -- and they're pretty low, actually -- are good public policy because we really have to use that \$25 billion that Tom talked about. If you look at that, you're going to realize that, some of these companies will become viable by getting their first contract and they may have these innovations and we want to spend some of that money in the minority community, in the women's business community, because we want them to succeed. It's good business practice for all of us now. The first Assembly hearing I went to was about minority and women-owned businesses and the pledge I made that day is that any time a vendor comes in to me, I'm going to ask them, What's your policy; what are you doing to help me meet my goals? Also internally, we're going to develop performance measures by our

business units and we're going to centralize what we do so we look at it in all of our business practices, because we do a lot of business at OGS. Of the \$25 billion dollars overall, on our central contracts, we did \$3.1 billion in business last year. Of that, a little bit more than a billion went to New York businesses. Of that, \$678 million went to small businesses, many of which are women and minority businesses. So that's my problem with those two specific areas of vendor responsibility, and I think that's something we should look at and talk about as this dialogue goes on.

Next I want to talk about e-government, e-commerce. I think that's one of the reasons why we had the Procurement Stewardship Act in 1995, because technology was here and I remember that 1995 was the year of the worldwide web. To me, that's when it started. Before that we had the Internet; we had e-mail, but the web came forward and all of a sudden -- and I know because I worked with Joan then at DSS -- we had all these vendors telling us, we can do this for you on the web. We can give you client server technology and it's going to improve everything you do. Did it? But the fact of the matter is, we sell surplus property of OGS on eBay now. We're getting a half million dollars for things that we used to put out at the curbside because nobody else wanted them. We're selling them on eBay. I don't know why people buy some of those things they buy, but they buy them. We've sold computers; we even sold a sailboat recently. So I think in terms of the commerce perspective of this, it's definitely there. The business community has recognized it. We in government are using it more and more. We in OGS use it in terms of registering vendors. You come to the OGS web site right now, you can get registered as a vendor; you can get bid notifications from us. You can see our bids; you can

see our awards. You can see our centralized contracts, and you'll get notified, based on the type of business. If you're a woman or minority business, you can have a direct link from us. You can see all of our rules, our goals and you go right to the Empire State Development Corporation where you can be certified. So for us as a tool that moves quickly, it's a very good thing, so I think it's something you definitely have to consider the implications of as it goes forward. I just think technology is going to continue to improve our lives and the one way -- the way I look at the Internet is in terms of Martin Luther King's "I have a dream" speech, because in that Dr. King said, "I dream of a world where people are judged by the content of their character, not by the color of their skin." Well, the Internet is like that; it doesn't know what race, color or creed you are. Unfortunately we can't see the content of everyone's character and that can be a good thing or bad thing, but, quite frankly, it's a great thing for people out there, because there is no favoritism on the Internet. If you can push that Enter key and you can send that file, it goes through with almost certainty. So it's something we really have to look forward to, because, it's a great equalizer for small businesses competing with big businesses.

The last thing I want to talk about is changes. I think we've got to make some changes and, quite frankly, I think a number of the changes that the Comptroller is talking about in terms of the thresholds are really good ideas. I think that over the next year as we have a chance to talk about them and look at how they'll impact us, you're right, the small contracts take a lot of our time. They do take a lot of our time. In terms of the audit you're doing on our centralized contracts, quite frankly, those contracts are, in fact, a convenience for us, for local governments, school districts, fire districts, libraries. So you've got to remember that, when we're looking at

these, because once again, listen to my mother. They're going to do the responsible thing with their money, and you got to count on that. I think your auditors will find that.

If you said to me, Commissioner Hogan, if you could make one change what would it be? It wouldn't be taking out the preference for New York State wine. I'd leave that there. I'd let somebody else have that as their idea. I think the Procurement Stewardship Act can be improved, and I think that the reason it works is because it's stable but it's also flexible and, the new buzz word this year, every year there's a new buzz word with every legislative session, is "transparency". When I grew up, a transparency was something you put on an overhead projector. Now, everything has got to be a transparent process. Well, this is a transparent process, because you can look at it and you can put together a flow chart, and you can come forward and you can say, Well, I understand. Even if you got a law degree, you can understand how this works, and you can go to the OGS web site and you can read Section 163 of the State Finance Law and, you know what? For the most part, it makes sense, and if you read it as I was happy to find out, the Commissioner is mentioned 114 times. If we take a look at 1995 and what we did in terms of Section 163, my one change would be to do the same thing to Section 112 in the State Finance Law. That would be my change. I would say to you and the Comptroller's Office the same thing. Let's have a public debate about your approval process because Section 163 is 10 pages long. Section 112 is two paragraphs, and it says, anything over \$15,000, up to 90 days, and basically you can do anything: you can approve, you can disapprove, you can send a letter if you take more than 90 days. I think part of the dialogue we need to have over the next year is we need to look at that approval process, and we need to do the same thing. It has to be

transparent. It has to be something that's not at the whim of an individual. We've got to have a process that we as government officials understand, you as lawyers understand, and that also is fair to the business community. They have to be able to come in and say, What does the approval process hold for me? And, quite frankly, if you're worried about procurement lobbying, you've got to stop that being the next avenue for procurement lobbying. If you want to have vendor responsibility, put it in section 112. If you want to have the right to do bid protests, put it in section 112. Let's put it up there. Let's have a dialogue. Let's have a dialogue and let's have it start right now. We've got a year. Thank you.

(Applause)

DEAN SALKIN: Thank you very much, Commissioner. We now have some time for some questions from our first two speakers. You've listened for about an hour. I think that you both gave outstanding presentations and somehow found a way to add humor into this, which is great.

QUESTION: How far along is the Vendex system?

DEAN SALKIN: The question is how far along is the Vendex system that the Comptroller's office is putting together?

MR. SANZILLO: At this point, we're currently collecting information from agencies. We're asking that they engage in this activity as part of the contracting process. OSC's Bureau of Contracts is reviewing the contracts and questionnaires to see how each agency is responding and working towards compliance.

QUESTION: Mr. Sanzillo, can you speak to the dual role that you have including Number 112 and also the enforcement and trustee obligations you have to the Retirement System as well as

(inaudible) and how you see the two of those interplaying?

MR. SANZILLO: How I see what?

VOICE: How you see the two of those interplaying. There seems to be increasingly the 112 powers are tied into the actions you're doing on (inaudible).

MR. SANZILLO: Right. Well, they're not tied. Many of the areas I talked about this morning in terms of the Comptroller's role, the responsibilities that have been given to our office over the years, basically require judgment. For instance, last year we had a long discussion with our outside auditors about our auditing program. The auditors noticed that over the years state Legislature and the Constitution have given us many different responsibilities that impact how we audit. So we're constantly aware of and sensitive to these varied responsibilities of our office. The way we handle these is to look at transaction by transaction and where there are findings, we use them delicately, and always with the state's best interest in mind.

QUESTION: Do you have any comments or information you could share on the new sales tax certification?

MR. SANZILLO: No. I believe the policy just came through, as a matter of fact, this week.

QUESTION: In the area of (inaudible) disclosure, as someone who's been on both sides of the (inaudible) agency involving contractors, I would argue that it's really that you get a chance to talk to the vendor community, (inaudible) but Tom mentioned it and certainly there are technologies, that's another area of (inaudible) Are we going to be discouraging this type of interaction?

COMMISSIONER HOGAN: I don't think so. I don't think so. I think that we've got to have an

open discussion about these new technologies as they emerge. I think energy is a perfect example. You know, I mean one of the fun things I got to do last week was I went down and made a speech at the New York car show. I mean for a guy, that's like Hey! This is the best. What I got to talk about was the fact that in New York State, back in 1996, with the bond act we started putting in place the infrastructure for clean fuels, and we have right now, 4400 clean fuel vehicles in the state service, and we're way ahead of a lot of other states. Other states said to us, How did you get started? I said, Well, the Governor had this idea to put it in the bond act, and we looked at these new technologies and we had the people come in and talk to us about them and we made some investments in infrastructure and then we started putting things into practice, sometimes as pilots, but later on as we figured out how things work more and more, we started investing in these and we would go out and do RFPs, we would do requests for information and we would talk about it. I don't think the fact that you have to sign an EO 127 for, or whatever is going to happen in the law should preclude anybody from coming in and talking about what's going to happen.

I think you've got to have a starting point with those proposals and sometime, as we've said before, there's going to be a compromise that's reached by the Legislature. There's going to be a compromise that's going to be reached by the Legislature and the Governor, and I think that they're going to have a chance to, as we're doing today, look at it and figure out what should be allowed and what shouldn't be. One of the best things about the Procurement Stewardship Act is that it mandated that we have to have a procurement record. That's really the big safeguard that you have in 163, the procurement record. It protects us; it protects the vendor. It helps the

Comptroller's office in terms of that. So I think that having a record doesn't necessarily hurt us at all, and I think more and more, when we talk about the web and new technologies, people are going to increasingly demand that all of our information be instantly available; it's going to have to be there. So we're going to have to have those discussions as we go forward, and I welcome those discussions. I don't think they should be anything we worry about in terms of disclosure because we have to go forward and you're going to have to talk not just to us, you're going to have to talk to the Legislature. You're going to have to talk to others in the Executive branch, and from that we'll come to some consensus, or a meeting of the minds that may, in fact, result in good legislation.

QUESTION: The current policy with respect to determination of vendor responsibility requires that many times an agency and staff, either a contract or an amendment, can determine the vendor responsibility under this act. Coming from an agency where we see an annual amendment for all of our contracts, is there any thought to recommending (inaudible) pre-searches for determination of vendor responsibility that take up a lot of (inaudible) resource time; is there any law that is in the contract right now that you might want to consider reversing the requirement of an amendment to say that, if a contract expires within five years, that at the inception of a new contract which then may allow the -- my staff to spend more time researching new vendors, people who are submitting for five years as opposed to, frankly, the people we have to do business because of the taxes involved in providing those services over the life of that contract, and if we were to find someone who was non-responsible, there is no way to replace that (inaudible).

COMMISSIONER HOGAN: We're going to deal with that in Patsy's Law. That's my mother's name. We'll name the law after her. Go ahead, Tom.

MR. SANZILLO: That's a good law. O.K. You've raised very good questions. We are looking to improve and to make an information system that works well and limits the search burden agencies will have to engage in, and I think that over time we'll do just that. Regarding your other point, due to the corporate revelations that have occurred in the last few years, especially in the drug business, many of the pharmaceutical firms and the financial firms are under some form of investigation or cloud, and paying fines. The question becomes: How can you do business with this firm? They stole money from retirees in their 401(k)s or they killed people with pharmaceutical drugs that they knew were going to do harm. Agencies may have to do business with these companies too, so you have to engage in that discussion. However, there is an accountability requirement on our part to be able to explain why we're doing business with these companies. Your point is sometimes there's no other game in town. This is a reasonable response but we also have collective market power and can exert pressure, and raise those issues. We are expected to use our power and not be blinded. So I agree with you on both of the points you raised and I think we're taking steps to mitigate these concerns by first centralizing access to vendor information over time and, second by keeping the dialogue between agencies and OSC going because this is an issue for any agency involved in procurement.

COMMISSIONER HOGAN: And I think I would go back to what I said before. I think that responsibility really needs to rest with the people who are making the procurements, and I think that's something that really should be looked at if we're going to have this year to revise the law

because I think it's going to be one of the major issues for two reasons. My broad philosophical reason is that I have to live with the purchases I make, number one; so do all your agencies, but the second is, as I say, we've got other public policy issues that we've got to deal with and particularly I think we have an obligation to do as much business as we can with small businesses, wherever possible, because that's really where the jobs are at. You know, when you think about that, nine out of ten small businesses fail. I don't know if you can always hold that against them because they may come back. That may be where the innovation occurs that we need, so I think it's something that we have to keep having a dialogue about, and I don't think at the end that the answer to this is just going to be a data base because I think it's got to be more than just, you know, the Vendex system or whatever it's going to be. I think it's got to be something that has some discretion but, as I say, it's got to be stable but flexible. That's what I like about 163, and that's why I think in terms of added responsibility. If it's going to be part of 112, then we need to say, Here's how it is, and you could even do rule-making on it. And you can have outreach and you can have an open and transparent process, and that's where I would come down on it.

QUESTION: More a comment than a question. From my perspective, what we need (inaudible), is that the subjects that we discuss are the exception to things that have gone wrong, and I think there's a very good reason for that. I think that if we started talking about the things that go right, we wouldn't get half the examples of what goes right today, tomorrow or the next how many weeks, and when something does go wrong we do hear about it. If the system does work, whether it's a system in New York State or in a neighboring state or California where

we've heard about a technology contract that went wrong, or on the federal level, so if the process works with the exception of the problem, where are we putting our emphasis and our resources? Are they with respect to correcting a problem? Once we've made a contract that we have concerns with, we can't go backwards. We need to go forward. What can we do with respect to that? We're putting -- it seems as though we have a tendency with so many procedures in place because, of course, the horse got out of the barn, that the barn is going to fall down, and so just to keep that perspective.

COMMISSIONER HOGAN: I think that's really an important point. As a matter of fact, the first round of my speech had what I called the airplane analogy, and it goes back to my days as a spokesman because, like Tom, I worked at DSS too. I was a spokesman doing all the welfare reform stuff, and one day I was on the phone with a reporter and he was giving me this story of this poor woman who was out on the streets. Of course, you know, he didn't mention the fact she failed to come in for recertification and got 15 notices and that she failed to comply with all the rules, but it was going to be front page in a major New York City newspaper. I'm saying to him, you know, you know what? I said, Right now at this point in time -- this is about eight years ago -- we've taken a million people off of welfare. We've taken 100,000 families, women and children, off of welfare because we're collecting child support. We get 40,000 people who never came back, and we put finger-imaging requirements in. When are you going to write that story? His response to me was, "You know nothing about the news." He said, The news is like an airplane, because when the airplane lands, it's not news, but when it crashes, it's big news. The fact of the matter is, you've got to think about the airplane analogy because, if we always focus

on the crashes we'd never get on an airplane. Our kids might not be scared, but you and I are going to, and I think the important thing with forums like this is we do know, whether it's at the Comptroller's office, my office, in the vendor community, most people are honest and decent and want to do the right thing. We've got to keep that in mind, and we can't focus everything on how we're going to stop that plane from basically taking off and landing because otherwise there'll be delays, and it's really something – it's something I always thought about. You know, I love airplanes. My father was a bombardier in World War II, so when somebody gives me an airplane analogy, it sticks with me, and that one has always stuck with me. I think that we always have to talk as much as possible about the good things we're doing, and I think that's actually happening today. I was serious when I talked about Tom, a lot of things the Comptroller is talking about. I think they're good policy, and I think that we're going to have a lot of agreement on it, and I think we do, while we have a lot of disagreements, we have a lot more agreements and they, at the Comptroller's office, do try and find the way to get to "yes". I appreciate that, and, you know, as I look in this audience, I worked with Joan Sullivan before; I worked with Dan Berry before, John Moriarty, there's a bunch of -- there's actually probably about 30 people here that used to work with me at one of my various 13 jobs. But in every case, I've always been impressed by professionalism, and I think that the Comptroller must have been impressed by professionalism as well. That's why he hires these good people. So I think one of the good things that comes out of this, will be the record. Will it be covered by the news? No, but the people who are going to make the decisions do know about it because they're here today. Whether you're here for CLE credit or because you're an interested party, in either case it's good.

The word gets around.

MR. SANZILLO: The only thing I agree with Dan on that particular item is the quality of the staff in the Comptroller's office.

COMMISSIONER HOGAN: We got great people at OGS too. I'll introduce you to some of them.

MR. SANZILLO: I've said that twice during a speech, and then --

COMMISSIONER HOGAN: You can say it again.

MR. SANZILLO: I'll say it again. I think what we are all about is trying to ensure the best use of taxpayer dollars. We may have our squabbles, but I think that's what we're all interested in achieving and we're both extremely happy when that occurs. The one really good point you raise, I think, is that things are changing all the time. We are constantly assessing risks because you can't know everything, and that's obvious, so you determine what risks you can live with, and you put your resources into combating those risks that aren't acceptable, hoping your judgment is a correct judgment. This is one of the reasons why we're happy to come to symposiums like this to discuss with each of you how we make our decisions. There are laws and regulations to abide by but judgments are made all the time. We continuously seek to educate ourselves through working with others.

QUESTION: (Inaudible).

COMMISSIONER HOGAN: Well, I don't like the premise you're talking about. I'm sure most of the attorneys here do. I don't. I think that one of the things that we have in New York State is, we have by the nature of the size of it, we have volume, and we've got to go in and we've got

to negotiate on those things and you're right, you don't have attorneys but, on the other hand, you do have to have some protections and maybe they go too far. I think that's a place where, if we are going to get into these national consortiums on -- and we are involved in some of these -- we've got to go in there and we've got to say, Hey, you know, I've got the big trump card, folks. You know, you need me more than I need you, and we've got to come to some compromise here that everyone can live with and that's not always easy. It does, in fact, require some negotiation and, you know, some of the restrictions that they want to put in place, I don't think are all just their own restrictions, but they're restrictions that, based on other practices in other states, we have to look at, but anything that can make them more flexible I'm all for because, as I say, I think they want our volume of business from New York State. Otherwise, we can go out and we can be a market leader ourselves. So I would view it as a negotiation issue.

MR. SANZILLO: I'm a hundred percent with Dan, we should use market power in ways to achieve our objectives and, if it means pushing back very hard on what are clearly obnoxious rules and regulations and terms and conditions that are harmful to the interests of the people of the state of New York, then we should just do it and do it as aggressively as we can.

DEAN SALKIN: I want to thank the Commissioner and the Deputy Comptroller for being with us this morning.

(Applause)

MR. FERNANDEZ: We'd like to begin the next panel, and that's on Procurement Lobbying and Other Ethical Considerations. My name is Hermes Fernandez. I'm going to be the moderator of this panel. I have the unique privilege of being chosen because the first choice turned it down.

I've been in Albany now for about 20, or 19 years. My career has come full circle. I started as a government employee, as a clerk for a federal judge, where I got to help the judge decide if the government had made mistakes. I then went to the United States Justice Department, Civil Division, where I got to defend governmental mistakes. I came to Albany to work on Mario Cuomo's Counsel's staff where I got to make mistakes. Now, actually for the last 15 years, I've been with Bond, Schoeneck & King here in Albany and at Bond, Schoeneck & King, I sue on governmental mistakes, or I defend people when the government contends they've made mistakes, and I've been on both sides of the procurement issues. I've seen it really, I think, from all four sides, looking at it from times when we've tried to actually place contracts, done some where we have actually tried to influence the awarding of contracts, done some challenging of contracts, gone to the Comptroller's office to ask the Comptroller to not approve an award of contracts; so we've been around the block on this, and I also, unlike the rest of the members of the panel, who I'll introduce in a minute, I'm the only member of the panel right now who is not in government.

The first speaker will be Rich Reed. Rich is going to have a tough act to follow, because Rich is the Counsel to the Commissioner of General Services who gave us quite a good presentation this morning. Rich is going to speak on Governor's Executive Order 127 and the Governor's proposed legislation.

Our second speaker will be David Grandeau. David is the Director of the Lobbying Commission. Now, you might have a little difficult time in drawing David out because, as we know, David is known to not have many opinions and could be difficult to make a presentation,

but he's going to work on that.

Our next speaker is Karl Sleight. Karl is the Director of the Ethics Commission. Karl is going to speak on the Ethics Commission's perspective on lobbying issues.

And our last speaker will be Richard Rifkin. Richard is an excellent lawyer, a long time attorney in the Attorney General's office, and also former Executive Director of the Ethics Commission. Richard is going to speak on the Attorney General's perspective on lobbying issues.

Now, we have a daunting agenda. We have an hour and 15 minutes. We don't want to go too deep into the lunch, and we also hope to reserve time for your questions and for some interaction between the panel. So without further ado, I'm going to give the podium over to Rich Reed.

MR. REED: Thank you, Hermes. One thing I have to correct from this morning, because it's one of my favorite bits, is the Don Novello as Guido Sarducci joke. He really teaches you in five minutes everything that you would have remembered if you had gone to college, not what you would have forgotten. That's the joke, you don't remember much, and then the law school is two minutes of what you would remember if you had gone to law school. While we're on the subject, a lot of you have probably heard that our Health Commissioner, Dr. Antonia Novello, is Don Novello's sister. That's not exactly true. She is his sister-in-law though; her married name is Novello. Her husband is Father Guido Sarducci's brother. So much for the continuing comedy education. I just, like I said, I had to set the record straight on that. It was really irking me that they had that backwards. I'll probably get some things backwards myself as I go through this

presentation, but several members of my staff who are here today, I'm sure, will point that out to me and correct me and, while I'm on that subject, this presentation was really put together by Lisa Fox, one of the attorneys in my office who is here today, who we very fortunately hired right around the time this Executive Order went into effect, and she has gone around the state and to many state agencies educating people on Executive Order 127.

Right now, Executive Order 127 is really the only control on procurement lobbying that's in effect in New York State. As was mentioned earlier this morning, there are several bills out there. I will talk later about the Governor's Program bills that he released about three weeks ago, which includes restrictions on procurement lobbying, but right now all that's in effect that has any kind of control on procurement lobbying in New York State is Executive Order 127. See if this works. By the way, whenever you do something like this, always bring a back-up disk with your presentation on it because, as happened today, you often find there's something wrong with what you sent earlier, and we're working from the back-up disc which I'm very glad to say seems to be working. Executive Order 127. It builds on the state's existing framework for procurement, most of which is in Section 163 of the State Finance Law. The Governor issued the Executive Order because there was a lot of public concern a couple of years ago and it's still going on today about the public knowing who contacts state agencies to influence a procurement decision. We all know that goes on. Until Executive Order 127 went into effect, it was completely unregulated, and really not disclosed unless it was disclosed inadvertently or some other way, some probing member of the press, that kind of thing. The overriding purpose of the Executive Order is to have an open records process. It's disclosure; it's sunshine. Let's make all

this information available on who is engaging in procurement lobbying, trying to affect these procurement decisions by collecting the information and making it openly available to anybody who wants it. Basically the Executive Order standardizes information collection practices subject to executive direction. I think most of us here are government lawyers, but for those of you who are not, let me just point out briefly that this is an Executive Order, it is not a statute. The Executive Order can only direct activities of state agencies and those authorities where the Governor has some control over who gets appointed to run that authority, so this Executive Order can't impose obligations directly on the vendor community which would probably happen if we do get a law, if we get a bill passed, that regulates procurement lobbying. So it is the state's, not any vendor's obligation to determine when the Executive Order's requirements are triggered, to collect the information that the Executive Order requires you to collect and to make it available to anybody who wants to see it. One key element of the Executive Order, and it does only apply to transactions where they're subject to be involved in the procurement decisions, those procurements that are awarded based on lowest price are not covered, for the obvious reason that there's very little room for procurement lobbying there. That's the sole criterion. Who puts in a bid to sell something for the lowest price, usually a commodity, they're going to get the contract no matter who's lobbying and how aggressively they're lobbying for their client to get it. The Executive Order also doesn't cover very small procurement amounts, under \$15,000. That's also the dollar amount that's in Section 112, which requires the Comptroller's approval before the contract can go into effect. My office was somewhat involved with this Executive Order because the Office of General Services does so much procurement as an

agency. It is the agency that puts together the centralized contracts that are used by the other agencies, municipalities, school districts, whatever. So we were consulted on several aspects of this Executive Order before it was finalized and the Governor signed it. One of the big issues was when are the requirements of the Executive Order going to be triggered, because there was a concern that somebody would engage in procurement lobbying and violate the Executive Order without knowing that the Executive Order's requirements had gone into effect. Now, because it's the agencies that make the initial decision as to whether or not they're going to go forward with a particular procurement and because, again, the Executive Order really controls the conduct of the agencies and authorities, the decision was made, it's only fair, the best way to do this is to have the Executive Order's requirements go into effect once the agency makes a determination that it's going to go forward with a particular procurement. And that's -- I misled you. The Executive Order is also triggered by decisions to amend or renew contracts that were in place before the Executive Order went into effect. It went into effect August 14th, 2003. So the converse of that is that the Executive Order is not triggered by certain activities that typically arise in the formative or information collecting stages of a procurement. For example, receiving advertising materials, even though that's an attempt to influence procurement decisions, the Executive Order doesn't apply to that kind of a contact. Intra-agency communications, you want to encourage that full kind of communication within agencies and between agencies without having the Executive Order's requirements triggered. As you see on the slide, with the inter-agency communications, it says "except in certain circumstances." There was a concern that somebody trying to influence a procurement decision of one agency would contact another agency and then

have that agency make the contact to the agency that's actually making procurement decisions, so there the Executive Order requirements would apply. But generally, communications between agencies regarding procurements aren't covered by the Executive Order.

There are really four key elements to the Executive Order, and vendor disclosure of contacts is the first one. Vendors have to disclose those who they designate, retain or employ to attempt to influence a particular procurement. Part of that disclosure requirement is the record of contact. If the agency is contacted by someone who is trying to influence a particular procurement, and that person has not been disclosed at the outset by the vendor, the agency has to make a record of that contact.

The other three elements which I'll get into as we go forward are responsibility determinations required under the Executive Order. There's a contractual certification requirement that there's been compliance with the Executive Order, has to be in the contract itself, and then finally, there's a requirement that there be a termination clause in each contract that allows for termination of the contract, for intentional failure of a vendor to comply with the Executive Order's disclosure requirements.

The vendor disclosure that's triggered at the outset, once the agency makes a decision to go forward with a particular procurement, the information required by that disclosure essentially is the information you'd find on a business card, the name of the person, name of the organization, business address, et cetera, et cetera. The one that you won't find on a business card is the one that causes the most confusion and concern, and that's whether or not the person who's disclosed as someone who might be trying to influence the procurement has a financial

interest in the procurement contract. We get questions from other agencies, questions from the vendors themselves as to, you know, what does that mean. Well, it's right in the Executive Order, and I'm not going to read them to you, but there are five components to that determination of whether or not the person disclosed has a financial interest in the procurement itself. Pretty much what I tell people is you can assume that most anybody who's listed under this disclosure requirement does have a financial interest in the procurement because that's probably why they're going to be contacting the agency about the procurement and trying to influence it in some way, because they have a financial interest. People don't tend to do that out of the kindness of their hearts. They tend to be lobbyists or you know, vice-president for marketing within a large group, somebody who is going to benefit if this contract is awarded to the vendor that they want it awarded to. How the vendor conducts its business determines who must be disclosed under Executive Order 127. When very large corporations, such as Microsoft makes its disclosure, they are going to probably disclose their, you know, people who are engaged in marketing or engaged in lobbying, trying to influence procurements. On the other hand, if you've got a sole proprietorship or a closely held corporation, it's possible that everybody employed by that vendor, by that business, are people who should be disclosed because they're going to be actively involved in contacting the agencies, trying to get that contract, trying to influence the procurement. And another common misconception here, despite all our efforts to educate, is that, well, this is a procurement lobbying thing so it only applies to lobbyists. You only have to disclose whether you hired a lobbyist to try to get you contracts from state agencies. That certainly is not the case, but again that's the mentality we're dealing with all the time, not just

from the vendors themselves, but from the state agencies. So we're fighting that all the time. Everybody who's here and has any questions about that, feel free to contact my office and ask them because, again, that's where we see the most confusion and, as a result, that's where the most likelihood is that there's going to be non-compliance, because we just have that knee jerk reaction. Well, we haven't hired any lobbyists to try to get this contract, so we don't have to worry about the Executive Order 127 compliance. You're wrong. If there are people within your organization designated, retained, employed, they are people who should be listed on that disclosure as those who might be contacting the agencies to try to influence the procurement. I think I mentioned this before, I can go through it pretty quickly, this record of contact requirement is really intended so that there is complete disclosure, that all the information is in the procurement record as to who has contacted an agency and tried to influence the procurement. There might be a situation where the vendor has provided names under the disclosure requirements. Later on, the agency -- usually somebody higher up like the Commissioner, gets a phone call from someone who is trying to get that contract awarded to a particular vendor. The Executive Order requires that a record of that contact be made if the person contacting the agency has not disclosed -- is not included in the disclosure provided by the vendor. Now, as a practical matter, again, if it's the Commissioner who is getting the contact, he or she is not going to know what's in the procurement record, you know, held by the purchasing officer as far as the vendor disclosure requirement goes. So better in that situation to just err on the side of making a record of that contact, getting it down to the procurement people, let them see if that contact was made by somebody who has already been disclosed. If

so, they can pull out the record of contact. They've already got the disclosure in the record. If not, now you have a record of that contact, so you have complete disclosure as to who was trying to influence a procurement. As I mentioned earlier, the Executive Order adds another element to consider and that is responsibility of the vendor. The vendor has to disclose whether he's been found non-responsible for failure to comply with the Executive Order within the prior five years. This hasn't happened yet. The Executive Order has been in effect for less than two years. Nobody's been found non-responsible for failure to comply with it yet. Nonetheless, that disclosure requirement exists. Regarding that responsibility determination: A failure to comply takes into account the accuracy, completeness of the information, cooperation of the vendor, timeliness of submissions. Bottom line is, the responsibility determination is intended to avoid situations where a vendor is going to be penalized for mere inadvertent non-compliance with the Executive Order's disclosure requirements. As long as there's a good faith attempt to provide the information, you're not going to have a finding of non-responsibility because they technically didn't provide something that they should have provided. There are certain requirements under the Executive Order as to what has to go into a contract. The contractual certification informs the vendor that the information submitted is complete, true and accurate, and then the clause reserving the State's right to cancel the contract if there's a finding, after the contract goes into effect, that the vendor intentionally provided incomplete, false or inaccurate information. There's concern, and especially when the Executive Order first went into effect, there was a lot of concern that, boy, this is just going to kill our ability to do business with the private sector because they're not going to be willing to sign off on a contract that has a clause like that in it,

and we have found that not to be true and what we tell people who make that argument to us is the vendors are in control of that. They're not giving away control. As long as they are making a good faith attempt to provide the information that's required by the Executive Order, they're not going to be found non-responsible. The contract is not going to be terminated, so it's really not something that they need to be that concerned about, and we have found that, as a practical matter, that going forward since the Executive Order went into effect it hasn't harmed our ability to, you know, get the contracts that we want to get. The state has to compile lists of persons and organizations that were identified that did communicate regarding the transaction. This becomes part of the procurement record. It's kept with the procurement record because the intent is to have the information concerning each procurement with that procurement record rather than have just kind of some kind of centralized data base where all this information is collected and not, you know, relating to particular contracts. Frankly, we've had some trouble with that, because after the Executive Order went into effect, we got, for example, FOIL requests, asking for every record showing compliance by the agency with Executive Order 127. Well, that's a real problem when you don't have all that information in one centralized place. What we anticipated was that, if there were inquiries regarding compliance, they would be addressed to a particular contract and regarding the X, Y, Z contract, show us the records that show us compliance with the Executive Order. So what we are doing in OGS, and I believe other agencies, is we are putting together that centralized data base so we will have all of that information in one place if it is requested, but again that's not because of an Executive Order requiring it. The Executive Order hasn't changed in that it requires that that information be kept

with the procurement record with that particular contract. It is the State agency's obligation to determine when the requirements are triggered, when you've made a decision to go forward with a particular procurement, engage in good faith efforts to obtain the information required by the Executive Order from the vendors, and educate your vendors about what the obligations are under Executive Order 127. The attorneys in my office who are the procurement gurus have gone around doing the "dog and pony shows" to both the agencies and all vendor groups, you know, business groups, trying to get the word out on what their obligations are as far as the information providing aspects of the Executive Order, disclosure requirements. We're just continuing what agencies have to incorporate those requirements into the responsibility determination and the contractual process, provide access to the information upon request. There's intentionally no mention of FOIL, Freedom of Information Law, in the Executive Order, the reason for that being the intent was to have the information regarding particular procurement right in the procurement records so that if there was any requests for that information, it would be immediately disclosed, so the intent is to have even more disclosure and more rapid disclosure than you have under FOIL. That is the case where you get a request for information concerning compliance regarding a particular procurement because it's all in their procurement record; but again the Executive Order does not require that FOIL be followed, and there's no mention of FOIL. That's intentional again, because it's supposed to be even more open and less procedural than FOIL. Finally, where to get more information. The procurement disclosure guidelines are at OGS's web site, OGS.state.ny.us. Also you will find the State Procurement Council guidelines there. The State Procurement Council is a group formed by statute of

agencies who do procurement, what they call facilitating agencies for the preferred sources, these are the Industries for the Disabled, the Blind, and they are charged with putting together guidelines for state procurement generally. That bottom web address on this slide is their address. That's where you find the State Procurement Council guidelines.

That's it on Executive Order 127. I guess we're saving questions for later, right? So I'll just go right into the next part of my presentation, which is the Governor's package released about three weeks ago of what he called "government reform measures." There's basically four bills, a couple of which are geared completely towards procurement and procurement lobbying, and the others that have aspects that involve procurement lobbying. The package was released on March 10th; I'm not aware that any of these bills have been, in the parlance, picked up yet, that they have a sponsor in the Legislature. Wait and see what happens there. There are other bills in each house kind of floating around out there, I couldn't tell you what stage they are at, that also regulate procurement lobbying. Back to the Governor's package, and I'm going to do a lot of reading right off of the Governor's memos in support and the press release because, you know, I work for the Governor, and I like my job and I want to get this right. I don't want to say the wrong thing. The package would prohibit gifts to public officials from lobbyists and other parties who seek to benefit from official action. It would close what's called the "Flynn loophole." That's the loophole that results from a Court of Appeals decision that allows former state officials to avoid penalties for violations of the state's ethics laws if they leave state service. The third thing it does, it enacts a ban on procurement lobbying, and I'll get into some more detail about that in a minute, because it's not a complete and whole ban, but it, for the most part,

does not allow procurement lobbying to occur, and then there's kind of an omnibus bill that includes several provisions that reform the lobbying law, but what we're concerned with here is there's an addition to the procurement lobbying to lobbying regulated by the lobbying law. Right now again, there's no regulation in the statute of procurement lobbying. This would add that kind of a regulation. O.K. Going through the four bills quickly. One is the gift bans. It bans gifts from lobbyists and their clients to any public official, regardless of whether the lobbyist lobbies the public official. Now, this is just a gift ban. Now, you know, right now everybody is familiar with the \$75 rule, gifts over \$75, and there are restrictions also on soliciting or accepting gifts under \$75 in certain situations. This bill would basically ban gifts from lobbyists and their clients to public officials. The bill conforms the lobby law definition of a gift to the definition of a gift as interpreted by the State Ethics Commission. In fact, if you go to the State Ethics Commission web site and see their list of criteria as to what makes something a gift subject to those prohibitions and what is excepted from that prohibition, it looks to me like it was pretty much lifted out and put into this bill because, again, the Ethics Commission is the expert on that -- on that subject. That bill would also require the Lobbying Commission to refer violations of the lobby gift ban to the ethics body having jurisdiction over the officer or employee involved in the illegal gift and would require both the State Ethics Commission and the Legislative Ethics Commission to investigate the circumstances involved in the illegal gift and issue a public report on its findings. The second bill closes the Flynn loophole, and I'll just go quickly through that. There was a 1995 Court of Appeals ruling, Flynn versus New York State Ethics Commission, providing that with the exception of the revolving door provisions, you know, the two-year bar

or the lifetime bar, the Ethics Commission doesn't have jurisdiction over state officers and employees when they leave state service. So what's gone on since 1995, since that decision was issued, is people who get into trouble for ethical violations and don't want to go through the process of a determination, they simply resign if they've reached the point where they can retire. They retire, and the whole thing ends. There's really nothing more that the Ethics Commission can do to sanction that employee for the unethical conduct. The third bill has a lobbying ban in it, and I'll go into a little bit more detail on that. That amends the Public Officers. I know the other members apparently all have their own ideas on what should be done regarding procurement lobbying, you know, from just allowing it wholesale to go on as long as there is, you know, registration with the Lobbying Commission and as long as there is sunshine and everybody knows what's going on -- in other words, we get it out of the back room -- to the other end, banning it altogether, which is what the Governor's bill does. Thank you very much.

(Applause)

MR. FERNANDEZ: Well, Rich, thanks for the big finish. Our next speaker is David Grandeau, who is the Executive Director of the State Lobbying Commission. David is going to speak on the Lobbying Commission's proposals and other ethical considerations and gifts.

MR. GRANDEAU: Thank you, Hermes. I'm in a unique situation today. I'm not used to doing these classes where I really don't have much to say, but when it comes to procurement lobbying, as many of you know, the Lobby Commission has no role right now. We don't cover it. It's not under our purview and, as I have learned over the last year from my Commissioners, they prefer that I not talk about things that aren't under our purview. So, having said that, when Hermes

first called me up and said, What are you going to talk about, I gave him that same shtick I just gave you and I said, I think I'll just sit here and listen to everybody else. He told me I can't do that, because that's his job, so we had to come up with something that we could talk about, and in conversations with Karl and Richard, we realized that the three of us really have some commonality, no matter what you may have read in the paper. Richard and I do agree on things occasionally, and where we don't, he's wrong, but we're working on that, and those things are not so much what is going to happen for procurement lobbying but the kinds of areas that we can look at that have created problems or issues today, certainly in legislative lobbying, and the first one I want to talk about is the actual definition itself. I think when we're talking about procurement lobbying, and I certainly got a wealth of information from this, you've got to be sure that if and when a bill gets passed, it's clear what kind of activity you're trying to cover. I can tell you that the Lobby Commission for the past 20 years had had a definition regarding procurement lobbying, in fact, any kind of lobbying, a proposed definition for changing the act that would expand it to be any advocacy on official action, and that's how it was for 20 years and that's pretty broad, and you can understand it. Two months ago, the Commissioners changed that suggestion; that no longer is included in our official proposals. Maybe it's just coincidental, but on the day of the meeting they received a package from the New York Civil Liberties Union and after receiving the package, we now only believe that the definition should be expanded to include procurement lobbying, whatever that is. So I would caution any of you who are in this field, if and when a bill gets passed, and I'm sure that now that we have a budget done on time, this will be the next area that they turn their attention to. I think you have to pay a lot of

attention in that debate as to what exactly we are trying to cover when we talk about procurement lobbying. The other two areas that I think are vitally important to discuss are the two areas that are the only areas in the present statute that are criminalized, that are actual misdemeanors. For the most part -- and, by the way, how many lobbyists do we have in here? I'm not going to audit you. I just want to get a general idea of what we're dealing with. None? No one is admitting to it? There we go. For the most part, the Lobby Act covers disclosure. That's what we're interested in. We want to get the information in a timely fashion. We want to get it back out to the general public, to the media, government, in a way that's useful to them. There's very little regulation in the act. It's really geared towards disclosure. How you lobby is your business. Who you lobby, all those factors, who gets to lobby, whether you can -- I've been asked this question more times than I care to admit. Can people with criminal records lobby? Sure they can. Nothing in the act that says they can't do that. It's really not a prohibitive act except for two instances, and one is contingent fees and the other is gifts. Both of those areas are misdemeanors if you violate the act, and I'll deal with them separately and maybe we'll say some things that you'll find a bit unusual, and I'm not going to follow the rules, Hermes. If you got a question, please feel free to ask it, because I'll forget it by the time we all sit down and start arguing again. Contingent fees: Right now, the act says if you enter into a contingent fee lobbying contract, you have committed a misdemeanor, punishable by up to a year in jail. In the ten years I've been there -- and my counsel Ralph Miccio, is up in the audience; I don't know if you have a better memory than I do, Ralph -- I can only think of three or four instances where we've ever come across contingent fees lobbying contracts, and I don't believe for a minute that

those are the only three or four contingent fees that have occurred. I happen to believe that it probably happens a lot more often than we're certainly aware of, and probably a lot more often than people are willing to admit. But what happens is you do your contingent fee and you just don't tell us because you're worried about the punishment, and in thinking about this, I got to thinking why are we prohibiting contingent fees? I mean the simple answer, and the one that you hear all the time is that, well, if you have a contingent fee on a large contract, you're likely to do something inappropriate to earn that contingent fee. I don't know if that's true or not. I guess that's going to depend upon the lobbyist more than it is on the issue that they're on, but even accepting that that's the case that you're more likely to do something inappropriate when you have a contingent fee, I think that's all the more reason to allow the contingent fees and disclose them. If you know about the contingent fee, if I know about the contingent fee, rest assured the general public is going to know about it, because that's what we do. We disclose this information. We make it available, so if you have a contract out there with a contingent fee and we know it, the public will know it and, if the public knows it the media knows it. If the media knows it, they're watching. If they find out about the half a million dollar phone call, they're more apt to find out all the circumstances that surrounded that half a million dollar phone call; so I think at the end of the day and in procurement we're probably going to have a lot more issues with contingent fees -- I'm assuming you do some more work on it, the contingent fees in procurement? All right. I mean the last time I read the lawsuit that Featherstonhaugh was in with MEDCO, there was some big argument about contingent fees. Assuming that they're out there, I think we'll do a much better job of controlling this inappropriate behavior if it is

inappropriate if we disclose it, make it available to the public and let the media and the public do what they do best, which is to look into these matters. And then in thinking about it some more I said, You know what? What's wrong with having contingent fees in legislative lobbying, and then it dawned on me that if the lobbying community -- and there's only one lobbyist here, so I'm not going to get in too much trouble, I guess -- it dawned on me that if the lobbying community was allowed to do contingent fees and the clients smartened up, every client would request a contingent fee because, you know what? Most of these lobbyists don't accomplish a whole heck of a lot. They don't. I mean I say that jokingly but we've run the numbers. Fortunately, as a result of some pretty significant fines that we were able to recover courtesy of Mr. Trump and others, we have a pretty sophisticated computer system and it allows us to track the bills that lobbyists say they're working on, compare them to which bills pass, and as those of you in government know there's not all that many bills that pass anyway, and it's getting fewer and fewer and yet the amount of lobbying is going up and up. But let me say this. If you're a lobbyist and your firm is successful in passing more than ten percent of the bills that you're listing as having worked on, you're a superstar; you're Barry Bonds, on steroids. I mean it. The numbers are actually kind of astonishing, I know. I've heard it already, what you're losing track of is the fact that a lot of lobbyists are working the other side of the issue; they're trying to stop bills from being passed. O.K., I'm assuming, though, for every bill that's trying to be passed, and every bill that's trying not to be passed, there's a fairly equal army on each side of the equation. Unless there's some specialists out there that just deal in killing things, somebody's not getting a whole lot done, and I think, quite frankly, if the clients smartened up they'd either (a) if they

could, let their lobbyists work on contingent fees because they'd save a lot of money or (b) they'll start doing it themselves and once again save even more money. I just throw that out, and I know it's not something that people tend to want to hear from the head of the Lobby Commission, but I don't say these things just to shock you. I've thought about it quite a bit. If what you're really interested in is stopping that inappropriate behavior, certainly legislative advocacy and even in procurement, let them have contingent fees, require them to disclose it. We'll find a lot more about what's going on out there. It's interesting. The one case we're working on right now, and I have to be careful about discussing ongoing cases because in case it gets back to my Commissioners, I get in trouble. I'm only going to talk about what's been out in the public, and it's been out in the public because the law firm involved in this particular contingent fee was sued by the client, which I guess happens. Clients get upset with their lawyers sometimes. In this case, there's a document from the attorney, one of the attorneys trying to collect on his fee and it said -- and I'm going to paraphrase it -- we're the only firm in this deal not working on contingency. That was interesting to me. I mean the way he said it, it was pretty clear that he was knowledgeable of a bunch of other firms. This was a casino deal, and he thought that he was the only firm involved in this casino deal that wasn't working on contingency. Rest assured, before our investigation is done, we'll find out who those other firms were that were working on contingency, and unfortunately for them, if they have not disclosed it, it is a misdemeanor. We'll do our job. We'll figure out who committed the misdemeanor, and then we'll get to the other part of our conversation that I hope we have today which is that you can't look at it just as disclosure; there's got to be a regulatory action. There's got to be a hook on

the end. Someone's got to be willing to punish these people when they get caught doing something wrong.

Gifts, and that's the big one, and this is an area that I think there's certainly quite a bit of disagreement between Karl and myself on, maybe more agreement between Richard and myself than people realize. The present gift ban in the Lobby Act prohibits any lobbyist or client from giving or even offering a gift having a value in excess of \$75, and on its face that seems pretty simple. If you're a lobbyist for a client and we know who you are, you can't give a gift or offer a gift having a value over \$75. The problem comes in when you start trying to interpret all the simple parts of these gift bans, and especially important when you go to a complete gift ban as many people have suggested they want. Well, you know, that's a slippery slope because once you start saying you want to ban all gifts, there are things that should be exempted from gift bans. They should be exempted from \$75 gift bans; they should be exempted from one dollar gift bans. One everyone talks about is a cup of coffee. You can look at the Lobby Act; it goes on and on. It's within those exemptions, though, that you get the lobbyists and the clients that start to push the edges, and I'll just briefly run through for you, there are five cases, requests for opinions presently pending before our Commission, and we have a meeting Tuesday where hopefully they'll address many, if not all of these gift opinions; but here's the kinds of things that you run into. We have a case where a group of clients got together to split the cost of an event so that they got the per person cost, their own individual per person cost is below \$75; yet the value that the public official received was in excess of \$75. Where does that fall on the gift ban? We had another case where, in return for getting a gift, the public official gave back something

of questionable value. I mean do you have a legitimate argument? In this case, it was a television advertisement in New York. I think it had to do with the Jets stadium, if I remember correctly, but one of the parties was providing free access to their TV to run ads, and it was done during the week leading up to the elections, so clearly the public official is getting something of value. They're getting their face out there in front of the public. But are they giving something? I mean they're giving up their time to be filmed in this ad. We've got to deal with whether or not that's a fair exchange of value. Another case involved a charitable vendor. It's not unusual in golf tournaments to have what they call a Pro-Am before the golf tournament occurs. In this case, it was a tournament down in Corning, the LPGA tournament, where some part of the proceeds of the tournament is turned over to charity and the Pro-Am has an entry fee of \$500, \$94 of which the charity says is a charitable deduction. The balance of it obviously is not charitable. The present gift ban has an exception for charitable events. The question is, does that mean that the \$94 portion of the gift is exempt from the gift ban, or is the whole gift exempt from the gift ban because it went to a charity? And we'll be dealing with that. Many of you may have read about Senate Minority Leader Paterson taking a private jet to Albany provided by a gentleman by the name of Richard Fields who is, coincidentally, a casino developer. In that case, Senator Paterson paid the coach fare that would have been available for that -- that trip between, I believe it was White Plains and Albany because there wasn't a first class fare available. If I remember correctly, Karl, you guys used a first class fare.

MR. SLEIGHT: First class if there is regular travel between point A and B; otherwise you'd have to use the actual cost of the charter for that.

MR. GRANDEAU: Well, in this case it was a charter that was worth about 6,000 bucks. They billed him the coach fare which is a hundred and something, and that's what he paid because there was no first class fare. So the question is, you know, what are you supposed to use as the measurement, and these are all issues that you're going to come into even more with procurement than you do with legislative advocacy.

And lastly, and this is my favorite, because this was Jim Featherstonhaugh. He's got a client that gave multiple tickets to an event to one party, and he makes the case and I don't remember what the exact numbers were, but let's for the sake of argument, say there were five \$20 tickets to a Syracuse basketball game. That wasn't the case, but I'm using that as an example. When his client gives the five \$20 tickets, has he made a gift of \$100 or has he made five separate gifts of \$20? And then when you get down into actually having to think about what that is, believe it or not, the Lobby Commission's position -- and I'm almost embarrassed to say this -- if you stick the tickets in separate envelopes and put different names on the front of it, that's five \$20 gifts. In fact, it wouldn't even matter if they were tickets. They could be five \$20 bills. Those are five separate gifts. If, however, you give the tickets in one bunch to the individual, that's a \$100 gift, and that's a crime. There's something wrong with a statute that pays so much attention to this kind of detail when it comes to criminal behavior. I mean that's a misdemeanor, if you make the mistake of not having enough envelopes. Funny but I can tell you, and I can assure you that if you're on the other end of it, if you're one of these lobbyists that we end up investigating, in addition to going to the powers that be and telling them what a rotten guy I am, it's serious stuff for you. It's your livelihood, so with that thought -- and this is another

area where I'm not just saying it to shock people -- I have been giving this quite a bit of thought -- I make the suggestion to you, and I'd be interested in what you have to say and certainly in what Karl and Richard have to say -- let's not ban the gifts. Let's not have any arbitrary \$75 limit; let's not worry about whether it's within a 12-month period or six-month period. Let's not worry about carving out exceptions for coffee cups or putting a quarter in the parking meter. Let them give -- when I say "them," I mean the lobbyist and the client -- let them give whatever they want. Last time I checked, and, Karl, obviously you have a lot more experience than I do, there's a statute dealing with bribery, right, totally independent of any gift ban that we have, you have, or that the Governor may impose. If it's a bribe, it's going to be a bribe, and there's nothing that we do at the Lobby Commission or that you do at the Ethics Commission that's going to change that. So with that thought in mind, let them give whatever they want. Require them to disclose it. If the lobbyist knows that he's going to read tomorrow in the paper about what he gave public official X, I think that's a far more effective way of moderating that behavior than coming up with these crazy at-the-edge exceptions, and they do it on purpose to try to get around it. I can tell you, I've said this before, without even trying I could probably come up with 20 ways to avoid certainly our gift ban and if I really thought about it, Karl, I could probably come up with another ten to get around yours, but fortunately I haven't had to. When it gets right down to it, people don't change their behavior based upon the gift bans that we may have in the lobby statute, or that you may have in ethics. I can tell you as a government employee, I don't base my decision on whether I'm going to take something not on whether it's covered by your act. Quite frankly, I haven't read it. You know in your heart whether you should or shouldn't be

doing it. It's a matter of your own conscience and not what they're saying. I leave you that as my last thought and let these guys get up here.

(Applause)

MR. FERNANDEZ: Thank you, David. We're going to move right to Karl Sleight who is the Executive Director of the Ethics Commission.

MR. SLEIGHT: When Hermes told me I was following David Grandeau, I said, Oh, how can you follow David Grandeau, but then I thought maybe that's a good thing because, as provocative as I try to be, I'll never be as provocative as David Grandeau, so I have a little bit of license today, to say some things that may go beyond the scope of my duties and roles as the Executive Director of the Ethics Commission. I'm someone who likes to think in big picture ideas, not limit myself to the nuances of a particular statute, and I'm going to try to speak in those terms today. Some people here may not know what the State Ethics Commission's specific role or mission is in state government. I want to touch on that briefly. The Commission was created as part of the Ethics in Government Act of 1987 for the Executive branch of government. There are five Commissioners. They're not full-time employees. They are unpaid, and receive only a per diem for meetings they attend. We meet every four to six weeks. The Commission, having been in existence now for about 16 years, allows the public to look back at the distinguished people who've served as Commissioners. I think it's a tribute to both Governor Cuomo and Governor Pataki, as well as the past and present Comptrollers, Attorney Generals, who have nominated people to this Commission, that in all cases, they've had absolutely stellar reputations. They have included deans of law schools, people who have been extremely

successful in business, priests, rabbis, accomplished lawyers. Currently two of our five Commissioners were former law clerks to U. S. Supreme Court Chief Justices. There's no lack of intellectual fire power at the Commission, and I think they take their job very, very seriously and it's contributed in a lot of ways to the reason the Commission works so well. The Commission has jurisdiction over the Executive branch of government, which consists of approximately 250,000 State employees. We have jurisdiction over the traditional departments, Department of Health, Department of Motor Vehicles, we have jurisdiction over the four statewide elected officials. We also have jurisdiction over any entity where the Governor has an appointment to the board so we get the MTA, the Long Island Rail Road, Metro-North, for example.

Over the course of the life of the Commission, we've issued over 300 formal opinions which is, in essence, the interpretive body of law for ethics in New York State. We have jurisdiction over former employees with respect to the revolving door or post-employment restrictions and, as I think Richard mentioned, our jurisdiction is compromised when we are investigating someone who has committed an ethics violation while they're in state service, but then leaves. The Court of Appeals held in Flynn versus State Ethics Commission back in 1995, that our jurisdiction ends once a State employee separates from State service. More on that later.

I'm going to try to give you an unvarnished perspective with respect to ethics. I think when you speak of things like ethics laws, what you're talking about is trying to regulate moral conduct by a statutory scheme. Frankly, I don't know that there has been a great history of success in the law when we use laws to try and regulate moral conduct. I think back to the

Prohibition experiment from 1920 to 1933. I think most recently of the application of the laws to the predominately moral principles found in the Terry Schiavo case. I don't think in those examples where there was a fundamental moral issue, the law was really able to adequately address the key issue. I think at the very best, you'd have to say it was an incomplete answer. I think as we look at many of these issues, whether it's the state ethics law or something else, trying to regulate moral behavior with respect to ethics and procurement lobbying, you're going to find that you will run into the same kinds of difficulties. If you are going to try to tackle this potentially impossible problem, I think you'd have to try to do certain things: One, I think you have to have a law that's meaningful. It is critical that if you have something that's meaningful, then it's going to be a positive influence on the process. You don't want to have something that's simply a "feel good" measure. Frankly, that's a waste of time. My personal opinion on the current ethics law is that the statute itself is poorly drafted. That's another reason why the Commission has been so active in the legislative arena. Throughout the history of the Commission, for example, in our seminal opinion on gifts, we've tried to give state government officials some direction in terms of what's appropriate or inappropriate behavior in terms of what's expected by the State ethics laws. For someone, like myself, who as a prosecutor is accustomed to the generally clear statutory scheme found in the Penal Law and the Criminal Procedure Law, I cannot honestly tell you that the Public Officers Law with respect to ethics is crystal clear. That fact makes it all the more important that the Commission provide a clear interpretation of the law in the form of opinions. In terms of procurement lobbying, in general, I think there's several interesting things that you might want to consider, and this is more in terms

of the big picture. First and foremost, why are we even talking about this? I mean really, we've reached the point where we have to pass laws so that government officials are not allowed to accept gifts from people that they're giving lucrative contracts to. That's ridiculous. Seriously. I'm not trying to be naive about the political process, but when you get to the stage where you have to lobby, as I do and as others do, to try to make things a little bit better, by advocating for a statute that prohibits this kind of behavior, you really have to stop and think, well, how did I get here and why am I here? At what point in time does a government official stop saying, you know, Mr. or Ms. Lobbyist or Mr. or Ms. Vendor, I think what you have, on its merits, is a good idea, and, I can go along with that because it's in the best interest of the people of the State of New York. I don't need to go out to dinner with you, Monday, Wednesday and Friday to make the correct decision. I don't have to rely on an interpretation of the ethics law that says I can have a \$74.99 breakfast, a \$74.99 lunch, or a \$74.99 dinner, to dine with you while I decide the outcome of a contract award, or the fate of a bill. So at what point in time do we as citizens and voters come to the point of view where you say, enough is enough, and I think, if you look at what's playing out publicly with a lot of these issues, we're already there in some respects. Over the last few years, the Commission has come to feel that their 16 years of experience puts them in a unique and positive position to advocate for improvements to the State ethics laws. When David asked Who's a lobbyist, I raised my hand. I am a lobbyist because I lobby for better ethics law. David mentioned that even nominal success of a lobbyist who gets a bill passed can make them, in his words, 'Barry Bonds on steroids'. Last year we had three of our six proposals passed into law. I guess that makes us the Yankees on steroids. The changes in the law were

helpful and important. I think periodically we read about a lobbyist who has unusual or significant influence in the contracting process but is that, in fact, true? I don't think we're at the point, and we don't even have to get to the point where we answer the question of whether or not a particular lobbyist has more influence than somebody else, because it doesn't matter. Most importantly, the process, at the very least, has been overcome by the illusion that it really matters who you hire, otherwise you won't get results. Where in the past, the effectiveness of the agent in articulating the merits of a particular product, if it's a vendor or a particular bill if it's a traditional lobbyist were most important, now the illusion of access trumps the merits of the product. So in reality, and I think David would probably speak better to this – on the whole, one lobbyist may be marginally better than another. However, consider it from the position of the government decision-maker, whether it's somebody in the Executive branch or somebody in the Legislature and ask what is the test in that person's eyes, of what makes a good lobbyist. Is it whether or not the person can explain and articulate the position, or is it whether, in the eyes of the decision-maker, how many times did he or she go to my fund raiser or how much money did he give to my particular campaign. When you move away from the merit of the position at issue to things like attendance at fundraisers, even slightly, the illusion becomes reality because if the market thinks that certain people are better situated to influence decision-makers, then these people will be the lead lobbyists. For example if you're from Canada, and you want to come to New York and have an impact on, let's say, thoroughbred horse racing, you may think, not having been in the arena before and based on word of mouth, and media reports regarding attorney lobbyists, that you need to hire certain lobbyists. Again, at the least, the illusion

becomes reality and certain lobbyists are hired. Now, I think an interesting aspect of this is that, if there is too much of this perception within the lobbying marketplace, what happens is it spills out of the lobbying marketplace and into the general public and into public opinion, and the way it gets there is through the media, and I think that's what we have seen over the course of the last two or three years. In the world of public opinion, I think that this illusion is not who are the best lobbyists. The general public, when they examine the situation through the lens provided by the media, they are left with the belief that it's simply a corrupt system. If you hire the right person, then you get things done, and as David pointed out, that's not necessarily the case, but that is clearly the perception now with the media and the general public. To come full circle, I think it's those motivated voters that are the real reason that we are all here today, and why 200 people are talking about procurement lobbying, specifically ethics in lobbying. If you're going to try to get workable controls in procurement lobbying, I think you do have to be a bit cynical to start out with. There are practical answers to the problem, but more importantly there are political answers to that same problem. In my experience, the political always trumps the practical. When the Ethics in Government Act of 1987 was drafted, who was at the table? I mean you had people who were going to be regulated by the Act while in State service, and after they left state service. So you have to keep that in mind when these particular issues are being hashed out. We talked about a good example -- I think Richard mentioned it -- the Flynn case from 1995. There's a gaping loophole in the ethics law which allows state employees who are either under investigation or who could be under investigation for a breach of the ethics laws to simply leave state service and escape the jurisdiction of the Commission. Now, that loophole

has existed for ten years. There's no big secret. The Court of Appeals issued a decision a decade ago, but there was really a lack of political will by anybody to fix it. Until we had the situation where two or three high profile people were reportedly the beneficiary of the statutory defect, whether or not they really were or not, the issue lies dormant. But when there are real examples, editorial boards write about the issue, voters read about the issue, and it feeds into this perception that there is something very wrong with government in our state. I think another good example or maybe a lesson, is found in the existing financial disclosure process. Part of the ethics reform debate of 1987 was this tremendous concern, at least articulated by some "good government" groups and some newspaper editorial boards, that there needed to be disclosure of the financial holdings of high ranking public officials because those same people were making decisions that potentially could have a personal financial benefit to them. The concern was real, and the concept to address the situation was very good. Transparency, I think, in government is always a good thing, and I think the concept was very good. If you have somebody who is a high ranking decision-maker and they're making decisions, let's find out what, if any, impact there is on the decision maker. But then as you're carrying that ball down the field and you get to the two-yard line and you're about to go in and accomplish your goal, it's almost like the reform team walked off the field, or the JVs came out and tried to run it in, because what you end up with was an abysmal financial disclosure statement. How many people here have to file a financial disclosure statement? Oh, man! That's a lot. The financial disclosure statement is actually in the Public Officers Law. If you look at Section 73 (a) of the Public Officers Law, the statute actually has the form in it. So the Commission is powerless to change it, and it wasn't an

accident that the form ended up in the statute. I cannot recall many other places in the law where there's a form that's part of the statute, but clearly the Legislature did not want the Commission or anybody else tinkering with the scope of financial disclosure. The other thing that they did instead of hitting the target of people who really should be disclosing things with respect to their personal finances, was to cast an overly broad net. I put in some of your materials, some newspaper articles from 1987 that talk about financial disclosure. Originally there was 100,000 people in state service who had to file financial disclosure statements, and it became a huge issue for the public employee unions. It ultimately was pared down, I think to 20- or 30,000 filers. There was a lot of criticism right out of the box about financial disclosure. Again, you didn't have anybody at the table trying to think of a practical solution to this problem of financial disclosure. It was more of a political solution to a public relations problem. O.K. I'm going to save my thoughts on gifts for maybe some questions, but quickly, I think you need to articulate a rule that's very clear. People talk about a zero tolerance on gifts. That sounds good politically, but to be true to the rule, take that rule and give it to the regulator and the regulator has to say, 'Well, you can't take a New York Times, you can't take a cup of coffee.' Otherwise you have a situation where zero is never really zero, and then you have introduced a tremendous amount of arbitrariness into the process for the regulator. I think that's a major problem with zero tolerance, and I'd be glad to talk to any of you after the program. Thank you.

(Applause)

MR. FERNANDEZ: Thank you, Karl. Karl spoke about the financial forms. Those financial forms actually show the problems if the Governor actually negotiates the real details of a bill.

The past Governor did that himself. Now, with that, I'll turn this over to Richard Rifkin from the Attorney General's Office.

MR. RIFKIN: Well, I suffer the penalty of going last. So just looking at the clock, let me compress my remarks to maybe five minutes or so.

I see that I'm the most popular person in the room in saying that. I've really got one central point to make. And it's exceedingly well teed up by David's remarks, because assuming that we all want to bring some sort of oversight, if you will, or control over procurement lobbying -- in other words if you're going to have people coming in and trying to influence the procurement process, if you're going to allow that -- you ought to have some sort of regulation or oversight, and David's position, which he advocated I thought exceedingly well, is disclosure. Disclose everything, and then let the chips fall where they may. Make the information available to the public. Certainly, that's one way in government when we're talking about issues of integrity in government, which is absolutely legitimate. We do it, for instance, in the elections area. We certainly do it in the lobbying area, and even, to some degree, although there's a good deal of regulation in the Public Officers Law to what state employees can and can't do, there's financial disclosure which is also a different form of disclosure. So disclosure is absolutely a legitimate way or means of oversight, but then another means of oversight are codes of conduct. In these various areas that we talk about, where there's a sense that you need more than disclosure, you then put restrictions on what people can do. It's done certainly for state employees in Section 73 and 74 of the Public Officers Law; in the elections area, where it's primarily disclosure, there are still restrictions on what candidates and contributors can do. If

you take a look at Article 14 of the Election Law, there are crimes against the electoral franchise. As David mentioned, even in the current lobbying law, though he opposes it -- I recognize he opposes what's there -- there are a few behavioral restrictions such as contingency fees and restrictions on gifts. So the question, I think, if we're really going to debate this topic in terms of what type of oversight or what type of regulation we need in the area of procurement, which is what we're talking about here this morning, the question, and I think the central question for everybody to think about is whether you want disclosure or whether you want in some way to regulate the conduct of the players in the area. The Governor has put in his bill banning disclosure. The Governor and the Attorney General also have a similar bill which would ban disclosure. I'm sorry, when I say "ban disclosure," I meant ban lobbying for procurement. I misspoke, and I apologize. We believe that, in order to promote fairness -- and, after all, Commissioner Hogan and Deputy Comptroller Sanzillo spoke about this this morning, the need for not only fairness but the appearance of fairness -- the problem with disclosure is that you can have disclosure but then you don't have fairness, because once you disclose, you can have heavy lobbying by one party, especially a well funded party, and not effective lobbying by another less well funded party. So you lose your fairness element in the contracting process. Therefore, at least from my perspective, the only way you achieve fairness and the appearance of fairness is to ban lobbying in the procurement process. With that, I leave you.

(Applause)

MR. FERNANDEZ: Well, thank you, Richard, for those succinct remarks. We do have five minutes for questions. I just want to start off with a comment as well. What we're really talking

about is conflicts of interest. Whether you're talking about bans which are really attempts to avoid conflicts of interest, or disclosure which is attempts to enlighten the world as to potential conflicts of interest, every one of these steps is something that's intended to take on or in some way deal with the issue of conflicts of interest. If we tell our clients whether it's relating to a government matter or whether it's relating to a private matter, take the steps that you'll be comfortable with if they are disclosed, because when something comes out in the public, it's going to look worse than you intended. It's going to be looked at from a different perspective than you may have intended it, so we use that as a rule. David's comments in terms of the gift ban was, I think, very provocative and also very defensible. Many of the things that I think are identified as gifts, sometimes the government people may not actually agree that they are gifts -- receptions, for example -- the cost of receptions get listed as gifts. It's arguable, I think, whether you would regard going to a reception as a gift or as an obligation. Many of us, run into each other at Albany Youth Soccer or at Little League or, one of you may coach someone else's child; so there's so many opportunities for interaction. How does all this play off? When one spouse works for a vendor, another spouse is in government. How do you deal with these various conflicts? Rich, I'll throw that to you since you've got the largest procurement agency, how do you deal with those sorts of things as we bump into each other in our small community?

MR. REED: We just try to get as much disclosure from our employees as possible, and, you know, I, for example, am the ethics officer for an agency, and encourage them to call those things to our attention and give them opinions and check with the Ethics Commission if I can't answer it; but, you're right, it comes up all the time.

MR. FERNANDEZ: Karl, do you want to comment on that?

MR. SLEIGHT: In terms of being in a fairly small community, and interacting with people outside of their business relationships, I think both sides have to appreciate that there's a wall there, an invisible wall, and when you're wearing your government procurement hat or your lobbyist hat, that's one situation. If you're coaching the other person's kids in the Little League, that's clearly another hat, but I think there has to be an appreciation for separation between your public duties and your private relationships.

MR. FERNANDEZ: Others?

MR. GRANDEAU: You know, the problem, Karl, though, at least in our statute, is that the statute itself doesn't allow for that difference. The statute says, if you are a lobbyist or a client, once you meet that threshold, once you file with us, you're prohibited from even offering a gift. What if I get invited to a wedding of a friend who is a public official? The statute says what the statute says, and that's the problem -- we said this before -- any time you're going to try to draft these things, you're going to run into trouble and it's why I continually advocate. Look, people are going to do what they want to do anyway. All you do when you provide a statute is provide them a means to defend what they shouldn't be doing. Let's let the gifts happen; ensure that there's disclosure; ensure that there's someone at the end of the process that will punish these people criminally if they don't disclose.

MR. FERNANDEZ: That would be your guide, Richard.

MR. GRANDEAU: And I think you're going to go a lot farther in stopping the behavior that we're all concerned about.

MR. SLEIGHT: Be careful not to over-simplify, in the transition from the topic of illegal gifts to generally the type of relationships you have with people in a small community. If somebody is a lobbyist, for example, or if somebody is a disqualified source with respect to the Ethics Commission, regardless of what hat they're wearing, they shouldn't be showering the decision-maker with gifts. I think that that's something that's offensive for a variety of reasons, and I don't think that disclosure alone is enough. I think you have to have a combination of effective enforcement and disclosure. If you have just disclosure, I think you really have some significant problems, but you talked about the difficulty of writing a statute, and it's very difficult, as I mentioned in my remarks, to try and regulate what is, in essence, moral conduct. It's very, very difficult. You have situations, for example, where the crux of the facts presented is a personal relationship. For example, there's a bar mitzvah or somebody has a baby and you want to give them a gift, and you don't want to create a law that's inconsistent with normal and accepted social behavior. So it is very, very difficult. No question about it. I think we agree there. On prohibited gifts, I think you need a number whether it's \$10, \$50, or \$75, and I think the Commission's adaptation of a time frame that says that you cannot take multiple gifts of \$75 or more from the same source during a 12-month period, gets you away from the cup of coffee and New York Times examples I mentioned earlier, and makes it easier to regulate for the regulators, and I think it makes it easier to understand for state employees. The big problem that now exists, is that the same statute has been interpreted differently by the Executive branch of government and the Legislature. I think, if you took our interpretation and went across the board with it, it's workable.

MR. FERNANDEZ: Any further questions from the audience? One question.

QUESTION: (Inaudible) it's really difficult for them to get educated in that new technology unless they participate in that activity.

MR. GRANDEAU: What you really don't want to do when you're trying to create some structure, is to prevent interaction between the public sector and the private sector. That's certainly a disservice, I think. We've always tried to facilitate situations where government employees are trying to learn what's available, particularly in areas of technology because it's important for the decision-makers in government to have a full breadth of what's there. That's why there's exceptions, for example, for widely attended events and things of that nature or for people to go to learn about things.

MR. SLEIGHT: On that point, and I hate to be the cynic, unfortunately, the widely attended events all too often happen in resorts with golf courses. Where do you draw the line?

MR. GRANDEAU: That wouldn't be a widely attended event, arguably. Widely attended golf outings are prohibited.

MR. FERNANDEZ: Well, thanks Albany Law School for having us all here. Thank you all for your attendance.

(Applause)

DEAN SALKIN: Our lead-off speaker this afternoon -- I am really thrilled that he made the trip -- is Larry Ethridge who has been a personal friend for a long time. In fact, we got to know each other through the American Bar Association, not so much through the Model Procurement Code, but because Larry and I both served as chairs of the ABA's State and Local Government Law

served for four years as Assistant Project Director for Implementation. While at the ABA and Section. He joined the staff of the ABA Model Procurement Code Project in 1976, where he thereafter as a consultant Larry served on the Procurement Advisory Panel of New York's Legislative Commission on Public Management Systems and as a member of the New York City Charter Revision Commission, focusing on procurement policy reform at the state and local levels. He's a shareholder in Ackerson & Yann in Louisville, Kentucky, specializing in public and private contracts, construction, administrative and employment law. He served as chair of the Model Procurement Code Coordinating Committee from 1985 until he was designated as co-chair of the Steering Committee for the Model Procurement Code Revision Project in 1997. He served as an editor for all three editions of the Model Procurement Code Annotations and has written numerous articles on state and local government procurement for various publications. At every ABA meeting of the State and Local Government Law Section, he would bring up the Model Procurement Code, and most of the people's eyes would glaze over on the State and Local Council, because that wasn't work that anybody did, and I think that he always thought that he was being ignored. I kept telling him, I'm going to get you to New York one day and we're going to do procurement code work, and so this is the second time that we've been able to get Larry to come to New York and talk about the Model Procurement Code.

MR. LARRY C. ETHRIDGE: Thanks, Patty. So Patty is now getting back at me. She's getting me a whole room full of people whose eyes can glaze over and ignore me while I'm trying to speak here today. I've got several things to talk about. I think Patty put me in the post-prandial position so that you could continue sleeping while I give you the history of the Model

Procurement Code in the state of New York.

In '78 there was some underlying tension that we noticed right off the bat -- I think it went beyond tension -- between the Office of General Services (OGS), and the Comptroller's office. So the first thing I'd like to do in our group participation efforts here is to see how many people are affiliated with OGS in the audience. It's packed up there in the corners and the rafters. You folks just didn't get in on the lottery for the NCAA Final Four tickets; that's what it is! All right, now how many from the Comptroller's office? Aah, I think we're outnumbered. That's the Yogi part, you know, this is "deja vu all over again." I heard Dan and Tom going at it again this morning, but in Kentucky, of course, we have the Hatfields and McCoys. So up here now I guess you have the Hevesis and the Hogans, but what we're hoping is that we can bring a mutuality of interests together here and move forward. When Patty told me last night about the Budget Bill, and it's the first one that's been passed on time in 20 years, you don't have anything on us in Kentucky. We didn't even have a budget for the entire last year! Our legislators got mad at the Governor over his tax reform program and just went home, wouldn't enact a budget, so the Governor adopted his own emergency budget. The courts, of course, found that to be unconstitutional, but said that we'll give you until June 30th of this year to pass another one. So they finally got one passed a couple of weeks ago, and we're back in operation as a government, so to speak. But as part of yesterday's Budget Act, I think the extension of the Procurement Stewardship Act for one year gives New York State an incredible chance to perform a complete review of the Stewardship Act, and its ten years of implementation. What it has done, what it hasn't done, and where you can go from here. That's part of what I'm going to talk about after I

get through the boring history part of this speech. The Model Procurement Code was drafted between '75 and '79. At the time, it was the largest funded ABA project in history. We received a little over \$3 million in grants from the federal government, state governments and local governments. You can read about this in the speech, but we literally had thousands of volunteers working on this project. That was the great part of it. I was the Assistant Director for Implementation and I just got to fly around the country telling folks I was from Washington and I was there to help them -- which is the world's third greatest lie. Actually, today I'm from Kentucky and I'm here to help you! We got the Code approved by the ABA House of Delegates in 1979, and it has been adopted in large part by 16 states and Guam, and we have no idea why Guam is listed as a state enactment, but we always like to put it in there because it sounds good. New York State didn't make our list because when the Procurement Stewardship Act was enacted, it wasn't as comprehensive as legislation in the states that we have credited with enacting the entire Code. But New York took a lot of it, and we're happy for that and we hope the State ends up taking some more in the year ahead. So let's go back in time to 1978. I have a magic gym bag here, from which in Mandarin-like fashion, I shall produce the entire history of the New York Model Procurement Code drafting process! In 1978, you had something called the Legislative Commission on Economy and Efficiency in Government, which in itself is probably as great a misnomer as Naval Intelligence, which I served in while in the Navy. In any event, we were asked at that time to prepare a comprehensive comparison of the Model Procurement Code for State and Local Governments to all related New York statutes and, believe me, that was an undertaking of gargantuan proportions. You had 150 different major

statutes governing purchasing found in 12 different volumes of the New York laws, and we basically condensed it into this puppy which came out in 1983. We've been up here for several conferences in Albany, each one more fun than the last, but from this one came this Comprehensive Comparison of the MPC to New York Procurement Laws, and while we didn't have any proposed legislation, we did have recommendations, and I do want to go through those because I think it will fill you in as to how we ultimately got to the Procurement Stewardship Act. The major findings in 1983 were that there was no overall purchasing law. That took us a long time, but by golly, we came up with it! There was no central policymaking body. There was no cohesive source selection framework, and I was just talking to a young lady who was telling me that in those days it was just sort of guess and pick and pull and just hope that you were right at that time you went out with your solicitation. There was no uniform system for the procurement of construction or architect/engineer services. There was no overall system of supply management and disposal, and it was interesting to hear Dan Hogan talking about using eBay today for surplus material disposal. There was no system to hear bid protests in contract disputes, and I think I heard that again this morning, particularly at the administrative level. There was no true cooperative purchasing across all levels of government. There was no cohesive system for encouraging participation by small and disadvantaged businesses. Yogi, deja vu all over again, and there was very little coverage of ethics in procurement as the last panel has instructed us. So with that in mind, the Commission on Economy and Efficiency in Government recommended a review of the state's overall procurement system, an evaluation of source selection methods, legal and contractual remedies, and inter-governmental relations and

ethics in procurement. So what happened? We renamed the Commission! We moved forward. Suddenly we have the Legislative Commission on Public Management Systems, and in 1985 -- bear with me as I reach into the magical gym bag -- we produced a two-volume study entitled "Procurement Reform in New York State Government." And these books are real! I've had them for 20-something years now, and they're fun to read when you have insomnia. They actually came out in 1986, and with them was a recommended consolidated procurement act that was a result of studying the New York State statutes, pulling them all together and putting them into a cohesive consolidated act. So what happened then? We had the following major goals emerge once again:

1. Consolidate all state purchasing law in one new chapter.
2. Create a procurement policy office for consistency in drafting and implementing state laws and regulations.
3. Create an Office of State Chief Procurement Officer to oversee purchasing and delegate authority to using agencies per their respective levels of expertise. This is what they'd done in South Carolina. They had a chief procurement officer, but that official would delegate authority to the various agencies based upon their levels of expertise. I think one of the best things that NIGP has done for the purchasing profession is to institute all of their certifications and educational levels and requirements, and that's what South Carolina goes by to see how far they'll delegate purchasing authority to agencies.
4. Extend statutory coverage to all of state government, including the Judiciary and the Legislature. Fat chance! That's not going to happen.

5. Separate policymaking functions from operations, which I think the Procurement Policy Council or the State Procurement Council has done to an extent here in New York now.

6. Adopt alternative means of source selection methods to meet special circumstances. I was talking with Susan at lunch about the state of Arizona, and you'll see a blurb in the handouts that I have that talks about their procurement law and how expansive that is, but one of the main goals of the Code is to give you purchasing professionals the flexibility to get your job done. I think one thing you'll find interesting that most people overlook is in the new code, MPC 2000, where there is no stated preference for competitive sealed bidding. It just says you shall use competitive sealed bidding except as provided in the rest of this chapter, which lets you take a situational look at every procurement and decide which source selection method is best for that particular procurement.

7. Strengthen MBE and WBE participation in governmental contracting.

8. Improve communications with vendors, and that sounded like that was being done with the electronic sign-up in OGS and those sorts of things on the internet.

9. Establish a Procurement Appeals Board, which still doesn't appear to be there, and an Ethics Commission.

O.K. That was 1986. Now, as a little aside here, and we'll keep the names anonymous mainly because I don't remember them all, but in the spring of 1986 when we were working on this baby, we had a meeting up here, and decided that we would have a wrap-up meeting in Williamsburg, Virginia where we were having another ABA meeting that fall. The annual meeting was in New York, and all the folks from the Commission on Public Management

Systems came down, and we were at the end of the meeting, the meeting in Williamsburg, when one of the staff members pulled me aside, the fellow who was directly in charge of procurement, and said that his boss had threatened to beat him up if he came to Williamsburg! That presented somewhat of a problem, so I wrote to the then Executive Director of the Commission, who was an Assemblyman, and said we'd really prefer not to have pugilistics in Williamsburg; if you could kindly help us out. He wrote me back and said, "Fine, None of them are coming. You just conduct the meeting by yourself and send us your notes." We did, and we had the calmest meeting we ever had on the subject of New York procurement. Anyway, years go by. It's getting tiresome, and finally in 1989, still working with the Legislative Commission on Public Management Systems, we produced "Improving the Purchase of Goods, Services and Construction in New York State Government," and again we included an overview. We also had the consolidated procurement act that had been updated based on other Code developments, and we had another set of proposals. What were they?

1. Expand vendor access to state contracting opportunities and thereby increase competition.
2. Standardized procurement operations in state government.
3. It was noted that executive discretion dominated state procurement operations, and
4. Vendors lacked effective remedies for bid protests in contract disputes, and a tremendous information gap hindered the overall management of procurement operations.

Now, at this point, my New York history goes into a dark hole. I was hoping that some folks here today could help me, but regarding the Legislative Commission on Public

Management Systems, apparently the two pugilists got together, and that was the end of that group. I don't know if anybody knows when they finally dissolved, but they were a temporary Commission, according to Paula Moskowitz, so we really didn't hear anything more. Anne Phillips has filled in one gap today, telling me that in 1993, the Office of Budget took over the push to get the state purchasing law reformed. Finally in 1995, you came up with the Procurement Stewardship Act, and there's a lot of the Model Procurement Code in that Act, if you look through it, particularly the source selection areas and this sort of thing. There were no remedies for disappointed bidders, among other things, but you do have the State Procurement Council which is your policy-making board and that's one of the major recommendations of the code. So on to New York City and, that's a quickie. You've heard, I think it was Tom this morning, talking about the Charter Revision Commission that he worked with. That was a great experience for me. I got to meet people like Dick Ravitch and Fred Friendly, who were just super, and the Charter was indeed revised. Basically the Charter was like a state statute which adopts the code then fleshes it out with rules and regulations, and the charter was fleshed out with rules and regs more than the code itself! But that went in, I believe in 1988 after about three years of study by the City. So that gives you your history of the code project in New York. I know it's been scintillating, but I do have one other thing here. Watch this, I have an entire historical file from the ABA files, and there's a picture on the front here, and other than me there are people who participated on this Commission including Pat Faley and Sandra Van de Walle of the Port Authority; Tom Treacey, who was just a wonderful construction lawyer in New York; John Short, who had been president of NIGP, and a couple of other people whom I

don't recognize. So if anybody can name all the people in this picture, I'll give you two tickets to the Final Four! Unfortunately, since there's nobody here to really confirm it, that's going to be hard to do. In any event, and as I'm running right to the end of my time, I just want to bring your attention to the new MPC 2000, and you can read it in the outline, but there was really a huge need for revising the 1979 Code due to e-commerce, construction acquisitions, inter-governmental contracts, developments in source selection, and other things. So we formed a Code Revision Commission -- we always have a new name when you do something different, and I was the Vice-Chair of the Steering Committee, and there were four major areas changed in the Code. Number one, in Article I, we inserted definitions of "electronic signature," "written," and "in writing," to incorporate the Digital Signature Act and the Uniform Electronic Signature Transmissions Act. So we're trying to facilitate e-commerce. We go on in the Source Selection Article, and we add methods for facilitating design/build, design/build/operate/maintain and design/build/finance/operate and maintain procurement methods, which all tie right into the changes in Article V, which was renamed "Infrastructure Acquisition," and it introduces a whole new area of procurement possibilities for states, particularly in financing major infrastructure projects. Article III also did away with the preference for competitive sealed bidding and said, purchasing officials, do what's best for the state and best for the taxpayers' money. We did add a section on debriefings -- I heard that come up this morning -- particularly after an RFP, and then there's a new section 3-207 called "Special Procurements" and, Susan, that's the one we were talking about from Arizona, and it's pretty wide ranging language, but when we would go into the states in the '70s, they were all doing competitive negotiations. They just did it under a

statute called "competitive sealed bidding," and now people are doing design/build and other exotic procurements. They're just doing it under RFPs for construction, so we wanted to make that explicitly clear in the new code. Article V, as I say, is totally new, but these procurement policy methods are followed by the source selection method that fits each. Then, finally, in Article X, "Inter-governmental Relations," we expanded the field. Two little words were added in one area, "non-profit organizations", and that's going to allow the state to interact with state purchasing consortiums. There's the Western State Cooperative Alliance; and there's the E&I Cooperative put together by NAEB here on Long Island, and I think that's the growing wave of cooperative purchasing. We were talking about consolidating state needs for economy of scale and using your procurement volume leverage. Just think when you do that over a series of many states, and it's been done successfully with pharmaceuticals, coin-operated telephones which are now, of course, a thing of the past, but many other areas where states have gotten together to flex their muscles and bring people to the table with lower costs and better value.

So, that all having been said, I'm going to reverse the natural order of things here, and ask Patty to come forward. I have a special presentation. Patty, it's my pleasure, on behalf of the American Bar Association Model Procurement Code Project to present the Government Law Center with our hysterical – sorry – historical materials from our New York State archives!

Thank you.

(Applause)

QUESTION: My question: With all those words and all those years, what took so long for anything to happen here in terms of a code and legislation?

MR. ETHRIDGE: Well, you were dealing with a state Legislature and you're dealing with an entrenched bureaucracy.

QUESTION: (Inaudible-talking over).

MR. ETHRIDGE: Yeah. Quite frankly – quite frankly, what brought us into most jurisdictions was some form of scandal. You know, I've got to be honest with you, New York City, I think, had the parking thing, amongst some other things. At the state level, there were a few here and there. I think it was really just the passage of time and the perceived need to change the system as it then was, and so in '89 we felt we had a good shot, and it got held up in committee and just barely missed making it out for the end of the session, and that's the last time I was actively involved.

QUESTION: Can you expand on how they do it in Arizona because I'm on the NASPO -- I was telling Larry, that I was on the NASPO Subcommittee for Procurement and a fellow started talking about, Well, you know, states aren't aware that they can negotiate in the middle with all the vendors, you know, in side negotiations or something, that I said, Stop, and what state are you living in, because that's not New York. Could you elaborate on what that process is that allows the flexibility to negotiate because I think this audience would be astounded to hear that other states don't do it the way we do it?

MR. ETHRIDGE: Well, see if I can find it in my speech, because I have it quoted in there, the section that they use.

AUDIENCE MEMBER: It allows the state to negotiate.

MR. ETHRIDGE: Yeah, it's pretty wide open, but there are still controls, you know, the whole

procurement record that you have to establish covers everything. Well, I can't find my speech now.

AUDIENCE MEMBER: He indicated -- John Adler, who is with NASPA and is from Arizona, said that you could negotiate in the middle sequentially. I can go to you and negotiate with the next guy and I'm not sure it's written offers; it seemed to be sort of flexible.

MR. ETHRIDGE: Here you go. It's on page 5 of my handout, if you look toward the middle. This has to do with best value procurement and the related concept of the Code, and the "application benefit" was defined as "a quantified assessment of the benefits to be achieved in state program and support areas by the information systems or telecommunications systems proposed by the vendor, including reasonably projected reductions in program costs and increases in productivity of state personnel." So when you get into that, you're automatically in negotiations, but these are all triggered by RFPs anyway. So you're not starting out in a competitive sealed bid stance. You're starting out with an RFP and then you're moving into some really sophisticated negotiations which you almost have to have in that area of technology.

AUDIENCE MEMBER: So how does it work? They bring the bidder in, and he sits down and says --

MR. ETHRIDGE: He's not a bidder. I said, he's a --

AUDIENCE MEMBER: (Talking over) I'm sorry. You bring a company in.

MR. ETHRIDGE: Yeah.

AUDIENCE MEMBER: There's no sealed bid in front of you.

MR. ETHRIDGE: Well, you have a proposal.

AUDIENCE MEMBER: A proposal.

MR. ETHRIDGE: Yeah.

AUDIENCE MEMBER: And then you can negotiate with them as to how much staff and how much efficiency you can get out of them.

MR. ETHRIDGE: Sure, sure.

AUDIENCE MEMBER: And then you go to the next guy.

MR. ETHRIDGE: Yeah. You can do that for points of clarification. You can't have the information overlap or bleed off. You know, you keep them all confidential when you talk to everybody for purposes of clarification, because nobody can really afford to keep on their staff somebody that writes specs that are up to the date with what telecommunications are doing, or the computer industry, and so you bring them in, and what you're doing is you're playing the competitive marketplace. You're trying to get the best bang for the buck, and that "application benefits" definition allows them to do that. We have Section 3-207, "Special Procurements," but the beauty of it is that there is sunshine on the system. There has to be a written record of why you use that particular system just like the reports you have to the Comptroller's office.

AUDIENCE MEMBER: And once you finish negotiating with me as to what I can do for you, then you go and you talk to Saul.

MR. ETHRIDGE: M-m h-m-m.

AUDIENCE MEMBER: And what do you do then?

MR. ETHRIDGE: You decide who's best.

AUDIENCE MEMBER: Can you come back to me and --

MR. ETHRIDGE: Yeah.

AUDIENCE MEMBER: – barter what he said against me?

MR. ETHRIDGE: Well, you do, obviously. You know, that's sort of like --

AUDIENCE MEMBER: (Talking over) Not in New York you don't often.

MR. ETHRIDGE: Well, that's sort of like reverse auctions.

AUDIENCE MEMBER: Yes.

MR. ETHRIDGE: When you set the thing up like that.

AUDIENCE MEMBER: And you set the wheels.

MR. ETHRIDGE: What you're doing is just clarifying and getting whatever is the best deal.

When you get into technology though, it's just so subjective as opposed to objectively quantifiable materials. You're getting whatever is the best for that particular program, and in some instances, you know, the software dictates. In other instances, it's the equipment, but this allows you to procure the services and the equipment and materials together. The original code allowed you to do that but only in the context of competitive sealed proposals, and now we go beyond that, but everything really does start with an RFP, and I think, who's from IT? You are? That latest proposal you got that's like a phone book.

AUDIENCE MEMBER: M-m h-m-m, exactly.

MR. ETHRIDGE: Would you be able to negotiate with --

AUDIENCE MEMBER: (Talking over) I'm really getting feisty, that's why -- that's the only reason.

MR. ETHRIDGE: Would you be able, though, to hold discussions with the offerors after they

submit their proposals for purpose of clarification.

AUDIENCE MEMBER: (Talking over) We did not want to. There's a plus and a minus of entering into conversations and you know what that is. There's leverage and there's other things that can be brought to bear, so we tried to make it as objective and quantifiable which is why it's the size of a phone book.

MR. ETHRIDGE: You folks stick around; we're going to talk about this afterward.

AUDIENCE MEMBER: I'm sorry.

QUESTION: (Inaudible).

MR. ETHRIDGE: Well, now, it looks like logically the State Procurement Council would take over that function of reviewing current New York law, moving it forward. We had our best opportunities for implementation in the field whenever you got the legislative and the executive and the private sector together to decide what was best for all three groups involved in the procurement process. If you got that going here in New York, I think you could come up with some dynamite legislation by June 30th,'06.

DEAN SALKIN: Yes.

QUESTION: (Inaudible).

MR. ETHRIDGE: By definition, the code only applies to the expenditure of state funds, so to the extent that they're state funds, yes. If they're not state funds, no.

DEAN SALKIN: I want to thank you very much, Larry.

MR. ETHRIDGE: Thank you, Patty.

(Applause)

DEAN SALKIN: We're going to move on to our next panel, looking at technology considerations, and our moderator is Saul Seinerberg, who is the Director of the Science and Technology Law Center at Albany Law School. He joined us at Albany Law School not too long ago, with a tremendous background in all aspects of IT and IP, including work at Sun Microsystems, at Westinghouse, at IBM. He's been all over the country, and we're very fortunate that he has chosen to settle down here now in the Capital Region.

(Applause).

MR. SEINBERG: Thank you, Patty. I spent most of my career, my professional career, in the private sector and so trying to get my arms around this panel and the kinds of problems the panelists and you all deal with, was not an easy task. The assumption for most people is that, if you have a computer system, if you make it bigger and faster, you can conquer any problem, and they, of course, don't understand having to cope with the Procurement Stewardship Act or any like legislation, and that's always difficult. I've been involved in IP, Intellectual Property, and transactional agreements in the private sector and did have some dealings with public sector operations, but they went fairly smoothly, I'm happy to say, in retrospect, but our panel today is going to be talking about e-commerce and innovative techniques of applying e-commerce or making a decision that it's just not applicable and it won't work and may even, in fact, be more inefficient than the present system. Helping me get that message and the rationale for it across to you today is Walter Bikowitz, who is Director of Procurement Services Group in the New York State Office of General Services; Susan Corbett Zeronda, who is Deputy Director for Strategic Policies, Acquisitions and e-Commerce -- that's longer than any title I ever had -- in

New York State Office for Technology, and Marla Simpson, the Director of New York City Mayor's Office for Contract Services, and Marla, because she works in New York City or for New York City, has a different set of problems than her colleagues on the panel for the most part.

So each of the panelists will introduce themselves and take a few moments to let you know what kind of e-commerce issues they deal with, why progress might appear to be slow from the outside, and how they're trying to make their groups best accommodate technology, and I think we'll start with Walt Bikowitz.

MR. BIKOWITZ: I do have a presentation that's in your pamphlets in Section 3, but I'm really not going to use that today. I would just invite you to take a look at it as you have time because we did gather some data from other states to see how they compare with New York. We also just have some data in terms of what the cost of procurement is and there's not much that I can find around on the cost of procurement, so we put some figures together based upon our own experience in the centralized procurement area. As most of you know, the Commissioner of General Services is designated under the state law to do the state contracts in the areas of commodities and services and technology, and the Procurement Services Group that I work for is the agent that's been designated by the Commissioner to do that. If I can borrow some of Commissioner Hogan's words this morning, I think what I'm going to do is talk about the planes that are taking off and landing, and while it's not that newsworthy, at least I know I can fill up the time that I have. If I talk about the crashes, we might have some dead space, no pun intended. Just generally, how we're doing in New York, I do want to read a quote that I came

across not too long ago. The February 2005 issue of "Governing" magazine had this to say of New York: "Contracting and purchasing processes are far more rational and professional than in the majority of states around the country." I think with everything that you're going to learn today, by the end of the day, you'll be able to make your own judgments, but I can just tell you that, being involved in procurement in New York, I couldn't have paid "Governing" magazine enough to say those words, and also, I didn't have to lobby them either, so it was a double win. Basically, I see under our Procurement Stewardship Act three basic charges that we have to follow: The wise and prudent use of public money that's in the best interests of the taxpayers; guarding against favoritism and providence; fraud, corruption, and so forth, and facilitating the efficient and timely acquisition of commodities and services. It's my belief here today that competition as we talked about this morning is the cornerstone of procurement in New York State, but I also would like to borrow a little bit from Larry Ethridge in some of his comments in that I think at a high level, a conceptual level, we would all agree that competition is the cornerstone. However, I think competition can mean a lot of different things to different people. Most of us are very familiar with the traditional competition through a sealed competitive bid which, back in the, what I call the "good" old days before 1995, almost always meant doing a specification, going out and bidding for specific items, and obtaining competition for those items with sealed bids. I think the Procurement Stewardship Act gave us a number of new tools that we could use to enhance competition, tools such as electronic commerce and reverse on-line auctions. Some of the other tools that we have at our disposal today with the Procurement Stewardship Act, though, are some new procurement processes that we've developed which

today might seem a little bit old, but if you go back before 1995, these are tools that really did not exist, at least not in New York State or in my experience. So we have tools that are both user friendly, agency friendly, as well as vendor friendly, tools like what we call “continuous recruitment”, “backdrop contracts with a mini-bid process”, and let me just explain what we mean by that. “Continuous recruitment” means that a vendor, unlike the traditional (pre-1995) system, where a contract may be in place for a period of years and a vendor would have to wait until the next bidding of the contract to have an opportunity, continuous recruitment means setting contracts up in a manner in a number of areas, especially technology areas, where vendors can come into New York State and literally get a contract at any point in time, and then the backdrop contract concept is one where we develop contracts with these vendors. Many of the backdrop contracts, have "maximum not to exceed" pricing and then the vendors are eligible to participate in mini-bids, and the whole idea behind the mini-bid is just as the name implies. It's a little miniature bid. It's competition, but it's set up in a way where agencies can deal with the world of technology in more of a realtime way. It gives agencies the ability instead of going through the entire procurement process, which in New York can often take eight, nine months, even 12 months or more for a technology procurement, to go out and do things like some of our fast track contracts and get the technology tools and solutions in place that they need, sometimes within a matter of weeks. I think that several years ago that was considered really groundbreaking. Some other tools that we have in place today are things like what we affectionately call "piggybacks". Section 163.10 gave New York State the opportunity under the Procurement Stewardship Act to adopt the contract of another government entity for use in New

York State, and there's two types of piggybacks when we refer to piggybacks that we're talking about. One is where we, OGS, will authorize an agency to do a piggyback purchase. The other is where OGS will actually take another government contract and, in essence, turn it into a New York State contract. That kind of an innovative process does a number of things for us. Just to use one example, where it's prudent, we've been able to get federal GSA pricing in the wireless and some of the communication areas. That pricing tends to be about 8 percent less than organizations like WSCA (Western States Contracting Alliance) can get, and sometimes is as much as 15 to 20 percent less than what we know other states currently enjoy. So, you know, I'm able to stand here and say that I know that we have the lowest price in the country when it comes to wireless services. But not only does a piggyback do that for us; it enables us to take advantage of the low cost of procurement. Just based on data that we keep internally, the standard invitation for bid usually costs us about \$2900 to do. A best value RFP process, based on the hours involved, will cost us sometimes as much as a \$54,000, on average, to do one. The lowest RFP cost I've seen is about \$29,000, and I've seen one RFP where it was \$170,000, although, admittedly, that was a flawed procurement that had to be done a second time. So I count the entire time -- from start until the product is finished. The cost of the procurement for us to do a piggyback is roughly about \$1400, in terms of our resource time and processing time. So we do keep track of those things and generally what we're geared toward in OGS and in terms of coming up with innovations is just how do we get the best return on the investment of time that we do? How can we maximize contracting for the agencies and do it at the least possible cost to us? It's pretty much that business approach. I think we're going to have questions, so I'm

going to stop at this point.

MR. SEINBERG: Marla?

MS. SIMPSON: Oh. I didn't realize my problems were going to be sandwiched in between the state's problems, but I'll try to cope. Apropos the Model Procurement Code, I know that some of you out there, this being a law school, want to get your history exactly correct and while a consideration of the Charter Commission in New York City began in 1988, the adoption was by the voters in November of '89, and that was in connection with the charter that actually replaced the form of government in the City that had been found unconstitutional, which used to be called the Board of Estimate, and other than that, I believe that the language that was referred to just recently in the statute about preventing fraud and ensuring fairness and competition, we have all the same language. I do think that the comment about having all the detail is definitely "you get what you wish for" and, as the chief procurement officer in the City, I wish the charter had less detail. The one thing that's a little curious is that the state language is "wise and prudent" and ours is "fair and reasonable," so I think we need to parse what the definitions are meant to distinguish in that respect. We were instructed that we should introduce ourselves. I am an attorney by profession, a refugee from the practice of law as often as I can be. In my 27 years as a lawyer, I've spent about 15 of them as a litigator, mostly in the public sector, some in private sector. In terms of this position, I was brought in as Mayor Bloomberg's first permanent appointment to the Office of Contract Services in 2003, after he had been in office for a little over a year, and there had been some strategic planning before that and some consideration of how to reform the City's procurement system, and so at the point when I was appointed by the

Mayor, we had a very clear procurement reform agenda ahead of us that the Mayor, as a businessman, is strongly committed to. The one part of the job of recruiting me that was perhaps deceitful is that while I knew I was being appointed as the Director of the former Office of Contracts, which was renamed as Contract Services to explain that we were now friendly, that I was going to serve as the city's chief procurement officer, the acronym for which is CCPO. It was not until I not only accepted the job but showed up for work that anyone bothered to tell me that the acronym for CCPO is pronounced throughout City government as "CHEAP-O," so anyway that's what I am. It's a much better and shorter title for what I do. I was here for the panel earlier on disclosure and lobbying, and we do have a very robust debate going on in the City now on "pay to play" issues. For most of us in senior positions there are two disclosure forms, not one, and they're each about twice the thickness of the ones that I fondly remember from my stint in state government. So you should count yourself lucky. The one thing that the City does have that I'm not sure the state has mastered in quite the same format is, we have a rule which I think of as the wedding gift rule. We have a rule that quite explicitly describes the kind of gifts one may take in customary occasions, so that we're not doomed to receive only wedding gifts below \$50, which if you've ever tried to put on a wedding in New York City, you'll understand would not be a happy situation. Since most of you are from state government I'd like to do a little bit of background on the scale of New York City procurement so that some of my other comments will make sense. We do an annual procurement volume of \$9.5 billion. That's approximately six and a half billion in expense budget contracts, and the rest are capital. It breaks down roughly by industry at \$3 billion in construction and construction-related services

such as design; about \$3 billion in human services, mostly client services through the social service agencies, about varying between a half billion and a billion in goods, and the remainder which is \$2 billion and change in a variety of more standardized services, ranging from janitorial to delivery, et cetera. Our data system is not perfect in how it captures industry classifications, so for those of you in the technology arena, some of the volume for technology will show up in construction, some of it will show up in services. It's sort of spread out throughout City government. Some of it obviously is in goods, but we obviously have well in excess of a billion dollars annually in technology purchases. I was lured here for this panel on a slightly false premise that I was going to be permitted to talk about innovations other than simply innovations in the electronic procurement arena, and I do want to do a couple of commercials about some procurement innovations that New York City is working on that fall outside the electronic arena before I turn to the e-commerce area directly. Some of it cuts across all types of procurement, and so it's certainly relevant to both contexts. We are very involved in trying to streamline the procurement system. I know there was a lovely chart that was distributed this morning from OGS. There's an even more complicated chart that's contained in one of the material items that I submitted, and I gave you the simple version of our chart. I gave you the chart that shows how we process a renewal application. When we process new awards, we have even more steps, so one of the things that Mayor Bloomberg was very adamant about was that we would work with our agencies in order to try and make sure that we apply the same standard to ourselves as we apply when we negotiate with vendors; namely, we want to make sure we're getting value for each step that we include. In New York City, the procurement of goods is largely centralized,

but the procurement of all forms of services, including technology, is mostly decentralized. We have 45 mayoral agencies, and depending on the type of procurement for each one -- particularly for large procurements, there are between five and seven oversight agencies that they all have to go through. At the moment, none of our cross-agency processes are visible even to us within City government electronically. We do not have a workflow system that permits us to see the processing of our own procurements across agency lines. Anecdotally, I can pretty much guess if someone tells me that there's a road block being experienced in a particular procurement, I can usually figure out what it is in two or three phone calls, but we do not yet at the moment have an electronic workflow tracking system and that is, I would have to say, probably the highest priority initiative that we're implementing now. We have a requirements definition project under way now that will produce, we believe, a seamless end-to-end system from the point of vendor enrollment and solicitation through to the point of registration of the contract and continuing into at least some of the contract administration functions. The only part of our current process that is fully electronic is the vendor enrollment part. I'd say about 90 percent of that process is fully electronic now, although -- and this was sort of my first point about the electronic world, even for vendor enrollment where we have developed a very simple form that vendors, by and large, prefer to fill out on-line, we are required by state law, as I'm sure many of you know since it applies to the state as well, to maintain a paper alternative. The state law Electronic Signature and Records Act does not permit us to take any part of the procurement process that affects the public and make it fully electronic. That's one of the reasons why we've prioritized the internal workflow issue as an electronic initiative, because we believe we can gain

huge efficiencies in our own internal process, and we have no state law requirement that tells us we have to maintain a paper alternative there. So for at least the various five or seven agency oversights that have to approve a procurement, I can eventually produce a system that does that whole transaction on line. However, for everything else we do, if we go into the electronic arena, we are required to maintain a paper alternative. The consequence of that, in a sort of big picture setting, is that we pretty much use electronic tools for information dissemination. It is far less likely that we will use electronic tools for the receipt of information from vendors -- other than enrollment information. To receive actual proposals or bids in electronic format is so difficult a process, not so much setting up the electronic process, but in how we must create (on a completely equal footing) a paper process that can live in the same universe as the electronic one. This is such a difficult process that by and large we don't do it, although I will touch on some areas where we're experimenting. Two other non-electronic initiatives that are somewhat relevant to the context: One is that we are working, with a particular emphasis on design and construction, on an initiative the Mayor calls the Design and Construction Excellence Initiative. We are working to examine our procurement process for those categories of services where judgment is such a key portion of the basis for the selection and where we believe that the role of price probably needs to be evaluated more on a long-term than a short-term basis. The savings that the city will obtain from a well designed project when that gets to the construction stage far outweigh what we might be able to save by picking a lower priced designer. We are currently involved in the use of a tool that the City has called innovative procurement, which is literally a rule that the city has that allows us to experiment with new methods that we do not codify. We

start and we simply do a project or two under a new method, and then our Procurement Policy Board gets to review it a year later to decide whether that method should be codified. So we have a number of those in the hopper now, all in the design and construction arena, that we think are promising tools that will expand our ability to negotiate and to treat pricing decisions somewhat differently than we have in the past. We have not yet implemented those tools for any procurements in the technology arena, and there are some factors that would make technology perhaps a little more difficult than architecture to codify, but that is something that we're looking at down the road with those methods. Another area where I gave you some materials on is my little Betty Ford Center for errant vendors. We've created a process that we call rehabilitation. Our vendor responsibility process is somewhat more complex and onerous than the responsibility system that's used by most other jurisdictions, state and city. It's quite similar, I think -- I missed the Comptroller's presentation -- but it's probably quite similar to some of what you heard from the Comptroller. We've read some of the materials that Comptroller Hevesi has been releasing on this subject and the City system is quite similar to that. As a consequence and because our data base on vendor responsibility preserves information about vendors' problems for so long, we have found that sometimes the competitive market is restricted to an undue degree by the number of problems that the whole marketplace has or that so many members of the marketplace have that we have difficulty getting robust competition for our procurement. In order to create a way for vendors who have had those problems to come at us and ask to, in effect, be found cured, we developed a rule. We do have everything the Model Procurement Code talks about in terms of bid protest and bid appeal and award appeal methodology, and that

is all centralized. The problem there is that the vendor has to contest and say he didn't do what he's accused of doing. We need to create a way for the vendor to say, "Yes, I did it, but here's how I fixed it, and things are cleared up now," and so the rehabilitation initiative provides that vehicle and has been very successful both in cutting down our appeals and in getting the competition that we were looking for. With that, I think I'll wrap up on our innovation. I will only mention one other statute for those of you who are students of City government. We are restricted by our friends in Albany through a vehicle called the General Municipal Code, Sections 103 and 104. Many of the things that you are able to do through OGS, in terms of procurement methods are not available to us. In a nut shell, what 103-104 does, is that it says we can procure through any method that existed in 1953, not for any method that's been instituted since then.

(Applause)

MR. SEINBERG: And now Susan Zeronda is going to tell us how her department handles e-commerce.

MS. ZERONDA: Can you all hear me without the microphone? I'm never accused of being a quiet person, so I'm thinking that's O.K. Good afternoon, I'm really pleased to be here. I appreciate the invitation, and I am here to say I think we're doing pretty well. There's a lot that we've covered today. Some of it has to do with the electronic aspects, the technological improvements to procurement. Some of it has to do with the statute and the process itself, but I'd like to say this: There's a lot that's been going on in New York in the last 10 years, and we've had a lot of lessons learned and some curves, you know, that we've gone through, and I'd like to

just go back through a couple of those. I represent the Office for Technology, which is the office in New York State that manages the state's central technology infrastructure. We run the State data centers, human service network, and the state telecommunications infrastructure. I also am here de facto representing the CIO, the Chief Information Officer, who directs the policy arm for technology for the state and a lot of what I'm going to speak to is a blend between the two positions of OFT and the CIO. We did get the Procurement Stewardship Act in 1995 in New York, and I happen to be a huge fan of it. So I'll start with saying I'm not going to comment at all on the procurement issues and the discussions related to vendor responsibility. I'm going to concentrate on technology procurements. Shortly after that Act was passed in '95, we embarked on an initiative that Governor Pataki started on e-commerce. It was designed to try to take advantage of a lot of the technologies that were budding around in your world and my world, and to bring them to bear on the monolith called state government. That initiative produced a lot of transactions and government services on-line. As a result of that initiative, OFT undertook a couple of things, specifically designed in the procurement arena to move us forward into the 21st Century. I know my daughter surprised me at Christmas with a present. I have no clue in the world where it came from. It's an oil painting, and she was very proud to tell me that she bought it on line while at college. It's a picture of a scene in Italy and for only \$18, including shipping, she got the oil painting as well as a painting of Paris that she's going to put in her first apartment. I like to describe myself as a shopper because my job is technology acquisitions, and I'm thinking, maybe this kid is going to do, you know, better than I've done because she got "two for one" on just the first transaction on-line. But I think there's an

expectation in talking about this topic that it's going to be as easy for the State as going to eBay and just putting it all up and buying it and getting it home. However, when you're talking about the size and scale of state government, I think that's probably the wrong expectation to have at this conversation today. We undertook in 2000 an "Electronic Procurement" initiative that involved 54 agencies, including the Comptroller's office. It was a great partnership, which also included the Division of Budget, meeting to look at the question of procurement and how to streamline it on-line, soup to nuts. It is a topic that can be carved up a number of ways that we've discussed such as buying on line, competitive bidding on-line. But procurement should really be used as a flow from "cradle to grave." It is knowing what people are buying, knowing what the agencies need, putting those needs into some sort of a sieve which tells you what the aggregate volume is that they're spending money on. At the point you get the data on the aggregate spending, then you try to put in place processes that will be able to effect, through your purchasing arm, some centralized buying and leverage yourselves to realize the buying power that we represent. If New York State were a private entity, we would be the size of a Fortune Top 10 company in the range of a GE or a HP. You've heard of those companies. That's how much revenue we take in, but we buy technology, for instance, in a decentralized manner, so it doesn't truly realize that buying power. Once you put the contract up, there are a host of contract management issues, workflow on the back end of it, which are just as critical as the procurement process, including monitoring the ongoing vendor responsibility, purchasing and performance on an ongoing basis. The initiatives that the State has undertaken in the area of e-commerce included the e-Procurement Work Group that I just mentioned. It took the better part

of a year for that work group to go through an analysis of “cradle to grave” procurement and we parsed it exactly that way, how to get the financial picture, how to get the procurement picture and then cradle to grave including how to get an accurate inventory off of it. We then took the data, looked at the budget and available funding, which makes a lot of decisions for you at the end of the day. But we looked at the proposed, integrated solution and it is a massive project to truly streamline the process electronically like my daughter’s trip to eBay. In order for it to be purely streamlined, you need to go cradle to grave with all of your information so that the information will pass seamlessly through that process. We defined what the impediments were within each of the various stages of procession. One of these impediments is the different accounting codes that are at the agency level versus the central accounting system. We also looked at the problem for vendors registering. How do they sell products to New York when, in fact, there are numerous electronic commodity codes - there are over 11 different ones, that immediately come to mind. Which one do you pick? Whichever one you pick, there's another section of the market that's using something different. There's a question of fitting into a global marketplace, you know, e.g., are the codes that they're using in New York different than the federal government codes, et cetera. That initiative raised the State’s learning curve by identifying key issues. Simultaneously, OFT undertook a pilot technology buy using a reverse auction. I assume you know that a reverse auction is bidding to the low number as opposed to the high number, so that you have bidders competing for selling you something, multiple sellers to the lowest number. We undertook that at the Office for Technology, built a home-grown application. Before we did it, we looked through the procurement laws to see where there were

holes in the procurement law or problems that would make it not work on a broader basis. In addition to that, the Comptroller's office is undertaking a huge initiative to streamline the central accounting system, and for the first time there's an initiative under way where (I mean I like that old Hatfield and McCoy thing referenced earlier today between Hogan and Hevesi), quite frankly, the Executive branch is looking at FMS in cooperation and conjunction with OSC as they look at the CAS system. That initiative is designed to sort of start to look at these major system overhauls with a broader view than just the legacy inconsistencies and stovepipes that we've built before. That is under way. Those procurements are, in fact, well advanced, particularly for the CAS system. They're going through that one now. The FMS one is going to be forthcoming, and I think as a state you've got a lot to be proud of that we are where we are. This is not a minor undertaking. There are huge amounts of data and infrastructure (and, oh, by the way, state process behind it), that needs to be looked at, reengineered, streamlined, put in line with commercial applications, and we are currently undertaking that as a state. In addition to the more directly procurement-related initiatives, New York State beat the federal government at passing an electronic signatures law, and I think that's a terrific accomplishment in New York. It was part of the Governor's "E-Commerce Initiative." New York's e-signatures law said that essentially electronic transactions and documents could be given the same validity as a hard copy or a physical signature. It removed the kind of questioning and uncertainty that a lot of folks had in the private and public sector about do we want to take the risk of everything falling on this computer transaction, and how about the evidentiary authentication issues that go with it, to prove that it will work. We passed that law. The first e-sign law that was passed in, when was

it, John? I have my whole team with me here somewhere.

VOICE: '99.

MS. ZERONDA: '99. (Thank you. I have it in my notes, but my eyes are going bad, so I've decided I'm just going to shout it out to you from now on). When we passed it in '99, the federal government then came in in 2000 and dealt with it in interstate commerce, and passed a somewhat more flexible, relaxed version of our law, I would say. The New York standard really required a signature to have higher authentication level tied to a document in a way that would have been a costly solution for a state. (Aside:) where's Joan? How many contracts do you approve a year at the Comptroller's office?

VOICE: Millions.

MS. ZERONDA: Millions. To pay the cost per signature for some of the more secure electronic solutions such as PKI and the encrypted technologies, you know, would be extremely costly. You have to bring all of these potential e-commerce solutions back to a practical, cost benefit level: Can we do them within the means? I mean when it becomes a question of you have a limited amount of funding and you need to advance social programs, or we can have the State implement the higher cost e-signature and tally them digitally, electronically, for example at \$475 a signature, you know, you have to make some choices. So we've looked at that as a State. And when the federal government came in and said, O.K., we're going to pass a law that's a little bit looser -- and I'm going to paraphrase, but essentially it freed it up so that it didn't have to be the tightly encrypted attached to standards. I'm going to say it loosened it from what New York had in its original law, to say the signature can be pretty much what the parties agree to provided

that you can authenticate it and that the record is reliable and you can prove that it was kept in the normal course of business and it's been unaltered, e.g., normal evidentiary rules about proving that the document or the electronic information is what it purports to be. Once the federal government passed that law, I give the Legislature a lot of credit. They went back and they revised our law. So that we now have the same flexibility as you would under the federal law. I'm going to try and cut my remarks short here, but between all of those initiatives, I think New York State has done a great job to look at the use of e-commerce in procurement, especially when you talk about OGS streamlining the vendor registration on-line and you've got economic development in New York State, and all of the procurement contracting opportunities in New York are now on-line in the NYS Contract Reporter so that you can sign up and get a subscription to know any bidding that's going on in New York. And you go to the OGS web site, you can link out to ESD. You're not registered with the Department of State. You can go on the hyperlink over to the DOS web site and see what the registration requirements are. The combination of all these initiatives has really moved us forward and, although we are not like a Microsoft Corporation. If you work for Microsoft and you were working out of Tulsa or Bangkok, you can sign onto the internet and go to the company store and order a computer and, bam! It goes through and the computer shows up just like my daughter's artwork.

MR. SEINBERG: Thank you, Susan. Despite my white hair, I'm a child of technology, an early adapter. I had an Apple II back in 1976 when it first came out, and still have it in the basement. Getting moldy somewhere, so I'm impatient with some of this, and I think that technology could be adapted more rapidly. If I were Marla, I would be agitating to get electronic signatures

permitted for New York, for example. My question would be what are, in your opinion, the greatest inhibitors or facilitators you see in the near future for e-commerce or innovative purchasing techniques in your area of influence? Marla, we can start with you.

MS. SIMPSON: Well, on electronic signatures, several of our agencies have already gone ahead and moved forward with some electronic signature procurements. We are going to try and get a handle on that through this electronic workflow initiative that we have, to try and do some standardization before we end up with 45 versions of it, but people are still using it in fairly narrow applications, and I think that will continue at least as long as the statutes remain as rigid as they are. Under the General Municipal Law, there are some very specific requirements that apply to our use of competitive sealed bids. As resistant as we are to change, the vendor community in some ways is more resistant in many areas. I have regular vendor outreach sessions on a variety of topics, and I was speaking to the construction industry vendors about a week ago. There is enormous skepticism in the construction arena for any system that doesn't let them sit in the bid room and watch paper bids be opened, and so that is an issue that I think we have a public relations job to deal with. In addition, because again in New York City, one of the things we are not allowed to do -- that the state can do much more of -- is prequalification of bidders. We are required to keep virtually every procurement, except for some very narrow exceptions, open to the world, and that means that theoretically they are open to every Mom and Pop business that thinks it's in the same line of work as we are -- or as IBM is. And so you have enormous resistance and inequity in access to electronic tools once you start factoring in the fact that the system has to be open to all small businesses, and, that in fact, we have to keep it open to

all small businesses everywhere. We can't have a geographic limitation either, so all of that is an inhibitor on making major investment in the creation of what is, by definition, a redundant system.

Similarly, obviously, as long as their system requires that everything we do through electronic signature be preserved in a paper format, again you're talking about a redundant system. Budget constraints being what they are, as the previous speaker noted, we're not going to make an astronomical investment in a new system when we have to keep right next to it a paper alternative for all purposes. But I don't want to just talk negatively. What we are doing with the electronic tools -- and this is something the Mayor feels very strongly about -- I'm sure you've heard of or used the City's new 311 system that now consolidates all of our public contact with agencies for information or complaints or whatever. We're very proud of the initiatives we have, using electronic tools to disseminate information about procurement opportunities. In addition to a fully electronic vendor enrollment, we have a fully electronic solicitation system. The City Record is on-line; anyone can obtain the City Record and get all of our solicitations and indeed all of our award notices through the City Record. We are expanding the degree of -- to use this morning's phrase -- "transparency." I mentioned we had \$3 billion worth of human services. We have all of our procurement on-line for our vendors to be able to see how their procurements are progressing through the approval process; so we're using a lot of electronic tools to increase information and opportunity. What we are not doing, and probably won't do in the current statutory environment, is putting major investments into systems designed to allow us to accept bids and proposals through electronic means.

MR. SEINBERG: Thank you. Walt, what would you like see happen in electronic commerce for your group?

MR. BIKOWITZ: Just to put things in context, about the time that the Legislature gave us the Procurement Stewardship Act in '95, OGS gave us computers; so the first thing we did was learn how to turn them on and use them. A lot's changed since then. In the mid- to late '90s, OGS did develop its website and all of the OGS contracts are on the worldwide web. That web site gets about 400,000 hits a month just for procurement. Many of you, I'm sure, in the audience, both state and local agencies as well as the vendors, are coming onto our web site daily. In April of 2000, we launched our on-line vendor registration/bidder notification service, and the reason that we did that first was in terms of e-commerce. I mentioned looking at an ROI perspective. We found that we had two full-time equivalent people just maintaining bid lists. We've been able to move those people to other added-value work, and we currently have about 22,000-plus registrants in the OBRBNS system. All of our notices go out that way; all of our bid documents are up on the web. In May or July of about 2002, we launched our purchaser notification system which many of you may also be registered on. In launching each of these systems, we've been able to, although as Marla says, the law doesn't permit us to do away with paper if someone insists on it, for all practical purposes, do away with paper systems. We have over 6,000 purchasing people who are registered on the PNS. All of our daily contract updates and other information relating to our contracts goes out on that system. The thing that we're currently working on right now is a couple of different areas. One is, we have launched a new purchasing team to do IT aggregated buys. We recently did one in the area of PCs which is saving the state

about 40 percent to 45 percent over what those kinds of purchases have cost in the past, and I think upwards of \$3 to \$4 million has been saved; but the other thing that we're doing related to e-commerce is we're looking at systems like electronic bidding and also contract management systems, and we currently have two people dedicated to going through our organization because the first step in any process to really automate your work flows within your environment is to kind of document all of your "as is" processes. We're learning an awful lot. PSG as an organization has been bidding commodities dating back for what feels like a hundred years now, and we're finding out that we have a lot of stovepipes and internal system across state agencies, the things that happen every day, because people come in, do their jobs, they know their job, and they just do it. Even at our management level we have an opportunity to learn more, so we're learning a great deal about the impediments that are yet to be addressed in this area.

MR. SEINBERG: Thank you. In the e-commerce Christmas for tomorrow, what would you like to find under your e-commerce tree?

MS. ZERONDA: Other than a money machine?

MR. SEINBERG: Other than a money machine.

MS. ZERONDA: O.K. Well, two things: First of all, we are moving into a process that is being implemented across the Executive branch to have people file requirements in the technology area in advance to facilitate the aggregate buys through OGS, and that is a huge initiative which is going to allow us to forecast and put the resources where the bang is for the buck. I would like to see that planning process mature. Number two relates to the reverse auction that we did at OFT, which I mentioned earlier, in which we built the application in-house and we ran it

through to see what impediments would be involved in the current state procurement law. There are three areas where I think you would want to look at the law to remove potential impediments by legislative action. First, and you could make an argument that there's not any impediment, but I think reasonable minds could differ on that. The first problem for electronic procurement, I think that Marla's mentioned, is the ESRA law requirement that government entities must accept hard copy filings unless otherwise provided by law. Now there are ways around that. I mean you certainly can allow in electronic procurement for a vendor to come in and deliver a bid in hard copy but, if you're going to do a reverse auction, he must be physically present as opposed to filing it electronically. Then you (the bidder) would have to be physically in the office so that you can give us your bid in hard copies if you chose and we could put it into the system for you. There are ways like that that you can get around the ESRA problem, but you might want to take a look at that legislatively. Number two, within the State Finance Law 139 (d), I think it is, the non-collusive bidding certificate. There are a couple of areas in that that we found problematic and at the time we did the pilot, we did it in conjunction with OSC, OGS and the Attorney General's office. The AG, OGS, OSC came over to observe it, and we all put our legal brains together -- which I don't know that that produced a good result -- but it produced a consensus result. The provisions of 139 (d) say bidders have to certify under penalty of perjury that the prices have been arrived at independently without collusion or communication for the purpose of restricting competition as to any pricing. I think for any initiative relating to electronic auctions or reverse auctions you'd at least have a facial argument that that doesn't comply with the statute, although the intent of the law is not being subverted. This provision in the State Finance Law

prohibits knowingly disclosure of the bid if you are the bidder, prior to opening, directly or indirectly, to any other bidder. You'd have to argue that the reverse auction was an opening to get around that -- so we could possibly make the argument. But there are several places in the statute where we think it could be cleaned up. There is an OFT departmental that has been approved for introduction by the Governor's Counsel's office. It is LFP Program Bill 04-2005 and it basically provides for a fourth sub-paragraph in that section that would acknowledge submission of bids electronically, and clearly state that as an exception which does not violate the non-collusive certificate. (I'm sure cutting it, and the lawyers took a lot of time writing it, so I don't mean to dismiss that.) The third thing that I would like to see, there is a provision in 163.9 (c) of the State Finance Law which says that the contents of competing offers cannot be divulged prior to award unless it's a low cost bid. For purposes of the pilot that we did, we pre-qualified the vendors and did all of the best value, if you will -- you know, was it a technology that met or exceeded our requirements, and all of that, ahead of time and then did a truly low cost award because we didn't want to run into a conflict with the statutory provision which provided that we, as a state, couldn't divulge the offer until there was a decision of who won and, obviously, if you're going to be doing procurement on-line, or reverse auctions, you could be in conflict because the winner is not determined when the disclosure is made. Your system must address this issue -- the electronic system that you set up, whether you in-source it as we did for the pilot situation or whether you do what Walt is looking at, which is out-sourcing to a service provider, and as several other agencies (DOT and DMV) as well are looking at out-sourcing to a service provider. For auctions, you are ending up with a situation where we

can argue that it is actually your state system that is disclosing the bid before the winner has been determined, but I think there's at least again a facial argument that that area of the statute needs to be clean. Lo and behold, OFT has also introduced in our departmental, along with the non-collusive, the same departmental containing a clean-up for 163.9(c).

MR. SEINBERG: Thank you.

(Applause)

(A recess was taken.)

MR. BENSON: We're going to get started, please. Well, it's after lunch. It's mid-afternoon. It's after break. It's Friday. It's the nicest day so far in 2005, and it's the opening day of trout season, and you're still here. That's great. I've been trying to profile you as you sat here so I want to ask a couple of questions for our panel, so they know who they're talking to. Would those of you who are attorneys who represent buyers just raise your hand? You represent the state, government agencies. Come on, come on. O.K. Would those of you who are attorneys that represent sellers, one or more? O.K. How about non-attorneys but on the buyer side? Agency, local, state? O.K. And how about corporate folks? Sellers. O.K. You've heard about the laws, the regs, the Executive Orders, the procedures, the policies that we have to protect us from the devil. This is the first time now before you, the devil. This is the dark side.

VOICE: Thanks for the invite, Greg.

MR. BENSON: Seriously, this is the regulated side, and I guess more seriously because I work kind of in between public and private and, as a matter of fact, in my own life had the opportunity to start a business and develop it and sell it in this state, as well as spend 20-some years in

government, so I have an amphibious perspective, and I think that this isn't the dark side. This is the enabling side. Think about what you would accomplish in state agencies if you didn't have your contracts and your contractors to get it done, if you didn't have the commodities, the phone to pick up, the pencil, the pen to write with, the paper to write on. Fact of the matter is, we can't exist without them, so this isn't a dark side at all. This is the other side, the other half of the partnership in procurement. We have a panel here that I think shares very different perspectives, and I want to get to them very quickly. Before I do the introductions, I think what you'll hear today is some individual perspective from an organization, a private sector organization, one particularly active in the technology arena. You'll hear from Dan Walsh who represents the aggregate of business in this community and also has experience in the legislature. You'll hear from Ron Soloway, who represents the non-profit sector, and I know that at least in one case, these folks, one or more of them are familiar with the process, the law, the regs, the procedures, the appeal process, and in some cases litigation. I won't be specific.

Let me first introduce Steve Frank. Steve is, contrary to what it says on your program by the way, the vice-president of North American Sales for Curam software, which is the leading provider of social enterprise management software solutions for state and local government. Steve focuses on increasing Curam's market share. That means sell, and in New York State and North American markets. He also concentrates on growing the sales team and to support those markets.

Dan Walsh joined The Business Council in 1987 as President of the Public Policy Institute after having served in the State Assembly for 15 years, including eight years as Majority

Leader. Dan is responsible for The Business Council's overall efforts to improve the business climate in New York State.

And last Ron Soloway is the Managing Director of Government and External Relations for the United Jewish Appeal Federation of New York. Previously Ron oversaw the first year's work of the Carey Commission, one of four commissions charged with developing program priorities and allocating targeted funds. Prior to joining UJA Federation, Ron held important policy positions in both government and the not-for-profit sector and between 1980 and '88, he founded and was Executive Director of the Center for Public Policy, Advocacy Research which is a human service advocacy organization concerned with the needs of poor women and children.

I'd like to start with the perceptions that these three people have, and I'll start with Steve, concerning their experiences with the procurement process. All the laws, regs, policies, Executive Orders that we've been talking about all day. What has been their experience with them, what are their observations relative to what works; what are their observations relative to where it might be improved? Steve?

MR. FRANK: Thanks, Greg. Well, first of all, thank you, Government Law Center, for inviting Greg who, in turn, invited me. Here I'm not the devil. It's just me trying to make a living here. I am with Curam Software. We have a budget on April 1st for the first time in however many years, so we're very, very happy as vendors. I've been selling various technologies to the state of New York for 18 years, O.K., and my perspective is somewhat narrow in the sense that all the companies that I've worked for are enterprise companies. So usually things like the minimum thresholds and, you know, challenges around commodities don't typically apply to the

companies, in my experience, so I'm going to talk about some of the experiences that I've had in selling large enterprise solutions. I'm also the co-chair for The Corporate Roundtable, part of the New York State Forum and, as that, I've had the chance to also sit on the Procurement Subcommittee where one of the strengths that I'll talk about in a little while is that the stakeholders that do procurement in New York State generally want to know what the vendors think about the policies and procedures they're putting in place. So a forum like that that Greg is the Executive Director for, and particularly in the subcommittee, gives the vendor community a chance to get their voice heard, and I'm very pleased to report that a lot of the things that we actually talk about there do find their way into policy and procedures. Things like the mini-bid which we have, things like the fast track mini-bid or the double secret fast track mini-bid or whatever the latest and the greatest is, but I am continually learning. I sat over there for about an hour and again, you know, just the amount that's available from a vendor to a vendor is just mind boggling, and it's just a continual learning process. So the first thing kind of on the strengths of New York State procurement, you know, as a sales manager I'd like to think that all of my people know exactly what opportunity is out there, exactly when it's coming, exactly who it's coming from, et cetera. That's just not reality. You know, there's so much market for us to cover. There's so much potential market share that we need to look at. What New York State does a tremendous job, in my opinion, at is including vendors and making them aware of the bid opportunities, O.K.? Things like public notification, whether it be the Contract Reporter, whether it be the agency websites, whether it be the services that, some of the technology providers like Government Technology, or input, the feeds for the RFPs that are coming, and stuff like that, so

unless you're totally asleep at the switch, as a vendor, you know what opportunities are out there, and that's very positive from a vendor perspective. The other thing that I think is very, very positive is that there is availability of contracts, and I think it was Walt that mentioned, if the individual agencies or the ultimate users of the contract identify a need, OGS, in working with the other stakeholders around the state have made contracting available, O.K.? I've worked for three companies right now and, if the agencies have identified a need, OGS can get a contract discussion going with you very, very quickly. So again, very important, I think, from a vendor perspective wanting to do business in New York State. And the third thing that I'll include in this category is by opening up the contracts to such a large authorized user, as I call it, whether it be, you know, the K-12 market, whether it be local municipalities, cities, counties, towns, et cetera, and opening those contracts up to those organizations, it's increased the reach of the vendor community, and that's a very positive thing. As a vendor, I want to feel like the playing field is always level. Now, not to confuse that with I want to win all the business, but I do want to make sure that the playing field or feel that the playing field is level, and I think again New York does an exceptional job on that. Whether it be clearly documenting evaluation criteria, time frames for decisions, publishing requirements, questions and answers, you know, what you're going to benchmark it against, things GSA benchmarking, so again, the rules of the game, if you will, are clearly described, and I think that's appreciated by the vendors. Vendors, for those of you that don't know, vendors have things called quarterly pressures, you know. We can never deliver revenue fast enough or quick enough and probably just as challenging, it's hard for us to predict revenue. So I think New York State, as a result of the statute, has come up with

some very creative ideas that create a win/win situation for both parties: Things like consortium or aggregate buys, you know, where we, you know, can lump purchases together, where the vendors have the opportunity to give better pricing in return for contracts being executed by a certain time frame, say, or in a certain prescribed deliverable time frame. That's a very good thing, and I think by and large the vendors appreciate that type of opportunity. Mini-bid: just an outstanding concept from my perspective, one that I think should be adapted more freely around the rest of the United States. It really allows the vendors to take care of the business of defining what the solution should be and focus on the program and the business problem that you're trying to solve and not have to worry about the "t"s and "c"s and the emphasis around that, because that's by and large been taken care of. So again that assists greatly in the area of being able to predict your revenue in an orderly fashion. So Walt mentioned it earlier and not to sound like I'm suckin' up to you guys because I know I certainly get my head handed to me enough, but I really do think New York does these type of things better than most people in most states around the country. The last thing I'll say on the good side, and then we'll get into some of the challenges, is you've come a long way on the use of your technology, particularly in the areas of information dissemination. Vendors get confused very, very easily, right, but you know, whether it be OGS or OSC, I never feel like we can't get our questions answered, you know, and be led down the correct path towards getting our questions answered. So the web sites have the information out there. There's frequently asked questions. There's software templates. There's hardware templates. All of that stuff really helps the vendor get answers to their questions in the shortest time possible, which ultimately allows us to put our best solutions forward. So suffice it

to say the OGS and OSC browsers or web sites are earmarked on my browser for constant use. So, in terms of challenges, I would say again, I'm coming at it from the perspective of large, typical enterprise type procurement. Vendors want to put their best foot forward and be able to articulate a particular value proposition, but the requirements aren't always detailed enough for us to do that, O.K.? And, you know, I have the adage that your job is to run the business of state government. That doesn't mean that you're expert on writing detailed RFP or mini-bid project specifications. One that I particularly like that's actually gotten cleaned up over the years is the famous "ability to". When a vendor sees something in the contract under the requirement section of we'd like the vendor to have the ability to do A, B and C, well, does that mean we need to scope it? Does that mean it's a mandatory requirement, a desirable? You know, these are computer systems, right? Typically we have the ability to do almost anything, but what does ability mean and how do we measure it and how do we quantify it? The other things that aren't always detailed enough as we look at RFPs, is the concept of best and final offers, right? Is there a best and final offer? Can there be a best and final offer? You know, why is there a best and final offer? That leads to some confusion as we're working on the responses. And then the last I touched on, the mandatory versus the desirable deliverables and again I think this has by and large improved over the years, but there's still places where it's not apparent to us what's a mandatory, what's a desirable, what we should price and scope, and what we shouldn't. That results in projects where either the scope is too high or too low or the price is too high or too low. Typically as vendors, if we can't quantify something or we can't assess the risk, we tend to err on the high side. So the more detailed the spec's can be, the better off we are. So, you know,

I don't know the exact answers to these problems, but what I would suggest, and a lot of this is really driven out of work we're doing at the Forum, is there needs to be ongoing training in the areas, you know, again primarily focused on the business side, whether it be the project specifications, the technical specifications, the functional specifications, there needs to be training in those areas to write the RFP. I think there also needs to be training in those areas on how to evaluate the RFP. I've seen some instances where folks take specifications of similar projects from other agencies, so (a) they don't necessarily understand the specifications and (b) they certainly can't evaluate them. So that needs to perhaps be looked at. Users need to be made aware of and utilize some of the things that the central agencies in the state are putting together for their use, things like the peer review that the CIO's office is putting together or, you know, has put together, these are basically groups that have done these projects before you, and understand the best practices and what should go in a project description, what are some of the strategies to do the procurement. O.K.? And you know, I just think this is a excellent way to get the best practices from those authorized users that have done this before you. The other thing that I've seen happening, and my most recent example is with the Comptroller, is before the RFP comes out and the vendors all start to get tense and, you know, finalize their partnerships of who's going to bid it, they have a pre-RFP conference. And what that is basically is, before the RFP is released, the vendors get to come in and ask questions in more of an open and comfortable forum, before the RFP is actually on the street, and I think that can go a long way to help firm up and tighten up the requirements (a) and (b) really give the vendors some first-hand input as to really what you're thinking about and not just relying about reading it on a paper. So

the tighter the specifications, the better, and most times the cheaper the responses can be from the vendors, and in terms of a plug -- I don't know if Greg has planned on doing this -- but that's some of the work that we're actually tackling as part of our work in the New York State Forum and the work that we're helping with on the Corporate Roundtable. So number two is the RFPs and really the project type work against the mini-bid are still prone to many delays, O.K.? And Walt mentioned the cost of putting contracts out on the state side. These are very costly responses. The bigger the response, the bigger the costs are on the vendor side. Susan mentioned the CAS and particularly the FMS system. I mean we've been looking at those for a number of years, and for very legitimate and for very real reasons they've been delayed, but this is more of a question. Can we continue to expedite the process with more continual use of technology? You know, where appropriately, right? I kind of heard a negative answer, but can the bids be submitted electronically? Again with the intent that it's cheaper for vendors to respond that way, and expediting the evaluation. I've seen some creative things again, where OSC created some data bases, you know, where you're actually submitting your response in the form of a data base response, and I think that lends itself more to maybe some check box responses and things like that, but again that helps the vendors, and I really think it expedites the scoring. Vendors like realistic expectations, so if you can publish, you know, the time line, and again I know there's things that are outside of all of our controls, but to the extent that we can publish the time lines and really try to stick to those time lines for the project and the evaluation, that would be helpful; but I know there's no silver bullet. What I would say is we need to continue to study it, but if we incorporate some of the training, I think, and particularly around

that area of evaluation and getting your organization more equipped to evaluate the responses, I think that may ultimately streamline the overall process. I think the law is very useful and promotes fair and equitable competition. So just, I guess, two final quick things here. Vendors, as I mentioned, submit a lot of time and money submitting the bids and we really do want to put our best foot forward on those. One of the things that I'd like to see become more uniform is why we lost, right? We want to win everything, but when we lose, we really do want to know why we lost. Now, I know that this maybe more than anything is a trust issue, and in the protest-happy world that we all live in, that may be challenging, but if there's a way we could look at kind of institutionalizing the review process so that we can get candid, honest and open feedback as to why we lost, I think that's going to ultimately help us prepare better solutions and better answers for our customers and ultimately get you guys better solutions to your business problems. And then lastly, I think some more time needs to be spent on the design versus build in the area of IT discussion, 163 (a) specifically, if I'm not mistaken, and I think some things have changed in the industry that would make that appropriate to look at, right? I mean basically, as I understand the statute, it says that, if you specify the contents of the procurement, you can't bid on the procurement or the ultimate procurement, so I have some questions as to whether that's in the state's interest. I conceptually understand why that was in there, but I think the industry has changed since the law first went into effect in that most of the enterprise solutions that were being developed were really being developed from scratch, so you would design the system, you know, soup to nuts and then construct it on your own as well, and I think one thing that has happened in the industry is this concept of COTS or commercial off-the-shelf software,

has become more prevalent and more accepted in government so that what that does really is, that creates a larger pool of practitioners that can implement the commercial off-the-shelf package. So if you're using the packages, which the concept of the package is to encapsulate kind of the best practices, specifications, for this particular market, if you're using that to kind of design the specifications of the system, then you should be able to proceed forward knowing that, if you spec that product, there's going to be several practitioners and competitors that can compete for ultimately implementing it. So that's something that perhaps would warrant an additional look.

MR. BENSON: Dan?

MR. WALSH: Thank you. Hi, everybody! Oh, come on, come on, come on! Reminds me, I did a group in Utica here about two weeks ago, and it was their annual dinner and unbeknownst to me they had a motivational speaker on the program just before I got there and I said, Hi and they said, Hi, Dan, and I said, I'm from Albany, and they went Boo! So Albany's been fixed, folks. We've got a budget, and we've got some things that you probably don't know too much about which I'm going to talk to you about. I think everybody here has a handout now, which is basically what I'm going to talk about, so if I doze off or you doze off, you got something to take home, I'll sign it, to prove that you were here. I got roped into doing one of these things about seven months ago, and I got called by the chairman of the Public Service Commission and asked me to be on an energy panel and, of course, obviously, that's a major issue with the companies that are members of The Business Council and anybody, including yourself, who live in the state of New York. So I show up at 7:30 in the morning at the Assembly Parlor, and I was rather

perplexed as to why anything would start that early in the morning anyway. And I got there and it was a continuing education program put on by a group of which the PSC was a part of, and in the first four rows was every lawyer from the Senate, every lawyer from the Assembly, every staff lawyer who was trying to get out of buying the tapes, or having to be in a room from 9:00 to 5:00, and they all got an exemption; if they showed up at the 7:30 one, they only had to stay 'til 10:00. Now, I didn't know this until it was all over, so sitting in front of me is John Faso, Kenny Riddett, George Winner, and with big smiles on their faces, so we go through this panel. We go the whole thing, nine yards, and George Winner puts his hand up and he said, "Dan," he said, "I've been asked to ask you a question on behalf of the first four rows," and I said, "Fine. What is it?" He said, "Would you tell me...." I said, "I agree," and he only had one question. So it was over with. I'm going to quickly go through this, and I'm going to stop on a few points and bring you up to date on some of the things that have happened in the last two days, which I think will have an effect. The Business Council, if you don't know anything about us, was formed in 1980. This is our 25th year. It was formed by a merger of the Statewide Chamber of Commerce and the Statewide Manufacturing Association and when you put those two groups together, you have exactly what you have on the left-hand column of the piece that I put out there. You've got everything from IBM and Northrop-Grumman to Avon. Our current chairman is Phil Teal. He's the top person at Northrop-Grumman on the Island. They are growing. They have an extremely large presence on the island. They're bringing in the best and the brightest they can find from anywhere in the world in their new high tech operation. Their biggest problem is affordable housing and, if anybody knows anything about Nassau and Suffolk, you understand. Our

vice-chairman who will take over from Phil in September is Linda Sanford. She's part of the senior management team of IBM, senior V-P, an extraordinary woman, in her own right with IBM, and knock on wood, you may find the first female chairman of IBM in the not too distant future. And falling right behind Linda is Curt Gregg who is one of the top people in the senior management team of Corning. We have a very strong interest in procurement in New York and, as you can tell, anywhere where you see \$44 billion a year spent on a variety of things is big business, despite what Everett Dirksen said about one millionaire and one millionaire.

Understanding and overseeing the procurement process is difficult, and it's complicated but taxpayers have the right to know that their dollars are being spent effectively. Fortunately, New York State does a good job of overseeing the state procurement process. Of course, there have been recent stories of abuse both here and in neighboring states, and I suspect that we might not even have had this panel in some form if it hadn't been for Alphonse D'Amato's \$500,000 phone call to MTA which jumps right off the screen in everybody's mind, and we probably wouldn't have had the enormous attempt to finish April 1, if the Brennan Center hadn't coined the word "dysfunction." You know, it's like everything else in life, you say it and you say it and you say it. Like raising your kids, you say it and you say it and you say it, and every once in a while something happens and it sinks in. Well, that place down the street runs on a combination of things: Pride, guilt, fear and shame. And guess which one prevailed? What's the product? The product is basically good. The Governor is not particularly happy that they went about a billion-plus over his proposed budget. I think there's still a raging argument and debate over the exact amount of it, but it has taken this 44 billion that's available for services and upped the ante

in a variety of ways, and I was sort of struck by Dan Hogan's comments as I quickly went through them, on the provisions about contracting with OGS and if you read, as I'm sure you all have, Dan Hogan's comments this morning, you notice when you get down to certain sections in the law, there are requirements that have been put in there by some bright and brilliant legislators of the past. I won't tell you who they are. The prohibition on the purchase of over 40 different species of tropical hardwood. That means if you buy furniture from CORFRAM, it's junk, and what's the reason? Hardwood furniture. Mechanicville went nuts when CORFRAM was basically put into place and they had the furniture built by prisoners in the correctional institutions which went out on the open market and became competitive. So the only way they could get at it is basically restrict certain hardwoods from being used in that furniture, also at the same time the price of hardwood was going through the ceiling. So there's one of the elements, but I like other ones. Food products. The designation of favored source status for the purchase of New York State label wines. Now, does anybody in here really love New York State wines? Two hands, three hands, four hands. And the requirement that contractors for commodities, services, technology and construction stipulate in their contracts that they do not discriminate in employment in Northern Ireland. That's the old McBride principles. We've come a long way except here we are in 2005, you know. About a month and a half ago, they basically said that they're going to authorize the expansion of the Javits Center. Well, the \$360 million bonding authorizations, but because it's downstate, the basic tenor of part of that house says, Well, if you're going to authorize borrowing for a Javits Center, you ought to have \$360 million for upstate projects. They could be anything, mini-Javits Center or mini-Bruno Center, whatever.

This side is all from Troy, you can tell. Now, nobody told anybody that to get your hands on the money from the Javits Center that you had to pay prevailing wages and that you had to be eligible for a labor neutrality act. Now, you know what a labor neutrality act is. That is if you got a hundred people to work in your operation that are non-union and you got 60 of them to sign a card saying they want an election, the ballot, the actual card is the ballot. You are unionized. Now, we have been in court for a year on a statute that tried to do the same thing in California, the same thing, but our contention is you can't do this stuff by fiat. If you want to take the entire labor relations in New York State of 150 years and turn it up-side down by fiat rather than by duking it out in the legislative halls, give us a chance. But all the things you do as workers in the public employee systems in New York, what we're trying to do is not make your jobs any harder. That's a provision you're going to hear more about because a lot of those monies are coveted by a lot of organizations, a lot of companies, and they're going to be out on the street within the next four or five months. Commercial contracts often pay higher, and they carry less risks due to uncertainties regarding appropriations, availability of funds, and the payment of the funds, and all of you who are in the business know exactly what I'm talking about. If you can't get paid on time, you don't make that transaction attractive. It's difficult enough in this world that we live in where the products and the technology that the best and the brightest of the state employees have an extraordinary challenge trying to understand the actual item, in fact, or the service and the product that they're basically dealing with on a timely basis. Steve mentioned the fact that it's very difficult sometimes to get your product ingenuity, so to speak, and product status on the table without getting somebody off the wall over a favored

treatment. Our concern with the act which has now been extended is the fact that you get too much curtailment of interaction on the fear that you're going to get favoritism that you basically close the process down entirely, to the point that you minimize the best product that you can possibly get. Contract conditions, ought to be consistent with general conditions. We'll make the case that there's some model programs out there, NASBO for one. The National Association of State Chief Executive Information Officers is working on a model condition program for acquisitions. We have another problem and concern on that Procurement Act when and if we ever get around to it, but I suspect even though it's been extended, it's not going to go away. Contractual conditions imposing, "limitless liability." That's the one that gets the fur up on the back. High bidders. Now, knowing that New York State is not a litigious state, I wouldn't mind that provision, but we've got a past history requiring bidders to provide the state with broad indemnification. State indemnification is, incidentally, a problem found in many settings, including permits, clean-up agreements. We spend a lot of time on that in the environmental area, requiring indemnification of the state even in the answer to absence of adverse impacts, contractual requirements requiring letters of credit guaranteeing performance of contracts. So we've been duking this thing out. We have a Procurement Council within the Council, with about a hundred active companies. We watch this thing very closely, and we are going to watch TV closely. We are very concerned about the Sarbanes-Oxley principles as it applies to New York, particularly with the small companies, and I tell you, if you want an experience, you got to go down to the halls of the Legislature in New York and try to explain the Sarbanes-Oxley principles to the average legislator. Half of them roll their eyes, and the other half think it's a

new flavor of Ben and Jerry's. They just don't get it, and to them it's just another requirement that some legislative body created, and that it will ferret out collusion in the classic Enron/WorldCom examples of corporate scandal which everybody uses for an excuse more than they say that Al D'Amato's \$500,000 phone call is the reason why you have to turn procurement upside down. We don't. You can't throw the baby out with the bath water in that any more than you can have a Sarbanes-Oxley theory that does not fit with small businesses, and you take a look at the companies that are delisting because of the expense in getting involved. Now, I'll give you another idea of what's going on. The Governor was given permission in the budget bills that passed in the last two days to basically appropriate \$315 million of federal money for homeland security. No checks and balances, all going through the agencies, probably all OGS. What requirements, we don't know other than what the fed's may impose upon it. That's very important for a lot of our members. Why? Because homeland security is the place where all the dollars are coming out of the federal budget, and rightly so and hopefully done the right way. So we pay very close attention to this kind of stuff. Business in New York is big, and if you fold it in with the local governments around the state, it can get kind of dicey. For those of you who are in state government and work in this area, we applaud you. We thank you for doing the work you do. It's an important part of the process, in both private and public operations. And one last thought about the lobbying side of it, and also the part of the fact that everybody is saying you can be on a lobbying list but you can't necessarily be on a procurement list or whatever. We have no problems with having people file, and you can file on the lobbying list. You ought to file with some agency on the procurement side. The problem there is that, if you get into a

reporting requirement like the lobbying act you will never have enough time to procure anything. We send a messenger to the Lobbying Commission monthly with volumes of paper certifying transactions. I don't know where the hell they're putting all this paper, but it's got to be out in Menands in one of those famous warehouses, but it's big business. It is not going to go away, and it ought to be as fluid and as simple and as forthright as it could be, but let's not throw the baby out with the bath water. Thank you.

(Applause)

MR. BENSON: Thank you, Dan.

MR. SOLOWAY: I want to thank my colleagues from the private sector for leaving a little bit of time for the not-for-profit sector to say a few words. It may be because, as you know, the not-for-profit sector is exempt from Section 163 of the Procurement Stewardship Act unless we're bidding against for-profits. This is happening a little bit more, but there are few instances when non-profits are directly competing with for-profit businesses. I want to let you know that UJA-Federation is the largest local philanthropy in the world. We raise about \$250 million a year from donors in New York City, Long Island and Westchester. The funds are distributed both globally to communities that have large Jewish populations and here in New York. In our New York catchment area we have a hundred agencies that are affiliated with us, ranging from hospitals to community centers to human service agencies. Our agency network serves not only the Jewish community but the broader community as well. Our New York network agencies receive \$150 million in philanthropy, but they get a billion dollars from government, and if you add in our five hospitals you're looking at something like \$4 billion of revenue. My job as the

Managing Director of Government Relations for UJA-Federation and its network of a hundred agencies is to represent their interests here in Albany and make sure that their needs are met. So if they have a problem, they call me, and I get a lot of calls about procurement related issues. Now, I'd like to talk to you a bit about the good and bad news from my perspective of the procurement process. The very good news is that the process has a lot of integrity. My agencies never call to complain that they didn't know money was available. I mostly receive calls from my agencies saying, "I just submitted a proposal. Can you help me?" And I can truthfully say, "There's no way that I can help you." The proposals go through a process, they're read, they're paneled, they're selected based on their score. We can agree or disagree on whether the ratings are appropriate, but there's an honest process to get there. You win or lose based on that process. And the state agencies are also very good, if somebody loses, in arranging for them to come in and have a conversation. It may not be the most timely conversation. One of the big issues, is the length of time between notification of contract award/loss and the actual contracts being processed. So the state agencies don't want to have these conversations the moment that somebody knows that they've lost a contract; but there's an openness to do that. In my view, the process has integrity and works very well for our sector. But the bad news is that the contracting process is not completed in a timely manner. I'm sure all of you are aware that a decade ago, the Legislature passed a prompt contracting act. It set time frames for how quickly contracts are supposed to be processed, and it created interest penalties when the state agencies didn't meet the time lines. I had the pleasure of helping shepherd that legislation through the State Legislature and working with the state agencies on implementation right after its passage. I know that the

state agencies can meet those deadlines, because with a little pressure from the Governor's office, and a lot of pressure from OCS, state agencies did meet those guidelines. Now, a decade later, progress has really slipped. I think I'm correct in saying to you that 80 percent of the contracts that are now processed are late, some of them as late as a year. I probably don't need to tell you that this situation creates difficulties for the not-for-profit sector. The sector has to go to the bank, borrow money, and wrestle with the uncertainties of payment with their boards of directors, who are concerned that the contracts will ever be approved. In addition, the non-profit sector cannot appropriately serve clients because they're afraid they may not see all the money due them from the State. A related issue is that the state agencies have not lived up to the spirit of the interest payment provisions. Instead of compensating non-profit agencies for their interest expense, State agencies de rigeur, ask not-for-profit agencies to sign interest waivers, and the agencies are afraid not to because they're concerned if they don't, the contracts will not be processed or they will not get the contracts the next time. So even though this may not be an issue central to the Procurement Stewardship Act, it is an important issue. Every state agency official in this room ought to better follow the provisions of the Prompt Contracting law. Because of the problems our sectors have, we currently have legislation before the Assembly and Senate to close loopholes in this legislation and make sure that the time frames are met and that penalties are paid if the time frames are not met. It is unfortunate that the non-profit sector had to appeal to the Legislature to try and impose some discipline on the state agencies. But after years of discussions but no action, we had to find a venue to address this major problem that confronts our sector. A couple of other comments: One is that I think you will find that our

sector believes there ought to be competition for the grants that are available. In the city of New York, there's a system of rebidding grants every three, six years or nine years, depending on the type of contract. Sometimes the City gives extensions so the three-year contracts are not rebid for five years, but there's an expectation that there's going to be a rebidding of these contracts. That expectation doesn't always exist on the State level. I know from my own work in Albany that UJA-Federation agencies have contracts that have not been rebid for a decade. I think this is a mistake. I think there has to be something in the procurement process that recognizes that, if somebody's done a good job for ten years, they ought to get some additional points in the review, but there ought to be competitive bidding. I understand this matter is now the subject of a discussion between the Comptroller's office and the state agencies over what that process ought to look like. As you may know, the Legislature has intervened this year by inserting specific language in the appropriation's bill that contracts don't have to be rebid; but I think this is an issue we really need to look at. So I just wanted to raise that issue, and I am now available for questions.

(Applause)

MR. BENSON: Questions?

QUESTION: (Inaudible)

MR. SOLOWAY: Well, I think passage of a timely State budget does have a potential to help, although I would note that over the past 21 years, budgets have been passed on April 3rd and they've been passed in May and they've been passed in August, and the contracts were still very late. Frankly, I think that there's more diligence that's required on the part of state agency

personnel. That said, I also want to acknowledge that staffing in the state agencies has been diminished over the last decade and that has contributed to the problem of late contracts. But I don't think you can use that as an excuse for not getting these contracts done on time.

QUESTION: (Inaudible)

MR. SOLOWAY: Well, absolutely, and we are in agreement that when a not-for-profit is the cause of a contracting delay, the State agency should not be penalized. We have no problem with the delay by the State processing those contracts, but the law is quite clear on what the process is in terms of notification of the agency, in terms of correction.

MR. WALSH: There's a big distinction too when you go back 21 years ago and member items totaled about \$180,000. That's the interest that's being paid on the borrowing right now for member items. I suspect that probably 90 - 95 percent of the member items go to some sort of not-for-profit. Most of them have a store front, a copier machine, a computer, and maybe a body that shows up once a week. Supposedly legitimate. Good causes, tied primarily to the health care industry in one shape or form, but it's an extraordinary challenge because you've got to basically provide some sort of a contractual arrangement for that member item. Now, if Ron complains about the government process, you ought to hear my former colleagues talking about the Division of Budget trying to get their member items released through that so they can go through the OGS system or, excuse me, the Comptroller's system; but the world has changed from the standpoint of state budgets. For those of you who toil every day with this, and I truly appreciate what you do, somewhere along the line this system has to correct itself and unfortunately in a system like New York you sometimes have to have a legal collapse or a

political collapse before the whole thing gets straightened out.

(A short recess was taken)

DEAN SALKIN: In alphabetical order, joining us this afternoon is Steve Acquario, who joined the New York State Association of Counties in 1989, having served as its General Counsel and Legislative Director. Just this week, I am proud and happy to say that he has been appointed as Executive Director of the New York State Association of Counties. So as you'll see in the formal bio that you've got in the materials, he's got lots of hats that he's been wearing at the same time for NYSAC, and he did confirm about five minutes ago that he will be taking off some of those hats so he could focus on his new role. Greg Benson who you met on the last panel, is the Executive Director of the New York State Forum for Information Resource Management at the Rockefeller Institute of Government. Anne Phillips is the Associate Counsel with the New York State Office of General Services. She works with the OGS Procurement Services and Information Business Units supporting their centralized contract functions and agency-specific acquisitions. She also works with the State Procurement Council, and she works with the agency's legislative program. We have Bill Redmond, who is the chairman of the Government Law Center's Advisory Board. He's retired as Counsel to the New York State Office of Business Permits and Regulatory Assistance, a position that he held from 1983 to 1994. He has more than 36 years of experience with New York State government, including ten years as either Chief Executive or Chief Operating Officer of a state agency, 14 years as General Counsel to a state agency, two years on a Governor's staff, and ten years with state agency legal staffs. We also have Joan Sullivan, who was named Assistant Comptroller for the State Financial Services

Group in February of 2004. She's responsible for the oversight of five bureaus, including contracts, state expenditures, financial reporting, accounting systems, as well as the project to redesign the state's central accounting system. She joined the Comptroller's office in January of 2000 as Assistant Director of Contracts and, in September of 2001, was appointed to Director. Prior to joining the Comptroller's office, I think we heard earlier today she managed the strategic analysis, technology assessment and acquisition team for the Office of Technology and prior to that worked with the then Department of Social Services. And Dan Walsh, who is the Executive Director of the New York State Business Council, we asked him to stay on and sort of be the conscience and the voice of the business community. So I'm just going to start with these questions in no particular order of importance, just in a listing of ten questions that I thought might be of interest. So the first question I'm going to direct to Anne Phillips first, but then anybody is free to answer it: The Procurement Stewardship Act has application to state agencies, the business community, including small and minority-owned business enterprises and local governments. What benefits have been derived from the law, and what has presented problems for you?

MS. PHILLIPS: Well, in order to talk about the benefits and the problems, I think we have to put some of what I'm going to comment on in perspective. Prior to 1995, centralized procurement was only done for commodities. There was no competitive requirement for the acquisition of services, and there was case law precedent that said for certain types of technology procurements, you didn't have to do those competitively either. The Comptroller's office did have guidelines in place at that time that urged state agencies to do those acquisitions

competitively, but if the agency had a need that they felt would be better filled by using an alternate source of procurement, they frequently went to the Comptroller's office and said, You can't make us do this because it's not in statute. One of the really beneficial things that the Procurement Stewardship Act did was to bring services into the centralized contracting area, and also recognizing that we had been acquiring services through a variety of other methods by also including those alternate forms of procurement, single source, sole source. We had the ability to do emergency contracts, but we reiterated that, so that it's quite clear that we can do that. We have the ability to do multiple award contracts, and I truly think that that ability is very significant to both the business community and local governments. Centralized contracts let state agencies do things in the acquisition of services which had been done on a onesy-twosy basis which meant that not only wasn't the state getting optimal value, the business community never knew what kind of approach was going to be used by a state agency in buying technology or services. This kind of put it within a larger infrastructure where there was more reasonable expectations of how the state was going to proceed on those types of procurement, and businesses didn't have to enter into individual contracts with an array of agencies and deal with them in terms of meeting their needs as opposed to trying to negotiate or bid on thousands of contracts. I do know that my contracting files for services for OGS shrank dramatically with the ability to buy off the centralized service contracts. Local governments also get the benefit of those, that aggregation of discounts. This has been truly beneficial to them because in many instances the size that they are is going to mean that they're going to pay list price, and we know that no one in New York likes to pay list price. Finally, as a final point, the other benefit for

local governments has been we do use these alternate forms of procurement so they get the benefit of having access to that despite the impediments of the General Municipal Law, which was referred to earlier, because they can buy off of our contracts. The biggest problem that I see with the Procurement Stewardship Act is that the process takes too long, and it's very hard to fix, because there's a lot of different requirements that are made part of that infrastructure, many of them, rightfully so, but there are things that need to be reconsidered and improved so that you can streamline the process and meet the agency's requirements at the end of the day.

DEAN SALKIN: Would anybody else on the panel like to address that? Joan?

MS. SULLIVAN: I think that the one primary benefit, and I say this both as someone who grew up in a state agency and was engaged in conducting procurements and now as someone who oversees the procurement process, one of the real benefits to the law is that it's standardized. Agencies follow fairly consistent processes. Vendors understand what the procurement rules are. The law requires that agencies, when they do a solicitation, inform vendors as to what's really important to them. This information helps a vendor develop a proposal that meets an agency's need. One of the problems with the law is that it is so prescriptive. I believe we need more flexibility. As good as it is to have a prescriptive law so that the rules clearly are known, sometimes such rigid rules can present unreasonable challenges; like with the technical component of a procurement, for example.

DEAN SALKIN: I'm going to ask Greg to comment first. Much of what's been addressed and discussed today was initially driven by the short-term context of a sunset, because before yesterday I think that we were still looking at June 30th. Now, we're looking at June 30th of

2006. I'm not sure that that's enough of a long-term approach the way that things go in New York. You never know, maybe this is the start of something good in terms of timing, but if there were going to be a long-term approach -- and I'll assume that we now have the year to address enhanced quality and efficiency for the New York State procurement process -- what might that long-term approach be and who might the key players be?

MR. BENSON: Well, I'm hopeful that a year is sufficiently long-term. It may not be, but it seems to me that given the magnitude of our contractual expenditures and the cost of the processing (which we only estimate at this time), it seems to me that we ought to be taking a very deliberate look at the entire process. I really think that ought to be done independently and really begin to assess what the actual and full costs are. I would have thought that we had a more clear picture of the expenditures until the first two speakers this morning, and they had a \$2 billion discrepancy in terms of what procurement expenditures are in a given year. I would suggest that we get a clear picture of what we are spending under the procurement law. Secondly, I would like a clear picture as to what it costs for the processing of those contractual expenditures, keeping in mind that we hear over and over that it takes too long, and time is the measurement that we seem to be fixated on. That time is money. That's cost. For Grade 18, that's \$35 an hour. You know in your agencies who's processing what, how long it takes. Staff looking at terms and conditions and at vendor qualifications and validations of numerous kinds. How much is that really costing us? Third, once we've got those costs that full outflow, it's simply a business approach. This is what we're spending and where (either on the contracts or their processing). I understand we need to cover our risks in the public sector but is that money

being spent where it ought to be, with the high risk? I suspect not. If I heard properly this morning, 23 percent of the contracts represented one percent of the money being spent, is that right? So that means that we're devoting 23 percent of the contracts and contracting costs to an extremely small expenditure. Isn't that "upside down"? Can't we begin looking more at credit cards, at master contracts, at aggregate purchasing, to take care of those lower end expenditures, and focus our contracts and the high associated processing costs where the higher risk is? Now, I'm just guessing and that's the point. Nobody knows what we're spending and where it's actually being spent in terms of the risk continuum. Sounds like it's being spent on the wrong end to me. I think we ought to quantify that and have a benchmark so that we really know where we are. I guess one other thing that I would look at in all of this assessment in dollars would be expenditure thresholds, because I think that triggers an awful lot of costly processing, and I would just simply make one proposal that the study ought to look at, and that is that the thresholds ought to be at least set at the salary and benefit level of the person making the decision, simple as that. If I make \$50,000 and my salary benefits take me up to \$70-80,000, trust me to make that annual decision. If you're going to pay me that much in a year, trust me to make that level of purchasing decision. That's all. And I think it was said earlier that it was a question of trust. In terms of who I think should do this study and assessment of contract costs, I think it's very clear. The responsibility of the New York State Procurement Council is to study analyze and develop recommendations to improve state procurement policy and practices. I think this study I'm suggesting ought to be a New York State Procurement Council initiative, or at least done under their auspices.

MR. REDMOND: I'm new again to a process that used to aggravate the devil out of me when I was trying to run a state agency. I did some reading to get back up to speed and hoping that I'd see some improvement. There are some improvements in 163, but the major aggravation has gotten worse, and that's delay. Centralized contracts are terrific, and they do produce a lot of economies of scale, but unfortunately, they move you into a "one size fits all," and I'm not sure that always fits the individual agency's needs. When I started looking, my first thought was there's got to be some way to simplify the process from the standpoint of the agencies that have got to implement it. I always felt badly for my administrative staff. They had to try and figure out what they could or couldn't do, how to do it and then do it quickly because I was never satisfied with how long it took. But as I started reading and realizing that the delays were not less, but probably longer, and knowing that it's been on the books for ten years, I started to rethink my original concept of where we were and what should be done. My original thought was this thing is going to run out in just a few days and we should worry about what's going to happen if they don't renew it. We should worry about getting it renewed. Then I had the second thought. I recalled a fellow I used to work for a few years ago who used to tell me, Bill, if you want a decision, the only way you're going to get it is to create a crisis. I can't think of a greater crisis than if we had let the damned thing expire. You'd have seen a lot of quick action, believe me. I don't think you're going to see a lot of quick action by just renewing it for a year, because I think we're going to have the same thing that's happened for the last ten years, unfortunately. Now, what can be done on a long-term basis? First, I'm going to make some recommendations. I agree that the limits of the bidding threshold should be raised, significantly. I think I heard the

Comptroller's office talk about some relatively minor increases. I think they should be even higher than Greg mentioned. I don't know, you can probably tie it to the volume of the contracts that are being covered by the limit. I don't know that you should worry about any less than let's say 40 percent of the number of contracts. You put your resources where the big money is. You don't put it on the little ones. \$100,000 is probably low. That will shock a lot of our politicians, but it's very, very low. Think about it. You buy a car every two or three years. A small agency will buy maybe, two or three or four cars a year. You can't buy five cars for \$100,000. Put in that kind of a perspective, \$100,000 isn't all that big a deal, and even that is probably too low. I think we've made a lot of progress in e-commerce. I got bothered though when I started to hear about data bases and how long it's going to take and how big the project has gotten. We've got to develop e-commerce because that may well be the salvation of our problems. But let's chew off a little piece, and get that done and then build on that. Just as an example, let's just pick out a piece, identify it and make it work. Let's take, for example, the delays that are caused by the Contract Reporter. Why can't the Contract Reporter be accomplished through an interactive web site available to all agencies and have instant notice, rather than waiting anywhere from three to four weeks to have the letter published by the Department of Economic Development. I know there are problems with it, but that, I think, you can get your arms around relatively quickly and maybe lead the way to eventually get the database. Yes, you're going to need databases, but let's not delay what you can do now by the five years or more it's going to take to develop the data. Again, whoever looks at this, please, please, please involve some of the people that have to implement the contract process. OGS is great, don't get me wrong; I don't mean that they're not

good, but I think that we can even expand beyond OGS to bring in some of the agency people who have to deal with it also, and maybe are not quite as expert or have the resources that OGS has available to them. I came from a lot of small agencies and, believe me, we didn't have a lot of resources to deal with our procurement issues. I thought one of the most beneficial aspects of the current statute is the procurement record, the requirement for developing and maintaining a procurement record. The major problem I see with it, however, is the same problem that you run into every time somebody mentions economy and efficiency in government. That means two things. It means, first, your staff and your budget are going to be reduced, and secondly, you're going to be imposed upon. You're going to get another job added to your duties, and nobody is going to take any duties away. I think the employment procurement record could very well be the device for achieving a lot of the current requirements and possibly eliminating some of the aggravations in the current system. This is the record that the Comptroller, for example, can look at in his pre-audit or even his post-audit. Even the Budget Division, God forbid, can look at when they're holding up one of your expenditure authorizations. Think about it for a minute. Great idea, but they just piled it on top of you like so many other things. You know, for the latter part of my career I was very heavily involved in the process of adopting rules and regulations and, if you think the procurement process is bad, look at what agencies have to go through to adopt a regulation on the state level. Having said that, however, if there is to be eventually improvement in this state from the standpoint of simplification, I'd suggest that the statute be extremely brief, not lengthy, extremely brief with very general principles, general authorizations and a broad-based authorization to the Procurement Council or some similar body

to flesh it out with well thought out rules and regulations and let the Procurement Council have the job of keeping those regulations up to date. I think it's a distinct possibility that it can be done without quite as much of the political impact that's felt through the legislative process.

Dan, I understand your concern and I don't want to step on industry's toes, but I think it might be worth the experiment if we're talking about a long-range plan. One final remark. Well, a couple of final remarks. I'm having a lot of fun here, now that I don't have any responsibility. This is terrific. Whatever we come up with, and again simplification is the end result, one of my hopes would be that the agency procurement personnel could do their jobs and achieve a procurement without having to have somebody from their counsel's office and somebody from the Comptroller's office sitting at their elbow through the whole process. Maybe I'm wrong, but that's what it looks like is going on now. I can remember the days when the Comptroller used to talk about pre-audit or post-audit and the emphasis being on audit. Now, what I hear is oversight. That's a very, very different and much broader concept than we operated under when I was in the Comptroller's office. I probably would find it a lot more offensive now than I did back then. In any event, whatever you do, you've got to make the process easier. And another practical point, and it's a political one, watch out for trying to fight the public authorities fight in this process. One of the reasons that public authorities have been created over the years, aside from the financing angle, is that the burdens placed upon the regular operating agencies have been considered too great or too burdensome or too time consuming to get a job done quickly. Procurement requirements are one of those things that the authorities were created to avoid. Let that be one of the things that we should be considering when we retool the procurement law.

Now, I'll stop preaching. That's enough.

(Applause)

MR. WALSH: Let me just make some comments about my former friend. How would you feel like if you were sitting next to somebody who took his evaluation report, gave himself a five and gave me a one? I'm not even on the form. Let me put my old hat on. Be careful what you ask for when you're talking about thresholds. They come with social conditions, folks, and it isn't anything that's been found in 2005. At one time it was "Buy New York," New York State wines, affirmative action, minority set asides, and the list goes on and on, all for a great purpose. Because they end up in statutes, some extraordinary body made a constitutional judgment and some court probably upheld it under a challenge or whatever. Classic case in point. How many here have heard about the Wicks Law? Threshold, \$10,000. Separate contractors. I mean this is 2005. And can you get that done? Can you get it passed? Can we change the threshold up to a million or two million, where it's at least reasonable on the street? No way. Senator Wicks died 25 years ago with a safe full of money.

MR. REDMOND: A big safe.

MR. WALSH: But, you know, people get attached to these things, and they're very hard to do, so when you fight for thresholds, you sometimes have to give up conditions for a threshold. We tell our people that basically, you know, no conditions. Make it simple. Be careful of people who are small in stature economically, but have an extraordinary amount of energy and maybe have a widget that works. I mean there's a great story in this week's Business Journal in Albany. Sort of a sad good news, bad news. Gentleman had an incubator program at RPI, two

employees, heading out to Tucson. Didn't say it was a weather thing, but he said New York State stinks. The rules were heavy, the taxes were high and all the rest of them, to the gentleman who happens to be the chairman of the local business group who owns Comfortex, Tom's last name escapes me now, but he started in the same operation. 800 people eventually. He had a widget. The widget was basically a shade and drapes and whatever, and he got good and he got better and that's really what the whole thing is all about. I mean you can chase the weather but if you like to play golf, the bottom line in this story when you read the whole thing is that the guy had two people in New York. He had 26 in India. I mean that's where that whole operation is going and you can set all the guidelines you want by statute, create all the social conditions for doing work in New York on somebody who's got a bright idea and a widget, and you know what, folks? They don't have to stay here. IBM can operate from a barge on the Nile. They don't have to be down in Armonk. They don't have to do their Fishkill chip plant there. Hopefully we're going to get the rest of the chip operation up in Luther Forest, but, you know, don't create all the burdens into it. If they're going to do business with New York, let them do business with New York. Sit down with them, check the product out, have a background informational thing for it, and then if somebody loses the bid, bring them back in and tell them why. Don't let them throw darts in the dark. Now, you got me started, Bill.

MR. REDMOND: I'm glad to hear it. We haven't disagreed on much so far. I don't know what you're upset about.

DEAN SALKIN: Well, the only voice for local government up until now has been the city of New York, and we all know that that's an island unto itself, and so for Steve Acquario, what

improvements would be most desirable to the state procurement infrastructure from the local government point of view?

MR. ACQUARIO: We don't have the problems in local government that the state experiences. We run very efficient operations. (Laughter) Just kidding. We have our share of problems as well, and we certainly struggle, as Dan Walsh mentions, with the Wicks Law. In fact, we've taken it off our legislative agenda for the past five years, just can't get an increase of \$5,000, let alone \$550,000 or \$950,000 up to a million dollars, which is certainly reasonable today. I'd like to respond, Patty.

First of all, thank you for having me here at this fine forum. If everyone has these booklets here that they handed out, in the back after the pink divider, this is something that comes from an affiliated organization, from SAMPO, the State Association of Municipal Purchasing Officials, and if I could just call your attention to go over a few recommendations here on page 5 that this group is advocating for, and some of it makes sense to me. It's the last packet in the booklet, or the last publication in the booklet. These are just some things that are being advocated by local purchasing officials. The first one here, and I think it ties into what Greg was speaking about who: should be purchasing and dollar values tied to salaries. What this group of people who are actually in the business are calling for is continuing education. It seems many groups are required to have continuing education -- attorneys, doctors, engineers now. This group is calling for a minimum of 24-hour continuing education which we're doing here today, so perhaps that makes some sense.

You can see the statute that we're bound by and the local government, General Municipal

Law predominantly, 104(b). It says we have to adopt a policy but this group is saying it doesn't necessarily state the identification of the individual, so this group is saying that when we do a policy that they should, in fact, identify either the title or the name of that individual who will be responsible for municipal purchasing. So I'm going to focus most of my remarks on local purchasing reform, not necessarily the state's procurement policies. Number three there ties into what Dan Walsh was talking about a little bit with the Wicks Law. I don't have that in there, but again Bill was speaking about thresholds, and we completely agree that a \$100,000 threshold is really not a lot. This group is advocating \$25,000. We're bound by a \$10,000 and \$25,000 threshold currently. This group is advocating for \$25,000 for commodities and \$50,000 for public works projects. Personally, I think this should be much higher, but that would be very difficult and Dan's right, social conditions would attach that perhaps would make sense in one part of the state but maybe not in another part of the state, but we're going to work with the Comptroller's office, hopefully advance some legislation to raise those thresholds to at least at minimum, these thresholds that you see there. Number four there on page 6 is best value awards. I think I'd like to look into this a little bit further about what does it mean to be the lowest responsible bidder, and there's certainly an awful lot of case law on this, but what I'm being told is across the country and in certainly some of the amendments to the State Finance Law is this best value analysis and perhaps lowest responsible bidder was a term when Senator Wicks was around that made sense. Maybe it still makes sense today. All I'm saying is it's probably worthy of a review, best value analysis or low price. On page 7 is something that I'm most particularly interested in and would appreciate some examination by some of you that are in the field in this

business, is we need a little bit more flexibility from the state to access federal contracts directly from the General Services Administration and not necessarily piggyback off a state contract. We would prefer to directly purchase off the federal General Services Administration Schedule 70 contracts, and one of the biggest pushes we're trying to do these days is allow a county the size of Nassau County, which is our largest, or a county the size of Hamilton, which is our smallest, to buy off a contract issued by LA County, California through a national co-op purchasing arrangement. 49 other states have it. We're one of the last to allow this type of process. It's just something that the state has refused to grant authority on, and it just makes absolutely no sense to us.

MR. WALSH: California wines in there?

MR. ACQUARIO: You get California wines, although I work for the New York State Association of Counties, so we have to drink New York wines at our functions, but those are some of the principles. The only other two things I'd like to say, there hasn't been very much municipal purchasing reform in the last decade. In 2003, there was an important change which did allow Nassau County to purchase off Erie County's lists. It used to be that contiguous counties could bid off each other, use each others' bids. We can now bid off a non-contiguous county; and, finally, they did allow us, the state that is, to receive and use electronic bids which is still really in its infancy to try to implement. So that's sort of how I would respond from the local government side.

DEAN SALKIN: Thank you. This is for Joan. The Procurement Stewardship Act does not just address the authorized processes for procurement. It also includes provisions promoting social

issues and economic development. Should the focus of the law be weighted toward the procurement process, or should the procurement process be subject to more emphasis on other issues of significance to state government, and do you think that the procurement system is sufficiently balanced?

MS. SULLIVAN: Thank you. I would like to respond to a couple of things before I answer your question. Bill, I would agree with you that if, in fact, the Comptroller's office engaged only in oversight activity then I would be offended too. In fact, the Comptroller's office has spent a tremendous amount of time over the last few years conducting agency outreach and training activities and providing technical assistance. We see first hand that institutional knowledge is vanishing very quickly and agencies are losing the skills to even conduct a basic procurement. Some agencies do very well, but others just don't understand how to get a procurement through the process. So to say that the Comptroller's office is only concerned with oversight is an injustice to what we've been trying to accomplish. The second point is in terms of who should be engaged in the discussion in terms of procurement reform. I think that the Procurement Council is a very active player, but as I look around this room I see that many of you, especially our business partners, aren't members. I think it's too limited. I think that one of the most important steps to creating true procurement reform is to reach out to as many groups as possible to gain their understanding and perspective. It's easy for us as state bureaucrats to say this is what's wrong. However, we understand only half of what's wrong with the process. I think the debate and conversation has to be broadened to include those that are here today and to others in the business community that don't normally have an opportunity to provide their input

in terms of the procurement process. As a result, I think we'll end up with a better law. I think we need to focus on more oversight flexibility. The idea of thresholds is really important, but there are also social issues, as Patty just said, that the law tries to address as well. Should one be more important than the other? I don't think so, but when you start talking about raising thresholds beyond those that small businesses can compete in, it's a disservice to New York State. Comptroller Hevesi has invested a tremendous amount of our retirement fund into New York State small businesses that have demonstrated good potential for success and believes in fostering economic development through these means. We can't overlook the minority and women owned business aspect of the law. It's been very difficult for those of us engaged in outreach activities in these communities, to find those organizations that can compete on the large procurements. We have an obligation to ensure there are opportunities for everyone under the law and not just the big businesses that can compete in it.

DEAN SALKIN: Would anybody else like to respond? O.K. Anne?

MS. PHILLIPS: Just a couple of points. I understand Joan's point that some agencies don't do procurement well, but I don't think the procurement process should be driven by the people who do it in the worst way. I think it should be driven by the people who do it the best possible way and, unfortunately, I think the trend is to do things based on the way the people who do it the worst way. I just wanted to make that point.

DEAN SALKIN: Dan?

MR. WALSH: Patty, let me make a comment because, therefore, I will not answer number four and number eight because I think we've gone through it. I wonder sometimes what would happen

to Wal-Mart if they decided they want to be a bidder? It would be interesting. I'll guarantee you that it would change the competitive price structure. I mean they can pass a box product through three times and still come in and blow most of the people out of the water. I mean it comes right down to the low price, and it's not even just a box for a widget, the stuff that Wal-Mart is getting into, if you follow Wal-Mart real closely; they're going to be into a lot of products. It won't be long, it will be insurance, banking. If you think the credit unions and the regular banks are having a go at it, this world is changing real, real quick and it's all driven by technology. When you think back, not too long ago, we had seven investor-owned utilities in New York. If you knock out the nuclear part of it, right now, all our generating capacity is from companies that are based in two zip codes, Houston and the UK. The world that I deal in is changing dramatically, and all of them have a process, all of them have a product, and all of them have a widget, and when you get \$44 billion on the table, probably after this budget it's going to be up around \$49 or \$50 and they broaden it out and broaden it out and broaden it out as to what's going to be available, your job is going to be even harder, and competitive bidding as it's commonly referred to over the years, it may just have to go out the window by the basic nature of the material, the product, and the thought process. How do you actually put a value on an idea which is eventually going to be one of the things you're going to be buying? You got a tough job, and the more restraints we put on it, I think the harder it is to come to a conclusion. Joan and I chatted real quickly, and I'll sort of finish with this: I think it's more important now to go ahead and try to find as many people as you can to agree on this particular provision. Forget that this thing has been extended. This is now the time to strike, and this is really when you want to get your act

together. Get as many people behind you as you can. Pile up the letters of endorsement. Get all your own parts of it ironed out, get your consensus perfect, get your group larger, and force that position to be the one that everybody comes off with and starts to debate as we go forward, and that's really where you want to go with this because, mark my words between now and June 2006, you're going to have another phone call to MTA; you're going to have something else that's the 30-second sound bite or the left-hand thumb print in the New York Times or the New York Post, and they're going to drive somebody else to change it in a way that isn't going to be practical. So I say the quicker you can get your own act together and all of us can get our own act together, show a combined force on this thing, you're going to be able to prevail in the long run.

DEAN SALKIN: Let's give the audience a chance to have some questions.

QUESTION: The level of the threshold for small business is somewhat smaller than has been estimated. (Inaudible) over 90 percent of the value of this conference would still be above the threshold that has been put forth by OSC that should happen. (Inaudible) do you think \$500,000 is a reasonable figure? (Inaudible).

MR. WALSH: There are better people that can pass judgments on the specifics of that, but you got market prices on everything these days. I mean the thing you don't want to do, you don't want to get into the old \$10,000 Wicks provision that you can't lock out, and the problem with this is that we have enough faith basically to put it into the brains and the intelligence of the agencies to follow a criteria that is outlined in general. Statutory numbers are what you have to get away from because, if you do it in 2006 and you pick \$100,000, \$200,000, your

grandchildren are going to be fightin' that baby off, and the worst thing you can do is put it in a statute because then you got 211 people that have to agree to change it. Maybe it's time as you go forward in 2006, to think outside the box on the traditional way of buying a product, determining its value and let the value float. I'll tell you one thing, if you're trying to buy gas, good example, all right? We're past the commodity stage these days. I don't know how you price an idea. I don't know how you price a good piece of software, but it's really got to be as flexible as you possibly can, and then you've got to convince the political process that they got to get away from thresholds. They bought into this social argument that thresholds protect different groups, or entice certain groups and it's worked the opposite. It's become a prohibition, and that's what you have to sell, and we have to sell going forward on this.

MR. REDMOND: There may be a different approach to the threshold. I couldn't agree more with what Dan said, but it's very difficult to just take something away or increase it way above what it's been. Historically, you know when I started working, many years ago, the limit was \$5,000. It's only \$15,000 now and that's over 40 years ago. So it doesn't increase very quickly and the political heat to try and get up to fifty, I'm sure would be intense. I think it might be easier to have a rolling number based on percentage of contract volume. You say 90 percent would get you up to \$500,000. Maybe 90 percent is the number we ought to have as the limit. Draw the line at where the value of the number of contracts exceeds 90 percent, for example, versus the 10- or 15- or 20- or the 100- or \$500,000. Get away from the fixed dollar amount.

QUESTION: (Inaudible).

MS. PHILLIPS: The Procurement Council produced a "how to" book which is called the

Procurement Guidelines which we believe provides a lot of useful information to those administrative staff about some of the basics of how do you do procurement. Those guidelines were revised in about 2000 and they're due for another look, so that we can be responsive to state agencies. I know that my agency lost 25 percent of the Procurement Services Group with the last early retirement effort and, as Joan said, that meant a lot of institutional knowledge went out the door. One of the original ideas was there was going to be a second volume to the Procurement Guidelines that would include models, templates, examples, key studies of a good procurement that was conducted by an agency so that another agency can look at it and say, Wow, I never knew you could do that. These are the things that the Procurement Council has committed to look at over the course of the rest of the year in terms of improving the guidance that we give to state agencies.

VOICE: (Inaudible)

MR. WALSH: Let me give you an idea what you can do. At the bottom of that letterhead that you have, there's a web site; it's our web site. You can take off of that anything you want, including all the information that we're doing on procurement, send me an e-mail on your thoughts. You don't have to get permission from the Budget Division to come to a meeting. We take e-mails from anybody, and we won't divulge it, but I'll let it go at that.

MS. SULLIVAN: The reason I mentioned the Procurement Council as only one avenue, there are many, many good ideas out there and we need to find a venue for those to be vetted. We have to do something with technology. You know, every agency is trying a little bit. We're starting to have some conversation with a couple of agencies that are out front, and the idea is

that they're real interested in selling what they have to us. We think we need to replicate what they've done and share it with other agencies. So far people are amenable to that. We need to move, you know, into the technology arena to find the efficiencies there. Dan challenged everybody to think outside the box. I think that the idea today is to start everyone thinking that procurement is all of our responsibility, it's not OGS's, it's not the Comptroller's, it's not the Business Council's; it's everybody's and the folks that are really on the front lines are the ones that know what the problems are. We need to find an avenue to share that better.

MR. BENSON: I just want to clarify, and I think I was brought up to the Procurement Council originally as being a place where a study or a benchmark examination of our system ought be done, and let me just clarify. I would say under the auspices of. Understand we have a state Legislature. We don't pass laws by referendum in this state. There has to be some group that represents us, and I think that the Procurement Council, in law, was defined to be that group. Matter of fact, Dan's council is represented on that group, as are seven of the large state agencies, and there are non-voting members and non-profits represented, and so the point is, since there is defined in the law a group responsible for the study analysis, development of recommendations to improve state procurement policy, and since their five objectives encompass in their strategic plan all the things we've been talking about right now -- shorten the time frame, move the system from a traditional paper base to technology driven; improve training and communications, et cetera. All I'm saying is let's not create something again. We got it. Let's use that as the core upon which we build a mechanism for examining and documenting what we're spending and how much it costs us to spend to cover our risks. I'm not saying it is the

organization that ought to do it; I'm saying we do it within the auspices of an organization that's created within the law.

QUESTION: (Inaudible).

MR. REDMOND: Let me try it, Dan. I'll give you a break. One of the first assignments I got in 1975 or '76 as Governor Carey's Industrial Coordinator was to work with OGS in implementing a statute that gave New York State bidders either a five or ten percent discount or preference in the bidding process. OGS was much brighter than we were. I was on the Governor's staff. OGS didn't want to implement it because they thought it was bad public policy. I wanted to do it because it was a Governor's Program bill and the Legislature had established the public policy. Well, we started to implement it and the first contract that was being bid out, Pennsylvania sent us a letter and said, If this contract goes to a New York State bidder, and named the firm, (a major manufacturer in New York State), that firm will hereafter be forbidden on bidding on anything in Pennsylvania. That was the end of the five or ten percent discount. There was no legislation; that was the end. I don't think it would work, frankly.

MR. WALSH: I made light of one of the comments of Dan Hogan in his testimony but that one provision in there is a couched by a New York thing. It's very hard to do. It was even hard to do then, and it was prompted way back when Bethlehem Steel in Buffalo had 28,000 people, and it was starting to go down, and buying steel for different things in New York, when things were being built, everybody thought was the right thing to do. It was hard to vote against that. It's like hugging a teddy bear, and you know, kissing a tree, and it's just great stuff. Unfortunately in 2005, it's tough. Buying an automobile, the component parts could be from anywhere. Now,

if you really want to get into a dicey discussion on made in New York and buy in New York, how about made in USA. My favorite story is if you're allowed to stand up and undress and only leave the clothes on you that were made in the United States, we'd have one hell of a problem. How many people play golf? Here's one you don't know, all right? You know where 95 percent of the heads on irons are made, the basic heads? Thailand, and they're shipped over here and refined or whatever. The world is so large but yet so close, which is a great part of our challenge. I mean in this room are some bright and intelligent people. Now in this room is the next generation of the extremely bright people. I'm not worried about out-sourcing. We're going to find a better widget. We're going to find a better way to do what the widgets are being done. You can't tell me that the Chinese and the Indians are better than anything we can do. We're going to be better. Technology is going to get us there, not going to be an impediment, but the more you get into saying that it's got to be done this way rather than any way, payroll tax is a criterion. I don't know how you do it. Commodities are very hard, and you take Wal-Mart's, God, how many Wal-Mart's are there? Payroll tax in Wal-Mart is probably one of the largest payroll players in the state. And I got to tell you, a lot of communities don't want them now because they don't want their local Ace Hardware to go out of business that's owned by the Browns that live next to them. So it's a real challenge to do business in New York, not so much put upon employers by the economics but by government's basically happiness with telling you how you got to do it or why you can't do it. One of our mantras is stay the hell out of our way, and we'll stay out of your way. We'll pay the tax. We'll pay the payroll taxes. Do whatever you want socially, but don't create the restrictions and the barriers to doing what every other state in

the country is doing. You know, it's rather simple, but yet it gets complicated because people have a lot of desires. The tragedies of the last few days with this suffering woman who was dying, and families that are all torn by it, everybody has been mesmerized by it. Those things change public policy, and it'll change it in New York because people get emotionally caught up in a way of doing things because they want to take care of their own sensitivities. Things end up in the statute. There ought not to be something in the statute about New York wants. I was flippantly talking about that. I don't mean that, but there ought not to be anything in there about contents. It ought to be based on the market of 2005-2006. Let the Oracles of the world come in and present their project. Let the IBMs come in, or maybe somebody who's got a new widget that needs encouragement. That's what you got to do, keep the windows open, but not so narrow that the big ones, you know, can get in easily because of everybody around town they're paying to get them in. So, you know, don't make it too complicated, give everybody a chance to get at it, but brain power basically will put everybody at the table equally, but just don't put prohibitions there on it, that's all.

DEAN SALKIN: Last question.

VOICE: As the last person because everybody's leaving, I'll be very brief, but I do have to respond as a person who's been in the Comptroller's office for two years which comes close to overlapping with Bill, I do have to take issue with the comment that Bill said, and I don't know his precise words about finding it more objectionable or more distasteful; I don't know what the word was, but as a person who's been there a long time I don't find our role then or now distasteful, and I have to make that point very strongly.

MR. REDMOND: Well, you've got to consider where you're speaking from. I sounded much differently when I was working in the Comptroller's office also.

QUESTION: For a state agency employee, I think our role is consistent because in a constitutional role, I disagree with what you said about oversight as a separate role.

MR. REDMOND: Oversight is one thing but substitution of judgment is another, and I think that that line is crossed too many times.

(Applause)

VOICE: We don't substitute our judgment with respect to the facts; we substitute it on questions of law where we have to be as satisfied as the agency that the procurement supports the law.

DEAN SALKIN: Throughout the day today, I counted probably close to three dozen different ideas for how to make changes or modifications in the law that various constituents believe would make the process better. Not that there was consensus on all of those points, but perhaps one thing to think about moving forward is that this would be a real good project, a really good topic to build a public policy consensus project around, one that involves all of the key stakeholders, something that everybody has acknowledged today and in that way perhaps we could generate something that's meaningful, meaning that it's efficient and effective, both in law and process for procurement for the state of New York, and I agree with the comments that were made this afternoon that even though we now have another year before the law sunsets yet again, we should start this process today because you never know, we might be surprised, and might get something done sooner than later.

I want to thank our panelists and all of our speakers today, and thank all of you.

(Whereupon the symposium was concluded.)