

Guide To The “New Jersey Local Unit Pay-To-Play” Law



**P.L. 2004, Chapter 19
(as amended by P.L. 2005, c.51)
N.J.S.A. 19:44A-20.4 et seq.**

Division of Local Government Services
Dr. Susan Jacobucci, Director

Department of Community Affairs
Charles A. Richman, Acting Commissioner

State of New Jersey
Richard J. Codey, Acting Governor

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DISCLAIMER

This Guide has been prepared by the Division of Local Government Services to assist local governmental entities and their counsel in complying with the recent Pay to Play law (P.L. 2004, c.19, as amended by P.L. 2005, c.51). The Guide is not designed to provide nor should it be taken as legal advice to local entities and officials. That is the province of the attorneys for those entities. Rather, it is designed to identify issues that may arise under the law and to offer for considerations approaches, forms and model documents that seem to address the obligations imposed by the law. As always, local governmental entities and officers should consult their legal counsel regarding compliance with the law and its application to particular circumstances.

Generally, a local government entity cannot award a contract to a vendor who has made a political contribution unless a fair and open process has been used.

Introduction

On January 1, 2006, N.J.S.A. 19:44A-20.4 et seq. takes effect. Known as the “Pay-To-Play” law [the Law], these statutes make important and wide-ranging changes the way New Jersey municipal and county government agencies acquire certain goods and services.

The Law affects how all municipalities and counties, local authorities, including fire districts, and all their subsidiaries, boards, commissions, and agencies (together, referred to as agency or agencies in this handbook) award contracts in excess of \$17,500 for goods and services. It affects all agencies subject to the provisions of the Local Public Contracts Law.

The Law reflects the following principles for contracts having an anticipated value in excess of \$17,500:

- A municipal or county government agency cannot award a contract without using a fair and open process if the contractor...
 - ...is a contributor to a candidate committee or a political party committee where a member of the party is serving in an elective public office of that municipality or county, and, either...
 - ...made “reportable” contributions (those in excess of \$300) during the year prior to the award, and/or...
 - ... makes contributions during the life of the contract.

This Handbook provides agency officials with guidance on implementing the Law in the organization. It discusses general application of the Law in the context of the Local Public Contracts Law. It does not replace advice from the agency’s legal counsel. Questions of interpretation for specific circumstances should be referred to local counsel as they will have the best perspective on how circumstances and local policies may affect agency actions.

Division of Local Government Services staff is available to provide general guidance in the context of this Handbook. Any questions are best sent to the Division via e-mail at dlgs@dca.state.nj.us. The Division maintains a [web site on the Law](#)¹, that includes a downloadable version of this handbook, a copy of the statute, sample documents, and a Frequently Asked Questions section. Content of this Handbook, FAQ’s, and the site will be regularly updated.

¹ www.nj.gov/dca/lgs/p2p

History of the Law

In mid-2004, P.L. 2004, c. 19 was signed into law. Originally known as Senate Bill Number S-2, the Law was an effort to regulate the practice of “pay-to-play” in the Executive and Legislative branches of state government, as well as in counties and municipalities. Later in 2004, Governor James E. McGreevey signed Executive Order 134 which imposed wide-ranging standards affecting state agencies, state authorities, and independent state agencies.

The Law and Executive Order No. 134 were part of an effort by State policy makers to establish limits on political contribution to elected officials. The Law adds “transparency” to the process of awarding contracts that are not subject to the rigor of the formal bidding process. It is intended to avoid creating constitutionally impermissible restrictions on the ability of individuals and organizations to participate in the political process.

In 2005, Executive Order 134 was essentially codified into law as P.L. 2005, Chapter 51. This new law also made several important, clarifying amendments to the original provisions of Chapter 19 that affected counties and municipalities. Today, the two laws affecting counties and municipalities are codified at N.J.S.A. 19:44A-20.4 et seq.

The Law is part of the New Jersey Campaign Contributions and Expenditures Reporting Act (N.J.S.A. 19:44A-1 et seq), administered by the New Jersey Election Law Enforcement Commission (ELEC). ELEC is responsible for receiving complaints and providing guidance on matters related to contributions. In applying the Law, local officials should keep in mind that Executive Order 134 does not affect county and municipal government contracts.

Currently, ELEC is in the process of adopting rules covering their responsibilities under the Law. Formal guidance about contributions and the complaint and enforcement process may not be available until those rules have been promulgated. Information about ELEC’s responsibilities and the ability to submit questions can be found on its website at www.elec.state.nj.us.

What Agencies Are Covered

Government agencies covered under the Law are counties and municipalities, and “...or any agency or instrumentality thereof...” (N.J.S.A. 19:44A-20.4 and 20.5) This covers all entities related to counties and municipalities, whether the governing board is elected by voters or appointed by a governing body that is elected.

The following are examples of agencies and instrumentalities covered by the Law:

- Any government entity whose board or management is appointed by a county or a municipal governing body or other official. These entities include, but are not limited to:
 - Local, county and regional authorities
 - Public libraries
 - Boards of health
 - Public assistance boards
 - Joint meetings
 - Joint insurance funds
- Fire districts
- County constitutional officers
- County colleges
- Independent boards and commissions, including but not limited to: Planning and Zoning Boards, Park Commissions, Boards of Social Services, Mosquito Control Commissions, and Workforce Investment Boards.

Agencies whose members are appointed by the State and funded by State government, such as County Boards of Taxation **are not** covered, but their activities are subject to different State laws on pay-to-play.

All local Boards of Education, including Type 1 School districts, County Vocational-Technical Schools, and State-operated school districts are not considered an “agency or instrumentality” of the municipality or county, and are not covered by the Law.

General Provisions of Pay-To-Play

For contracts executed on or after January 1, 2006, the Law prohibits an agency from awarding contracts with a value in excess of \$17,500 to a business entity that made reportable contributions² to:

- Any municipal committee of a political party if a member of that party is **in office** as a member of the governing body of the county or municipality **when** the contract is awarded;
 - This applies similarly to county government committees and elected officials.
- Any candidate committee of a person serving in an elected position of the county or municipality;
- In the one year **preceding award** of the contract.

Other Considerations

Two important considerations on award of contracts with a value in excess of \$17,500:

- A contractor receiving a contract issued under a non-fair and open³ process is barred from making a reportable contribution during the term of the contract.
- The Law permits award of contracts pursuant to a non-fair and open process to businesses that made a reportable contribution to a covered committee during calendar 2005⁴. The prohibition on making reportable contributions during the life of contracts awarded to such businesses, however, does apply.

The critical exception to these limitations is that a contract can be awarded to a contractor that made reportable contributions as described above, if the award is made through a “fair and open” process.

About Committees

State law provides for several types of committees; those affected by this Law are:

- Candidate Committees:
 - Candidate committee [N.J.S.A. 19:44A-3(q)]
 - Joint candidates committee [N.J.S.A. 19:44A-3(r)]
- Political Party Committees: a municipal or county committee of a political party [N.J.S.A. 19:44A-3(p)]

Excluded from the Law are types of “political committees,” commonly known as political action committees or PACs.

² More than \$300 to a covered committee; pursuant to N.J.S.A. 19:44A-8 and 16 et seq.

³ Explained in Section 7

⁴ L.2004,c.19,s.12: “Nothing contained in this act shall be construed as affecting the eligibility of any business entity to perform a public contract because that entity made a contribution to any committee during the one-year period immediately preceding the effective date of this act.”

What Contracts Are Covered?

Business entities awarded contracts valued over \$17,500 are affected by either the fair and open, or the non-fair and open process outlined in the Law.

The Law does not alter the provisions of contracting laws regulating agency procurement for goods and services that are subject to public bidding.

Exemptions from public bidding may be procured through either a fair and open process or a non-fair and open process pursuant to this Law (see table below). Sections 6 and 7 describe the requirements of both fair and open and non-fair and open processes.

There are several important elements in the Law concerning contracts with a value over \$17,500:

- 1) Contracts awarded by any authorized process are included: i.e., formal public bidding, competitive contracting⁵, cooperative purchasing, informal quotations; and contracts that are exempt from the bidding process, or for professional or extraordinary unspecifiable services.
- 2) They include contracts issued by purchase order, as well as by more formal contractual agreements, and are subject to the concept of aggregation
- 3) **The \$17,500 threshold holds regardless of the agency's bidding threshold.** Therefore, if an agency's bid threshold is \$21,000 or \$29,000 (as permitted with a Qualified Purchasing Agent), a contract with a value between \$17,500 and the agency's bid threshold is subject to pay-to-play prohibitions. This is an important limitation on the otherwise straightforward reading of the Local Public Contracts Law. The term "window contracts" is used to describe these contracts.
- 4) The Law does not affect contracts awarded to other government agencies.
- 5) Guidelines used for complying with the State's *Business Registration Certificate* requirements can be applied to determinations of the conduct of public business under Pay-To-Play. These guidelines provide exemptions from the Law for certain contracts where the government agency is acting as an intermediary or agent on behalf of its employees (for certain ongoing employee benefits programs), or for

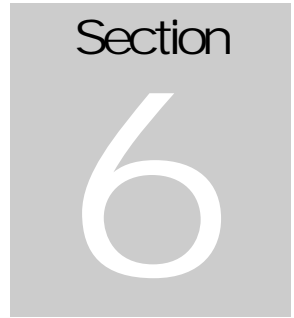
⁵ Pursuant to N.J.S.A. 40A:11-4.1 et seq.

recipients of social service or housing programs. In these cases, where a BRC is not required, Pay-To-Play procedures similarly do not apply. Information on the BRC is at www.nj.gov/dca/lgs/lpcl.

The following contract procedures are covered; how they are awarded is covered in the following sections.

Contracting Procedures Covered Under Pay-To-Play Law

1. Publicly bid pursuant to law
2. Receipt of quotations in excess of \$17,500 and less than the agency's bid threshold
3. Competitive contracting (N.J.S.A.. 40A:11-4.1 et seq.)
4. Professional services (attorney, engineers, etc.)
5. Exempt from bidding (i.e., insurance and risk management, recycling, codification, etc. (N.J.S.A. 40A:11-5)
6. Extraordinary Unspecifiable Services (i.e., consultants)
7. Cooperative purchasing



What Is a Fair and Open Process?

The Law defines the term “*fair and open process*” as follows:

"fair and open process" means, at a minimum, that the contract shall be: publicly advertised in newspapers or on the Internet website maintained by the public entity in sufficient time to give notice in advance of the contract; awarded under a process that provides for public solicitation of proposals or qualifications and awarded and disclosed under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications; and publicly opened and announced when awarded. The decision of a public entity as to what constitutes a fair and open process shall be final. (N.J.S.A. 19:44A-20.7)

In practical terms, the minimum requirements of a fair and open process are:

- Publicly advertised (either conventionally in newspapers OR posted on the entity’s website) with “sufficient time to give notice,” and
- Awarded under “a process that provides for public solicitation of proposals OR qualifications,” and
- Established on the basis of an award and disclosure process documented in writing prior to any solicitation, and
- Publicly opened and announced when awarded.

It is also important to note that despite some similarity in practice and terminology, a fair and open process is **not** the same as conventional public bidding or competitive contracting.⁶ While the public bidding and competitive contracting models meet the requirements of a fair and open process, their more rigorous procedures are **not mandated**.

Applying these standards to agency procurement practices requires interpretation to ensure consistency with existing laws and to ensure a consistent, minimum standard level of practice across government agencies. The following guidance will assist agencies in applying the Law.

⁶ N.J.S.A. 40A:11-4.1 et seq.

Fair and Open Interpretations and Explanations

Agencies are advised to use the following guidelines to meet the requirements of a fair and open process for contracts not subject to public bidding or competitive contracting:

1. The provisions of the Local Public Contracts Law that apply to public bidding and the competitive contracting process fully meet the intent and purpose of the fair and open process, notwithstanding any variances to the definition above. **Thus, when public bidding or the competitive contract process is used in accordance with law, the fair and open standard is met.** An alternative fair and open process can only be used when goods and services are exempt from public bidding.

Public bidding and competitive contracting meet the requirements of a fair and open process.

2. The requirement of “sufficient time to give notice” is met at a minimum by the standard for newspaper publication of bids; 10 calendar days. This applies for either newspaper or web site advertising.
3. The notice should include:
 - a description of the requested goods or services;
 - the time, date and place proposals must be submitted;
 - contact information for obtaining the proposal document;
 - the name of the agency requesting the proposal; and,
 - a statement that the proposal is being solicited through a fair and open process in accordance the N.J.S.A. 19:44A-20.4 et seq. (or 20.5 if a municipal entity).
4. For notices placed on web pages, the agency’s home page must either provide a direct link to information on contracts being solicited, or there must be a link to a page where such contracts are listed. Such links must be sufficiently prominent and clear to the user and not disguised or inartfully labeled.
5. The criteria that will be used as the “basis of award,” for the desired goods or services must be included in the document soliciting proposals (not in the public notice).

An agency has several alternatives in choose their basis for award under a fair and open process. These include:

- Choosing “lowest responsible bidder” as used in traditional public bidding
- The standard used by both state government and the competitive contracting model: “most advantageous, price and other factors considered.” Model criteria for this approach is found in Appendix E.
- Other “fair and open” process established by the agency (See Appendix E for sample language).

6. The following principles may be applied to the requirement to “publicly open and announce awards:”
 - It does **not** mean that proposals must be opened and awarded at the same time. Like bids, a proposal can be accepted and opened at one time, and awarded at a later date, after evaluation.
 - **Proposals may be opened in any public venue**, not just at a public meeting; i.e., the purchasing agent or another official can receive, open and announce proposals in a public meeting room, at the established time and place and open to the public. Like formal bids, fair and open proposals must be publicly opened, and the name of each vendor, their price proposal(s), and other pertinent information read aloud.
 - **Awards can be made at a separate time by resolution**, without a reading of all proposals. It is recommended that when multiple proposals are received, the analysis that led to the award (or rejection of proposals) be formally memorialized in writing and made part of the public record.
 - **Awards of fair and open contracts must be made by the governing body.** This requirement has an important effect in those agencies that delegate responsibility to the purchasing agent to award (window) contracts under the bid threshold. The Pay-to-Play requirement does not recognize the provisions of the Local Public Contracts Law that permits the purchasing agent to make these awards without governing body approval.

This issue has been carefully considered by the State and barring an amendment to the Law, no other conclusion as to intent can be reached.
7. All resolutions awarding contracts over the \$17,500 threshold should include wording indicating that the contract is awarded pursuant to a fair and open process or a non-fair and open process.
8. The definition also provides that “the decision of a public entity as to what constitutes a fair and open process shall be final.” This determination is subject to meeting the minimum criteria of the Law. This provision does not supersede existing legal recourse for challenges to contracts awarded pursuant to the competitive bidding provisions of the Local Public Contracts Law or as otherwise authorized by law.

Requirements for Non-Fair and Open Contracts

The Law clearly permits agencies to award contracts to business entities **without** using a fair and open process (a “non-fair and open process”). The Law requires that for a non-fair and open contract to be awarded:

- a. The contractor may not have made a “reportable contribution” in the previous year (Section 8 defines a “reportable contribution.”)
- b. The contractor may not make a reportable contribution during the term of the contract.
- c. The contractor must certify that no reportable contributions were made during the one year preceding the award of the contract. (N.J.S.A. 19:44A-20.8).
 - o The Law excludes contributions made during calendar year 2005 from this requirement (discussed below in Subsection 3).

The above three requirements are met and documented in the following manner. Each requirement is explained in detail following the list:

1. The governing body has a written determination that a contract has an anticipated value in excess of \$17,500.
2. The business entity files a disclosure form certifying that no reportable contribution was made during the previous year.
3. The contract contains a requirement prohibiting reportable contributions from being made during the term of the contract.
4. The governing body passes a resolution awarding the contract.

1. Determination of Value

Prior to the governing body formally considering a resolution awarding a non-fair and open contract, an appropriate official must certify in writing that the estimated amount of the contract to be awarded exceeds \$17,500. The appropriate official may be the purchasing agent, financial officer, chief administrative officer, or an appointed or elected official with knowledge of the contract.

The determination of the amount is based on the value of the full contract life, not the amount spent annually. Therefore a two-year contract for \$10,000 a year awarded through a non-fair and open process falls under this requirement. A single one year contract for

\$10,000, however, does not. The determination should be kept on file and made part of the resolution awarding the contract.

An agency can design its own Determination of Value form, or use a simple memorandum that makes the statement of the description of the goods or services to be procured and list the anticipated amount of the contract.

2. Business Entity Disclosure Certification

A model Business Entity Disclosure Certification has been developed for use by agencies (Appendix D). It contains the information necessary to comply with the statutory requirements of certifying that no reportable contributions were made in the year prior to the award of a contract.

A business entity must complete and submit the form to the agency prior to the governing body approving a contract. **The governing body cannot award a contract without having the completed certification on file.**

Form

The form has four elements:

- Affirmation statement
- Listing of candidate and political committees (provided by the agency)
- Business ownership disclosure
- Certification

Form Contents

The form provides space for the agency to list the names of the political and candidate committees and names of the elected officials to which contributions would have been barred during the one-year period **prior** to the award of the contract.

The clerk must obtain the names of the political party and candidate committees and the individual officials from the elected officials of the municipality or county. This allows the contractor to certify that prohibited contributions were not made to any of the named officials or committees.

Implementation Actions

The municipal clerk or freeholder board clerk should obtain the names of the committees from the elected officials and provide the information to the purchasing agent or other individual responsible for the contract.

The agency should designate an official to provide the committee names to the instrumentalities and agencies of the municipality or county with their own contracting authority. These agencies are obligated to include the same information on their forms.

This requirement imposes a new relationship between individuals elected to the municipal or county governing body and what are otherwise subordinate or independent agencies. It

is very important that contracting officials in the agencies establish good communication with the parent municipality or county so that the agencies and instrumentalities are aware of the political makeup and names of the committees. This will ensure that any non-fair and open contract certifications are properly completed.

This disclosure has an unusual ramification for agencies that are composed of more than one local unit. This includes regional authorities, joint meetings, joint insurance funds, joint health insurance funds, and regional health commissions. All these entities are made of more than one municipality (and may include a county government).

In these cases a contractor for a non-fair and open contract would have to **submit a Business Entity Disclosure Certification for each entity** represented by the agency making the award.

Disclosure of Ownership

The Certification also requires a disclosure of ownership of the contractor's organization (similar to the one required for public bidding) as a way to determine if any individual owns more than ten percent of the business entity. This is necessary as it will affect audit, enforcement and complaint processing.

The person signing the form certifies that he/she is authorized to represent the entity. This certification must be notarized.

3. Prohibition on Contributions

The Law requires that a contractor:

“...shall not make such a contribution, reportable by the recipient under P.L.1973, c.83 (C.19:44A-1 et seq.), to any municipal (*or county*) committee of a political party in that municipality (*or county*) if a member of that political party is serving in an elective public office of that municipality (*county*) when the contract is awarded or to any candidate committee of any person serving in an elective public office of that municipality (*county*) when the contract is awarded, during the term of that contract.”

Broken into its components, this section requires that the contractor:

- Shall not make an ELEC *reportable contribution* (see Section 8)...
- ...to a municipal or county or candidate committee (individual or joint) or political party committee if a member of that party is in office at the time of the award...
- ...during the term of the contract.

This prohibition on donations starts at the time of award, not when the contract is executed. Contributions are prohibited for one-year prior to the award.

IMPORTANT 2005 EXCEPTION!

Section 12 of Chapter 19 (this section is not codified as an N.J.S.A. section) provides the following:

12. Nothing contained in this act shall be construed as affecting the eligibility of any business entity to perform a public contract because that entity made a contribution to any committee during the one-year period immediately preceding the effective date of this act.

This section “grandfathers” otherwise reportable contributions made during 2005, exempting them from being treated as reportable, as far as pay-to-play disclosure is concerned. It permits award of a non-fair and open contracts despite the fact that contributions would have otherwise been barred.

Regardless of whether or not a reportable contribution was made in 2005, the Business Entity Disclosure Certification is still required for a contract awarded in 2006. The Certification provides that no contribution has been made “that would bar the award of the contract pursuant to P.L. 2004, c. 19.” The law provides that any 2005 reportable contributions does not bar award of the contract in 2006. The wording properly represents that no reportable contributions were made in 2005.

4. Resolution awarding the contract

The governing body can award the contract only after it has the Determination of Value and the Business Entity Disclosure Certification on file. Resolutions must also meet any other requirements as may be required by the Local Public Contracts Law (i.e., certification of availability of funds, or publication of professional services resolutions). A sample resolution is provided in Appendix B.

The resolution should contain the following elements:

1. Statement that the action is the award of a non-fair and open contract in accordance with N.J.S.A. 19:44A-20.4 (for a county agency) or 19:44A-20.5 (for a municipal agency)
2. Estimated value of the contract
3. A description of the goods or services to be provided
4. Name of the contractor
5. Length/term of the contract
6. Acknowledgment that the Business Entity Disclosure Certification has been received from the contractor
7. Recitation that a certification of availability of funds has been received from the agency chief financial officer, or that the funds will be encumbered by purchase order on an as needed basis (required pursuant to N.J.A.C. 5:30-5.4)
8. Statement awarding the contract to the contractor
9. Statement incorporating the Business Entity Disclosure Certification and the Determination of Value into the resolution
10. **The resolution must also comply with the recitation and publication requirements of N.J.S.A. 40A:11-5(1)(a) if the contract is for a professional or extraordinary unspecifiable service for an amount over the agency’s bid threshold.**

What Are Contributions and Business Entities?

A “contribution” to a committee is one that is reportable by the recipient under The New Jersey Campaign Contributions and Expenditures Reporting Act. (N.J.S.A. 19:44A-1 et seq.), administered by the Election Law Enforcement Commission. The election law⁷ defines a “reportable contribution” as one in excess of \$300.

The Pay to Play Law defines a “business entity” As follows:

“...any natural or legal person, business corporation, professional services corporation, limited liability company, partnership, limited partnership, business trust, association or any other legal commercial entity organized under the laws of this State or of any other state or foreign jurisdiction;” (N.J.S.A. 19:44A-20.7)

Government agencies are advised that this definition includes not-for-profit organizations, regardless of the laws under which they are formed.

The Law elaborates on circumstances concerning contributions:

“If a business entity is a natural person, a contribution by that person's spouse or child, residing therewith, shall be deemed to be a contribution by the business entity.

When a business entity is other than a natural person, a contribution by any person or other business entity having an interest therein shall be deemed to be a contribution by the business entity.” (N.J.S.A. 19:44A-20.6)

Further, the Law provides a definition of “interest” given its importance when determining if a contribution has been made:

“Interest” means the ownership or control of more than 10% of the profits or assets of a business entity or 10% of the stock in the case of a business entity that is a corporation for profit, as appropriate. (N.J.S.A. 19:44A-20.7)

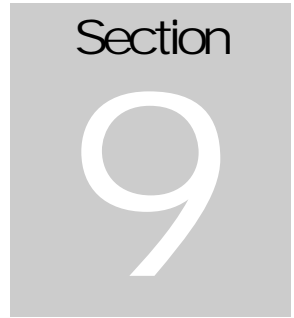
There are two provisions clarifying these definitions. N.J.S.A. 19:44A-6 requires that:

1. When a business is also a natural person, a contribution by that person’s spouse or children residing with the “natural person” are contributions of the business entity.

⁷ N.J.S.A. 19:44A-8(d) for political party committees and N.J.S.A. 19:44A-16(f) for candidate committees.

2. When the business entity is not a natural person, a contribution by any person or other business entity that has an interest (as defined above) are contributions by the business entity.

Questions concerning an individual's or business entity's ability to make contributions and amounts should be referred to the Election Law Enforcement Commission at www.elec.state.nj.us. This handbook does not cover these issues.



Other Aspects and Implications of the Law

Emergencies and “Exigencies”

The Law provides that:

“nothing contained in this act shall be construed as prohibiting the awarding of a contract when the public exigency⁸ requires the immediate delivery of goods or performance of emergency services as determined by the State Treasurer.” (N.J.S.A. 19:44A-20.12)

While the State Treasurer must make the decision, the Division of Local Government Services and the State Treasurer are developing a system to meet the needs of local officials in these circumstances. These provisions will be announced and circulated prior to January 1, 2006.

Aggregation

Contracts to a single business may individually be less than \$17,500, but if the value of all contracts awarded during a year to exceed that amount, they are affected by the Law. Agencies are advised that when the value of all contracts to a single business will exceed \$17,500 in the aggregate, to use vendor aggregation rules (N.J.A.C. 5:34-8.2). The rules can be used to trigger a determination to use either a fair and open process or a non-fair and open process.

While N.J.A.C. 5:34-8.2 discusses aggregation in terms of the goods or services purchased, the pay-to-play law means that the aggregation decision is applied to the vendor, not goods or services.

Cooperative Purchasing Contracts

Cooperative purchasing meets the fair and open process requirements because it requires public bidding or competitive contracting. Therefore, cooperative purchasing members may continue to use the contract awards of a lead agency and be in compliance with the Law.

To ensure that audit and control standards are met, agencies should reinforce their compliance with the existing practice of including the lead agency’s identification number in the body of the purchase order.

⁸ Conventionally defined in dictionaries as “a sudden unforeseen crisis (usually involving danger) that requires immediate action.”

2006 Transition: Use of Non-Fair and Open Contracts in 2006 and Contributions Made in 2005

The Law is not to be construed as affecting the eligibility of any business entity to perform a public contract because that entity made a contribution to any committee during calendar year 2005⁹. Procedurally, the wording of the Business Entity Disclosure Certification form meets the standard required by the Law. No other disclosure is necessary.

Agencies without Elected Officials

The statutory restriction on non-fair and open contracts also applies to those agencies whose governing body is appointed (i.e., authorities, libraries, etc.) and not elected. In this case, it is the political party and candidate committees that represent the elected officials on the governing body that appointed the members of the agency that are listed on the Disclosure form.

For agencies that have more than one municipality or county represented on their governing body, information on the elected officials of all governing bodies that appoint members must be considered when the agency awards non-fair and open contracts. Given the complexity of this process, these agencies should consider using a fair and open process as much as possible.

Local Pay-To-Play Ordinances

A local ordinance is not required to implement the provisions of Chapter 19. The Law affects all agencies equally. Some agencies have adopted their own Pay-To-Play ordinances with requirements that may be more restrictive than the provisions of Chapter 19. Some observers have noted that these local ordinances may be in conflict with the State Law and may be invalid after January 1, 2006. Agencies that have adopted such policies should consult their legal counsel and keep abreast of relevant legislative or judicial activity concerning them.

Awarding "Pooled" Contracts

Some agencies presently create a "pool" of pre-qualified contractors to perform various professional services. Traditionally contractors are selected based on a review of qualifications. Once the pool is established, contracts for projects or other assignments are issued to one of the pre-qualified contractors, chosen on a price, rotation, specific qualification, or other basis as the agency determines relevant.

This practice, when used for professional services or other goods or services exempt from bidding, may be continued, but must follow either a fair and open or non-fair and open process. The governing body should choose the process, and award open-ended contracts.

⁹ P.L. 2004, c. 19, s. 12 (see Appendix E)

If a non-fair and open process is used, each contractor would submit a Business Entity Disclosure Certification, and a contract would be awarded and executed. Similarly, for a fair and open process, after an appropriate solicitation process, multiple contracts may be awarded to those contractors that meet the agency's selection criteria.

In each case, the contract's compensation would be based on rate schedules or other appropriate basis, depending on the work involved

Following award of a contract through either process, an internal selection procedure would be used to assign work to a contractor. Assignments would be made by the governing body or designated official, as the agency determines, and purchase orders issued for each assignment.

Handling Recurring Contracts

Traditionally, many goods and services that are exempt from public bidding and have a value over \$17,500 are procured from a single vendor by issuing multiple purchase orders. Examples of these include marketing of recyclables, legal advertising, and library goods and services. Litigation and engineering services also fall into this category. This existing process for recurring contracts **is not** viable under pay-to-play requirements and the contracts must now be procured pursuant to a fair and open, or non-fair and open process.

To eliminate the need for repeated procurement cycles for these goods and services, the agency can use a two step process. Step one is selecting a vendor or vendors through either a fair and open or non-fair and open process. The section above on Handling Pooled Contracts outlines a process for awarding more than one contract for the same goods or services. Step two requires awarding a single, open-ended contract to the selected vendor(s) for a period permitted by law (see N.J.S.A. 40A:11-15) with funds certified as work is authorized. After the initial award, each time goods or services are needed, a purchase order is issued, based on the terms and conditions of the initial contract.

An example would be a contract with a law firm that handles litigation. An initial non-fair and open contract may be awarded for one year (professional services) with the required Business Entity Disclosure Certification Form. The contract awarded by the governing body includes the appropriate terms, conditions, and rates, but without reference to specific litigation. Each time the governing body authorizes litigation, a purchase order can be encumbered which would refer to the initial contract as the basis for award. This practice would work in a similar manner for project-based engineering services.

The same principle applies for contracts for goods that are exempt from bidding (i.e., library supplies for which fair and open practices may be incompatible, or legal advertising). A open-ended contract for up to two years (with an optional extension for two more) can be authorized, with the appropriate submissions. For audit and control purposes the initial contract award is referenced on all subsequent purchase orders.

Contract Language

All non-fair and open contracts **must include** provisions in the contract for goods or services prohibiting the contractor from making contributions to any political party or candidate committee that represented any member of the governing body when the contract was awarded.

Special Circumstances: Banks, Utilities, and Insurers

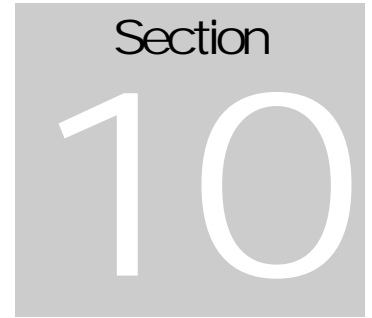
There are several circumstances where the application of the Law creates anomalies with other statutes and where the public is served by exempting contractors from the application of Chapter 19. Certain conflicts arise due to the nature of the business relationship and laws regulating political contributions. In these cases, agencies can issue purchase orders and pay vouchers without regard to non-fair and open contracting procedures. The following services are affected by this circumstance:

1. Services whose rates are regulated through tariffs approved by the Board of Public Utilities. This includes, but is not limited to: water and sewer services, transmission of electricity and natural gas, basic electricity and natural gas services, and local telephone service. Providers of these services are statutorily barred from making reportable contributions.

This exemption **does not include** contracts with non-tariffed vendors (including unregulated subsidiaries of regulated companies) providing generated electricity, natural gas supplies, long-distance telephone services, and alternate intra-LATA telephone services. When the cost of the service is over the agency's bid threshold, these services must be procured either through public bidding or competitive contracting (if authorized). A fair and open process must be used when the contract is a window contract (over \$17,500 but less than the agency's bid threshold).

2. Banking services. Banks are appointed by resolution of the governing body and banking services are rarely reflected in contracts. Banks are prohibited from making reportable contributions.
3. Contracts with insurance companies (the state-regulated company that is the actual insurer, not an agency or agent representing the company). While insurers are prohibited from making reportable contributions, the purchase of insurance continues to be subject to contracting laws directing the procurement method, i.e., exempt from bidding, but subject to extraordinary unspecifiable services procedures.

This exemption does not extend to other areas that may be similar in part. For example, rates for government "legal" advertising in "official newspapers" may be set in statute and the choice of newspapers restricted (N.J.S.A. 35:1-1 et seq.). Under Pay-To-Play however, because there is often a choice of vendors and newspaper owners are not legally restricted from making contributions, this service is subject to pay-to-play procedures.



Implementing the Law in 2006

Assess

Agency administrative personnel should assess the impact of the Law and plan to brief elected officials on the implications of the Law as soon as practicable. Where new elected officials are taking office on January 1, 2006, this information should be provided to them as part of their briefing material.

Identify

The Municipal Clerk and Board Clerk should make appropriate arrangements with elected officials to identify the names of the political and candidate committees used by elected officials in the previous year. Legal counsel should be consulted on the form the agency will use for business entity disclosure purposes (a sample is found in Appendix D). Steps should be taken to fill in the form with the names of the committees. If the name of the party or candidate, as appropriate, is not part of the committee name, the name of the party or candidate must be included in the same space.

Decide

With the advent of annual appointments made at reorganization meetings, elected, appointed, and administrative officials should consult to determine which contracts will be awarded on a fair and open basis and those that will be non-fair and open.

Inform

Contractors that will receive a non-fair and open contract should be notified of their responsibilities to disclose their contribution information (see also part 3 of Section 7 for the 2005 exception provision) to ensure that the necessary documents are filed prior to the time the appointment resolution is to be passed.

Prepare

For non-fair and open contracts, the appropriate local officials should prepare the required “value determination and certification” and have them on file prior to the award of the contract.

Update

Be sure standard contract resolution forms and contract documents are updated to include the required disclosure information. See Appendices B and C for model language.

Determine

For contracts to be awarded pursuant to a fair and open process, set a timetable for providing notice, determine the award criteria, draft the request for proposals, and move forward with the process on a timely basis.

Share

Municipal Clerks, Freeholder Clerks, Chief Financial Officers, and Purchasing Agents are encouraged to use their GovConnect Discussion Forums as a way to share ideas and questions with their peers. Agencies that develop model documents or procedures can share them with others by posting them in a Document Library (e-mail them to lpcl@dca.state.nj.us).

The Division of Local Government Services may also be able to assist with difficulties; e-mail those to lpcl@dca.state.nj.us. DLGS staff will also monitor Discussion Forums to lend assistance and maintain the Pay-To-Play Frequently Asked Questions page at www.nj.gov/dca/lgs/p2p.



Frequently Asked Questions

1. Can contractors awarded contracts through public bids or competitive contracting make reportable contributions to municipal or county candidate or political committees?

Yes. Only the non-fair and open process prohibits the business entity from making contributions in the year prior to award and during the life of a contract.

However, any reportable contribution would preclude the business entity from receiving a subsequent contract made under a non-fair and open process.

2. Is the threshold for the governing body to award a fair and open contract \$17,500 or the agency's bid threshold pursuant to the Local Public Contracts Law?

The amount is \$17,500, not the bid threshold under the Local Public Contracts Law. Under Pay-To-Play, the Purchasing Agent cannot award window contracts (those between \$17,500 and the agency's bid threshold); governing body approval is required..

3. Are contracts that are exempt from bidding subject to the fair and open process, requiring public advertising, award criteria, a formal proposal, and award by the governing body?

Yes.

4. Are contracts with any New Jersey government or federal government agencies covered under the Law?

No. Under this Pay-To-Play law, only contracts with business entities are covered.

5. Are contracts with non-profit organizations covered under the Law?

Yes.

6. A contractor has certified that they have made no contributions that trigger the restrictions established by this Law but I have reason to believe they have in fact made contributions. In light of the certification, what is my responsibility to disclose my belief and may I award the contract based on the "certification?"

Contact ELEC. Furthermore, if there is a question to a contractor's eligibility, officials should seek the advice of their local counsel.

7. A contractor suggested that he made a contribution to a political action committee (PAC) within our county, but they have not made any direct contributions to the officials in office. The county PAC supports a political party that is represented within our governing body. Is that contractor eligible for a non-fair and open contract?

Yes. If the contractor has made contributions to a county PAC they are not precluded from doing "non-fair and open" business with a municipality in that county.

8. May a business entity that has a made a reportable contribution re-establish eligibility to for a contract by returning the contribution.

Yes, provided that the contribution is returned within sixty (60) days of said contribution. ELEC should be consulted for additional information.

9. How does the Law apply to multi-year contracts?

- a. *The value of the contract over its entire life of the contract is considered for determining if the \$17,500 threshold is met.*
- b. *A contractor receiving a non-fair and open contract cannot make reportable contributions during the life of the contract.*

10. A business entity has contracts with three separate contracting agencies (as defined pursuant to the Local Public Contracts Law) in a county: One is with the county itself, one is with the County Park Commission, and one is with the County Library. All three contracts are less than \$17,500. Does the aggregation principle apply, making the contracts subject to the Law.

No - these are three separate contracting units. The aggregation rule only applies to contracts issued by a single contracting agency.

Italicized text is to be filled in as appropriate and if necessary to the circumstances. This form is downloadable as a separate document at www.nj.gov/dca/lgs/p2p

**RESOLUTION AUTHORIZING THE AWARD OF A CONTRACT FOR
<INSERT PURPOSE>**

WHEREAS, the <local unit> has a need to acquire <describe goods or services to be provided> as a non-fair and open contract pursuant to the provisions of <N.J.S.A. 19:44A-20.4 or 20.5 as appropriate>; and,

WHEREAS, the <purchasing agent or other individual> has determined and certified in writing that the value of the acquisition will exceed \$17,500; and,

WHEREAS, the anticipated term of this contract is X year(s) <and may be extended x times as approved by this governing body>; and

WHEREAS, <name of business entity> has submitted a proposal <date of proposal> indicating they will provide the <description of goods and services> for the <insert price proposal>; and

WHEREAS, <name of business entity> has completed and submitted a Business Entity Disclosure Certification which certifies that <name of business entity> has not made any reportable contributions to a political or candidate committee in the <name of agency with the elected officials> in the previous one year, and that the contract will prohibit the <name of business entity> from making any reportable contributions through the term of the contract, and

WHEREAS, (agency language complying with certification of the availability of funds requirements – N.J.A.C. 5:30-5.4>.

NOW THEREFORE, BE IT RESOLVED that the <form of government> of the <local unit> authorizes the <name of official> to enter into a contract with <name of business entity> as described herein; and,

BE IT FURTHER RESOLVED that the Business Disclosure Entity Certification and the Determination of Value be placed on file with this resolution. and,

(BE IT FURTHER RESOLVED that <insert agency language on publication of notice if required>)

Italicized text is to be filled in as appropriate and if necessary to the circumstances. This form is downloadable as a separate document at www.nj.gov/dca/lgs/p2p



Sample Non-Fair and Open Contract Contribution Prohibition Language

Political Contribution Disclosure. This contract has been awarded to CONTRACTOR based on the merits and abilities of CONTRACTOR to provide the goods or services as described herein. This contract was not awarded through a “fair and open process” pursuant to N.J.S.A. 19:44A-20.4 et seq. As such, the undersigned does hereby attest that CONTRACTOR, its subsidiaries, assigns or principals controlling in excess of 10% of the company has neither made a contribution, that is reportable pursuant to the Election Law Enforcement Commission pursuant to N.J.S.A. 19:44A-8 or 19:44A-16, in the one (1) year period preceding the award of the contract that would, pursuant to P.L. 2004, c.19, affect its eligibility to perform this contract, nor will it make a reportable contribution during the term of the contract to any political party committee in the *municipality/county* if a member of that political party is serving in an elective public office of that *municipality/county* when the contract is awarded, or to any candidate committee of any person serving in an elective public office of that *municipality/county* when the contract is awarded.



BUSINESS ENTITY DISCLOSURE CERTIFICATION

The Business Entity Disclosure Certification form that follows this explanation can be used by agencies as the certification required for contractors to receive a non-fair and open contract. The form is can be downloaded as a Microsoft Word document from the Local Unit Pay-To-Play website at www.nj.gov/dca/lgs/2p2. A blank page follows this page for the convenience of those printing on both sides of the page.

The form includes space for the agency to list the names of the political party and candidate committees that represent the elected officials of the municipality or county.

The reverse side of the form contains a reprinting of the statutory citations and terms that are referenced in the wording of the certification. It is recommended that agencies include this information on their form.

BUSINESS ENTITY DISCLOSURE CERTIFICATION
FOR NON-FAIR AND OPEN CONTRACTS
 Required Pursuant To N.J.S.A. 19:44A-20.8
 <NAME OF CONTRACTING AGENCY>

Part I – Vendor Affirmation

The undersigned, being authorized and knowledgeable of the circumstances, does hereby certify that the <name of business entity> has not made and will not make any reportable contributions pursuant to N.J.S.A. 19:44A-1 et seq. that, pursuant to P.L. 2004, c. 19 would bar the award of this contract in the one year period preceding (date of award scheduled for approval of the contract by the governing body) to any of the following named candidate committee, joint candidates committee; or political party committee representing the elected officials of the <name of entity of elected officials> as defined pursuant to N.J.S.A. 19:44A-3(p), (q) and (r).

Part II – Ownership Disclosure Certification

I certify that the list below contains the names and home addresses of all owners holding 10% or more of the issued and outstanding stock of the undersigned.

Check the box that represents the type of business entity:

- Partnership Corporation Sole Proprietorship Subchapter S Corporation
 Limited Partnership Limited Liability Corporation Limited Liability Partnership

Name of Stock or Shareholder	Home Address

Part 3 – Signature and Attestation:

The undersigned is fully aware that if I have misrepresented in whole or part this affirmation and certification, I and/or the business entity, will be liable for any penalty permitted under law.

Name of Business Entity: _____

Signed: _____ Title: _____

Print Name: _____ Date: _____

Subscribed and sworn before me this ____ day of _____, 2__.

My Commission expires:

 (Affiant)

 (Print name & title of affiant) (Corporate Seal)

BUSINESS ENTITY DISCLOSURE CERTIFICATION
FOR NON-FAIR AND OPEN CONTRACTS
Required Pursuant To N.J.S.A. 19:44A-20.8
<NAME OF CONTRACTING AGENCY>

The following is statutory text related to the terms and citations used in the Business Entity Disclosure Certification form.

“Local Unit Pay-To-Play Law” (P.L. 2004, c.19, as amended by P.L. 2005, c.51)

19:44A-20.6 Certain contributions deemed as contributions by business entity.

5. When a business entity is a natural person, a contribution by that person's spouse or child, residing therewith, shall be deemed to be a contribution by the business entity. When a business entity is other than a natural person, a contribution by any person or other business entity having an interest therein shall be deemed to be a contribution by the business entity.

19:44A-20.7 Definitions relative to certain campaign contributions.

6. As used in sections 2 through 12 of this act:

“business entity” means any natural or legal person, business corporation, professional services corporation, limited liability company, partnership, limited partnership, business trust, association or any other legal commercial entity organized under the laws of this State or of any other state or foreign jurisdiction;

“interest” means the ownership or control of more than 10% of the profits or assets of a business entity or 10% of the stock in the case of a business entity that is a corporation for profit, as appropriate;

Temporary and Executing

12. Nothing contained in this act shall be construed as affecting the eligibility of any business entity to perform a public contract because that entity made a contribution to any committee during the one-year period immediately preceding the effective date of this act.

~~~~~

**The New Jersey Campaign Contributions and Expenditures Reporting Act (N.J.S.A. 19:44A-1 et seq.)**

**19:44A-3 Definitions.** In pertinent part...

p. The term "political party committee" means the State committee of a political party, as organized pursuant to R.S.19:5-4, any county committee of a political party, as organized pursuant to R.S.19:5-3, or any municipal committee of a political party, as organized pursuant to R.S.19:5-2.

q. The term "candidate committee" means a committee established pursuant to subsection a. of section 9 of P.L.1973, c.83 (C.19:44A-9) for the purpose of receiving contributions and making expenditures.

r. the term "joint candidates committee" means a committee established pursuant to subsection a. of section 9 of P.L.1973, c.83 (C.19:44A-9) by at least two candidates for the same elective public offices in the same election in a legislative district, county, municipality or school district, but not more candidates than the total number of the same elective public offices to be filled in that election, for the purpose of receiving contributions and making expenditures. For the purpose of this subsection: ...; the offices of member of the board of chosen freeholders and county executive shall be deemed to be the same elective public offices in a county; and the offices of mayor and member of the municipal governing body shall be deemed to be the same elective public offices in a municipality.

**19:44A-8 and 16 Contributions, expenditures, reports, requirements.**

*While the provisions of this section are too extensive to reprint here, the following is deemed to be the pertinent part affecting amounts of contributions:*

“The \$300 limit established in this subsection shall remain as stated in this subsection without further adjustment by the commission in the manner prescribed by section 22 of P.L.1993, c.65 (C.19:44A-7.2).”





## Sample Fair and Open Proposal Award Criteria

The following language is suggested as a starting point for agencies to use in developing their proposal/qualification evaluation in considering a fair and open contract award. The Law requires that agencies disclose the basis for award of a contract in the request for proposals or qualifications for items not subject to public bid (lowest responsible bidder) or competitive contracting (most advantageous, price and other factors considered).

Agencies should consult with legal counsel to determine the appropriate language for an individual contract.

1. Proposals will be evaluated by the *<name of governing body>* of the *<name of agency>* on the basis of the most advantageous, price and other factors considered. The evaluation will consider:
  - a. Experience and reputation in the field;
  - b. Knowledge of the *<name of agency>* and the subject matter to be addressed under the contract;
  - c. Availability to accommodate any required meetings of the agency;
  - d. Compensation proposal;
  - e. Other factors if demonstrated to be in the best interest of the *<name of agency>*.
2. The following criteria, found under the competitive contracting rules at N.J.A.C. 5:34-4.2 may also be of assistance. These criteria are not intended to be limiting or all-inclusive, and they may be adapted or supplemented in order to meet an agency's needs. No criteria should unfairly or illegally discriminate or exclude otherwise capable vendors.
  - I. Technical criteria:
    - A. Proposed methodology:
      1. Does the vendor's proposal demonstrate a clear understanding of the scope of work and related objectives?
      2. Is the vendor's proposal complete and responsive to the specific RFP requirements?
      3. Has the past performance of the vendor's proposed methodology been documented?

4. Does the vendor's proposal use innovative technology and techniques?
5. Are sound environmental practices such as recycling, energy efficiency, and waste reduction used?

II. Management criteria:

A. Project management:

1. How well does the proposed scheduling timeline meet the agency's needs?
2. Is there a project management plan?

B. History and experience in performing the work:

1. Does the vendor document a record of reliability of timely delivery and on-time and on-budget implementation?
2. Does the vendor demonstrate a track record of service as evidenced by on-time, on-budget, and contract compliance performance?
3. Does the vendor document industry or program experience?
4. Does the vendor have a record of moral integrity?

C. Availability of personnel, facilities, equipment and other resources:

1. To what extent does the vendor rely on in-house resources vs. contracted resources?
2. Are the availability of in-house and contract resources documented?

D. Qualification and experience of personnel:

1. Documentation of experience in performing similar work by employees and when appropriate, sub-contractors?
2. Does the vendor make use of business capabilities or initiatives that involve women, the disadvantaged, small and/or minority owned business establishments?
3. Does the vendor demonstrate cultural sensitivity in hiring and training staff?

III. Cost criteria:

A. Cost of goods to be provided or services to be performed:

1. Relative cost: How does the cost compare to other similarly scored proposals?
2. Full explanation: Is the price and its component charges, fees, etc., adequately explained or documented?

B. Assurances of performance:

1. If required, are suitable bonds, warranties, or guarantees provided?
2. Does the proposal include quality control and assurance programs?

C. Vendor's financial stability and strength:

1. Does the vendor have sufficient financial resources to meet its obligations?



**“New Jersey Local Unit Pay-To-Play” Law**

**Excerpted from Chapter 19, P.L. 2004 (as amended by P.L. 2005, c.51)**

**N.J.S.A. 19:44A-20.4 et seq.**

**AN ACT** concerning certain campaign contributions by certain business entities and county political party committees, supplementing P.L.1973, c.83 (C.19:44A-1 et seq.), and amending P.L.1973, c.83.

...

**19:44A-20.4 Contributors to county committee of political party of elective officers; eligibility for county contracts.**

3. Notwithstanding the provisions of any other law to the contrary:

a county, or any agency or instrumentality thereof, shall not enter into a contract having an anticipated value in excess of \$17,500, as determined in advance and certified in writing by the county, agency or instrumentality, 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 that is reportable by the recipient under P.L.1973, c.83 (C.19:44A-1 et seq.), to any county committee of a political party in that county if a member of that political party is serving in an elective public office of that county when the contract is awarded or to any candidate committee of any person serving in an elective public office of that county when the contract is awarded; and

a business entity that has entered into a contract having an anticipated value in excess of \$17,500 with a county, or any agency or instrumentality thereof, except a contract that is awarded pursuant to a fair and open process, shall not make such a contribution, reportable by the recipient under P.L.1973, c.83 (C.19:44A-1 et seq.), to any county committee of a political party in that county if a member of that political party is serving in an elective public office of that county when the contract is awarded or to any candidate committee of any person serving in an elective public office of that county when the contract is awarded, during the term of that contract.

No such committee shall accept such a contribution from a business entity during the term of its contract with the county.

L.2004,c.19,s.3.

**19:44A-20.5 Contributors to municipal committee of political party of elective officers; eligibility for municipal contracts.**

4. Notwithstanding the provisions of any other law to the contrary:

a municipality, or any agency or instrumentality thereof, shall not enter into a contract having an anticipated value in excess of \$17,500, as determined in advance and certified in writing by the municipality, agency or instrumentality, 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 that is reportable by the recipient under P.L.1973, c.83 (C.19:44A-1 et seq.), to any municipal committee of a political party in that municipality if a member of that political party is serving in an elective public office of that municipality when the contract is awarded or to any candidate committee of any person serving in an elective public office of that municipality when the contract is awarded; and

a business entity that has entered into a contract having an anticipated value in excess of \$17,500 with a municipality, or any agency or instrumentality thereof, except a contract that is awarded pursuant to a fair and open process, shall not make such a contribution, reportable by the recipient under P.L.1973, c.83 (C.19:44A-1 et seq.), to any municipal committee of a political party in that municipality if a member of that political party is serving in an elective public office of that municipality when the contract is awarded or to any candidate committee of any person serving in an elective public office of that municipality when the contract is awarded, during the term of that contract.

No such committee shall accept such a contribution from a business entity during the term of its contract with the municipality.

L.2004,c.19,s.4.

**19:44A-20.6 Certain contributions deemed as contributions by business entity.**

5. When a business entity is a natural person, a contribution by that person's spouse or child, residing therewith, shall be deemed to be a contribution by the business entity. When a business entity is other than a natural person, a contribution by any person or other business entity having an interest therein shall be deemed to be a contribution by the business entity.

L.2004,c.19,s.5.

**19:44A-20.7 Definitions relative to certain campaign contributions.**

6. As used in sections 2 through 12 of this act:

"business entity" means any natural or legal person, business corporation, professional services corporation, limited liability company, partnership, limited

partnership, business trust, association or any other legal commercial entity organized under the laws of this State or of any other state or foreign jurisdiction;

"interest" means the ownership or control of more than 10% of the profits or assets of a business entity or 10% of the stock in the case of a business entity that is a corporation for profit, as appropriate;

"fair and open process" means, at a minimum, that the contract shall be: publicly advertised in newspapers or on the Internet website maintained by the public entity in sufficient time to give notice in advance of the contract; awarded under a process that provides for public solicitation of proposals or qualifications and awarded and disclosed under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications; and publicly opened and announced when awarded. The decision of a public entity as to what constitutes a fair and open process shall be final.

"State agency in the Legislative Branch" means the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch.

L.2004,c.19,s.14; amended 2005, c.51, s.14.

#### **19:44A-20.8 Business entity to provide written certification, ELEC reports.**

7. a. Prior to awarding any contract, except a contract that is awarded pursuant to a fair and open process, a State agency in the Legislative Branch, a county, or a municipality shall require the business entity to which the contract is to be awarded to provide a written certification that it has not made a contribution that would bar the award of a contract pursuant to this act.

b. A business entity shall have a continuing duty to report to the Election Law Enforcement Commission any contributions that constitute a violation of this act that are made during the duration of a contract.

L.2004,c.19,s.7; amended 2005, c.51, s.15.

#### **19:44A-20.9 Repayment of contribution.**

8. If a business entity makes a contribution that would cause it to be ineligible to receive a public contract or, in the case of a contribution made during the term of a public contract, that would constitute a violation of this act, the business entity may request, in writing, within 60 days of the date on which the contribution was made, that the recipient thereof repay the contribution and, if repayment is received within those 60 days, the business entity would again be eligible to receive a contract or would no longer be in violation, as appropriate.

L.2004,c.19,s.8.

**19:44A-20.10 Violations by business entities, penalties.**

9. A business entity which is determined by the Election Law Enforcement Commission to have willfully and intentionally made a contribution or failed to reveal a contribution in violation of this act may be liable to a penalty of up to the value of its contract with the public entity and may be debarred by the State Treasurer from contracting with any public entity for up to five years.  
L.2004,c.19,s.9.

**19:44A-20.11 Penalty for acceptance of unlawful contribution.**

10. Any person who is determined by the Election Law Enforcement Commission to have willfully and intentionally accepted a contribution in violation of the provisions of sections 1 through 4 of this act shall be liable to a penalty for each such violation equal to the penalties set forth in subsection e. of section 22 of P.L.1973, c.83 (C.19:44A-22).  
L.2004,c.19,s.10.

**19:44A-20.12 Construction of act relative to public exigency.**

11. Nothing contained in this act shall be construed as prohibiting the awarding of a contract when the public exigency requires the immediate delivery of goods or performance of emergency services as determined by the State Treasurer.

L.2004,c.19,s.11.

**19:44A-20.11 Penalty for acceptance of unlawful contribution.**

10. Any person who is determined by the Election Law Enforcement Commission to have willfully and intentionally accepted a contribution in violation of the provisions of sections 1 through 4 of this act shall be liable to a penalty for each such violation equal to the penalties set forth in subsection e. of section 22 of P.L.1973, c.83 (C.19:44A-22).

L.2004,c.19,s.10.

**19:44A-20.12 Construction of act relative to public exigency.**

11. Nothing contained in this act shall be construed as prohibiting the awarding of a contract when the public exigency requires the immediate delivery of goods or performance of emergency services as determined by the State Treasurer.

L.2004,c.19,s.11.

**Temporary and Executing**

12. Nothing contained in this act shall be construed as affecting the eligibility of any business entity to perform a public contract because that entity made a contribution to any committee during the one-year period immediately preceding the effective date of this act.

L.2004,c.19,s.12.

**C.19:44A-11.3a Limitations on receipt of contributions, certain, between county committees; violations, penalties.**

13. In addition to any other applicable limit prescribed by law, between January 1 and June 30 of each year, a county committee of a political party shall not make a contribution to any other county committee of a political party, nor shall any such county committee accept a contribution from any other county committee during that time period. In addition to any other penalty provided by law, a county committee that willfully and intentionally violates this section, or willfully and intentionally makes a contribution to any candidate or committee with the intent, condition, understanding or belief that the candidate or committee has made or shall make a contribution to another county committee, shall be liable to a penalty equal to four times the amount of the contribution.

14. Section 2 of P.L.1973, c.83 (C.19:44A-22) is amended to read as follows:

**C.19:44A-22 Violations; civil penalties; forfeiture.**

22. a. (1) Except as provided in subsection e. or f., any person, including any candidate, treasurer, candidate committee or joint candidates committee, political committee, continuing political committee, political party committee or legislative leadership committee, charged with the responsibility under the terms of this act for the preparation, certification, filing or retention of any reports, records, notices or other documents, who fails, neglects or omits to prepare, certify, file or retain any such report, record, notice or document at the time or during the time period, as the case may be, and in the manner prescribed by law, or who omits or incorrectly states or certifies any of the information required by law to be included in such report, record, notice or document, any person who proposes to undertake or undertakes a public solicitation, testimonial affair or other activity relating to contributions or expenditures in any way regulated by the provisions of this act who fails to comply with those regulatory provisions, and any other person who in any way violates any of the provisions of this act shall, in addition to any other penalty provided by law, be liable to a penalty of not more than \$3,000.00 for the first offense and not more than \$6,000.00 for the second and each subsequent offense.

(2) No person shall willfully and intentionally agree with another person to make a contribution to a candidate, candidate committee, joint candidates committee, political committee, continuing political committee, political party committee, or legislative leadership committee with the intent, or upon the condition, understanding or belief, that the recipient candidate or committee shall make or have made a contribution to another such candidate or committee, but this paragraph shall not be construed to prohibit a county or municipal committee of a political party from making a contribution or contributions to any candidate, candidate committee, joint candidates committee, political committee, continuing political committee, political party committee, or legislative leadership committee. A finding of a violation of this paragraph shall be made only upon clear and convincing evidence. A person who violates the provisions of this paragraph shall be liable to a penalty equal to four times the amount of the contribution which that person agreed to make to the recipient candidate or committee.

b. Upon receiving evidence of any violation of this section, the Election Law Enforcement Commission shall have power to hold, or to cause to be held under the provisions of subsection d. of this section, hearings upon such violation and, upon finding any person to have committed such a violation, to assess such penalty, within the limits prescribed in subsection a. of this section, as it deems proper under the circumstances, which penalty shall be paid forthwith into the State Treasury for the general purposes of the State.

c. In assessing any penalty under this section, the Election Law Enforcement Commission may provide for the remission of all or any part of such penalty conditioned upon the prompt correction of any failure, neglect, error or omission constituting the violation for which said penalty was assessed.

d. The commission may designate a hearing officer to hear complaints of violations of this act. Such hearing officer shall take testimony, compile a record and make factual findings, and shall submit the same to the commission, which shall have power to assess penalties within the limits and under the conditions prescribed in subsections b. and c. of this section. The commission shall review the record and findings of the hearing officer, but it may also seek such additional testimony as it deems necessary. The commission's determination shall be by majority vote of the entire authorized membership thereof.

e. Any person who willfully and intentionally makes or accepts any contribution in violation of section 4 of P.L.1974, c.26 (C.19:44A-29) or section 18, 19 or 20 of P.L.1993, c.65 (C.19:44A-11.3, C.19:44A-11.4 or C.19:44A-11.5), shall be liable to a penalty of:

(1) Not more than \$5,000.00 if the cumulative total amount of those contributions is less than or equal to \$5,000.00;

(2) Not more than \$75,000.00 if the cumulative total amount of those contributions was more than \$5,000.00 but less than \$75,000; and

(3) Not more than \$100,000.00 if the cumulative total amount of those contributions is equal to or more than \$75,000.00.

f. In addition to any penalty imposed pursuant to subsection e. of this section, a person holding any elective public office shall forfeit that public office if the Election Law Enforcement Commission determines that the cumulative total amount of the illegal contributions was more than \$50,000.00 and that the violation had a significant impact on the outcome of the election.

g. Any penalty prescribed in this section shall be enforced in a summary proceeding under the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

**15. This act shall take effect on January 1, 2006.**

Approved June 16, 2004.





