

Allentown Indictment A Warning To Attys Seeking Gov't Work

By **Dan Packel**

Law360, Philadelphia (July 31, 2017, 8:11 PM EDT) -- Federal prosecutors looking to prove that the mayor of Allentown, Pennsylvania, oversaw a multipronged pay-to-play scheme will see their efforts complicated by the constitutional protections accorded to campaign contributions, but last week's indictment — which also fingered a Norris McLaughlin & Morris PA attorney — should serve as a caution for attorneys in the world of municipal contracting.

In the 60-page indictment unsealed Wednesday, every single cash payment that three-term Mayor Ed Pawlowski allegedly received in exchange for the assignment of lucrative city contracts came in the form of a campaign contribution. That poses a challenge to the government as the U.S. Supreme Court has set a high bar for proving that political donations qualify as bribery.

"The Supreme Court has indicated that in the context of campaign contributions, compared to other benefits that go to politicians, there has to be a very clear understanding between those making donations and politicians that donations are expressly in exchange for particular official acts," said Covington & Burling LLP partner Arlo Devlin-Brown, who formerly headed the public corruption unit for the Southern District of New York.

Pawlowski faces a total of 54 counts of bribery, fraud, conspiracy and extortion. The Democrat has served as mayor of Allentown since January 2006, and he explored campaigns for Pennsylvania governor in 2014 and the U.S. Senate in 2016. He had been under scrutiny for several years as prosecutors had secured guilty pleas from seven others tagged in an investigation into corruption in the city. The probe did not discourage Pawlowski from seeking a fourth term, and he defeated six challengers in May's primary.

Prosecutors announced the charges against Pawlowski on the same day that they charged former Reading, Pennsylvania, Mayor Vaughn Spencer in a similar, if not as extensive, pay-to-play scheme featuring several overlapping players. But the indictment against Pawlowski was notable because it also featured charges against Norris McLaughlin attorney Scott Allinson.

Allinson, who, like Pawlowski, pled not guilty on Thursday, allegedly rounded up payments from fellow attorneys at his firm and made direct payments to political action committees associated with the mayor in exchange for city contracts. The firm and Allinson have denied any participation in a pay-to-play scheme, and Allinson is currently on leave.

The case against Pawlowski, Allinson and Allentown businessman James Hickey — also charged Wednesday — will be bolstered by the high likelihood that prosecutors have at least one cooperating witness.

"It's a detailed indictment which includes allegations of verbatim conversations involving defendants," noted McCarter & English LLP partner Bob Mintz, a former federal prosecutor in New Jersey. "This clearly suggests that the government has a cooperating witness who has been working with them likely for months putting this case together."

One likely prospect is political consultant Mike Fleck, who worked on campaigns for Pawlowski and Spencer and pled guilty in April 2016. In the indictment, Fleck is named in exchanges where both Allinson and Pawlowski are quoted directly, including one where Allinson notes the need to "cobble together" money for Pawlowski's consultants in exchange for contracts.

The breadth of the indictment, which alleges Pawlowski shook down at least four businesses and two law firms, will also work in the government's favor, especially if witnesses connected to those entities testify.

One name is Montgomery County Sheriff Sean Kilkenny, who worked for suburban Philadelphia firm Friedman Schuman Applebaum & Nemeroff PC during the time frame detailed in the indictment. Pawlowski allegedly solicited Philadelphia Eagles tickets and a dinner at a Philadelphia steakhouse from Kilkenny and the firm and later manipulated the bidding process to award a contract for delinquent tax collections to an entity connected to the firm.

Kilkenny's attorney, Michael Schwartz of Pepper Hamilton LLP, said his client cooperated with the investigation and is prepared to testify at trial. A representative of the firm did not respond to a request for comment.

"These cases are usually made or not made in the courtroom when you have insider testimony," said Jeffrey Cramer, a former federal prosecutor and managing director of management consulting firm Berkeley Research Group. "Once you get to five or six witnesses, the jury gets the idea that it's a pretty steady shakedown."

But prosecutors must show the existence of an explicit understanding between Pawlowski and contributors that the payments were made in exchange for city contracts, and that could be a tall order.

"Chief Justice [John] Roberts in Citizens United said that campaign contributions are not evidence of quid pro quo," said Scarinci Hollenbeck LLC founding partner Donald Scarinci, who has represented a number of New Jersey municipalities. "The reason for the existence of complex campaign reporting schemes is to protect elected officials and givers from the accusation that a campaign contribution is a quid pro quo. We can't lose sight of the fact that the First Amendment protects speech, and there's no more sacred form of speech than political speech."

Scarinci did acknowledge that it will be harder for Pawlowski to dodge allegations in the indictment that his associates had individuals removed from the contracting process and destroyed score sheets.

"When there is a process that's been established by a government entity, that process needs to be followed," he said. "If the process is not followed, it does provide evidence that something else might be happening in the world of contracts."

In addition to Norris McLaughlin and Friedman Schuman, the indictment references three other unnamed law firms that either were allegedly solicited for contributions or made contributions and received contracts. These firms were not accused of any wrongdoing, but their very proximity to purported illegal activity illustrates the high stakes for lawyers who vie for municipal contracts.

On one hand, lawyers have every right to make contributions to political candidates, and by virtue of their financial resources and proximity to people of influence, they have a greater propensity to contribute than the general public.

"Lawyers take the confidence of their client, and in many ways, lawyers can understand the elected official in a deeper and more personal way than the public will because they are privy to conversations," Scarinci said. "A lot of time, when they see this is a good person and should go further, they're inclined to help them go further. And money is all they can do. It's not practical to go door-to-door, and often they don't live in the same town to vote."

On the other hand, lawyers should never lose sight of the particular requirements inherent in working with the public sector.

"The world of government contracting is entirely different from the private sector, where it's not unusual for a potential vendor to wine and dine a corporate executive," Mintz said. "Once you are bidding or soliciting work from the government, the rules of the game are entirely different."

That means careful compliance with all applicable state and local finance rules — especially those governing contribution amounts and donor transparency. Prosecutors can point to these missteps, even if they are not inherently illegal, as intent to hide criminal conduct. And lawyers must know when to step back.

"It's fine to make contributions to particular elected officials because you think these elected officials will be supportive of efforts to pitch your firm on the merits for government contracts," Devlin-Brown said. "But you can't cross the line and make a donation to a politician who suggests that such a donation is a necessary or even sufficient step for winning the contract. If a politician on the other side makes that suggestion, a law firm, or any other vendor, would be wise to turn away and head in the other direction."

--Editing by Christine Chun and Katherine Rautenberg.