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October 15, 2004

Honorable Joseph J. Roberts, Jr.  
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Dear Assemblyman Roberts:

You have asked whether Governor James E. McGreevey has the authority to provide by Executive Order No. 134 of 2004 (originally numbered as Executive Order No. 1000 by the Governor at the time of its signing) that the State shall not contract with a business entity that has solicited or made certain political contributions. The Governor has the ability to issue executive orders to perform his constitutionally delegated functions. For the reasons set forth below, we believe that Executive Order No. 134, in particular, infringes upon the lawmaking power of the Legislature and does not "comport with the constitutional principle of separation of powers." Communications Workers v. Florio, 130 N.J. 439, 452 (1992).

On September 22, 2004, the Governor signed Executive Order No. 134, to be effective October 15, 2004. Expressing the core of its provisions, Section 1 of the Executive Order directs:

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, or to acquire, sell, or lease any land or building, 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 a candidate committee and/or election fund of any candidate or holder of the public office of Governor, or to any State or county political party committee: (i) within the eighteen months immediately preceding the

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commencement of negotiations for the contract or agreement; (ii) during the term of office of a Governor, in the case of contributions to a candidate committee and/or election fund of the holder of that office, or to any State or county political party committee of a political party nominating such Governor in the last gubernatorial election preceding the commencement of such term; or (iii) within the eighteen months immediately preceding the last day of the term of office of Governor, in which case such prohibition shall continue through the end of the next immediately following term of the office of Governor, in the case of contributions to a candidate committee and/or election fund of the holder of that office, or to any State or county political party committee of a political party nominating such Governor in the last gubernatorial election preceding the commencement of the latter term.

Neither the New Jersey Constitution nor the statutes define the authority inherent in a Governor's executive order. Corpus Juris Secundum describes, in general, the powers of a governor of a state, "The governor possesses only such powers and duties as are vested by constitutional grant or by statutory grant. The governor's duties under statutory provisions are circumscribed by the terms of the legislation." 81A C.J.S. States, §240 at 514 (2004). That legal encyclopedia goes on to state, "An executive order must be within the authority granted to the governor by the constitution or statutory provisions. Until rescinded or superseded, an executive order issued pursuant to statute has the force and effect of law, and is effective beyond the expiration of the term of the governor who issued it." 81A C.J.S.. States, § 242 at 516.

Article III, paragraph 1 of the New Jersey Constitution (1947) provides, "The powers of government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." Article IV, Section I, paragraph 1 of the Constitution provides, "The legislative power shall be vested in a Senate and General Assembly." Article V, Section I, paragraph 1 provides, "The executive power shall be vested in a Governor." And, paragraph 11 of Section I of Article V, in part, explains, "The Governor shall take care that the laws be faithfully executed. To this end he shall have power, by appropriate action or proceeding in the courts brought in the name of the State, to enforce compliance with any constitutional or legislative mandate, . . . ."

A search of the New Jersey statutes reveals that the term "executive order" appears 102 times. Of those, 53 are a citation of a specific executive order by number and year. The remainder appear within statutes giving the Governor, or the President of the United States,

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authority to accomplish some narrow purpose by executive order. N.J.S.A. 47:1A-9, for example, provides for exceptions to the open public records law by executive order. N.J.S.A. 52:27E-68 provides that the Office of the Public Defender may take actions as authorized by executive order for coordinating and cooperating with any private entity designated by the Governor as the State's mental health protection and advocacy agency. A familiar example of the exercise of the Governor's authority through executive order is the power to issue executive orders in response to emergencies, conferred by N.J.S.A. App.A:9-30 et seq., known as the "Disaster Control Act." N.J.S.A. App.A:9-33.1 defines "emergency" to include both war emergencies and disasters that are "any unusual incident resulting from natural or unnatural causes which endangers the health, safety or resources of the residents of one or more municipalities or the State, and which is or may become too large in scope or unusual in type to be handled in its entirety by regular municipal operating services." See, Worthington v. Fauver, 88 N.J. 183 (1982) and I.H.R.A.C. v. Diamond Shamrock Chem., 216 N.J.Super. 166 (App.Div. 1987).

In examining whether the Governor could convert the position of the New Jersey member of the Waterfront Commission of New York Harbor from a part-time to a full-time post, the court explains the need for a constitutional or statutory basis. "An executive order must find support for its validity either in a state of facts which gives rise to an emergent situation or must be based upon the furtherance of a legislative act or constitutional mandate." DeRose v. Byrne, 135 N.J.Super. 273, 288 (Ch. Div. 1975), vacated 139 N.J.Super. 132 (App.Div. 1976) citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (a decision invalidating President Truman's order to take over steel mills). Thus, executive orders issued by the Governor, other than those of a ceremonial nature or those creating advisory bodies, must be supported by some constitutional or statutory authority.

In the preamble of Executive Order No. 134, Governor McGreevey proffers constitutional authority stating that "the Constitution of this State requires me, as Governor, to manage the operations of State government effectively and fairly, to uphold the law to ensure public order and prosperity, and to confront and uproot malfeasance in whatever form it may take." For statutory authority, the preamble states that "in the procurement process, our public policy grants to the State broad discretion, taking into consideration all factors, to award a contract to a bidder whose proposal will be most advantageous to the State (see, e.g., N.J.S.A. 52:34-12,13; Commercial Cleaning Corp v. Sullivan, 47 N.J. 539 (1966))." N.J.S.A. 52:34-12 addresses the process of State advertisement for bids and award of contracts and qualifies, "Any and all bids may be rejected when the State Treasurer or the Director of the Division of Purchase and Property determines that it is in the public interest so to do." N.J.S.A. 52:34-13 provides that the State Treasurer, through rule and regulations, will determine "the terms and conditions of the various types of agreements or contracts, ... not inconsistent with any applicable law, as he may deem advisable to promote competition and to implement" the statutes governing State contracts.

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N.J.S.A. 52:34-1 et seq. [Emphasis supplied].

Because the Executive Order does not address the terms of a contract with regard to an entity's ability to perform, but addresses its political activities, no express statutory authority for the Executive Order exists. There also appears to be no basis for the Executive Order as a constitutional mandate. In Kenny v. Byrne, 144 N.J.Super. 243 (App.Div. 1976), aff'd 75 N.J. 458 (1978), the court upheld an executive order requiring certain high echelon State employees to file financial disclosure statements. The court stated:

The Governor is vested with the executive power of the State. N.J. Const. (1947), Art. V, s 1, par.1. As the head of the Executive Branch of government he has the duty and power to supervise all employees in each principal department of that branch. *Id.*, Art. V, s 4, par. 2. Of necessity, this includes the inherent power to issue directives and orders by way of implementation in order to insure efficient and honest performance by those state employees within his jurisdiction. Such power stems from the Governor's responsibility under the foregoing constitutional provisions as well as Art. V, s 1, par. 11, which requires that he 'take care that the laws be faithfully executed.' [at 250-251].

The court noted that "the intent of the Governor's directive is not only to ferret out actual or apparent conflicts of interest but also to disclose to public view all financial data which may be relevant in guarding against corruption and dishonesty in government." *Id.*, at 254. The court reasoned, "Since the executive order applies only to employees within the Executive Branch of government it does not encroach upon the prerogatives of the other branches of government." *Id.*, at 252. In the case of Executive Order No. 134, the Executive Order applies to persons beyond Executive Branch employees and does encroach upon the prerogative of the Legislative Branch. See, Buerell v. Walker, 319 N.E.2d 502 (Ill. 1974).

Executive Order No. 134 does not exist in a vacuum. Governor McGreevey states in the preamble that "for the purposes of protecting the integrity of government contractual decisions and of improving the public's confidence in government, it is a compelling interest of this State to prohibit awarding government contracts to business entities which are also contributors to candidates, political parties and the holders of public office." Had the Legislative Branch remained silent on the topic of this "compelling interest," Governor McGreevey may have asserted a need for an executive order consistent his executive functions. The Legislature, however, has acted and has articulated New Jersey's public policy with regard to the potentially negative relationship between State contracts and political contributions by contracting parties,

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commonly known as "pay-to-play." Through the process provided in Article IV, Section IV, paragraph 6 and Article V, Section I, paragraph 14 of the New Jersey Constitution, the Legislature enacted, and Governor McGreevey approved on June 16, 2004, P.L. 2004, c.19. Although not effective until January 1, 2006, P.L. 2004, c.19 establishes the State's public policy on this issue. The statement accompanying Senate Bill No.2 of 2004, which became P.L. 2004, c.19, states:

The purpose of this bill is to reduce the risk of actual or perceived corruption which may result when public contracts are awarded to business entities that have contributed to elected officials having control, or apparent control, over the awarding of those contracts, or to political party committees at various levels of government that may have influence over the officials responsible for awarding such contracts, a practice commonly referred to as "pay-to-play."

Governor McGreevey's stated purpose echoes that of the Legislature, but Executive Order No. 134 is not a mere administrative action that executes a statute. The scope of Executive Order No. 134 exceeds that of P.L. 2004, c.19 without obvious statutory or constitutional authority and infringes upon the policy established through lawmaking by the Legislative Branch.

Nonetheless, the court in Bullet Hole, Inc. v. Dunbar, 335 N.J.Super. 562, 574 (App.Div. 2000), finds no case "in which a court has overturned a Governor's action as violating the constitutional separation between the executive and legislative branches." "The separation of powers is not an end in itself, but a general principle intended to ensure that the system of checks and balances remains vital." State v. Abbani, 99 N.J. 418, 434 (1985). "Rather, the doctrine should be flexibly interpreted to encourage a 'cooperative accommodation among the three branches.'" Bullet Hole at 573, quoting Communications Workers v. Florio at 449. The New Jersey Supreme Court points out that "the doctrine of separation of powers is not peculiar to New Jersey; ... and it has nowhere been construed as creating three mutually exclusive water-tight compartments." Masset Building Co. v. Bennett, 4 N.J. 53, 57 (1950). Quoting from the same paragraph of Masset, the court further explains, "'[B]lendings are permitted so long as there is no impairment of' 'the essential integrity of one of the great branches of government.' " "[Emphasis supplied]. Cupano v. Gluck, 133 N.J. 225, 233-234 (1993), quoting In re Investigation Regarding Ringwood Fact Finding Comm., 65 N.J. 512, 519 (1974) (quoting Morss v. Forbes, 24 N.J. 341, 372 (1957) quoting Masset at 57). See, Sabatino, "Assertion and Self-Restraint: The Exercise of Governmental Powers Distributed Under The 1947 New Jersey Constitution," 29 Rutgers L.J. 799, at 822-823 (1998). Whether Executive Order No. 134 is a permissible exercise of authority by Governor McGreevey, then, depends upon whether it impairs

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the "essential integrity" of the Legislature's lawmaking role.

Justice Jackson, concurring in Youngstown Sheet & Tube, groups practical situations applicable to a President exercising his powers and advises:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. [Emphasis supplied]. [at 637-638].

P.L. 2004, c.19 limits the eligibility of a business entity that has contributed to elected officials at the State, county, or municipal level, or to a State, county, or municipal political party committee, to obtain a public contract from the corresponding unit of government. It provides that a State agency in the Executive Branch will not enter into a contract having an anticipated value in excess of \$17,500 with a business entity, except a contract that is awarded pursuant to a fair and open process, if during the preceding one-year period that business entity has made a contribution reportable under "The New Jersey Campaign Contributions and Expenditures Reporting Act," N.J.S.A. 19:44A-1 et seq., to the State committee of the political party of which the Governor, serving when the contact is awarded, is a member or to any candidate committee of that Governor. The law has similar provisions applicable to contract awards by counties and municipalities with parallel limitations. Both P.L. 2004, c.19 and Executive Order No. 134 address State contracts in excess of \$17,500, provide that contracting entities may not make certain political contributions during the term of a contract, and offer a process by which a contracting entity can return a prohibited contribution in order to become eligible for a contract.

Executive Order No. 134, however, expands the range of State contracts affected from contracts not awarded pursuant to a fair and open process to all State contracts; it increases the time period during which contributions are prohibited. The Executive Order prohibits contracting entities from contributing to a list of political committees different from the list established in the law. The potential number of persons and entities affected by the Executive Order is significantly larger than that affected by the law. In Bullet Hole, the court examines whether Governor Whitman had the constitutional power to designate the State Police as New Jersey's Point of Contact for background checks under the federal Brady Act. Acknowledging the Supreme Court's

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caution "against treating the branches as watertight compartments," the court explains, "Only when the challenged action impairs 'the essential integrity' of another branch will a court step in to enforce the constitutional boundaries." Bullet Hole at 573-574. The court concludes:

We are satisfied that the Governor's Point of Contact designation was an appropriate exercise of the authority and powers of her office and did not violate the Legislature's "essential integrity." Indeed, those actions complemented, and did not contradict, the Legislature's existing authorization of background checks for gun purchasers and of the State Police's role in that process. [Emphasis supplied]. [at 578].

Executive Order No. 134 does not complement but does contradict P.L. 2004, c.19. The October 15, 2004 effective date of the Executive Order, for example, directly contradicts the January 1, 2006 effective date of the law.

Corpus Juris Secundum states, in general, that a "statute has no force whatever until its effective date." 82 C.J.S., Statutes, §388 at 541 (1999). In the absence of effective law, the executive order is an accepted executive policymaking tool as long as the Governor is acting within the scope of his authority. The absence of a law in effect between June 16, 2004 and January 2006, however, does not necessarily permit the Governor to exercise his discretion through an executive order that is not consonant with the stated purposes of the Legislature. The delayed effective date is integral to the Legislature's establishment of State policy.

"The power to enact laws includes the power to fix a future effective date. ... The purpose of the future effective date is to inform people of the provisions of a statute before it becomes effective so that they may protect their rights and discharge their obligations." 2 Sutherland, Statutory Construction (6th ed. 2001), §33:7 at 20-23. Senate Bill No. 2 of 2004 was passed by the Legislature on June 10, 2004. At that time, the Legislature deliberately chose to delay the law's implementation. The delay provides a period of time in which business entities that wish to be eligible to participate in the non-competitively bid State contract process on January 1, 2006 and thereafter may choose to not make the proscribed political contributions after January 1, 2005. Executive Order No. 134 imposes a broader prohibition against certain political contributions by entities contracting with the State for all contracts and applies the prohibition to contributions made after October 15, 2004. Its contradictions to enunciated policy portend confusion on the part of citizens of the State and, more particularly, entities contracting with the State about their freedom to make certain political contributions. The order is disruptive to the State's contracting entities who will have to apply significantly different policies within a short period.

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In summary, Executive Order No. 134 attempts to set State policy when State policy has already been set. It violates the integrity of the Legislative Branch because the order contravenes enacted legislation, if not operational law, which represents State policy. It impairs "the essential integrity" of the Legislature and usurps its lawmaking role by challenging the Legislature's power to fix the limits within which its determination of policy will operate, that is, the designation of the type of State contracts addressed under its pay-to-play policy, the kind of contributions prohibited, the window of ineligibility, and the effective date.

Very truly yours,

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