



Jodi Franzese
Inspector General

NASSAU COUNTY
OFFICE OF THE INSPECTOR GENERAL

Advisory Report

**Gift Policy for Non-Employee
County Agents/Representatives**

A-22-345

Issued: December 21, 2022

"Good government is everybody's business"

INTRODUCTION

This advisory report describes an opportunity identified by the Nassau County Office of the Inspector General (OIG) for policy enhancement to reduce the chance of undue influence upon private sector employees, such as DPW program management consultant staff, who serve as County representatives or agents.¹

BACKGROUND

The Department of Public Works (DPW) retains private sector consultant firms to advise and/or act on behalf of the County. DPW's consultants include design consultants, construction management consultants and program management consultants. The scope of work of DPW's program management consultants may include evaluating, or assisting in the evaluation of, vendor bids or proposals during the procurement process, and participating in vendor selection committees, and/or activities in support of DPW contract administration.

Program management consultants may play a role which in some respects mirrors that of Nassau County employees. While vendor selection committees are primarily composed of County employees, OIG has often observed program management consultants present as non-voting members of, or subject matter expert advisors to, DPW selection committees. OIG has observed that program management consultants may not only participate in the examination of proposals but actively participate in committee discussions – opining as to the merits of vendors' proposals and potentially having an influence on the selection committee's decision-making process.

¹ For purposes of this report, the terms representative, agent, and consultant are used interchangeably to the extent that they refer to parties or entities serving or representing the interests of Nassau County but who are not actual employees of the County.

REASON FOR THIS REPORT

The OIG reviewed the state of the County’s existing guidance concerning the permissibility of giving gifts to private sector parties representing or acting as agents of the County. As explained below, OIG’s review identified what it assesses as a need for enhanced County policy direction in this area.

FINDINGS

The Vendor Code of Ethics Does Not Prohibit Vendor Gift Giving to County Consultants nor does it Prohibit County Consultants from Accepting Gifts.

There are various County legal and policy prohibitions on the giving of gifts to, and receiving of gifts by, County employees. These are collectively contained in the Nassau County Code of Ethics (County Charter § 2218), Executive Order 2-2018 (also known as the Zero-Tolerance Policy), the County’s Vendor Code of Ethics, and the Countywide Procurement & Compliance Policy.

As a matter of law, while the County’s Code of Ethics places limits on the receipt of gifts by the County’s *employees*,² in OIG’s assessment, it does not expressly regulate gifts to agents, the privately employed staff of a County consultant or other professional service firms.³

As to the conduct of *vendors*, the County’s Vendor Code of Ethics, § 3.01, states in part that:

No Vendor may offer or give any Gift, directly or indirectly, to a Nassau County *Employee*. Similarly, no Vendor may offer or give any Gift, directly or indirectly, to any Family Member of a Nassau County *employee* where such Gift is made because of the Vendor’s relationship with the Nassau County *Employee*. . . . (emphases added).⁴

² §2218(3) of the Code of Ethics states, “Gifts and favors. No officer or employee of the County, whether paid or unpaid, shall accept gifts aggregating to seventy-five dollars (\$75.00) or more during a twelve-month period, not solicit any gift of any value... which to his or her knowledge is interested directly or indirectly in any manner whatsoever in business or professional dealings with the County or agency thereof.”

³ While §2218(9) does address the pecuniary interest of officers, employees *or agents* in execution of contracts, in OIG’s assessment, this prohibition may not necessarily extend to all gifts.

⁴ The word “Vendor” in the Vendor Code of Ethics means any individual or entity seeking to or doing business with Nassau County, including contractors, consultants, suppliers, manufacturers

There is no parallel provision in the Vendor Code of Ethics that prohibits vendors from offering or providing gifts to private sector employees who are representing the County or otherwise serving on its behalf. The Vendor Code likewise has no corollary prohibition on the County’s consultants or agents accepting gifts *from other vendors*.

For its part, County Executive Order 2-2018 (the “Zero-Tolerance Policy”), prohibits County *employees* in certain roles from accepting gifts of any form or value from vendors or anyone doing business, or likely to do business, with Nassau County. While those prohibitions specifically apply to County *employees*, the Order does, however, also require that the County Attorney’s Office

include a provision in all county contracts prohibiting any tenant, concessionaire, vendor, or their representative or representative association from offering, giving, or agreeing to give anything of value . . . to a Nassau County employee, *agent, consultant, construction manager or other person or firm representing Nassau County*, or to a member of their immediate family . . . in connection with the performance of their duties on behalf of Nassau County, including, but not limited to, meals, holiday gifts, holiday baskets, gift cards, tickets to golf outings, tickets to sporting events, or Currency of any kind.... (emphasis added)⁵

seeking to act as the primary contracting party, officers and employees of the foregoing, as well as any subcontractors, subconsultants and suppliers at all lower tiers.

The word “Gift” in the Vendor Code of Ethics means the transfer, without equivalent consideration, of anything of benefit, tangible or intangible, having more than nominal value, including, but not limited to, cash, loans, forbearance, services, travel, gratuities of any kind, favors, money, meals, refreshments, entertainment, hospitality, admittance to private clubs, use of time-shares, personal use of the Vendor’s facilities, promises, tickets, golf outings, loans of equipment, or other thing or benefit. A Gift need not be intended to influence or reward any individual or entity.

⁵ The Countywide Procurement & Compliance Policy also specifies that any department that utilizes a contract template that is different than the standard model must insert the following language in its contract template:

Prohibition of Gifts. In accordance with the County Executive Order 2-2018, the Contractor shall not offer, give, or agree to give anything of value to any County employee, agent, consultant, construction manager, or other person or firm representing the County (a “County Representative”), including members of a County Representative’s immediate family, in connection with the performance by such County representative of duties involving transactions with the Contractor on behalf of the County, whether such duties are related to this Agreement or any other County contract or matter.

This requirement is repeated in the Countywide Procurement & Compliance Policy.⁶ Similarly, both the Zero Tolerance Policy and the Countywide Procurement & Compliance Policy require that the Chief Procurement Officer include similar wording in all County solicitations, including Requests for Proposals and bid solicitations.

Nonetheless, in OIG's assessment, the Vendor Code provides a highly suitable place to reinforce the prohibition of gifts by vendors to the County's agents or representatives, as the Code serves as a central repository of provisions governing the conduct of vendors, even those in pre-contractual status. Additionally, as the Vendor Code is commonly incorporated by reference in County contracts, this would ensure that the prohibition is automatically part of each such contract, even if the language prescribed in Executive Order 2-2018 was inadvertently omitted.⁷

On a related note, to OIG's understanding, while County procurement policy requires standard clauses, including certain contract language about the Vendor Code, it currently does not explicitly direct that the Vendor Code of Ethics itself be incorporated into contracts and solicitations.⁸

Selection Committee Documents - Receipt of Gifts

OIG also observed opportunity for improvement in the certification forms currently used by consultants participating in County vendor selection committees.

The Countywide Procurement & Compliance Policy provides templates of documents to be executed by Nassau County employees and consultants prior to opening vendor proposals. There are three certifications to be completed by County employees. There are four certifications (consultant forms) to be completed by non-County individuals participating in the selection committee or by persons

⁶ Policy Section II at pages 7-8, and also in Appendix Y.

⁷ OIG has observed that the County sometimes amends contracts executed prior to 2018 to extend their duration. In these instances, the drafter of these amendments must be mindful to ensure that the Prohibition of Gifts and Vendor Code of Ethics sections are both incorporated into the amendment.

⁸ While the procurement policy, at Standard Clauses for Nassau County Contracts, references certain requirements regarding the Vendor Code of Ethics, the policy falls short of either directly requiring the Code's inclusion, or of reciting the Code verbatim, in contracts or solicitations. Additionally, existing policy does not specify when or how the Vendor Code of Ethics is to be communicated by the County to vendors.

“performing in an advisory function embedded with County staff.”⁹ It is OIG’s understanding that the purpose of the consultant forms is to have such persons serve under ethics principles analogous to those of similarly-situated County employees.¹⁰

These forms require participants to certify, in part, that they have no financial or other conflicting interests or connections, or other interests or connections which might tend to subject the County to criticism as to impairment of their objectivity.¹¹ While these forms are an important means to that end, there is a difference between public sector and corporate environments that these certifications do not specifically address.

What is acceptable practice within the corporate environment does not always align with acceptable conduct in governmental environments, such as Nassau County. As meals or other business hospitality may be more commonplace in the private sector, a consultant might not necessarily identify that receipt of gifts from vendors might be perceived as a conflict – or as otherwise raising a question as to impairment of his or her objectivity – and thus not acknowledge such gifts in his/her certifications.¹²

⁶ These forms are: (1) *Competitive Proposal Solicitation Rules and Responsibilities for Consultants*, (2) *Certification for Consultants Participating in the Selection, Negotiation or Award of Contracts*, (3) *Conflict of Interest Affirmation for Consultants*, and (4) *Conflict of Interest Affirmation for Principal of Consultant Firm*.

¹⁰ The Policy explains: “These documents ensure that all members are aware of their obligations to conduct their review of the solicitation in an ethical manner that adheres to the established code of conduct.”

¹¹ See, e.g., *Certification of Consultants Participating in the Selection, Negotiation or Award of Contracts*.

¹² OIG additionally noted that one of the certification forms, *Competitive Proposal Solicitation Rules and Responsibilities for Consultants* provides that the consultant “shall agree to abide by and conduct themselves in accordance with the Nassau County Charter, Executive Orders, Vendor Code of Ethics, and the County’s Procurement and Compliance Policy rules on ethics, conflicts of interest and proper conduct when evaluating proposals received for County contracts.” However, as discussed previously, neither the Vendor Code nor the County Charter regulate gifts to consultants, and the other sources do so only in an indirect manner.

RECOMMENDATIONS

OIG accordingly recommends:

1. Enhancing the Nassau County Vendor Code of Ethics by adding explicit prohibitions:

(a) of vendors providing gifts or other benefits to County agents/representatives (including consultant staff acting or under engagement to act on behalf) of Nassau County; and

(b) of acceptance of gifts or other benefits by County agents/representatives (including consultant staff acting or under engagement to act on behalf) of Nassau County.

This recommendation could be accomplished, for example, by revising the wording of Vendor Code Section 3.01, similar to the following example (new text shown in emphasis):

No vendor may offer or give any Gift, directly or indirectly, to a Nassau County Employee. Similarly, no Vendor may offer or give any Gift, directly or indirectly, to any Family Member of a Nassau County employee where such gift is made because of the Vendor's relationship with the Nassau County Employee. Additionally, no Vendor may accept a gift from a Nassau County Employee.

No vendor may offer or give any Gift, directly or indirectly, to any employee, agent, consultant, construction manager or other person, firm or entity serving on behalf or representing the interests of Nassau County, or to a member of their immediate family (i.e., a spouse, child, parent, brother, or sister), in connection with the performance of their own or their employer's duties, assignments or responsibilities on behalf of Nassau County, including, but not limited to, meals, holiday gifts, holiday baskets, gift cards, tickets to golf outings, tickets to sporting events, loans, or Currency of any kind or other benefit or thing of value.

No Vendor, or staff member thereof, serving as an agent, consultant, construction manager or other person or firm serving on behalf of or representing the interests of Nassau County may accept, directly or indirectly, a Gift, benefit, or other thing of value from another Vendor, or from an agent of such other Vendor, doing business or seeking to do business with Nassau County.

This Zero-Tolerance Policy applies regardless of actual intentions. In other words, even if a Gift does not, or is not intended to, influence an action or decision by a Nassau County Employee *or a County agent or representative*, it is prohibited by this Code.

2. Revise the *Certification of Consultants Participating in the Selection, Negotiation or Award of Contracts* form to explicitly add, as a reportable interest, the direct or indirect offer or receipt of a gift (as defined in the Vendor Code of Ethics) or other benefits, to the participant or a family member of the participant, from any vendor or agent of a vendor, whose proposal, bid or other submission may be considered by the County, within a specified look-back period of not less than two years.

3. Revise one or more of the selection committee certification forms, such as the above *Certification*, to ensure that all members of selection committees and their advisors, including those who are not County employees, are on written notice and acknowledge awareness of the prohibition against acceptance of gifts or other benefits from vendors or their agents. For example, add an acknowledgement to the effect that:

The participant understands that all County employees, agents, consultants, construction managers, or other persons or firms representing the County, and their immediate family members, are prohibited accepting gifts of any kind, form or value, directly or indirectly, from any County vendor in connection with the performance of duties on behalf of the County.

4. Ensure that the Vendor Code of Ethics is explicitly and directly incorporated into all County solicitations and contracts, either by reference or verbatim.
