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April 29, 2003

VIA HAND DELIVERY

April Sands, Esq.
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: **MUR 5357 – Centex Construction Group, Inc. Response**

Dear Ms. Sands:

We represent Centex Construction Group, Inc. ("CCG").[1] The purpose of this letter is to respond to a letter from the Federal Election Commission (the "Commission") dated April 2, 2003, and received on April 7, 2003,[2] notifying CCG that it may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"). The Commission's letter was prompted by a complaint filed by Centex Corporation ("Centex") in letters dated February 27, 2003 and March 24, 2003, informing the Commission of potential violations of the Act at Centex-Rooney Construction Co., Inc. ("Rooney").

CCG is a separate and distinct corporate entity from Centex and Rooney. CCG is one of Centex's wholly owned subsidiaries, and itself is a holding company, with six subsidiaries in the commercial construction business operating in several regions of the country. Rooney is one of CCG's subsidiary construction companies. CCG is incorporated in Nevada and has headquarters in Dallas, TX.

CCG does not dispute the facts as set forth in the complaint. However, to the extent that the Commission determines that these facts constitute violations of the Act, we submit that no action should be taken against CCG. Rather, under the circumstances of this case, it is appropriate that any penalties be borne by Rooney, which was primarily responsible for any violations.

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[1] A Designation of Counsel statement is enclosed.

[2] The Commission's Office of General Counsel subsequently granted CCG's request for an extension of time to respond until April 29, 2003.

As described in the complaint, beginning in approximately 1997, Bob Moss, then the CEO of Rooney, encouraged senior employees of Rooney to make political contributions as a means of relationship-building. In March of 1998, according to Mr. Moss, he discussed the issue of political contributions with Brice Hill and Ken Bailey, then the CEO and COO of CCG. While Mr. Moss says that he informed them that he would like to take political contributions into account in exercising his discretionary prerogative to set bonus amounts, we do not understand that Mr. Moss claims to have obtained approval from either Mr. Hill or Mr. Bailey to reimburse contributions on a dollar-for-dollar basis. Mr. Moss and Mr. Esporrin began to collect copies of contribution checks from Rooney employees and used those checks to calculate management discretionary bonuses to reimburse the employees. The bonuses were paid from Rooney's incentive compensation pool that was based on Rooney's profitability.

In 2000, Mr. Moss and Mr. Esporrin assumed positions with CCG. However, they retained their positions with Rooney, and their actions overseeing the discretionary management bonus program were primarily as agents for Rooney. Indeed, their own bonus compensation continued to come from Rooney's bonus pool. The Supreme Court has recognized that it is a "well established principle that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately despite their common ownership." *United States v. Bestfoods*, 524 U.S. 51, 69 (1998). The hats that Mr. Moss and Mr. Esporrin wore while engaging in the improper activities continued to be Rooney hats even after they took positions at CCG.[3] At the times Mr. Moss and Mr. Esporrin calculated the management discretionary bonuses, they were continuing a practice that they had established at Rooney.[4]

It is thus apparent that CCG's subsidiary, Rooney, was at the center of the potential violations of the Act. It is a general principle of corporate law "that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *Bestfoods*, 524 U.S. at 61. The Commission itself recognized this principle, stating in an advisory opinion that "a

[3] As CEO of CCG, Mr. Moss was responsible for approving overall bonus compensation for employees of all CCG subsidiary companies, as was Mr. Hill before him.

[4] In 2002, employees of another CCG subsidiary, Centex Construction Company – Southeast, were reimbursed for a smaller amount of political contributions to state candidates. However, no employee of this subsidiary was reimbursed for any contributions to federal candidates, parties, or political committees.

subsidiary corporation is considered a distinct legal entity, an entity in its own right, apart from its parent." Op. Fed. Election Comm'n 1980-7 (1980), *available at* http://herndon3.sdrdc.com/ao/ao/800007.html. Accordingly, CCG is not legally responsible for the acts of its subsidiary Rooney.

Even if the Commission were to determine that CCG bore legal responsibility for violations of the Act at Rooney, no public interest would be served in holding CCG responsible. The primary violator of the Act was Rooney, not CCG. The courts have recognized that the Commission has broad discretion in determining whether to pursue an investigation. *See, e.g., In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044 (D.D.C. 1979) (holding that the court will reverse a Commission decision to dismiss a complaint only if the decision is arbitrary and capricious). Sound use of that discretion dictates that the Commission take no further action against CCG.

The potential violations of federal law began at Rooney, were undertaken by Rooney employees, and involved Rooney bonuses. While these activities may have been unlawful, they were not knowing and willful. *See* 2 U.S.C. § 437g(a)(5)(B). A knowing and willful violation of the Act requires evidence of "defiance or knowing, conscious, and deliberate flaunting of the Act." *AFL-CIO v. FEC*, 628 F.2d 97, 101 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 982 (1980). There is no evidence that Rooney employees, let alone any employees of CCG, acted to defy or deliberately flaunt the prohibitions of the Act. Less than one-third of the contributions to federal candidates were for the maximum amount permitted. The employees also were reimbursed for contributions to candidates in Florida and Georgia – states where direct corporate contributions are permitted. None of their actions suggest a criminal intent to evade the law.

Action by the Commission against CCG would be nothing more than an attempt to take two swings at the same pitch. Seeking to impose multiple punishment for the same acts would unnecessarily divert Commission time and resources from more immediate matters, when in this case Rooney has admitted that it violated the Act. The Commission's authority is fully vindicated by both the willingness of Rooney to seek pre-probable cause conciliation for violations that have occurred and the actions by Centex to strengthen its compliance programs to prevent violations in the future.

In addition, while Centex, CCG, and Rooney are distinct legal entities, with separate directors, officers, and day-to-day business operations, CCG and Rooney are wholly owned subsidiaries of Centex. As such, punishment that is meted out to Rooney ultimately will be borne by the many stockholders of Centex, which is a public

corporation. If the Commission were to punish CCG, ultimately the stockholders of Centex would bear that penalty as well. No valid public interest would be served by imposing multiple punishments on the same persons, the stockholders of Centex Corporation. Further, imposition of multiple punishments could discourage other corporations from coming forward with suspected wrongdoing when their business operations include multiple interests with diverse corporate holdings.

We submit that the Commission should take no further action against CCG. As such, CCG asks that the Commission find that no "action should be taken" against CCG on the basis of the complaint. 2 U.S.C. § 437g(a). Nevertheless, should the Commission determine that further action is warranted, CCG requests that the Commission's General Counsel enter into negotiations for pre-probable cause conciliation pursuant to 11 C.F.R. § 111.18(d).

We look forward to working with the Commission to reach a final resolution of this MUR. Once again, we would be pleased to discuss any aspect of this letter with you or other Commission staff.

Sincerely,

Martha L. Cochran

Robert S. Litt
Martha L. Cochran

Enclosure

STATEMENT OF DESIGNATION OF COUNSEL

Please use one form for each respondent

MUR 5357

NAME OF COUNSEL: Robert S. Litt
Martha L. Cochran

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The above-named individual is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

GLENN S. BURNS
Print Name

28 April 03 — Date
[signature] — Signature
SR. Vice-President, Chief Legal Officer — Title

RESPONDENT'S NAME: Centex Construction Group, Inc.

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