



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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MAURICE A. GRIFFIN
Acting Director

October 25, 2017

Via Regular & Electronic Mail (ssharareh@foxrothschild.com)

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CORRECTED FINAL AGENCY DECISION

This decision is being reissued to correct a typographical error in the end date of the period of ineligibility.

Re: IMO Chapter 51 - Fox Rothschild, LLP
Reconsideration of Chapter 51/ EO 117 Ineligibility Determination

Dear Mr. Sharareh:

This letter is in response to your correspondence dated September 25, 2017, (“Letter”) to the Director of the Division of Purchase and Property (“Division”) requesting that the Division reconsider and rescind the decision of the Chapter 51 Review Unit (“Chapter 51 Unit”) which found that Fox Rothschild, LLP (“Fox Rothschild”) was ineligible for a contract award. Specifically, the Chapter 51 Unit concluded that Fox Rothschild had made a political contribution to the campaign or election committee of gubernatorial candidate, Kimberly Guadagno, in the amount of \$1,000 on July 6, 2017, which rendered Fox Rothschild ineligible for a new contract award by Rowan University and the Rowan University Office of Technology Commercialization (collectively “Rowan”).

BACKGROUND

By way of background, in 2013 Rowan awarded a contract to Fox Rothschild for the performance of legal services, which included in part, intellectual property matters. See, Fox Rothschild’s Letter, p. 2. On June 20, 2017, Fox Rothschild was again selected as the contract vendor to provide legal services to Rowan. See, Fox Rothschild’s Letter, p. 3. Subsequent to Fox Rothschild being selected for a contract award, on June 29, 2017, Fox Rothschild made a contribution in the amount of the amount of \$1,000 to the Guadagno for Governor campaign fund.¹ See, Fox Rothschild’s Letter, p. 3.

As a required part of the procurement process, Fox Rothschild completed and submitted to Rowan the Two-Year Chapter 51/Executive Order 117 Vendor Certification and Disclosure of Political Contributions (“Form”). On August 17, 2017, Rowan forwarded the Form to the Chapter 51 Unit for review. The Form revealed that Fox Rothschild had made the potentially disqualifying contributions indicated in the table below.

¹ See <http://www.northjersey.com/story/news/new-jersey/2017/01/17/guadagno-launches-gubernatorial-run-compassionate-conservative/96672164/>. On or about January 17, 2017, Kimberly Guadagno announced her candidacy for New Jersey Governor.

Contributor Name	Relationship of Contributor to the Vendor	Date of Contribution	Amount of Contribution	Type of Contribution (i.e. currency, check, loan, in-kind)	Recipient (Full legal name)	Address of Recipient
Nicholas Menas	Not provided	2/20/2013	\$5,295.00	Check	Christie for Governor	Not provided
Michael Malinsky	Not provided	12/7/2016	\$2,500.00	Check	Hammonton Republican Campaign 2016	Not provided
Jack Plackter	Equity partner	3/6/2017 ²	\$1,000.00	Check	Kim Guadagno	Not provided
Jacob Perskie	Not provided	3/24/2017	\$500.00	Check	Murphy for Governor	Not provided

On August 21, 2017, the Chapter 51 Unit returned the Form to Rowan and asked that the University contact Fox Rothschild and request that the firm provide the missing information, noted in the chart above in red, and the cancelled checks for each of the above listed potentially disqualifying political contributions.

On September 5, 2017, Mr. Plackter's campaign contribution to Ms. Guadagno's campaign, noted above, was refunded.

On September 6, 2017, Fox Rothschild responded by providing an amended contribution list along with an email noting the following with respect to each of the above referenced political contributions:

1. Nicholas Menas contribution to Christie for Governor: This contribution was in fact the aggregate amount by 18 separate contributors for an amount of \$294.00 each. We are providing you the attached updated Chapter 51 certification to correct this inadvertent error made in our reporting form....
2. Michael Malinsky contribution to Hammonton Republican Campaign 2016: Mr. Malinsky is not an equity partner. His name was not included in the list of equity partners in the Chapter 51 certification attached to our response to the RFP 17-77...
3. Jack Plackter contribution to Kim Guadagno: This contribution was an unintentional oversight that was made on July 6, 2017 and not March 6, 2017. We are providing you an updated Chapter 51 certification to correct this inadvertent error made in our reporting form. Mr. Plackter has requested a refund from Mr. Guadagno's campaign.
4. Jacob Perskie's contribution to Murphy for Governor: Mr. Perskie is not an equity partner. Please note that his name was not included in the list of equity partners in the Chapter 51 certification attached to our response to the RFP 17-77...Further, this contribution was timely retracted and the check was returned to Mr. Perskie Mr. Murphy's

² It was subsequently noted by Fox Rothschild that the contribution date provided on its list of contributions was in error. In fact the contribution made by the firm was by check dated June 29, 2017, and debited to the firm on July 6, 2017. Fox Rothschild has informed the Division that March 6, 2017 was the date of the original check issued to Ms. Guadagno's campaign. This check was not cashed and was later voided and reissued on June 29, 2017.

campaign. We are updating our Chapter 51 certification to correct this inadvertent error made in our reporting form.

After reviewing the supplemental information, on September 8, 2017, the Chapter 51 Unit determined that Fox Rothschild was ineligible for contract award based upon Mr. Plackter's contribution to the campaign or election committee of a gubernatorial candidate, which was in excess of the \$300 threshold. While the contribution was later refunded, the refund was made outside of the permitted statutory time frame. Accordingly, Fox Rothschild was deemed ineligible for a new contract award by Rowan University.³

On September 22, 2017, pursuant to N.J.A.C. 17:12-5.5, Fox Rothschild filed a request for reconsideration. In that request, Fox Rothschild makes the following arguments:

1. The campaign contribution was refunded and therefore should not be imputed to Fox Rothschild.
2. The campaign contribution should be exempted.
3. Mr. Plackter does not control 10% of Fox Rothschild's profits or assets and therefore the contribution should not be attributed to the firm.

Based upon these points and the fact that it sought and obtained a refund for the political contribution requested by Mr. Plackter and made by Fox Rothschild, Fox Rothschild requests that the ineligibility determination be rescinded.

On October 3, 2017, the Division issued an interlocutory decision remanding the matter to the Chapter 51 Unit for review and fact gathering with respect to Mr. Plackter's contribution and for clarification regarding Fox Rothschild's distinction between equity and non-equity partners. Specifically, the Division's interlocutory decision noted:

A review of the Chapter 51 Review Unit's record of this matter, revealed that Fox Rothschild completed and certified its *Two-Year Chapter 51/Executive Order 117 Vendor Certification and Disclosure of Political Contributions* form ("*Chapter 51 Form*") on **April 6, 2017**. Attached to that *Chapter 51 Form* was a 'contributions report', prepared by Fox Rothschild.

...

Despite Fox Rothschild's assertion that the disqualifying contribution in question occurred on July 6, 2017, it is unclear how Fox Rothschild could have listed a political contribution on its contributions report and certified to the same, on April 6, 2017, if that contribution had not yet been requested or made.

Accordingly, this matter is being remanded to the Chapter 51 Review Unit for further review and fact gathering with respect to the noted March [6], 2017 contribution. Additionally, I ask that the Chapter 51 Review Unit request that Fox Rothschild provide a clarification regarding the firm's equity v. non-equity partners.⁴

[Division's October 3, 2017 decision, pp. 1, 3.]

³ The period of ineligibility expires on January 6, 2019.

⁴ The Division's October 3, 2017, interlocutory decision contained a typographical error, which indicated that the contribution was made on March 22, 2017. Rather, the original contribution check was dated March 6, 2017.

On October 13, 2017, Fox Rothschild provided its response to the Division's interlocutory decision. With respect to Mr. Plackter's contribution, Fox Rothschild advised:

As for the contribution in question, on February 22, 2017, Mr. Plackter requested a check for the amount of \$1,000.00 for contribution to Kim Guadagno for Governor. On March 6, 2017, check number 527451 was issued for the amount requested. However, check number 527451 was not cashed by Ms. Guadagno and was subsequently voided on June 29, 2017 by Fox Rothschild. A new check was then reissued on June 29, 2017, which was submitted to Ms. Guadagno on July 6, 2017. The new report indicates a delivery date to Ms. Guadagno consistent with the information available in the ELEC records. This specific contribution which is at issue here was subsequently refunded on September 5, 2017.

As to the Division's question regarding equity verses non-equity partners, Fox Rothschild advised as follows:

Fox Rothschild has two category of partners, equity and income partners. The individual equity partner compensation is derived from the Firm's net profits based on the number of units assigned to that partner with the unit value being determined by the profits and units outstanding. The individual income partners are W-2 employees...Mr. Perskie was not listed as an equity partner in the Chapter 51 Report of April 6, 2017. His status is still that of an income partner and not an equity partner.

[Emphasis added.]

DISCUSSION

The State is charged with the duty of assuring the public that the award of State contracts is based upon merit and not political contributions made by prospective contractors. The legislative intent is to safeguard the integrity of the procurement process against "political contributions that pose the risk of improper influence, purchase of access, or appearance thereof." N.J.S.A. 19:44A-20.13. The pertinent statute, N.J.S.A. 19:44A-20.13 through 20.25 ("Chapter 51"), prohibits the State of New Jersey ("State"), any of its purchasing agents, agencies, or its independent authorities from contracting with business entities that have solicited or made certain contributions of money to any candidate committee, election fund of any candidate, any holder of the office of the Governor or Lieutenant Governor, or to any State or county political party committee within specified time frames.⁵ Therefore, to protect the integrity of government contractual decisions and to improve the public's confidence in government, the Legislature enacted the Chapter 51 Law to prohibit awarding government contracts to business entities which contribute to certain candidates, political parties and the holders of public office. See, N.J.S.A. 19:44A-20.13.

In consideration of Fox Rothschild's request for reconsideration, I have reviewed the Chapter 51 Unit's record of this matter, including the relevant statutes, regulations, and case law. This review of the record has provided me with the information necessary to determine the facts of this matter and to render an informed decision on the merits of the appeal. I set forth herein the Division's Final Agency Decision.⁶

⁵ Effective November 15, 2008, Executive Order Number 117 ("EO 117"), among other things, extended Chapter 51's limit on contracting with firms that have contributed, to include business entities contributing to any legislative leadership committee or any municipal political party committee in the same manner as those provisions apply to a contribution to any candidate committee, election fund, or State or county political party committee referenced in Chapter 51.

⁶ First, with respect to the contributions made by Mr. Menas, Mr. Malinsky and Mr. Perskie, a review of the facts of this matter reveals that none of those contributions would result in Fox Rothschild being

1. Whether the refunded campaign contribution must be imputed to Fox Rothschild.

First, in support of its request that the ineligibility determination be rescinded, Fox Rothschild states that Mr. Plackter's contribution, which was in the form of a check issued by the firm, was refunded. Fox Rothschild alleges that the refund was received 46 days after the contribution was made. See, Fox Rothschild's Letter page 4. A review of the records maintained by the State's Election Law Enforcement Commission (<http://www.elec.state.nj.us/>) reveals however, that Fox Rothschild's contribution to Ms. Guadagno's campaign was made on July 6, 2017 and the refund was received by Fox Rothschild on September 5, 2017. This is a period of 61 calendar days after contribution had been made.⁷

Chapter 51 provides a very narrow window within which a business entity may neutralize the effect of an inadvertent and/or prohibited political contribution and maintain its eligibility for State contracts. N.J.S.A. 19:44A-20.20 provides in part:

If a business entity inadvertently makes a contribution that would otherwise bar it from receiving a contract or makes a contribution during the term of a contract in violation of this act, the entity may request a full reimbursement from the recipient and, if such reimbursement **is received within 30 days after the date on which the contribution was made**, the business entity would again be eligible to receive a contract or would no longer be in violation, as appropriate.

[Emphasis added.]

The Chapter 51 requirement that a refund be received within 30 days after the contribution is made has been explained and upheld by the Appellate Division in In Re Earle Asphalt, 401 N.J. Super. 310 (App. Div. 2008) aff'd o.b. 198 N.J. 143 (2009), wherein the court affirmed that both the request for reimbursement and actual receipt of reimbursement must occur within 30 days of the disqualifying contribution.

In the present matter, the disqualifying political contribution was made on July 6, 2017. The refund check was issued on September 5, 2017, 61 days later. However, even if the Chapter 51 Unit were to accept the Fox Rothschild's calculation of 46 days as the timeframe within which the refund was received, the statutory requirement has not been met. In either scenario, more than 30 days passed from Fox Rothschild's disqualifying contribution until it received the refund. In addition, I note that N.J.S.A. 19:44A-20.20 does not contain any "discovery" rule or relaxation provision which would permit a period greater than 30 days for receipt of the refund. The Court in In Re Earle Asphalt had the opportunity to carve out a discovery rule exception and chose not to do so. Thus, Fox Rothschild exceeded the legal threshold with its contribution to Ms. Guadagno's campaign and failed to obtain a refund within the statutorily permitted timeframe. Therefore, the Chapter 51 Unit properly determined that Fox Rothschild is ineligible for contract award.

disqualified from a contract award. Specifically, a review of the records maintained by State's Election Law Enforcement Commission reveals that the contribution in the amount of \$5,295.00 originally attributed to Mr. Means was in fact 18 separate contributions, each less than \$300. Therefore, none of these contributions results in a disqualification under New Jersey Pay-to-Play laws. With respect to the contributions made by Mr. Malinsky and Mr. Perskie, neither gentleman is an equity partner with the firm. Neither Mr. Malinsky nor Mr. Perskie is responsible for the operations of the firm; nor is their compensation derived from the firm's profits. Therefore, neither contribution is attributable to the firm. See, N.J.A.C. 19:25-26.1, and N.J.A.C. 19:25-26.6(b).

⁷ Fox Rothschild's calculation of the days until the refund was made appears to only count the business days between the date the contribution was requested (June 29, 2017) and the date that the refund was received (September 5, 2017).

2. Whether the campaign contribution should be exempted.

Second, Fox Rothschild asserts that public exigency justifies the granting of an exemption from the requirements of Chapter 51. In support of its position, Fox Rothschild states more than 90% of its work for Rowan during the last four years has been in the area of patent law. See, Fox Rothschild's Letter page 4. In that time it has handled virtually all of Rowan's patent matters, and currently it is working on numerous patent matters which have pending deadlines. See, Fox Rothschild's Letter page 4. Fox Rothschild notes that it has been successful in obtaining 14 patents in the last four years, "many of them with the goal of improving public health and advancing life science technologies in the South Jersey corridor." See, Fox Rothschild's Letter page 5. Moreover, Fox Rothschild claims that it is

uniquely positioned to assist Rowan in achieving its commercial goal through its Early Stage, Corporate and Health Care practice groups. OTC personnel frequently consulted Fox Rothschild as to the patent life cycle strategy that distinctively fits the Rowan scientists' expertise and fits the Rowan OTC economic model. To that end, disrupting the existing relationship will pose significant harm to the State Agency and their reliance on Fox Rothschild.

[Fox Rothschild's Letter page 5.]

Therefore, Fox Rothschild alleges that:

[t]he timing of the disqualification also favors rescinding the Ineligibility Notice. Many of the matters being handled by Fox Rothschild follow strict timelines and deadlines that need to be monitored. Reinventing the attorney-client relationship with Rowan's inventors and the OTC particularities and familiarizing Rowan's internal policies can cause great disruption of Rowan's commercial goals, causing more harm than good.

[Fox Rothschild's Letter page 5.]

N.J.S.A. 19:44-20.22 states that "this act shall not prohibit the awarding of a contract when the public exigency requires the immediate delivery of goods or performance of services as determined by the State Treasurer." See also, Communications Workers of America, AFL-CIO v. Christie, 413 N.J. Super. 229, 244 (App. Div.) (stating "in situations of public exigency, the statute does provide an exemption for contracts requiring the immediate delivery of goods or the performance of services.") The Division's Chapter 51/Executive Order 117 Question and Answer further clarify the public exigency exception stating:

8. In cases where the public exigency requires the immediate purchase of goods or services, what will the Chapter 51 Review Unit require in terms of justification and/or supporting documentation?

Answer: Chapter 51 provides that the Treasurer may exempt compliance from Chapter 51 and EO 117 in the case of a public exigency. Please see below for Public Exigency guidelines. Accordingly, agencies need not request that the vendor execute the Two Year Chapter 51/Executive Order 117 Vendor Certification and Disclosure of Political Contributions form, but instead, should send a request to the Treasurer explaining why the Treasurer should exempt the procurement as a public exigency.

Public Exigency - must be an emergency that affects the public health, safety, or welfare or a critical agency mandate which requires the

immediate delivery of goods or performance of services or involves a contract for specific goods or services that:

- a. Must be provided by a specific vendor; and,
- b. The timing of the procurement does not make compliance with Chapter 51 practical or possible; and
- c. The procurement is consistent with the intentions of pay-to-play laws.

An example of this would be a procurement where the goods or services are only available from a single source and the single source vendor's action prevents or stymies application of the law. In these cases, the public agency can request approval from the Treasurer.

At the outset, I note that under the statute, a public exigency exception cannot be granted by the Chapter 51 Unit or the Director of the Division of Purchase and Property. Rather, such an exemption can only be granted by the State Treasurer.

With respect to Fox Rothschild's allegation, Fox Rothschild has not demonstrated to the Division that a public exigency exists. There are no facts presented in the record before me that an emergency exists that affects the public health, safety or welfare; or that there is a critical agency mandate requiring the immediate performance of services by Fox Rothschild. While Fox Rothschild may have developed a relationship with the employees of Rowan during its prior contract term, and the Rowan employees may have come to rely upon the expertise of the Fox Rothschild attorneys, such interdependence does not create a situation where the legal services offered by Fox Rothschild are a sole or single source.

Accordingly, Fox Rothschild has not demonstrated that a public exigency exists.

3. Whether Mr. Plackter's control of less than 10% of Fox Rothschild's profits or assets, results in the contribution being attributed to the firm.

Third, Fox Rothschild states that Mr. Plackter, though an equity partner in the firm, does not control 10% of the firm's profits or assets; therefore, the contribution should not be attributed to the firm. In support of its position, Fox Rothschild relies upon the Appellate Division's decision in Communications Workers of America v. Christie, 413 N.J. Super. 220 (App. Div. 2010), wherein the Court held paragraph 1 of Executive Order #7 (hereinafter "EO 7"), which expanded the definition of a "business entity" to include labor unions and labor organizations, violated the doctrine of the separation of powers. CWA, supra, 413 N.J. Super. at 233. Fox asserts that EO 117, which expanded the definition of "business entity" to include "partners" similarly violates the law.

Fox Rothschild's reliance on the Appellate Division's decision in CWA, is misplaced. There, six labor organizations challenged EO 7 stating "that EO 7 transgresses their rights of free speech, political association, and equal protection under the Federal and State Constitutions." Id. at 235. In reviewing the legislative history of New Jersey's Chapter 51 pay-to-play laws, the Appellate Division stated:

Like both Chapter 19 and EO 134 which preceded it, Chapter 51 seeks to thwart pay-to-play activities that can improperly influence government procurement decisions. The preamble to Chapter 51 expressing the Legislature's findings and declarations of policy, N.J.S.A. 19:44A-20.13, is derived substantially--at times verbatim--from the preamble to EO 134. The statutory preamble replicates EO 134's multiple references to "procurement" and to procurement-related concepts such as "the selection of State contractors," and the "award" of a contract to a "bidder." Neither

the text nor the preamble of Chapter 51 makes any references to labor unions, labor organizations, or collective bargaining.

[Id. at 242-45, emphasis added, internal citations omitted.]

With respect to EO 7, the Appellate Division noted that:

[t]he constitutionality of EO 7 is not bolstered by the issuance of prior executive orders by Governors McGreevey and Corzine. Those prior orders were aimed at traditional procurement and public contracting, not collective negotiations. EO 7 is of an entirely different stripe. It alters the definition of a “business entity” in a manner fundamentally different from what was pursued in EO 134, EO 117, and EO 118.

[CWA, supra, 413 N.J. Super. at 272-73.]

The Appellate Division “conclude[d] that paragraph 1 of EO 7, at least insofar as it is intended to treat collective bargaining agreements as “contracts” and labor unions as “business entities,” is so fundamentally incompatible with our existing laws and statutes as to impair the “essential integrity” of the constitutional powers of the Legislature.” Id. at 274.

The applicability of EO 117 to Mr. Plackter is more properly addressed by I/M/O the Appeal of Langan Engineering & Environ. Serv., Inc., where the Appellate Division confirmed that “EO 117 does not encroach upon unrelated legislative enactments, which was the case in CWA. [and therefore,] reject[ed] appellant’s argument that EO 117 is unconstitutional.” 425 N.J. Super. 577, 589 (App. Div. 2012). Contrary to Fox Rothschild’s belief, Chapter 51 and Executive Order 117, encompass and apply to both the business entity and all individuals whose contributions are attributable to the business entity. N.J.S.A. 19:44A-20.17 adopted March 22, 2005, defines “business entity” as:

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 organized under the laws of this State or any other state or foreign jurisdiction. The definition of a business entity includes: (i) all principals who own or control more than 10 percent of the profits or assets of a business entity or 10 percent of the stock in the case of a business entity that is a corporation for profit, as appropriate; (ii) any subsidiaries directly or indirectly controlled by the business entity; (iii) any political organization organized under section 527 of the Internal Revenue Code that is directly or indirectly controlled by the business entity, other than a candidate committee, election fund, or political party committee; and (iv) if a business entity is a natural person, that person's spouse or child, residing therewith, are also included within this definition.

Executive Order 117 signed on September 24, 2008, with an effective date of November 15, 2008, expands the definition of the “business entity”. With respect to limited liability partnerships, like Fox Rothschild, the “business entity” shall include “the limited liability partnership and any partner.” Emphasis added. Further, the regulations governing the State’s Election Law Enforcement Commission, define “Partner” as:

one of two or more natural persons or other entities, including a corporation, who or which are joint owners of and carry on a business for profit, and which business is organized under the laws of this State or of any other state or foreign jurisdiction, as a general partnership, limited

partnership, limited liability partnership, limited liability company, limited partnership association, or other such form of business organization.

[N.J.A.C. 19:25-26.1.]

Moreover, the regulations note that:

(b) For the purposes of this subchapter, when a business entity is other than a natural person, a contribution made by any of the following shall be deemed to be a contribution by the business entity:

1. A person or other business entity having an interest in the business entity;
2. A principal, partner, officer, director, or trustee of the business entity;
3. The spouse of a principal, partner, officer, director, or trustee of the business entity;
4. A subsidiary directly or indirectly controlled by the business entity; and
5. A continuing political committee organized under section 527 of the Internal Revenue Code that is directly or indirectly controlled by the business entity.

[N.J.A.C. 19:25-26.6(b).]

Neither definition confines a partner to a person having a 10% or greater interest in the business. Rather, partner is defined as a person having an interest in the business entity. As an equity partner, Mr. Plackter's "compensation is derived from the Firm's net profits;" and therefore, he has an interest in the business entity. See, Fox Rothschild's October 13, 2017 Letter. Mr. Plackter is thus subject to the EO 117 requirements.

Accordingly, no matter how minimal the equity interest a partner holds in a limited liability partnership, the partner's contributions are attributed to the limited liability partnership. Therefore, Mr. Plackter, as an equity partner in Fox Rothschild, is subject to both Chapter 51 and EO 117, which regulate campaign contributions by limited liability partnerships, and his contribution is attributable to the firm.

CONCLUSION

Based upon this review and for the reasons discussed above, I am unable to overturn the Chapter 51 Unit's determination that Fox Rothschild is ineligible for a contract award for a period of 18 months through January 6, 2019. This is my final agency decision with respect to the request for reconsideration submitted by Fox Rothschild.

By copy of this letter, I am notifying Rowan University of this decision.

Sincerely,



Maurice Griffin
Acting Director

MAG: RUD

c: A. Davis
R. Storino
R. Yufer