

Top 5 Political Law Issues for Government Contractors in This Election Year

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As we head into an election year that is already flush with campaign contributions at the federal, state, and local levels, this article summarizes five key limits or restrictions on political donations and campaign finance activities that all government contractors must heed.

Pay to Play Is Here to Stay. The Supreme Court of the United States recently declined to review a case involving one of the federal pay-to-play rules. Although these rules are not applicable to most non-financial services contractors, the fact is that courts have upheld pay-to-play laws time and time again. Such laws, then, which at the state and local level preclude government contracts when the contractor, its PAC, officers, directors, or certain employees (or even family members) make certain types of contributions, are here to stay and will only continue to multiply. The provisions vary widely by jurisdiction (such as New Jersey, Illinois, and Connecticut), but they are at the intersection of the First Amendment and government contracts. In order to develop state and local government business with confidence, your contracting firm must establish and maintain a political contribution preclearance program to intercept and avoid any impermissible contributions, and to accurately certify compliance and report as required. Nobody likes the government interfering in fundraising and the campaign finance space, but, given that a successful challenge to pay-to-play rules is less and less likely, staying ahead of the curve with a rigorous compliance program is the only option.

The Contractor Must Provide Guidance When an Executive Fundraises. At the federal level and in many states (especially those with pay-to-play laws), corporate contributions are prohibited. This

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includes a corporate subsidy of political fundraising organized by an executive. Nonetheless, executives often want to be politically active and fundraise for candidates or act in a campaign's kitchen cabinet. Absent pay-to-play laws, this is usually permissible, but the employing contractor must ensure that the executive follows the applicable campaign finance/pay-to-play rules and avoids any activity that could give rise to an impermissible corporate in-kind contribution. This includes the use of company client lists, the use of administrative assistant time, charging travel costs to the company, etc. Executives should be briefed on the required rules for their voluntary political activity, and legal and compliance oversight should ensure that the guidelines are followed. Note, in the jurisdiction where there are pay-to-play laws, fundraising by executives may be prohibited.

The Ban on Federal Contributions by Federal Contractors Includes Super PACs Too. Federal law prohibits corporate contributions to federal candidates and committees. Federal law also prohibits contributions by federal contractors, regardless of whether the contractors are corporate in nature. The symmetry between these laws was broken when the Supreme Court in *Citizens United* permitted corporations to make unlimited independent expenditures and the D.C. Circuit permitted the creation of independent-expenditure (IE) only political committees (or super PACs) to receive unlimited contributions for IEs. Regular corporations may contribute to super PACs, but federal contractors, given the additional statutory restrictions, may not. The Federal Election Commission over the past few years has handed out several civil penalties for violations of this restriction, so this rule is important to keep in mind. (Similar rules apply to state and local contractors in various jurisdictions.)

Political Costs Are Unallowable. It cannot be stressed enough that political costs, like lobbying costs, are unallowable and may not be charged to the government. Contractors must be meticulous in ensuring that the administrative costs of their PACs and any costs, such as travel, related to handing out PAC or corporate contribution checks are not included in an indirect overhead or G&A pool that is allocated to a government contract. For those who use time cards, employees must be properly trained to charge political and lobbying time to unallowable charge codes. For tax purposes, political costs are also nondeductible.

There Are Permissible Ways for Candidates and Officeholders to Visit Your Business Site in Election Years. Most contractors welcome a visit by members of Congress to their business sites. In-state and in-district members of Congress are very happy to make such visits, especially in election years. The big problem in election years, however, is how to avoid such a visit becoming an impermissible corporate contribution. The good news is that the treatment of such a visit will depend on the timing of the event, the audience for the event (all employees, executives only, the public), and the content of the discussion. There are site visits that can definitely occur up until Election Day without any impermissible corporate contribution or, even worse, the reciprocity obligation with respect to other candidates in the race. Of course, without proper guidance, such an event can bring about federal violations and problems for a preferred candidate.