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U.S. Supreme Court Addresses Pre-RFP Phase Interactions with Owners

The U.S. Supreme Court recently overturned the federal wire fraud convictions of a contractor for his alleged involvement in a scheme to rig the bidding process to obtain state-funded development projects associated with the “Buffalo Billion Initiative.” The facts supporting the underlying convictions arose from bid-rigging in the preparation of a request for proposal (RFP) for a state-funded project. By refusing to recognize the right-to-control theory, which treats inaccurate information in negotiations and contract procurement as potentially fraudulent, the Supreme Court provided some shelter for pre-RFP phase discussions between government procurement personnel and industry participants.

The Buffalo Billion Initiative was a large state-funded development project to invest \$1 billion in upstate New York. As part of the pre-RFP stage, a process for selecting “preferred developers” was established. These preferred developers would be given the first opportunity to negotiate for specific projects. The government procurement agent and the contractor jointly developed a set of RFPs that treated unique aspects of the contractor’s construction company as qualifications for preferred-developer status. As a preferred developer, the contractor’s company secured a state-funded project valued at \$750 million.

The contractor was indicted on wire fraud charges for depriving the state of its right to control its property—specifically, accurate information in contract negotiations. The wire fraud statute criminalizes “scheme[s] or artifice[s] to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” 18 U.S.C. § 1343. The government argued the right-to-control theory criminalized the contractor’s pre-RFP communications with government procurement personnel. The contractor was ultimately convicted of federal wire fraud charges and sentenced to 28 months in prison, followed by supervised release.

The right-to-control theory was established by showing that a victim was deprived of “potentially valuable economic information” considered “necessary to make discretionary economic decisions.” In this case, the government argued, the contractor’s actions during the pre-RFP phase of the project “deprived [the state] of potentially valuable economic information” needed to analyze which company should receive the project.

The U.S. Supreme Court ultimately overturned the wire fraud convictions by rejecting the right-to-control theory. While the deprivation of information could result in a violation of state laws, the Supreme Court was not willing to uphold the federal conviction because the government’s interpretation of the wire fraud statute made almost any deceptive act criminal.

The underlying conviction was troubling for the construction industry because the government proved its case *without* establishing other companies would have successfully bid on the projects or that these other companies would have charged less or produced a more valuable product absent the fraud. In essence, the original conviction was supported by arguing the contractor’s pre-RFP communications with the nonprofit were criminal because the contractor failed to provide the nonprofit with *all* the information that the state subjectively may have found pertinent to the state’s economic consideration, resulting in the denial of the state’s rights.

The Supreme Court’s decision limited criminal liability for pre-RFP communications between government entities and industry participants, but it did not obviate criminal liability altogether. Indictments will still be regularly sought for making false statements to government entities during the course of contract procurement, and there are serious civil statutes that penalize such false statements as well. Still, the elimination of the right-to-control theory helps minimize the broad-brush criminalization of the longstanding practice of public and private communications prior to issuing RFPs. These communications are meant to *advance* a state’s interest in formulating an RFP by obtaining various industry members’ subjective views of a prospective project.

Takeaway: While pre-RFP phase communications between government entities and industry participants are uncommon in all

but the most complex of projects, the Court's decision confirms industry participants may communicate with government procurement personnel when input is solicited. Pre-RFP phase communication should not be confused with direct communication with owners during the RFP phase. Bidders should always follow project-specific guidelines when communicating with owners during the RFP phase.

If you have any questions about pre-RFP phase communications with owners or any other construction law questions, please contact the authors of this article or any attorney with Frost Brown Todd's [Construction Practice](#).

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