

## **Georgia Vendor Lobbying: Requirements, Prohibitions, and Penalties**

**By Philip E. Beck  
Smith, Currie & Hancock LLP**

Do contractors who pursue and perform public works projects for state and local governments in Georgia need to have their employees register as “vendor lobbyists” in order to avoid violating state law? This was a common question among contractors after a 2010 amendment to the Georgia ethics code changed the definition of “vendor lobbyist”. Most notably, the 2010 amendment expanded the definition of vendor lobbyist to include individuals engaged in efforts to influence the selection of vendors not only for the state, but also for local governmental entities, including counties, municipalities, and local school boards. As a result, it was estimated that 68,000 new individuals who did not previously consider themselves “lobbyists” would need to register as lobbyists in Georgia. This was a tremendous increase from the 7,800 lobbyist who had registered the previous year.

In response to protests from the Georgia construction industry, the 2011 Georgia Legislature passed, and the Governor signed, House Bill 232, limiting the definition of a “vendor lobbyist”. This 2011 legislation did not change the fact that an individual who undertakes to influence the selection of a vendor at the local government level may be considered a lobbyist. The legislation did, however, restrict who is considered a lobbyist based on the type of activities performed and the amount of time spent on those activities.

### **What is a lobbyist?**

In general terms, a lobbyist is an individual who seeks to influence the outcome of legislation or administrative decisions. For purposes of the Georgia ethics code, a person is a lobbyist if he or she fits any of the definitions set forth in O.C.G.A. § 21-5-70(5). That provision includes four separate categories of lobbyists: (1) state level lobbyists; (2) local level lobbyists; (3) vendor lobbyists; and (4) state agency lobbyists. State level lobbyists promote or oppose the passage of legislation at the state level; local level lobbyists promote or oppose the passage of ordinances or resolutions at the municipal or county level; and state agency lobbyists promote or oppose the passage of rules or regulations by any state agency. Vendor lobbyists, however, perform a somewhat different function. Instead of advocating for or against the passage of laws, ordinances, rules, or regulations, vendor lobbyists seek to obtain public contracts for either an employer or a client.

### **What is a vendor lobbyist?**

Most construction personnel engaged in pursuing public work, at least until recently, probably did not consider themselves “lobbyists”. However, in Georgia, a vendor lobbyist includes anyone “who, for compensation, either individually or as an employee of another person, *is hired specifically to* undertake influencing a public officer or state agency in the selection of a vendor. (emphasis added)” This is limited and clarified somewhat by the statement that a vendor lobbyist “does not include any employee or independent contractor of the vendor

solely on the basis that such employee or independent contractor participates in soliciting a bid or in preparing a written bid, written proposal, or other document relating to a potential sale to a state agency.”

Some have interpreted the “hired specifically to” language in the definition of vendor lobbyist to imply that a person is not a vendor lobbyist unless that person has an agreement with an employer or client specifying that the person’s specific duties include lobbying activities. However, a February 21, 2011 advisory opinion issued by the Georgia Government Transparency and Campaign Finance Commission (the “Commission”) expressly rejected this interpretation. The Commission reasoned that, had the Georgia Legislature intended to create such a prerequisite, it would have done so expressly. Thus, a person may be considered a vendor lobbyist even if that person’s employment agreement or contract does not specify his or her duties as encompassing lobbying activities.

By passing House Bill 232, the 2011 Georgia Legislature resolved some, but not all, of the confusion and anxiety created by the 2010 amendment regarding who must register as a vendor lobbyist. The 2011 Georgia Legislature did so by making two significant changes to the definition of vendor lobbyist. First, and most importantly, the 2011 legislation specifies that even a person who meets the definition of a vendor lobbyist is only a vendor lobbyist if 10 percent or more of his or her working hours are spent seeking to influence a public officer or state agency in the selection of a vendor. The time a person spends planning, researching, or preparing to influence a public officer or state agency in the selection of a vendor is included for purposes of this 10 percent calculation. Second, the 2011 amendment clarifies that the definition of vendor lobbyist does not include a bona fide salesperson who sells to or contracts with a state agency for goods or services and who does not engage in certain activities relating to the promotion or passage of ordinances, rules, regulations, or State Transportation Board matters.

These amendments clarify that individuals who otherwise meet the definition of vendor lobbyist, but who are only incidentally involved in lobbying activities, are not required to register as a lobbyists. The “10 percent rule” provides individuals a much more concrete method of determining whether their activities will subject them to registration and reporting requirements.

### **Who is required to register as a lobbyist?**

Any person who engages in lobbying, which is defined by the statute as the activities of a lobbyist, must register with the Commission. There are two statutory tests for determining whether an individual must register as a lobbyist. The first provides that a person must register as a lobbyist if he or she is an employee, agent, or independent contractor whose agreement specifies that his or her primary duties, or a substantial portion thereof, involve lobbying activities. Thus, someone marketing construction services would only be a vendor lobbyist under this first test if his or her written agreement with the employer or client specified that a substantial part of his or her duties involved influencing a state agency in the selection of a vendor.

If a person does not engage in lobbying activities as part of his or her written duties pursuant to an agreement with an employer or client, that person may still be considered a

vendor lobbyist under the second statutory test. The second statutory test provides that an individual must register as a lobbyist if that person spends more than 10 percent of his or her working hours engaged in lobbying. Thus, someone marketing construction services would only be considered a vendor lobbyist if that person spends more than 10 percent of his or her time seeking to influence a state or local governmental entity in the selection of a vendor. This “10 percent test” is applied by applying a look-back period at the end of each calendar month. So, if a person only undertook to influence a state or local governmental entity in the selection of a vendor one month out of the year, but in that month those activities constituted more than 10 percent of his or her working hours that month, that person must register as a vendor lobbyist.

### **How do you register?**

Each vendor lobbyist must file a verified application stating:

- The applicant’s name, address, and telephone number;
- The name, address, and telephone number of the person or agency that employs, appoints, or authorizes the applicant to lobby on its behalf;
- A statement of general business or purpose of each person, firm, corporation, association, or agency the applicant represents;
- If the applicant represents a membership group other than an agency or corporation, the general purpose and approximate number of members of the organization;
- A statement signed by the person or agency employing, appointing, or authorizing the applicant to lobby on its behalf;
- The name of the state agency or agencies and/or local governmental bodies before which the applicant engages in lobbying;
- A statement disclosing each individual or entity on whose behalf the applicant is registering if such individual or entity has agreed to pay him or her an amount exceeding \$10,000.00 in a calendar year for lobbying activities; and
- A statement verifying that the applicant has not been convicted of a felony involving moral turpitude in the courts of this state or an out-of-state offense that, had it occurred in this state, would constitute a felony involving moral turpitude under laws of this state; or, if the applicant has been so convicted, a statement identifying such conviction, the date thereof, a copy of the person’s sentence, and a statement that more than ten years have elapsed since the completion of his or her sentence.

Each vendor lobbyist must file a supplemental registration within seven days of any substantial or material change to any of the above information. There are also registration fees that must be paid. The annual lobbyist registration fee is \$ 300. The fee for each supplemental registration filed is \$10. Registration is for the calendar year only and expires on December 31st of each year.

### **What are the reporting requirements?**

Each vendor lobbyist is required to electronically file disclosure reports with the Commission. A vendor lobbyist must file a monthly disclosure report on or before the fifth day of each month, with a grace period of three business days. The disclosure report must include a disclosure of all expenditures made on behalf of or for the benefit of a public officer or employee for the purpose of influencing the selection of a vendor. The description of the expenditure should include: (1) the name and title of the public officer or employee; (2) the amount, date, and description of the expenditure, and a summary of spending classified by category; and (3) the name of any vendor for which the lobbyist undertook to influence the awarding of a contract by any state agency, with a description of the contract and the monetary amount of the contract. Thus, if an individual meets the definition of “vendor lobbyist”, he must disclose expenditures made to benefit public officials and employees, including entertainment expenses, on a monthly basis.

### **What are the late fees for failing to file a report by the deadline?**

Failure to file a required disclosure report by the filing deadline will result in the imposition of a \$275 late fee. Additional fines are based on whether the General Assembly is in session. Although this distinction seems to be irrelevant as applied to a vendor lobbyist, the Georgia ethics code only contains one fine levying mechanism for late reporting. When the General Assembly is in session, the failure to file a disclosure report within seven days of the deadline will result in a \$1,000 fine and the failure to file within twenty-one days of the deadline will result in a \$10,000 fine. If the General Assembly is not in session, the failure to file within fifteen days will result in a \$1,000 fine and the failure to file within forty-five days will result in a \$15,000 fine. It is important to remember that these fines will be imposed for each and every person who falls under the definition of vendor lobbyist and does not timely file his or her disclosure reports.

### **Prohibition of compensation contingent on award of state contract.**

The Georgia ethics code prohibits any person, firm, corporation, or association from retaining or employing a lobbyist contingent upon the granting or awarding of any state contract. In addition, it also prohibits a lobbyist from being employed for compensation contingent upon the granting or awarding of any state contract. The prohibition relates only to those who are considered lobbyists. That being said, it is important to be cautious in compensating individuals on a contingency basis because if that individual is considered a lobbyist, both the company and the employee may be subject to substantial fines.

## **Penalties for violation of Georgia ethics codes as they relate to lobbying.**

A person who falls within the definition of vendor lobbyist should keep in mind that the Commission may deny, suspend, or revoke a person's lobbyist registration for an entire year and impose a fine up to \$2,000 if that person engages in certain acts in violation of the Georgia ethics code. Specifically, the Commission may deny, suspend, or revoke a person's lobbyist registration if that person: (1) filed a registration application that was incomplete in a material respect or contained a false or misleading statement regarding a material fact; (2) willfully violated or willfully failed to comply with the rules promulgated by the Commission or the Georgia ethics code as it relates to lobbyists; (3) failed to comply with lobbyist reporting requirements; or (4) engaged in lobbying practices in violation of the Georgia ethics code.

## **Potential inconsistencies, ambiguities, and loopholes in the law.**

There are a number of potential inconsistencies, ambiguities, and loopholes in the current law which could lead to further amendments in future sessions of the Georgia Legislature in order to clarify the law and better achieve its intent. For example, at present, there is no connection between the dollar amount expended in lobbying efforts and the registration and reporting requirements. If an individual is deemed to be a "vendor lobbyist", that individual must register even if the individual spends little or no money on public officials. Further, that individual must then file a report each month even if there were no lobbying activities or expenditures during that month. Conversely, an individual who does not meet the definition of "vendor lobbyist" could spend a very large amount entertaining state and/or local public officials without being required to register or report, under a literal reading of the current statute. For other types of lobbyists, O.C.G.A. Title 21, Chapter 5 uses a threshold of \$1,000 in determining whether an individual who expends money to influence public actions is a lobbyist; but there is no such connection stated in the law itself where vendor lobbyists are concerned.

## **Best practices in light of the current law.**

For contractors who pursue and perform public works projects for state and local governments in Georgia, if any employee's job is to entertain public officials or attempt to persuade public officials to award contracts to that contractor, unless such activities are limited to the bidding process, that employee should register as a "vendor lobbyist" and file monthly reports, to be safe. This would likely include any employee who carries the title "Marketing Director", "Vice President–Marketing", or something similar, even if that individual spends no money entertaining public officials or buying them gifts. If the employee's job responsibilities include other things, but 10% or more of the individual's working hours are devoted to "lobbying" activities, the individual should register and file monthly reports.

As a practical matter, the Legislature has not budgeted any funds for the enforcement of the vendor lobbying law. Accordingly, the way the issue is most likely to arise is as a result of a complaint lodged by a disgruntled competitor. The possibility that this could occur, however, is sufficient to suggest that prudent public contractors should play it safe by having the appropriate employees of their companies register and report. The fact that the law is unclear in certain aspects will not ensure that an effective defense exists if a violation of the law is alleged.