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Curtailing 'Pay to Play' In State Contracts

A guide to navigating the provisions of Executive Order 134

As one of his last acts before leaving office, Gov. James E. McGreevey issued Executive Order 134 on September 22, 2004, which aimed to curtail pay-to-play practices for state contracts. The Legislature subsequently enacted the Executive Order into statutory provisions codified at N.J.S.A. 19:44A-20.13 through 20.25, which acting Gov. Richard J. Codey signed into law on March 22, 2005 (the Executive Order and statutes, "EO 134"). The importance of EO 134 is that it provides a set of complex rules that prohibit state agencies from contracting with business entities that make certain campaign contributions at the state and county level. EO 134 applies to contributions of more than \$300 made on or after Oct. 15, 2004.

To understand how EO 134 works, it is useful to look at its components: applicable contributors, applicable recipients of contributions, applicable solicitors, applicable beneficiaries of solicitations, applicable contributions and solicitations, the consequences of applicable contributions and solicitations, its exemptions and remedial relief, and its reporting requirements.

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Applicable Contributors and Recipients

EO 134 applies to a business entity, which means any natural or legal person, business corporation, professional services corporation, limited liability company, partnership, limited partnership, business trust, association or any other legal commercial entity. EO 134 also applies to the following persons and entities that have specified relationships with the business entity: (1) all principals who own or control more than 10 percent of the business entity's profits or assets, or 10 percent of the stock of a corporation for profit; (2) any subsidiaries directly or indirectly controlled by the business entity; (3) political action committees that the business entity directly or indirectly controls; and (4) if the business entity is a natural person, that person's spouse or child residing therewith. In determining an entity's principals, the Division of Purchase and Property of the New Jersey Department of the Treasury (Division) looks at ownership one generation up. In determining whether a business entity controls a PAC, the Division looks at the PACs of the business entity's intermediate parents, and its ultimate parent. Since partnerships cannot make campaign contributions under New Jersey law, the Division looks at partnership contributions that are allocated to more than 10 percent

partners and contributions made by more than 10 percent partners. Finally, the Division has stated that members of a professional corporation's management committee, and persons who decide the compensation of a professional corporation's shareholders, are not covered by EO 134 as long as they do not own more than 10 percent of the corporation's stock. The Division has posted an extensive list of Questions and Answers on EO 134 on its Web site at www.nj.gov/treasury/purchase/execorder134.htm.

EO 134 applies to the following recipients of contributions: (1) the candidate committee or election fund of any candidate for governor; (2) the candidate committee or election fund of any holder of the office of governor; (3) a state political party committee; and (4) a county political party committee. Thus, EO 134 does not apply to contributions to legislative leadership committees, municipal party committees, candidates for state legislative office, candidates for county public office and candidates for municipal office. Contributions to these persons and entities can, however, trigger scrutiny under pay-to-play statutes and ordinances governing county and municipal contracts.

EO 134 also applies to solicitors of contributions. The applicable solicitors are the same as the contributors described above, and the applicable

beneficiaries of solicitations are the same as the recipients of contributions described above. EO 134 does not define solicitation. The Division has stated that service on the host committee for a gubernatorial fundraising event is a form of solicitation.

Applicable Contributions and Solicitations

The crux of EO 134 is found in the applicable contributions and solicitations that trigger the prohibition on state contracts. First, EO 134 applies to contributions to and solicitations for a candidate committee or election fund of any candidate or holder of the office of governor, or any state or county political party committee, made within 18 months immediately preceding the commencement of negotiations for a state contract. Second, EO 134 applies to contributions to and solicitations for a candidate committee or election fund of the holder of the office of governor, or any state or county political party committee of the same party as the governor, made during the term of the office of governor. Third, EO 134 applies to contributions to and solicitations for a candidate committee or election fund of the holder of the office of governor for the next term, or any state or county political party committee of the same party as the governor for the next term, made during the eighteen months immediately preceding the last day of the current term of office of governor.

Fourth, EO 134 applies to contributions made during the preceding four years to any political organization organized under Internal Revenue Code Section 527 that is also a continuing political committee under N.J.S.A. 19:44A-3n, and which contributions the state treasurer finds pose a conflict of interest. In determining whether there is a conflict of interest, the state treasurer looks at whether the contribution appears to be an attempt to circumvent EO 134, and reviews information regarding the state contract and the political organization to determine whether there is a nexus between the contribution and the award of the contract. Finally, EO 134 provides that when a business entity agrees to a state contract of greater than \$17,500, an

applicable contributor or solicitor shall not knowingly make or solicit any contributions to a candidate committee or election fund of any candidate or holder of the office of governor, or any state or county political party committee, prior to completion of the contract.

When an applicable contributor or solicitor has made one of the first three applicable contributions and solicitations, then no state agency shall enter into an agreement or contract to procure from the business entity services, or any material, supplies, or equipment, or contract to acquire, sell, or lease any land or building that exceeds \$17,500. The Division has stated that EO 134 does not apply to Medicaid fee-for-service providers who are reimbursed by the state because there is no contract award between the providers and the state. Furthermore, if the state treasurer finds that the fourth applicable contribution poses a conflict of interest in the awarding of a contract, the state treasurer shall disqualify the business entity from bidding on or being awarded the contract. Finally, a business entity breaches a state contract when an applicable contributor or solicitor makes an applicable contribution or solicitation prior to the contract's completion.

Exemptions and Remedial Relief

EO 134 contains three exemptions. First, EO 134 exempts the award of a contract when public exigency requires the immediate delivery of goods or the performance of services, as determined by the state treasurer.

Second, when the federal government or a court of competent jurisdiction determines that barring the award of a contract would violate federal law or regulation, EO 134 does not apply. In

State of New Jersey v. Mineta, Civil No. 05-228 (D.N.J. 2005), Judge Stanley Chesler held that the federal Department of Transportation did not abuse its discretion in finding that EO 134 unduly restricts the potential bidding pool for federally funded state highway projects in violation of 23 U.S.C. § 112.

Third, EO 134 does not preclude compliance with the New Jersey Eminent Domain Act. Finally, EO 134 provides the following remedial relief. If an applicable contributor inadvertently makes an applicable contribution, it may request full reimbursement from the recipient and the contributor receives the reimbursement within 30 days after the date the contribution was made. Contributions made within 60 days of a gubernatorial primary or general election are presumed not to be made inadvertently.

Reporting Requirements

Prior to awarding a contract, the state shall require the business entity to provide a written certification that it has not made a contribution that would bar the contract's award. The business entity has a continuing duty to report any contribution that an applicable contributor makes during the term of the contract. If the state treasurer determines that any such contribution poses a conflict of interest, such contribution is deemed a material breach of the contract. In addition, prior to awarding a contract, the state shall require the business entity to report all contributions an applicable contributor made during the preceding four years to any political organization organized under Internal Revenue Code Section 527 and that is also a continuing political committee under N.J.S.A. 19:44A-3n. ■



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