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All Pay and No Play: How Political Contributions Can Prevent the Award of a Public Contract

The rules of the game for entering into contracts with public entities

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In his speech to municipal officials at the annual League of Municipalities Convention in Atlantic City last November, U.S. Attorney Christopher Christie warned, "If over the next couple of days someone approaches you with an envelope of cash looking to seek a favor from you, unless it is your mommy, turn and run for the ocean... It's probably us." (*The Record*, Nov. 15, 2007.) It is no secret that there is a fortune to be made in county and municipal contracts within the state of New Jersey for contractors and service providers in many different areas. It is also no secret that some people have resorted to illegal methods in order to obtain these contracts and for the past several years the U.S. Attorney's Office has brought many of these would-be contracts into the public spotlight.

State statutes, such as N.J.S.A. 2C:27-11(a), provide criminal penalties for those who attempt to manipulate the decision-making process of public officials:

A person commits a crime if the

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person offers, confers or agrees to confer any benefit, whether the benefit inures to the public servant or another person, to influence a public servant in the performance of an official duty or to commit a violation of an official duty.

However, a contractor or a service provider need not engage in criminal or other illicit behavior but may still find that they are precluded from the bidding process due to actions which may be considered unethical or otherwise violate the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.) and other applicable statutes (e.g., N.J.S.A. 18A:18A-1 et seq. as to school districts).

There is almost no single statute in New Jersey in the realm of county and municipal government as important as the Local Public Contracts Law. This law controls virtually every purchase of goods or services for a local contracting unit from legal services to light bulbs to multimillion-dollar construction projects. The law was designed to bring some transparency to the process of public bidding and the courts of New Jersey have almost without exception held this law to be prophylactic in nature, protecting the interest of the tax-paying public. It has been held throughout the law's history that its provisions should

be interpreted strictly in keeping with the public purposes to benefit taxpayers by securing competition and guarding against favoritism, improvidence, extravagance or corruption. See *L. Pucillo & Sons, Inc. v. Mayor and Council of Borough of New Milford*, 73 N.J. 349 (1977), and *Pied Piper Ice Cream, Inc. v. Essex Co. Park Comm.*, 132 N.J. Super. 480 (App. Div. 1975).

In response to a growing public outcry, the state legislature over the past few years has enacted new restrictions on the ability of counties and municipalities to enter into contracts with business entities which have made substantial political contributions. Under N.J.S.A. 40A:11-51, a county, municipality, independent authority, board of education, or fire district is authorized to establish by ordinance, resolution, or regulation that may be appropriate, measures limiting the award of public contracts there to business entities that have made a contribution pursuant to N.J.S.A. 19:44A-1 et seq. and limiting the contributions that holders of the contract may make during the term of the contract. Election laws have also been revised within the last few years in order to place restrictions on persons and entities entering into or having entered into contracts with various governmental entities. For example, N.J.S.A. 19:44A-20.5,

applicable to all contracts with New Jersey's 21 county governments and all municipalities, provides that neither a county nor a municipality may enter into a contract not subject to open bidding with a business entity if it made a reportable political contribution during the previous year. In addition, a business entity cannot make such a contribution political contribution to a county or municipal candidate for a period of one year after the award of the contract.

Given the standard which courts apply in reviewing the award of public contracts in order to protect the public interests, practitioners should assume that some of these terms will be defined rather broadly. For example, under N.J.S.A. 19:44A-20.6, a person having an interest in entity or family members or such principal generally will be considered part of the "business entity."

Other questions may arise with regard to what the "anticipated value" of a contract may be. Certainly any contract that is not capped below such said amount maybe open to an interpretation that these statutes will be applicable.

Another feature of the new legislation is an expansion of the reporting requirements so that a determination of a violation will be readily determinable upon review of public documents. Under N.J.S.A. 19:44A-20.26(a):

Not later than 10 days prior to entering into any contract having an anticipated value in excess of \$17,500, except for a contract

that is required by law to be publicly advertised for bids, a State agency, county, municipality, independent authority, board of education, or fire district shall require any business entity bidding thereon or negotiating therefor, to submit along with its bid or price quote, a list of political contributions as set forth in this subsection that are reportable by the recipient

It should be noted that under N.J.S.A. 19:00A-20.26(a), the provisions do not apply to a contract when a public emergency requires the immediate delivery of goods or services.

As with other sections of the statute, the term business entity will be interpreted broadly under the statute under N.J.S.A. 19:44A-20.26(b): For example, if the business is a person, then any contribution by his spouse or child residing with them will satisfy the statute; or if the business is not that of a natural person, i.e., corporation, then contributions by principals, officers, or directors or spouses will fall under the statutory language.

Strict compliance with the statutes may not eliminate the possibility of challenge to a public contract. For example, a local official who participates in the decision-making process on the award of a contract may be accused of a violation of the Local Government Ethics Law, where the official has received a political contribution or

other consideration. The Local Government Ethics Law specifically at N.J.S.A. 40A:9-22.5(f) states:

No local government officer or employee, member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties.

The bottom line for those seeking to enter into contracts with these public entities is that one must realize that the rules of the game are changing. While an overt action such as pushing an envelope of cash across a table to a public official is the most blatant example of trying to influence such official's conduct, it is has never been the only way to gain influence. As the system tries to clean itself up, the state legislature, as well as counties and municipalities through their own ordinances, will continue to adopt new regulations in order to prevent such improper influence, and those who do not play by the rules will be left out of the game. ■