



State of New Jersey

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June 9, 2017

Via Regular & Electronic Mail (cbrown@cov.com)

Caroline Brown, Esq.
Covington & Burling, LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956

**Re: Covington & Burling, LLP
Reconsideration of Chapter 51/ EO 117 Ineligibility Determination**

Dear Ms. Brown:

This letter is in response to your correspondence dated May 3, 2017 (“Letter”) which seeks reconsideration of the initial determination made by the Chapter 51 Review Unit (“Review Unit”) of the Division of Purchase and Property (“Division”) that the political contribution made by Covington & Burling, LLP (“Covington”) rendered it ineligible for a contract award. Specifically, the Review Unit concluded that Covington’s contribution to the campaign or election committee of gubernatorial candidate, Philip Murphy, in the amount of \$2,000 on October 10, 2016 rendered Covington ineligible for a new contract award by the State of New Jersey, Division of Law, Department of Law & Public Safety (“DLPS”). The Review Unit determined that the period of ineligibility would expire on April 10, 2018.

BACKGROUND

By way of Background, on or about May 20, 2016 Phil Murphy announced his candidacy for New Jersey Governor.¹ On October 10, 2016, Frank Conner, a partner at Covington, made a contribution in the amount of \$2,000 to primary election campaign of Philip Murphy.² See, Covington Appeal Letter page 2. On February 21, 2017 the campaign contribution was refunded.

In 2017 the DPLS sought to enter into a contract with Covington as Special Counsel. On or about March 27, 2017, as a required part of the procurement process, Covington completed and submitted the New Jersey Division of Purchase and Property Two-Year Chapter 51/Executive Order 117 Vendor Certification and Disclosure of Political Contributions (“Chapter 51 Form”) to

¹ See NJ.com at http://blog.nj.com/phil_murphy_for_governor/2016/05/phil_murphy_announces_candidac.html.

² Mr. Conner’s contribution of \$2,000 was made by credit card to “Murphy for Governor”.

the Review Unit for recertification. The Chapter 51 Form revealed that Covington had made a potentially disqualifying contribution.

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
Frank Conner*	Partner* [*Note: Frank M. Conner, III is listed a partner of the applicant/business entity.]	10/10/2016	\$2,000	Check	Philip Murphy	One Gateway Center, Suite 1025, Newark, NJ 07102
Frank Conner*	Partner*	2/28/2017** [Note: The refund was beyond the 30 day period provided in <u>N.J.S.A. 19:44A-20.20</u>]	-\$2,000 [Refund]	Refund Check	Philip Murphy	One Gateway Center, Suite 1025, Newark, NJ 07102

Accordingly, on March 29, 2017, the Review Unit returned the Chapter 51 Form to Covington and advised Covington that the Form revealed a potentially disqualifying political contribution to the campaign and/or election committee of a gubernatorial candidate. The Review Unit requested a copy of the cancelled check (front and back) for the above noted political contribution.

On April 3, 2017, the DLPS forwarded Covington’s Chapter 51 Form to the Review Unit along with a copy of Covington’s Business Entity Annual Statement (BE Form) dated March 26, 2017. The BE Form disclosed the same political contribution to a gubernatorial candidate. In addition the BE Form referenced three (3) current contracts with DLPS.³

On April 18, 2017, the Review Unit sent a follow-up email to Covington regarding the request for copies of the cancelled checks. On the same date, Covington replied and provided the requested information.

On April 19, 2017, the Review Unit determined that Covington was ineligible for contract award based upon the noted contribution to Philip Murphy’s campaign. Specifically, the contribution was in excess of the \$300 threshold and made to the campaign or election committee of a gubernatorial candidate. The ineligibility determination was emailed to the DLPS and Covington. On the same date, the Review Unit advised the DLPS that it had completed its review of Covington’s Chapter 51 Form and determined that Covington was “ineligible for contract award at this time because of a political contribution made to the campaign or election committee of any gubernatorial candidate.” See, Storino email dated April 19, 2017; N.J.S.A. 19:44A-20.13.

³ The Review Unit informed the DLPS that it had previously received the same Chapter 51 Form from Covington and that it had requested a copy of the cancelled political contribution check(s) and was awaiting a reply.

On April 21, 2017, the Review Unit further advised the DLPS that “pursuant to N.J.S.A. 19:44A-20.21, it is a breach of contract to make a reportable contribution to a campaign committee of any candidate or holder of the public office of Governor or to any State or county party committee during the term of the contract.” See, Storino email dated April 21, 2017. The Review Unit instructed the DLPS to review any current contracts with Covington and take appropriate action.

Subsequently, the DLPS determined that Covington was ineligible and/or disqualified from entering into a new contract with the DLPS as Special Counsel. The Review Unit was not advised whether Covington’s existing contracts with the DLPS were cancelled.

On May 3, 2017, pursuant to N.J.A.C. 17:12-5.5, Covington filed a request for reconsideration.

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. 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.

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.⁴

In its request for reconsideration, Covington makes the following arguments:

- A. New Jersey law does not require cancelation of the existing Covington contracts.
- B. The ineligibility determination is inconsistent with New Jersey Statutes and Regulations.

Based upon these points and the fact that it sought and obtained a refund for its political contribution, Covington requests that the ineligibility determination be overturned.

⁴ 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.

In consideration of Covington's request for reconsideration, I have reviewed the Chapter 51 Review 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.

A. Cancellation of Existing Contracts

First, Covington alleges that New Jersey law does not require that existing contracts be cancelled because of a post-contract award violation of applicable laws; rather, Covington claims that the "penalty for the violation of these rules is that the business entity is not eligible for future contract with the state valued over \$17,500 for eighteen months following the contribution." See, Covington Appeal Letter page 2.

With respect to Covington's first argument, N.J.S.A. 19:44A-20.21 states in pertinent part: "[i]t shall be a breach of the terms of the government contract for a business entity to: (i) make or solicit a contribution in violation of this act." Accordingly, on April 21, 2017 the Review Unit advised DLPS to review Covington's existing contract and take any appropriate action it deemed necessary.

The cancellation of an existing contract would be by the relevant contracting State Agency, here DLPS, not the Division. In fact, it is not clear whether any of Covington's existing contracts with DLPS have been cancelled, as neither DLPS nor Covington has explicitly stated that any specific contracts have been cancelled. Even if the existing DLPS contracts were cancelled, the Division has no authority to reverse a contract cancellation made by another State Agency. Therefore, this argument should be properly raised to DLPS.

B. The Ineligibility Determination is Consistent with New Jersey Statutes and Regulations

Second, Covington states that the Review Unit's April 19, 2017 ineligibility determination is inconsistent with New Jersey Statutes and Regulations. Covington asserts that the "aggregate" political contribution is zero based upon the fact that Mr. Conner, the partner who made the \$2,000 political contribution to Philip Murphy, received a refund before the primary election. In support of its argument, Covington relies upon N.J.A.C. 19:25-24.1 which reads in pertinent part:

"Contribution reportable by the recipient" shall mean a currency contribution in any amount or a contribution or contributions in excess of \$300 in the aggregate per election made to or received by a candidate committee or joint candidates committee or per calendar year made to or received by a political party committee or legislative leadership committee.

[N.J.A.C. 19:25-24.1, *emphasis added.*]

While Covington may be correct that effectively it has not made an aggregate contribution in excess of \$300, Covington's disqualification was not based solely upon the fact that it made a

contribution, but also because it failed to seek and obtain the refund within the statutorily permitted timeframe.

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 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.

Covington exceeded the legal threshold when it made its contribution to Philip Murphy in the amount of \$2,000 which is in excess of the \$300 threshold and Covington failed to obtain a refund within the statutorily permitted timeframe. The disqualifying political contribution was made on October 10, 2016. The refund check was issued February 28, 2017, 141 days later. Thus, more than 30 days passed from Covington'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, Covington exceeded the legal threshold with its contribution to Philip Murphy and failed to obtain a refund within the statutorily permitted timeframe. Therefore, the Review Unit properly determined that Covington is ineligible for contract award.

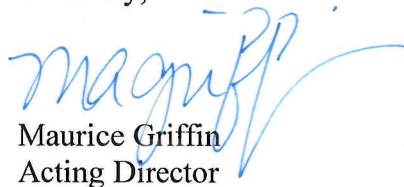
Finally, I note that N.J.S.A. 19:44A-20.14 includes a range for the period of ineligibility from 18 months to 5 ½ years depending upon the recipient of the political contribution(s) and the timing of same. Here, the Review Unit determined that the applicable period of ineligibility is 18 months, the minimum time frame provided by statute.

CONCLUSION

Based upon this review and for the reasons discussed above, I am unable to overturn the Review Unit's determination that Covington is ineligible for a contract award for a period of 18 months through April 10, 2018. This is my final agency decision with respect to the request for reconsideration submitted by Covington.

By copy of this letter, I am notifying the State of New Jersey, Department of Law & Public Safety, and Division of Law of this decision.

Sincerely,


Maurice Griffin
Acting Director

MAG: RS

c: A. Davis, DPP
R. Gibson, DPP
B. Mitchell, DOL