

New Illinois Pay-To-Play Laws

As of January 1, 2009, Illinois will have one of the most stringent “Pay-To-Play” laws in the country. In general, a so-called state or local “Pay-To-Play” law prohibits a government contractor or prospective government contractor from making a political contribution to a political candidate or officeholder that awards government contracts or has influence over procurement decisions. Violations of these “Pay-To-Play” laws may result in criminal or civil penalties for a government contractor. In some states and localities, in addition to these type of penalties, a state contract may be voided or not awarded to a public contractor or prospective public contractor who violates the law. This client advisory will only focus on Illinois’ new Pay-To-Play Executive Order and statute.¹ As discussed in this advisory, the Executive Order is broader than the law passed by the legislature over the Governor’s veto.

HIGHLIGHTS OF ILLINOIS EXECUTIVE ORDER NUMBER 3 (2008) (“EXECUTIVE ORDER”)

The Executive Order was issued by Governor Blagojevich on August 25, 2008 and was filed with the Secretary of State on August 26, 2008. The effective

date of the Executive Order is January 1, 2009, and it only applies to state procurements entered into on, or after, January 1, 2009 (not retroactive). The Executive Order generally applies to state contactors and those business entities and affiliated persons which seek state contracts with an aggregate value of \$50,000 for a calendar year (certain cost reimbursement contracts, purchase of care agreements, and grants are exempt from the Executive Order). Additionally, the Executive Order applies from the time a state RFP or bid invitation is issued through two years after a contract ends.

The Executive Order prohibits most Illinois state government contractors from contributing to officeholders and candidates for the office of Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller, Treasurer, General Assembly, and any committee of a political party represented by one of the above candidates or officeholders. (Note, that the Illinois statute, discussed herein, does not include contributions to General Assembly candidates or political parties.)

Covered state contractor donors include:

- The contractor business entity and any subsidiary, affiliate or parent of the business entity;
- Executives of the above business entities and their spouses and minor children;
- Any person with an ownership interest in excess of 7.5 percent of the business entity or its parent, affiliates, or subsidiaries; and

¹ Under Illinois state lobbying laws, seeking state contracts may be considered “procurement lobbying” and subject to state lobbying registration and reporting laws. In Illinois, “lobbying” means any communication with any covered official of the executive branch or legislative branch of state government for the purpose of influencing executive, legislative, or administrative action. Covered officials include the Governor, Lieutenant Governor, Attorney General, Secretary of State, State Treasurer, State Comptroller, and their chiefs of staff, cabinet members of any elected constitutional officers, including Directors, Assistant Directors, Chief Legal Officers and General Counsel, and Members of the General Assembly. Additional information regarding Illinois lobbying laws may be found at <http://www.cyberdriveillinois.com/departments/index/lobbyist/home.html>.

- Any 501(c) organization or political action committee established or controlled by the above persons or entities.

Penalties

As of January 1, 2009, a state contractor will be required to provide written certification of compliance with the Executive Order. Any improper contribution by any of the aforementioned covered business entities or persons shall entitle the State to terminate any relevant contract without any additional compensation to the business entity. Three or more violations by the business entity shall result in a three year procurement ban from the date of the last violation for the business entity.

Right To Cure

An inadvertent improper contribution is not a violation of the Executive Order if the covered entity or person requests a full refund within thirty days after the contribution was made. However, this right to cure exception is not applicable to contributions made within sixty days of a gubernatorial primary or general election. Such contributions are not curable under the Executive Order.

HIGHLIGHTS OF PUBLIC ACT 095-0971 (“ACT”)

The Governor originally vetoed HB 0824 and then promulgated an Executive Order. The legislature reconvened and overrode the Governor’s veto and passed the Act on September 25, 2008. The Act has the same effective date and similar penalties as the Order, except the Act has additional monetary penalties for registration violations. Covered donors are similar to those found in the Executive Order, but the Act includes a clarifying definition of “executive employee.” Under the Act, an “executive employee” includes the President, CEO, Chairman, executives with decision making authority over the contracting business entity and employees whose compensation largely depends on state government contracts. Additionally, covered donors do not include executives from affiliates, subsidiaries, and a parent company or their spouses and minor children like the Executive Order.

Applicable Covered Periods

- For contractors with state contracts, the applicable prohibited period runs to the end of the term of office of the incumbent who awarded the contract (in some cases the Governor will be deemed to have awarded the contract) or two years after the end of the contract, whichever is longer.
- For unsuccessful bidders, the applicable prohibited period is the date the RFP/solicitation is issued to the day after the contract is awarded.

Covered Recipients

Covered recipients of contractor donations are the same under the Order and the Act, with two major exceptions. The Act does not apply to contributions to officeholders and candidates for the General Assembly and to contributions to political parties.

Registration and State Board of Elections Database

The Act requires state government contractors and affiliated covered persons to file a combined electronic registration statement with the State Board of Elections. The State Board of Elections will establish a public database with all of the relevant contractor entities and persons (minor children names will not be made public) and issue a registration certificate to the contractor.

WHAT IS NEEDED?

As discussed in this Advisory, the Executive Order and Act are substantively different. It is currently unclear how differences will be addressed and reconciled by the Governor, Attorney General, and the courts. Additionally, some of the provisions of the Executive Order and statute are clearly open to interpretation and are in need of additional guidance from the State of Illinois. Nevertheless, Illinois state contractors should take steps now to create internal policies and compliance programs to deal with one of the toughest Pay-To-Play laws in the country.

CAMPAIGN FINANCE & POLITICAL LAW PRACTICE

Kelley Drye helps its clients succeed in the political arena by guiding them past the legal pitfalls that could lead to civil and even criminal penalties and adverse scrutiny. Through our comprehensive, continuing focus on evolving campaign finance and ethics rules and the tactics of enforcement authorities, we shape clients' advocacy programs, compliance approaches and defensive measures to reduce vulnerabilities and address problems. Many diverse corporations, trade associations and labor organizations turn to us for continuing assistance on government ethics, lobbying, and campaign finance and election law. We create tailored lobbying, government ethics, and political activity compliance programs for our clients designed to train employees on the relevant laws, reinforce the right behaviors, and clarify when to ask for guidance.

**For more information about this
Client Advisory, please contact:****DAVID E. FRULLA**

(202) 342-8648

dfrulla@kelleydrye.com**ROBERT R. COHEN**

(202) 342-8890

rcohen@kelleydrye.com