

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

REPRESENTATIVE TED LIEU, *et al.*,

Plaintiffs,

V.

FEDERAL ELECTION COMMISSION,

Defendant.

Civ. No. 16-2201 (EGS)

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

In further support of their Motion for Leave to File Amended Complaint [ECF No. 21], Plaintiffs hereby notify the Court of a recent Federal Election Commission decision that contradicts the FEC's position in this litigation. *See* FEC, *Matter of Suffolk Constr. Co.*, MUR No. 7099 (Sept. 25, 2017) (attached as Exhibit A hereto). This decision was not publicly available before the parties completed briefing on Plaintiffs' Motion for Leave to File Amended Complaint.

The decision arose from an FEC adjudication involving two \$100,000 contributions from a government contractor, to Priorities USA Action, which was an independent expenditure-only political committee (“super PAC”) during the relevant time period.¹ In its Factual and Legal Analysis, the FEC found that the government contractor’s contributions to the super PAC violated 52 U.S.C. § 30119(a)(1), which prohibits government-contractor contributions to political committees. *See Suffolk Constr. Co.*, Factual and Legal Analysis, at 1-5.

¹ The FEC expressly agreed in a conciliation agreement that Priorities USA Action, the recipient of the illegal contribution, was “an independent-expenditure-only political committee”—*i.e.*, a super PAC. *See Suffolk Constr. Co.*, Conciliation Agreement, at 2.

The FEC's decision in *Suffolk Construction Co.* contradicts its position in this litigation. Here, the FEC insists that, because of *SpeechNow*, it *cannot* enforce a restriction on contributions to super PACs. *See* FEC Opp. to Mtn. to Amend, ECF No. 25 (July 17, 2017), at 14-15. But in *Suffolk Construction Co.*, the FEC did just that, thereby showing that the FEC believes that it *can* enforce restrictions on contributions to super PACs in some contexts. Although *Suffolk Construction Co.* involved contributions by a government contractor, the underlying constitutional issue implicated in that adjudication is no different than the one here: whether contributions can cause corruption or its appearance if made to a political committee that makes only independent expenditures.

Dated: October 12, 2017

Respectfully submitted,

/s/ Stephen A. Weisbrod

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Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 12, 2017, the foregoing was caused to be served on counsel of record for Defendant by the Court's electronic filing system.

Dated: October 12, 2017

/s/ Stephen A. Weisbrod
Stephen A. Weisbrod

EXHIBIT A



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

J. Gerald Herbert, Esq.
Paul S. Ryan, Esq.
The Campaign Legal Center
1411 K Street NW, suite 1400
Washington, DC 20005

SEP 25 2017

RE: MUR 7099

Dear Messrs. Herbert and Ryan:

This is in reference to the complaint you filed with the Federal Election Commission on July 6, 2016, alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 23, 2017, the Commission found reason to believe that Suffolk Construction Company, Inc. ("Suffolk") violated 52 U.S.C. § 30119(a)(1) by making prohibited federal contractor contributions.

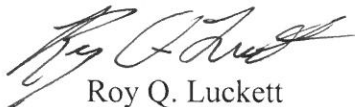
On September 20, 2017, the Commission accepted the signed conciliation agreement with Suffolk. On that same date, the Commission found no reason to believe that Priorities USA Action and Greg Speed in his official capacity as treasurer violated 52 U.S.C. § 30119(a)(2) by knowingly soliciting the federal contractor contributions at issue. Accordingly, the Commission has closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). A copy of the Factual and Legal Analysis and agreement with Suffolk is enclosed for your information.

J. Gerald Hebert, Esq.
Paul S. Ryan, Esq.
MUR 7099
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If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Roy Q. Lockett", written in a cursive style.

Roy Q. Lockett
Staff Attorney

Enclosures
Conciliation Agreement
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Suffolk Construction Company, Inc.

MUR: 7099

I. INTRODUCTION

This matter was generated by a Complaint filed by Paul S. Ryan, the Campaign Legal Center through J. Gerald Herbert, and Democracy 21 through Fred Wertheimer. For the reasons described below, the Commission finds reason to believe that the Suffolk Construction Company, Inc. (“Suffolk”) violated 52 U.S.C. § 30119(a)(1) by making contributions as a federal contractor.

II. FACTUAL BACKGROUND

Suffolk is a Massachusetts corporation involved in various construction projects. While Suffolk maintains that it primarily served as a general contractor and construction manager for privately funded projects, it acknowledges that a “small fraction” of its work over the past five years included federal contracts.¹ Suffolk contributed \$100,000 to the Committee on July 20, 2015, and another \$100,000 to the Committee on December 17, 2015.² The Committee disclosed receipt of these contributions on its 2015 Year-End Report.³

The Complaint notes that on April 7, 2016, the Center for Public Integrity reported that the Committee received the two \$100,000 contributions, and that the federal government had

¹ Suffolk Resp. at 1. (Sept. 1, 2016).

² Priorities USA Action 2015 Year-End Report at 11-12 (Jan. 31, 2016), *available at* <http://docquery.fec.gov/pdf/767/201601319005016767/201601319005016767.pdf>.

³ *Id.*

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Factual and Legal Analysis
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1 awarded Suffolk more than \$168 million worth of contracts since fiscal year 2008.⁴ According
2 to the Complaint, Suffolk had been awarded \$1,278,500 in federal contracts in Fiscal Years 2015
3 and 2016 (a period including October 1, 2014, to September 30, 2016) for projects involving the
4 Department of Defense.⁵

5 Suffolk responds that the contract work that it performed for the U.S. Army Corps of
6 Engineers (“USACE”) was its only work that might be relevant to this matter.⁶ According to
7 Suffolk, its USACE contract involved multiple construction projects at a Motor Pool facility in
8 West Point, New York. Suffolk states that this contract, which began in March 2009, provided
9 that Suffolk would assist the USACE in relocating a Motor Pool.⁷ In 2014, two years after the
10 original work on the Motor Pool concluded, Suffolk states that the USACE modified the contract
11 in three phases.

12 The third phase of the modified contract covers the period during which Suffolk made the
13 two \$100,000 contributions to the Committee.⁸ On July 7, 2015, Suffolk “received” MOD 28,
14 which called for the installation of a new green filter at the Motor Pool, among other things.⁹
15 On September 18, 2015, USACE issued Amendment P00002 to MOD 28, which involved
16 furnishing and installing an effluent line at the Motor Pool. Suffolk states that its “work on these

⁴ Compl. at 4. See Harper Neideg and Jonathan Swan, *Exclusive: Pro-Hillary Group Takes \$200K in Banned Donations*, THE HILL (June 29, 2016).

⁵ *Id.* at 3.

⁶ Suffolk Resp. at 3.

⁷ *Id.*

⁸ *Id.* The first phase, Contract Modification (“MOD”) 26, called for the design of a waste water treatment plant and was completed on December 14, 2014. The second phase, MOD 27, called for work on the boiler and propane supply system at the Motor Pool, which ended on January 22, 2015.

⁹ *Id.* at 4.

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projects spanned from December 2015 to August 2016.”¹⁰

On June 30, 2016, the Committee refunded Suffolk’s \$200,000 total contributions.

III. LEGAL ANALYSIS

Under the Federal Election Campaign Act of 1971, as amended (the “Act”), a federal contractor may not make contributions to political committees.¹¹ Specifically, the Act prohibits “any person . . . [w]ho enters into any contract with the United States . . . for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof” from making a contribution “if payment for the performance of such contract . . . is to be made in whole or in part from funds appropriated by the Congress.”¹²

These prohibitions begin to run at the beginning of negotiations or when proposal requests are sent out, whichever occurs first, and end upon the completion of performance of the contract or the termination of negotiations, whichever occurs last.¹³ And these prohibitions apply to a federal contractor who makes contributions to any political party, political committee, federal candidate, or “any person for any political purpose or use.”¹⁴

The available record indicates that Suffolk was a federal contractor when it made the contributions. Suffolk states that it “received” MOD 28 to perform additional services to USACE on July 7, 2015, thirteen days before Suffolk’s first \$100,000 contribution to the

¹⁰ *Id.*

¹¹ 52 U.S.C. § 30119(a); 11 C.F.R. § 115.2.

¹² 52 U.S.C. § 30119(a)(1); *see also* 11 C.F.R. part 115.

¹³ 52 U.S.C. § 30119 (a)(1); 11 C.F.R. § 115.1(b).

¹⁴ 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.2.

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1 Committee on July 20, 2015.¹⁵ Suffolk does not explain the significance of “receiv[ing]” MOD
2 28, but it is reasonable to infer that it was either a contract proposal or a negotiated work order,
3 thus making Suffolk a federal contractor at that point.¹⁶ On September 18, 2015, USACE
4 “issued” an amendment to perform additional services in conjunction with MOD 28. According
5 to Suffolk, its “work on these projects spanned from December 2015 to August 2016,”
6 apparently including December 17, 2015, the date of Suffolk’s second contribution. Thus, the
7 available information supports a reasonable inference that Suffolk made prohibited federal
8 contractor contributions to the Committee.

9 Suffolk’s argument that its federal contract work represented a “small fraction” of its
10 business does not negate the company’s status as a federal contractor. Suffolk further asserts that
11 “any inadvertent violation that may have occurred would have been *de minimis* and immediately
12 remedied by Suffolk before any harm could have possibly resulted.” While Suffolk may
13 consider its federal contract work a “*de minimis*” portion of its overall work, its \$200,000 in
14 contributions to the Committee are not *de minimis*.¹⁷ And Suffolk’s July 2015 and December
15 2015 contributions were not refunded for nearly one year, and more than six months,

¹⁵ Suffolk describes the July 7, 2015, MOD 28 as “call[ing] for, among other things, the installation of a new green filter at the Motor Pool.” Suffolk Resp. at 4. Although Suffolk speaks to possible differences of opinion with USACE as to whether the original contract dating from 2009 remained in effect through Fiscal Year 2016 or the MOD work was entirely new contracts, the MOD 28 information provided by Suffolk supports its status as a federal contractor at the time of both contributions. *Id.*

¹⁶ See 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.1(b).

¹⁷ In support of a dismissal, Suffolk cites MUR 5424 (Foxy), in which the Commission took no further action and closed the file with an admonishment, but that matter involved only \$286.71 in impermissible soft money contributions. See MUR 5424 First General Counsel’s Report at 4-5. Thus, Foxy is factually distinguishable.

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- 1 respectively, during which time the Committee spent millions of dollars.¹⁸ Accordingly, the
- 2 Commission finds reason to believe that Suffolk violated 52 U.S.C. § 30119(a)(1).

¹⁸ See Priorities USA Action 2015 Year-End Report at 4 (disclosing total year-end disbursements of \$5,657,289) (Jan. 31, 2016) *available at* <http://docquery.fec.gov/pdf/767/201601319005016767/201601319005016767.pdf>; and Priorities USA Action Amended 2016 July Quarterly Report at 4 (disclosing total year-to-date disbursements of \$54,650,193.92) (Oct. 10, 2016) *available at* <http://docquery.fec.gov/pdf/402/201610209034276402/201610209034276402.pdf>. While Suffolk states that its contributions were refunded before the Complaint in this matter was filed, the June 30, 2016, refund occurred after the Center for Public Integrity's April 7, 2016, report on Suffolk's contributions to the Committee and a June 29, 2016, article on the subject. See Compl. at 4-5; Harper Neideg and Jonathan Swan, *Exclusive: Pro-Hillary Group Takes \$200K in Banned Donations*, THE HILL (June 29, 2016).

BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of)
)
Suffolk Construction Company, Inc.) MUR 7099
)

CONCILIATION AGREEMENT

This matter was initiated by a signed, sworn, and notarized complaint by Paul S. Ryan, the Campaign Legal Center through J. Gerald Herbert, and Democracy 21 through Fred Wertheimer. The Commission found reason to believe that Suffolk Construction Company, Inc. ("Suffolk" or "Respondent") violated 52 U.S.C. § 30119(a)(1) by making contributions as a federal contractor.

NOW, THEREFORE, the Commission and the Respondent, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree as follows:

- I. The Commission has jurisdiction over the Respondent and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 52 U.S.C. § 30109(a)(4)(A)(i).
- II. Respondent has had a reasonable opportunity to demonstrate that no action should be taken in this matter.
- III. Respondent enters voluntarily into this agreement with the Commission.
- IV. The pertinent facts in this matter are as follows:
 1. Suffolk is a Massachusetts corporation involved in various construction projects. Starting in 2009, Suffolk has contracted with the U.S. Army Corps of Engineers ("USACE") to provide various services at a Motor Pool facility in West Point, New York.

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2. While Suffolk was in federal contractor status in connection with its service agreements with the USACE, Suffolk made two contributions to Priorities USA Action (the “Committee”), an independent-expenditure-only political committee. Suffolk contributed \$100,000 to the Committee on July 20, 2015, and another \$100,000 to the Committee on December 17, 2015.

3. On June 30, 2016, the Committee refunded Suffolk’s \$200,000 total contributions.

4. Respondent contends it has implemented new internal controls, policies and procedures since discovering the violation at issue, including having outside legal counsel assist with vetting of certain contributions.

5. The Commission did not find that the violation was knowing and willful.

V. The pertinent law in this matter is as follows:

1. Under the Federal Election Campaign Act of 1971, as amended (the “Act”), a federal contractor may not make contributions to political committees. 52 U.S.C. § 30119(a); 11 C.F.R. § 115.2. Specifically, the Act prohibits “any person . . . [w]ho enters into any contract with the United States . . . for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof” from making a contribution “if payment for the performance of such contract . . . is to be made in whole or in part from funds appropriated by the Congress.” 52 U.S.C. § 30119(a)(1); *see also* 11 C.F.R. part 115.

2. These prohibitions begin to run at the beginning of negotiations or when proposal requests are sent out, whichever occurs first, and end upon the completion of

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performance of the contract or the termination of negotiations, whichever occurs last. 52 U.S.C. § 30119 (a)(1); 11 C.F.R. § 115.1(b).

3. These prohibitions apply to a federal contractor who makes contributions to any political party, political committee, federal candidate, or “any person for any political purpose or use.” 52 U.S.C. § 30119(a)(1); 11 C.F.R. §§ 115.1, 115.2.

VI. Respondent violated 52 U.S.C. § 30119(a)(1) by making federal contractor contributions.

VII. Respondent will take the following actions:

1. Respondent will pay a civil penalty to the Commission in the amount of Thirty Four Thousand Dollars (\$34,000) pursuant to 52 U.S.C. § 30109(a)(5)(A).

2. Respondent will cease and desist from committing violations of 52 U.S.C. § 30119(a)(1).

VIII. The Commission, on request of anyone filing a complaint under 52 U.S.C. § 30109(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

IX. This agreement shall become effective as of the date that all parties hereto have executed the same and the Commission has approved the entire agreement.

X. Respondent shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

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XI. This conciliation agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained within this written agreement shall be enforceable.

FOR THE COMMISSION:

BY: Kathleen Guith
Kathleen M. Guith
Associate General Counsel
for Enforcement

9/25/17
Date

FOR THE RESPONDENT:

Elissa Flynn-Poppey
Elissa Flynn-Poppey
Counsel for Respondent

7/25/2017
Date