



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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FORD M. SCUDDER
Acting State Treasurer

JIGNASA DESAI-MCCLEARY
Director

March 9, 2016

Brian S. Montag, Esq.
K&L Gates LLP
One Newark Center, Tenth Floor
Newark, NJ 07102

**Re: Della Pello Paving, Inc.
Reconsideration on Remand of Chapter 51/EO 117 Ineligibility, Department of Transportation**

Dear Mr. Montag:

The State of New Jersey ("State") has received your letter to Ford M. Scudder, Acting State Treasurer, dated December 1, 2015 ("Letter"). The Letter requests that the Department of the Treasury ("Treasury") reconsider the ineligibility of Della Pello Paving, Inc. ("Della Pello Paving"), under P.L. 2005, c. 51, as amended, ("Chapter 51") based on additional documentation in support of Della Pello Paving's position. You also request that Treasury clarify the term of ineligibility imposed under Chapter 51 (N.J.S.A. 19:44A-20.13-20.25). The Treasurer reviewed the Letter and remanded the matter to the Division of Purchase and Property ("Division") for consideration in light of the addition to the record. This constitutes the second reconsideration decision.

Chapter 51 prohibits the State, its purchasing agents, agencies, or independent authorities from contracting with business entities that have solicited or made any contribution of money to any candidate committee or election fund of any candidate for, or any holder of the public office of the Governor, or to any State or county political party committee ("CPPC") within specified time frames. Effective November 15, 2008, Executive Order Number 117 ("EO 117"), 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 CPPC identified in Chapter 51.

The legislative findings associated with Chapter 51 place the utmost importance on the State's compelling interests in prohibiting the award of government contracts to business entities that are contributors to certain political parties and holders of public office. N.J.S.A. 19:44A-20.13. The State is charged with the duty of assuring the public that the selection of State contracts is based upon merit and not political contributions made by contractors. Ibid. The legislative intent is to safeguard against political contributions that pose the risk of improper influence or purchase of access and contributions that create the perception or appearance thereof. Ibid.

Procedural History

The New Jersey Department of Transportation ("DOT") issued a bid for paving services related to the DOT's Route 46, Fox Hill Road to Columbus Way project, Contract No. 044133320 ("Project"). After Della Pello Paving was selected by DOT as the apparent low bidder for the Project, it submitted a New Jersey Division of Purchase and Property Two-Year Chapter 51/EO 117 Vendor Certification and Disclosure of Political Contributions ("Certification") to the DOT, dated June 1, 2015. The DOT forwarded the Certification to the Division's Chapter 51 Unit for review. Della Pello Paving's Certification, signed by Valentino Della Pello, Jr., President of Della Pello Paving, certified that on April 9, 2014, Della Pello Paving made a \$500.00 contribution by check ("Contribution") to "Somerset County Republican Org.," located at 66 East Main Street, Somerville, New Jersey 08876.

Based on New Jersey Election Law Enforcement Commission ("ELEC") records, the "Somerset County Republican Organization" is the name used by the Somerset County Republican Executive Committee. The Somerset County Republican Executive Committee is a CPPC that is registered and filing with ELEC. The Chapter 51 Unit reviewed the matter and on June 9, 2015, determined the Contribution to the CPPC to be disqualifying for the Project contract.

During the pendency of this remand, the Division received information that Della Pello Paving had submitted a bid on the DOT's re-advertisement of the above contract. Della Pello Paving also submitted a bid on another DOT contract, for Maintenance Roadway Repair Contract Central, Sub-Region C-2, Contract No.C-209, DP 15441 Routes 28, 91, 172 and I-287 NB in Middlesex and Somerset Counties, for which it was the apparent low bidder. This reconsideration decision addresses Della Pello Paving's eligibility for all of these bids.

By letters from Della Pello Paving's former counsel to me dated June 19 and July 9, 2015, Della Pello Paving requested reconsideration of the Chapter 51 Unit's disqualification and requested that the Division stay the DOT's award of the contract, or to confirm that no contract would be awarded by the DOT pending reconsideration of the Chapter 51 determination. The June 19, 2015 letter argued the Chapter 51 Unit's determination was in error because the Contribution was issued to support a cocktail reception as a fundraiser for the pending election of Peter Palmer and Robert Zaborowski to the County Freeholder Board. It noted that the invitation to the cocktail reception reflected a ticket cost of \$500.00 and that checks could be made out to either the Somerset County Republican Organization, or the Committee to Elect Palmer and Zaborowski. However, Della Pello Paving stated its office manager "filled out the check to the Somerset County Republican Org to Elect Provenzano ... because it was computer generated at the request of Elisa Hauk in the Della Pello Paving, Inc." A copy of the check and the invitation were provided. The July 9, 2015 letter stated that the Contribution had been returned "within 30 days of it being first brought to Della Pello Paving, Inc.'s attention, and as a result of Della Pello's immediate request for return of the funds." A copy of the refund check dated July 8, 2015, from the Somerset County Republican Executive Committee was enclosed. Della Pello Paving argued it was not until it received notification of its ineligibility from the Chapter 51 Unit that it realized its check "has been improperly endorsed and deposited into the Somerset County Republican Committee's own bank account." Rather, it argued for the first time, the Contribution was intended for the Committee to Elect Sheriff Frank Provenzano.

By my first reconsideration response dated August 12, 2015, I concluded that pursuant to Chapter 51, I was without discretion to overturn the Chapter 51 Unit's ineligibility determination. I further concluded that the requests as to the DOT were beyond the scope of the Chapter 51 reconsideration request. Factually, I rejected Della Pello Paving's assertion that the Contribution was intended for the Committee to Elect Palmer and Zaborowski, or the Committee to Elect Provenzano, because the invitation stated "Al Gaburo, Chairman and the Somerset County Republican Executive Committee" was hosting a cocktail reception, which was paid for by the Somerset County Republican Organization. Further, the Contribution check payable to "Somerset County Republican Org to Elect Provenzano" was not one of the payee options on the invitation, but was partially consistent with the option to contribute to the "Somerset County Republican Organization." I then reviewed ELEC records to better understand the discrepancy between the check payee and the invitation, which revealed Frank Provenzano last ran for re-election as Somerset County Sheriff in 2013 and was not a candidate for election at the time the contribution was made on April 9, 2014.

I also rejected Della Pello Paving's argument that the contribution was cured by the CPPC's recent return of the contribution, because the "discovery rule" argument was inconsistent with N.J.S.A. 19:44A-20.20 and In re Earle Asphalt Co., 401 N.J. Super. 310 (2008), *aff'd o.b.*, 198 N.J. 143 (2009). A business entity that makes an inadvertent contribution must request and receive reimbursement of it within 30 days after the date on which it was made. N.J.S.A. 19:44A-20.20. The Contribution was made on April 9, 2014, and its return was not requested or received until after June 10, 2015, more than a year after it was made. Therefore, Della Pello Paving did not comply with N.J.S.A. 19:44A-20.20.

By letter from Della Pello Paving's former counsel dated August 27, 2015, and letters from Della Pello Paving's current counsel dated September 16 and September 23, 2015, to then Acting State Treasurer, Robert A. Romano, Della Pello Paving requested a stay and a reversal of my August 12, 2015, reconsideration decision, which upheld the determination of the Chapter 51 Unit that Della Pello Paving is ineligible for the DOT's contract. In those submissions, for the first time, Della Pello Paving contended that Della Pello Paving has "been a strong supporter of Sheriff Provenzano" for "many years" and "made contributions to Sheriff Provenzano's election campaign with the same payee identifying information on contribution checks in the past." It also contended, "Although Sheriff Provenzano last ran for re-election in 2013, Della Pello became aware that his campaign continued to have expenses, and in fact, Sheriff Provenzano's election committee maintained a bank account long after 2013." Della Pello Paving stated it fully believed the contribution would be deposited into the account for the Committee to Elect Provenzano and had no reason to believe it would be "improperly deposited" into the CPPC's account. Della Pello Paving also argued that the thirty-day period for return of inadvertent contributions should not apply where the "check had been misapplied – through no fault of Della Pello."

On October 26, 2015, Acting State Treasurer Romano denied a stay of the Division's August 12, 2015 decision and upheld the determination of Della Pello Paving's ineligibility to be awarded a State contract pursuant to Chapter 51. Acting State Treasurer Romano noted Della Pello Paving's June 1, 2015 Certification reported a contribution to "Somerset County Republican Organization" with an address at 66 East Main Street, Somerville, New Jersey, the name and address for the Somerset County Republican Executive Committee, which was a CPPC registered with ELEC. Acting State Treasurer Romano noted the disclosure in the Certification was consistent with the invitation that solicited the contribution. Acting State Treasurer Romano reviewed ELEC filings made by Sheriff Provenzano's campaigns between 2007 and 2014 and determined that none of those filings with ELEC listed any contributions by Della Pello Paving for Sheriff Provenzano's 2007, 2010, or 2013 primary or general campaigns.¹ Contrary to Della Pello Paving's assertion that the Provenzano campaign had ongoing expenses, Acting State Treasurer Romano reviewed the October 15, 2014 final Report of Contributions and Expenditures R-1 filed by the Committee to Elect Provenzano, which established that during 2014 it had no expenditures, received no contributions over \$300.00, and had no remaining balance in its account after a disbursement of remaining funds to the Somerset County Republican Executive Committee on October 14, 2014. Acting State Treasurer Romano noted that even accepting Della Pello Paving's contention that it did not "intend" to make a contribution to the CPPC, it did "nothing more than make the contribution to the CPPC 'inadvertent' within the meaning of N.J.S.A. 19:44A-20.20." N.J.S.A. 19:44A-20.20 provides that request for and return of the inadvertent contribution within 30 days of the making of the contribution is the sole remedy for that inadvertence. But Acting State Treasurer Romano noted, the Contribution was not returned by the CPPC until more than a year after it was made.

Clarification of Term of Ineligibility

Presently, Della Pello Paving's December 1, 2015 Letter requests clarification as to the term of ineligibility under Chapter 51 for the Contribution to the CPPC and provides additional documentary submissions for consideration. Della Pello Paving states Chapter 51 and "Treasury's past practice" permit imposition of the more lenient 18-month disqualification in its discretion. However, this argument hinges on a misreading of Chapter 51. N.J.S.A. 19:44A-20.14 mandates that Della Pello Paving be deemed ineligible for State contracts through the term of the current Governor.

¹ It is noted that the Committee to Elect Provenzano report received by ELEC on October 7, 2013, lists a \$1,000 contribution by "Val Della Pello," an employee of "Valvin Properties, LLC." The address listed for Valvin Properties in the contribution report is the same address used by Valentino Della Pello and Della Pello Paving.

N.J.S.A. 19:44-20.14 requires as follows:

The State or any of its purchasing agents or agencies or those of its independent authorities, as the case may be, shall not enter into an agreement or otherwise contract to procure from any business entity services or any material, supplies or equipment . . . where the value of the transaction exceeds \$17,500, if that business entity has solicited or made any contribution of money, or pledge of contribution, including in-kind contributions to . . . any State or county political party committee: (i) within the eighteen months immediately preceding the commencement of negotiations for the contract or agreement; (ii) during the term of office of a Governor and a Lieutenant Governor, in the case of contributions to . . . any State or county political party committee of a political party nominating such Governor and Lieutenant Governor in the last gubernatorial election preceding the commencement of such term; or (iii) within the eighteen months immediately preceding the last day of office of Governor and Lieutenant Governor, in which case such prohibition shall continue through the end of the next immediately following term of the office of Governor and Lieutenant Governor, in the case of contributions to . . . any State or county political party committee of a political party nominating such Governor and Lieutenant Governor in the last gubernatorial election preceding the commencement of the latter term.

Citing the October 26, 2015 Final Agency Decision from Acting Treasurer Romano, Della Pello Paving notes that there was a cite to subparagraph (i) of N.J.S.A. 19:44A-20.14. Della Pello Paving interprets that cite to be a determination that the term of ineligibility resulting from the Contribution is eighteen months from the date of the Contribution. However, that section was cited in the context of whether Della Pello Paving established the necessary criteria for a stay; it was not a determination on the term of ineligibility.

The term of ineligibility resulting from the Contribution is determined by the identity of the Contribution recipient and its timing. For a contribution to a county political party committee, the triggers for the longer disqualification (for the remainder of the term of the holder of the office of Governor rather than the 18 months) are (a) whether the contribution was made during the term of the Governor, and (b) whether the contribution was made to a political party committee of the political party that nominated the office holders in the last gubernatorial election.

A party's nomination is secured exclusively through the primary election process. See N.J.S.A. 19:5-1. A State political party committee is organized by a political party pursuant to N.J.S.A. 19:5-4 and its members are elected in the primary election each year there is a gubernatorial election. A CPPC is organized by a political party pursuant to N.J.S.A. 19:5-3, and its members are elected annually in the primary for the general election and must reside in the particular county. State and county political party committees may receive contributions and make contributions to other political entities or candidates. N.J.S.A. 19:44A-8. The State political party committee members and the county chairperson and vice chairperson are members of the State convention held each year in which all members of the General Assembly are to be elected, and at which the parties adopt platforms for the parties. N.J.S.A. 19:5-6.

The Contribution was made during Governor Chris Christie's second term in office. The Somerset County Republican Organization nominated Governor Christie, in the last gubernatorial election in 2013. Thus, N.J.S.A. 19:44A-20.20(ii) requires that Della Pello Paving be disqualified for the remainder of Governor Christie's term.

Finally, Della Pello Paving's Letter cites to In Re Langan Eng'g & Env't Servs., Inc., 425 N.J. Super. 577 (App. Div. 2012), as authority to impose an 18-month disqualification period. However, Langan is distinguishable primarily because the political contribution in Langan was a \$500.00 contribution to Assembly Republican Victory 2011. Assembly Republican Victory 2011 was a legislative leadership committee, not a CPPC, as here. Legislative leadership committees are different than county political parties. To begin with, contributions to legislative leadership committees are addressed by EO 117. Second, legislative leadership committees are not directly organized by a political party, but instead are established, authorized to be established, or designated by the President of the Senate, the Minority Leader of the Senate, the Speaker of the General Assembly, or the Minority Leader of the General Assembly "for the purpose of receiving contributions and making expenditures . . . aid or promote the candidacy of any individual, or candidacy of individuals, for elective office in any election, or the passage, or defeat of a public question or public questions in any election." N.J.S.A. 19:44A-10.1(a). Neither a legislative leadership committee, nor its members, has a role in the party convention. See N.J.S.A. 19:5-6. Thus, the disqualification period upheld by the Appellate

Division in Langan was pursuant to subparagraph (i) of N.J.S.A. 19:44-20.14 and is not helpful to Della Pello Paving in this matter.

Request for Reconsideration on Remand

The December 1, 2015 Letter also requests reconsideration of the ineligibility determination upon remand. In doing so, the Letter seeks to revise and supplement the record with an affidavit of Valentino Della Pello, Jr., the President of Della Pello Paving, sworn to on November 30, 2015 ("Della Pello Affidavit"), and an affidavit of Janet Linnus, the Executive Director of the Somerset County Republican Organization, sworn to on November 19, 2015 ("Linnus Affidavit") (jointly "Affidavits").

The Della Pello Affidavit offers copies of two prior Della Pello Paving checks, one for \$250.00 dated May 29, 2013, and one for \$300.00 dated September 25, 2015 made payable in a similar way to the subject Contribution check. The Della Pello affidavit also offers a copy of a \$1000.00 check from Valvin Properties, another company owned and operated by Mr. Della Pello, made payable in a similar way. Mr. Della Pello states, to the best of his knowledge, the funds from these checks were deposited into the account of the Committee to Elect Provenzano.² Review of the copies of the three checks reflects that the two from Della Pello Paving were made out to "Somerset County Republican Org to Elect Provenzano" and the check from Valvin Properties was made out to "The Somerset County Republican Organization to Elect Provenzano."

The Linnus Affidavit, on behalf of the Somerset County Republican Organization, states that the subject Contribution check was not written to the Somerset County Republican Organization. It states that the "Somerset County Republican Org. to Elect Provenzano is an entirely different organization and is not a 'county political party committee' as defined by N.J.S.A. 19:5-3, N.J.S.A. 19:44A-3 and N.J.S.A. 19:44A-20.14." Rather, it states "[t]he 'Somerset County Republican Org. to Elect Provenzano' has a separate and independent bank account and reported its contributions independently from the Somerset County Republican Organization." Donations to both accounts are "handle[d]" by the Somerset County Republican Organization. It also states that the Somerset County Republican Organization "mistakenly deposited the April 9, 2014" check in the amount of \$500.00 from Della Pello Paving into the general account of the Somerset County Republican Organization. Further, the Linnus Affidavit states that the allegedly disqualifying contribution was returned by the Somerset County Republican Organization to Della Pello Paving. Finally, the Linnus Affidavit states Provenzano ran for re-election in 2013, not 2014, although it continued to "solicit contributions to pay its own expenses at least through October 2014," and notes that Provenzano is running for re-election in 2016.

First, I take note and rely upon the fact that the subject Contribution was made payable to "Somerset County Republican Org. to Elect Provenzano." As discussed in the first reconsideration decision, this is a non-entity. There is no such election fund or account in existence, or registered and filing with ELEC listed under this name. Therefore, to the extent it is implied that "Somerset County Republican Org. to Elect Provenzano" is its own entity that is not supported by ELEC records. It is acknowledged that, by comparison, the Somerset County Republican Organization ("Somerset County Republican Executive Committee") and the "Committee to Elect Provenzano" are separate distinct entities that have organized and filed with ELEC.

Second, it is clear that the Affidavits continue to support Della Pello Paving's contention that it did not "intend" to make the Contribution to the CPPC. The Affidavits also support the contention that Della Pello Paving intended to contribute to the Provenzano campaign, or election fund. Accepting these contentions as accurate for purposes of this decision, there is no dispute that the Somerset County Republican Organization deposited the subject Contribution into its own account. Therefore, Della Pello Paving made a contribution to a CPPC, albeit inadvertently.

Chapter 51 provides a single means of curing an inadvertent contribution. N.J.S.A. 19:44A-20.20. This statute provides in part: "If a business entity inadvertently makes a contribution that would otherwise bar it from receiving a contract . . . the entity may request a full reimbursement from the recipient and, if such reimbursement is received within 30 days after the date the contribution is made, the business entity would again be eligible to receive a contract[.]" For the reasons expressed in

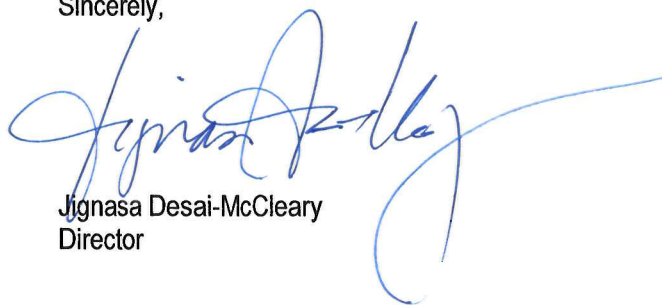
² As noted above, the \$1000.00 check from Valvin Properties appears in the Committee to Elect Provenzano report received by ELEC on October 7, 2013. Neither the 2013 \$250.00 or 2015 \$300.00 checks from Della Pello however, appear in any reports filed by the Committee to Elect Provenzano.

my August 12, 2015 decision, Della Pello Paving has not demonstrated compliance with N.J.S.A. 19:44A-20.20, and therefore, the Contribution makes Della Pello Paving ineligible to receive a public contract.

In the area of public contracting and in the specific area of Chapter 51 and EO 117, the public's interest and overriding public policy is to avoid both the actuality and the possible public perception of favoritism, improvidence, extravagance and corruption. See Chapter 51; Earle Asphalt, supra, 401 N.J. Super. at 319; and Terminal Constr. Corp. v. Atlantic County Sewage Auth., 67 N.J. 403 (1975).

I have reviewed the information submitted, including the supplemental Affidavits, as they relate to the provisions of Chapter 51 and EO 117. Based upon this review, and for the reasons discussed above, I remain without discretion to overturn the initial ineligibility determination rendered by the Chapter 51 Unit in this matter. I hope that the following additional information and guidance concerning the legal requirements found at the Division's website at <http://www.state.nj.us/treasury/purchase/execorder134.shtml>, will be helpful to Della Pello Paving in the future. By copy of this letter, I am notifying the DOT of this decision on remand.

Sincerely,



Jignasa Desai-McCleary
Director

c: A. Davis, DPP
L. Barber, DOT
B. Mitchell, AAG