

# State Contractors Prohibited From Making Campaign Contributions

BY JOHN D. CROMIE, ESQ. AND JOHN T. FOJUT, ESQ.\*

Seeking to bolster the public's trust in government, on March 22, 2005 Acting Governor Codey signed into law P.L. 2005, Chapter 51<sup>1</sup> (the "Act"), which strikes a delicate balance between upholding the integrity of public contract bidding and preserving the right of individuals and businesses to participate in the political process. With the passage of this law, a contractor is precluded from entering a State contract worth \$17,500 or more, if that contractor solicited or contributed – either directly or indirectly – any money (including in-kind contributions) to any candidate or holder of the office of Governor, or to any State or county political party committee.

The Act follows upon and supercedes Executive Order No. 134 (2004) – Governor McGreevey's order that prohibited the New Jersey Turnpike Authority from entering into any contract worth \$17,500 or more with a business that made a contribution to a candidate or holder of the office of Governor, or to any State or county political party committee. The Act, interestingly, does allow for the possibility that some political contributions by State contractors could be permitted. In early March 2005, Acting Governor Codey vetoed the original version of the Act that was prepared by state legislators. His veto called for the inclusion of a provision within the Act that recognized the federal government's position that a "pay-to-play" ban might harm competition and violate federal law. Presently, the federal government has withheld approximately \$350 million in transportation funds to the State. As a consequence, Executive Order No. 18 (2005) was issued to exempt New Jersey Department of Transportation projects from the pay-to-play ban,

if those projects are to be funded with federal money. The Acting Governor's veto called for a provision within the Act that created a limited exemption of the Act's prohibitions where the federal government or a court of competent jurisdiction determines that application of the pay-to-play ban would violate a federal law or regulation. The Act, with the inclusion of the above provision, was thereafter passed.

The Act takes effect immediately and is retroactive to October 15, 2004, applying to contributions made and contracts awarded on or after October 15, 2004. The major provisions of the Act are summarized as follows.

Certain campaign contributors are ineligible from contracting with the State. The Act applies to those contractors who provide services, material, supplies, equipment, or who acquire, sell or lease any land or buildings. The State, including any of its purchasing agents or agencies, are prohibited from entering a contract worth \$17,500 or more with a contractor, if that contractor has "solicited or made any contribution of money, or pledge of contribution, including in-kind contributions to a candidate committee or election fund of any candidate or holder of the public office of Governor, or to any State or county political party committee[.]" and, such contribution was made under any of the following circumstances:

- a. the contribution was made "within the 18 months immediately preceding the commencement of negotiations for the contract"; or,
- b. the contribution was made "during the term of office of a Governor, in the case of contributions to a candidate committee or

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<sup>1</sup> The Act concerning campaign contributions by certain business entities seeking or holding State contracts, supplements P.L. 1973, c.83 (C.19:44A-1 *et seq.*), amends P.L. 2004, c.19, and repeals section 1 of P.L. 2004, c.19 (C.19:44A-20.2).

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election fund of the holder of that office, or to any State or county political party committee of a political party nominating such Governor in the last gubernatorial election preceding the commencement of such term"; or,

- c. the contribution was made "within the 18 months immediately preceding the last day of the term of office of Governor, in which case such prohibition shall continue through the end of the next immediately following term of the office of Governor, in the case of contributions to a candidate committee or election fund of the holder of that office, or to any State or county political party committee of a political party nominating such Governor in the last gubernatorial election preceding the commencement of the latter term."

Thus, to summarize, a contractor is precluded

from receiving State contracts worth \$17,500 or more if the contractor made a campaign contribution: (a) in the 18 months before negotiation of the State contract, or (b) during the term of office of the Governor if the contribution is made to the Governor, or to a committee or fund that nominated the Governor in the last race; or (c) in the 18 months before the last day of the term of office of the Governor if the contribution is made to the Governor, or to a committee or fund that nominated the Governor in the last race, and in which case the prohibition against the contractor continues through the next term of office of the Governor.

A contractor may not merely withhold a contribution until after it receives a State contract. The Act also prohibits a contractor from making a contribution, in the manner defined above, prior to the completion of a contract that the contractor obtained in compliance with the Act.

Further, the Act applies not only to businesses, but in some instances to individuals. The Act

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defines a “business” as not only commercial entities organized under the laws of the State, but also as “principals” of a business who own or control more than 10 % of the profits or assets of a business, or who own or control more than 10 % of the stock of a business. If the business is a “natural” person, that person’s spouse or child(ren) residing with that person are, as well, precluded from making contributions.

The Act places new reporting requirements on contractors, and mandates the submittal of a compliance statement with all bid applications. Prior to the award of a contract, a contractor must now report to the State contracting agent all contributions to any political organization that the contractor made during the preceding 4 years. If a reported contribution is determined to pose a conflict of interest to the State, or if a reported contribution is otherwise in breach of the prohibitions contained in the Act, the contractor will be disqualified from bidding on or being awarded the subject contract.

In submitting a bid application, a contractor is now required to provide a written certification that it has not made a contribution prohibited by the Act. The Act imposes a continuing obligation upon the contractor to report any contributions it makes during the term of the contract. If a contribution prohibited by the Act is made by a contractor during the term of a State contract, it will be deemed a material breach of the contract.

The Act deems as material breaches other conduct as well. Specifically, in addition to the making or soliciting of contributions, the Act makes the following conduct a material breach of a State contract: (a) knowingly concealing or misrepresenting a prohibited contribution; (b) making or soliciting prohibited contributions through intermediaries; (c) engaging a lobbyist or consultant to make or solicit a contribution, which, if made by the contractor itself, would be a contribution prohibited by the Act; (d) contributions made by third parties, including family members, employees, attorneys, and consultants; (e) engaging in any exchange or contributions designed to circumvent the intent of the Act, and (f) causing any person or means,

either directly or indirectly, to make a contribution, which, if made by the contractor itself, would be a contribution prohibited by the Act.

In the event a contractor makes a prohibited contribution inadvertently, the Act permits the contractor to request full reimbursement of the contribution from the recipient, and if the reimbursement is received by the contractor within 30 days after the date on which the contribution was made, the contractor will again be eligible to receive a State contract, or would no longer be in breach of an existing contract. The Act records the legislature’s presumption that any contribution made within 60 days of a gubernatorial primary or general election was not made inadvertently.

Finally, in circumstances of “public exigency,” the Act permits the State to award a contract to a contractor who has made a prohibited contribution if the exigency requires the immediate delivery of goods or services. The State Treasurer makes a determination of this nature.

The Act centers on a legal area of increasing complexity. For the state contractor inclined to partake in the political process – caution should control, lest problems arise in the award of the contract or as a material breach during the life of the contract. **AGC**

## MEMBER NOTES

***Paradigm Associates** – Michael Sleppin of Paradigm Associates recently appeared on a business program on WCTS – 1450 AM to discuss a variety of business issues. He was also engaged by the State of New Jersey to facilitate a one day workshop on how to effectively sell your unique capabilities. It was held at the College of New Jersey in Ewing Township, New Jersey in early May. Finally, Paradigm Associates was featured in the Princeton Packet newspaper as a provider of effective business solutions.*