



# Staying on the Right Side of the Law: Companies Need to be Aware of Contracting & Procurement Laws

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**Earlier this year, Pennsylvania Attorney General Kathleen Kane announced criminal charges against a former state senator, five former Pennsylvania Turnpike Commission (PTC) officials and employees, and two former PTC contractors. The charges were recommended by the Pennsylvania Statewide Investigating Grand Jury, which conducted a 44-month investigation in cooperation with current PTC management and its new inspector general. These charges serve as an important reminder of the criminal laws relating to the procurement process.**

The Pennsylvania Crimes Code prohibits all forms of theft, including but not limited to theft by unlawful taking or disposition, theft by deception, receiving stolen property, and theft by failure to make required disposition of funds received.<sup>1</sup>

The Crimes Code also contains two, distinct offenses for bribery. A person is guilty of *bribery* if “he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

1. Any pecuniary benefit as consideration for the decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient;
2. Any benefit as consideration for the decision, vote, recommendation or other exercise of official discretion by the recipient in a judicial, administrative or legislative proceeding;
3. Or, any benefit as consideration for a violation of a known legal duty as public servant or party official.”<sup>2</sup>

A person commits *commercial bribery* “when, without the consent of his employer or principal, he solicits, accepts, or agrees to accept any benefit from another person upon agreement or understanding that such benefit will influence his conduct in relation to the affairs of his employer or principal.”<sup>3</sup> A person also commits commercial bribery if he “holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities or services [and] he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal or criticism.”<sup>4</sup>

Pennsylvania’s Procurement Code is rather specific in its prohibition of bid-rigging. “It is unlawful for any person to conspire, collude or combine with another in order to commit or attempt to commit bid-rigging involving:

1. A contract for the purchase of equipment, goods, services or materials or for construction or repair let or to be let by a government agency;
2. Or, a subcontract for the purchase of equipment, goods, services or materials or for construction or repair with a prime contractor or proposed prime contractor for a government agency.”<sup>5</sup>

The term “bid-rigging” is defined in the Procurement Code as: “The concerted activity of two or more persons to determine in advance the winning bidder of a contract let or to be let for competitive bidding by a government agency. The term includes, but is not limited to, any one or more of the following:

1. Agreeing to sell items or services at the same price;
2. Agreeing to submit identical bids;
3. Agreeing to rotate bids;
4. Agreeing to share profits with a contractor who does not submit the low bid;
5. Submitting prearranged bids, agreed-upon higher or lower bids or other complementary bids;
6. Agreeing to set up territories to restrict competition;
7. And, agreeing not to submit bids.”<sup>6</sup>

The Pennsylvania Public Official and Employee Ethics Act prohibits public officials and public employees from engaging in conduct that constitutes a “conflict of interest.”<sup>7</sup> A *conflict of interest* is defined as: “Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated.”<sup>8</sup> The Act further provides that: “No person shall offer or give to a public official, public employee or nominee or candidate for public office or a member of his immediate family or a business with which he is associated, anything of monetary value, including a gift, loan, political contribution, reward or promise of future employment based on the offeror’s or donor’s understanding that the vote, official action or judgment of the public official or public employee or nominee or candidate for public office would be influenced thereby.”<sup>9</sup>

Finally, any correlation between campaign contributions and contract awards (“pay to play”), whether real or imagined, has long been the subject of federal and state criminal investigations and prosecutions, and demands that companies and their employees pay extra attention to all laws protecting the integrity of the procurement process, as well as the provisions of Pennsylvania’s Election Code. Under the Election Code: “It is unlawful for any . . . corporation, incorporated under the laws of this or any other state or any foreign country or any unincorporated association, except those corporations formed primarily for political purposes or as a political committee, to make a contribution or expenditure in connection with the election of any candidate or for any political purpose whatever except in connection with any question to be voted on by the electors of this Commonwealth.”<sup>10</sup> Moreover, “no contribution from a partnership, limited partnership or limited liability company may be made from funds of any partner, limited partner or member that is a corporation.”<sup>11</sup>

However, the Election Code’s ban on corporate campaign contributions is not absolute. According to the Pennsylvania Department of State, the U.S. Supreme Court’s decision in *Citizens United v. Federal Election Commission* has rendered the ban unenforceable to the extent that it prohibits a domestic corporation or unincorporated association from making “independent expenditures.” *Statement Regarding The Effect Of The U.S. Supreme Court’s Decision in Citizens United v. FEC on Pennsylvania Law* (March 4, 2010). An “independent expenditure” is defined as “an expenditure by a person made for the purpose of influencing an election without cooperation or consultation with any candidate or any political committee authorized by that candidate and which is not made in concert with or at the request or suggestion of any candidate or political committee or agent thereof.”<sup>12</sup>

Although the Election Code does not limit the amount of individual donations to candidates for election, the Election Code does provide that: “Any business entity including but not limited to a corporation, company, association, partnership or sole proprietorship, which has been awarded non-bid contracts from the Commonwealth or its political subdivisions during the preceding calendar year, shall report by February 15 of each year to the Secretary of the Commonwealth an itemized list of all political contributions known to the business entity by virtue of the knowledge possessed by every officer, director, associate, partner, limited partner or individual owner that has been made by:

1. Any officer, director, associate, partner, limited partner, individual owner or members of their immediate family when the contributions exceed an aggregate of \$1,000 by any individual during the preceding year;
2. Or, any employe[e] or members of his immediate family whose political contribution exceeded \$1,000 during the preceding year.”<sup>13</sup>

In the high-stakes world of highway construction, where competition for government contracts has grown increasingly fierce, the criminal charges brought by the Pennsylvania Attorney General serve as an important reminder that law enforcement is more dedicated than ever in examining how public officials and contractors spend the billions of dollars in taxpayer funds dedicated to transportation each year. Taking extra precautions to avoid even the appearance of impropriety is a wise investment in you and your company’s future.



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<sup>1</sup> 18 Pennsylvania Consolidated Statutes (Pa.C.S.) Chapter 39

<sup>2</sup> 18 Pa.C.S. § 4701(a)

<sup>3</sup> 18 Pa.C.S. § 4108(a)

<sup>4</sup> 18 Pa.C.S. § 4108(b)

<sup>5</sup> 62 Pa.C.S. § 4503(a)

<sup>6</sup> 62 Pa.C.S. § 4502

<sup>7</sup> 65 Pa.C.S. § 1103(a)

<sup>8</sup> 65 Pa.C.S. § 1102

<sup>9</sup> 65 Pa.C.S. § 1103(b)

<sup>10</sup> 25 Purdon’s Statutes (P.S.) § 3253(a)

<sup>11</sup> 25 P.S. § 3253(d)

<sup>12</sup> 25 P.S. § 3241(e)

<sup>13</sup> 25 P.S. § 3260a(a)