



Things to Know About Local Unit Pay-To-Play Laws:

P.L. 2004, c. 19

P.L. 2005, c.271

**Division of Local Government Services
April 2006**

Our Program Today...

- Introduction to Pay-to-Play
- Fair and Open Contracts
- Non-Fair and Open Contracts
 - Non Fair and Open:
Disclosure Forms and Certifications
- Implementing Pay-to-Play

Disclaimer!

- This presentation of the Division of Local Government Services is intended to guide and assist local units in complying with Pay-to-Play laws.
- It is not intended to provide nor should it be taken as legal advice to local units and their officials. Legal counsel should be consulted regarding compliance with the law and its application to particular circumstances.



Introduction to Pay-to-Play

P.L. 2004, c.19

P.L. 2005, c. 271

About Pay-to-Play

- Chapter 19 of P.L. 2004 originally included the State Executive Branch
 - EO 134 and Chapter 51 of 2005 took them out and retained municipalities, counties, and the legislature
 - Made other important wording changes
 - Compiled at N.J.S.A. 19:44A-20.4 et seq.
- Chapter 271 allows local policies to supersede Chapter 19 requirements
- Enforced by ELEC – they handle contributions questions and complaints
- DLGS assigned to support affected governments and provide guidance

C. 271 – Includes...

1. Local Pay to Play Policies
 2. Political Disclosure Certifications for all contracting units
 3. Vendor reporting to ELEC
- **Important:** Governor Codey issued “Statement Upon Signing” to assist in interpreting C.271 in relation to Chapter 19

Who...

- The laws affect all county and municipal contracting units, even if their governing board is not elected (i.e., includes authorities, boards, commissions)
 - Laws reference: “agencies and instrumentalities”
 - Agencies and instrumentalities are covered by the elected officials that appoint their board members
- Boards of Education do not have to comply with Chapter 19, but can adopt their own policies, but have other Chapter 271 responsibilities

What Contracts Are Covered

- Contracts awarded after January 1, 2006
- **Contracts with a value over \$17,500**
 - Not linked to the agency's bid threshold
 - Will not increase based on index rate
 - Includes contracts with non-profits
- Chapter 19 does not apply to contracts with:
 - Other government agencies
 - Banks, insurance, and public utility companies that are regulated by State restrictions on political contributions
 - Chapter 271 may have an impact on these organizations

Local Policies – c.271

- Municipalities and counties and their agencies and instrumentalities can adopt local pay-to-play policies
 - Ordinances or resolutions, as appropriate
 - Includes boards of education
 - When local policies are adopted, Chapter 19 does not supersede or preempt them
- Local policies must be consistent with the disclosure “themes” of the laws
- Local policies that supersede c.19 must be specific, or c.19 will apply
- File all local pay-to-play policies with the Secretary of State

What if No Local Pay-to-Play Policy?

- ...Chapter 19 governs
- To the extent that local policies do not supersede elements of Chapter 19, Chapter 19 requirements applies

Keys to Chapter 19:

- ...Where a local unit has not adopted it's own pay-to-play policy...
- An agency cannot award a contract without using a competitive and public process to a contractor that...
- is a contributor to a political party where a member of the party is serving in an elective public office of that municipality/county
- the contribution limitation covers the 12 months prior to the award and bans contributions during the life of the contract.
- Chapter 19 does not affect goods and services that are **publicly bid.**

Impact of Chapter 19

- Chapter 19 requires contracts to be awarded by the governing body through a “fair and open” or “non-fair and open” process.
- These processes include:
 - Public bids
 - Quotes over \$17,500 (aka “window” contracts)
 - Competitive contracting
 - Professional services (lawyers, engineers, etc.)
 - Exempt from bidding (40A:11-5, i.e., insurance and risk management, recycling, codification, etc.)
 - Extraordinary Unspecifiable Services (consultants)
 - Cooperative purchasing

Key P2P Concepts

- Contributions: “reportable” per ELEC, are more than \$300 per election cycle to local candidate and/or local political party committee
- “Fair and Open” contracts permit contractors to make reportable contributions
- “Non-fair and open” contracts PROHIBIT reportable contributions 12 months before, and during the life of the contract

What's a "Window" Contract

- Contracts over \$17,500 but less than the agency's bid threshold...
- Are subject to the law as a fair and open or non-fair and open process
- Fair and open contracts must now be awarded by the governing body, not by the purchasing agent



Fair and Open Contracts

Fair and Open Process

- For goods or services not required to be bid or for window contracts.
- Announced in newspaper or on website
 - At least 10 days prior to opening
- Described in an RFP or RFQ
 - Must include description of award criteria
- Proposals are publicly opened and announced
 - Treat like bid: sealed proposals, no phone quotes!
- Awarded by governing body
- Agency determination of its fair and open process is final...
 - ...but within context of the these elements

What About Bidding?

- Public bidding and competitive contracting are considered as a “fair and open” process under the law
- Cannot substitute pay-to-play procedures for items over the agency’s bid threshold



Non-Fair and Open Contracts

No competition
required in vendor
selection!

To Receive a Non-Fair and Open Contract

- Vendors must certify that they did not give reportable contributions in previous 12 months to...
- ...political parties and/or candidate committees represented by people on the governing board...
- ...that bar them from receiving a contract.
- And cannot make them during the life of the contract
- Meaning: no reportable contributions to elected officials and/or their party committees, before or after award.

Disclosure Forms and Certifications

- Determination of Value
- Business Entity Disclosure Certification
- Political Contribution Disclosure Certification
- Stockholder Disclosure Certification (c.33)
- Resolution and Contract

Determination of Value

- Law requires a statement to be on file with governing body describing:
 - The required goods and services
 - That the amount exceeds \$17,500
- Can be a basic memo from the appropriate administrative official

Business Entity Disclosure Certification

- Contractor certified that he is not barred from accepting the contract:
 - Certifies that no reportable contributions were made in 12 months prior to award
 - Agrees that no contributions will be made over the life of the contract.
- Must be on file prior to award
- Required for all non-fair and open awards for agencies covered by c.19

Whose Contributions Must Be Reported

- A contribution by the business entity that is not a natural person...
- Is any person or other business entity having an **interest** in the business entity.
- “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.

Identifying Elected Officials and Committees for Contractors

- The governing body's clerk should obtain these names from the elected officials for Business Entity Disclosure Certification
- The information should be passed to all subordinate contracting units to include on their forms

2006 BONUS!

- Contributions made in 2005 do not count against contracts awarded in 2006
- Business Entity Disclosure Certification is still required
- The certification language covers contributions made in 2005

Political Contribution Disclosure Form (PCD, c.271)

- **Non-fair and open contracts over \$17,500 only**
- Business must submit a list of **reportable** contributions made to a wide range of elected officials for last 12 months
- Affects **ALL** contracting units (including schools)
- Is in addition to Business Entity Disclosure Certification
- Must be submitted 10 days prior to award
- Is not required for “public emergency” that calls for the immediate delivery of goods or services...
- Keep on file with other contract documents
- ELEC can penalize for failure to disclose
- Local P2P policy cannot waive it

About Contributors...

- Chapter 271 has it's own broad range of people whose contributions must be disclosed:
- Includes people with 10% or more “interest” in the business (same as BED-C).
- In addition:
 - All principals, partners, officers, or directors of the business entity or their spouses
 - Any subsidiaries directly or indirectly controlled by the business entity
 - IRS Code Section 527 New Jersey based organizations, directly or indirectly controlled by the business entity and filing as continuing political committees, (PACs)

Elected Officials and Committees Covered by PCD

- Any State, county, or municipal committee of a political party, or,
- Any legislative leadership committee, and
- Any candidate committee of a candidate for, holder of, an elective office of:
 - of the public entity awarding the contract
 - of that county in which that public entity is located
 - of another public entity within that county
 - of a legislative district in which that public entity is located or, when the public entity is a county, of any legislative district which includes all or part of the county
- Continuing Political Committee (PACs)

Stockholder Disclosure Certification

- Filing of PCD gives agency knowledge of who made contributions
- Knowledge obligates agency to check that people with a barred ownership interest (10%+, c.19) did not contribute
- Stockholder Disclosure Certification (c.33) provides 10%+ ownership information
- Request the Certification along with PCD
- Check PCD list of contributions against BED-C to ensure listed committees did not receive a contribution from a Stockholder Disclosure listed 10%+ owner

DLGS PCD Form Package

- Local unit instructions
- Vendor instructions
- Disclosure form
- List of affected agencies
- On P2P website

Resolutions and Contracts

- Resolutions for non-fair and open contracts require special disclosures above and beyond a traditional award resolution.
 - Sample in Guide book
- Contract language must reflect that:
 - The award is “non-fair and open”
 - Vendor made no contribution that would bar award
 - Vendor agrees to prohibition against making contribution limits during the term of the contract.
- Forms must be on file prior to award
 - Determination of Value
 - Business Entity Disclosure Certification of a contractor
 - Political Contribution Disclosure (10 days)



Implementing Pay-to-Play

Approval of “Public Exigencies” - Emergencies

- Emergencies: if in accord with LPCL emergency law and rules, approved when
 - Public health, safety, and welfare requires immediate delivery or performance
 - Chain of command for approval
 - Funded via governing body resolution if necessary
- File report with DLGS within 30 days
- No Political Contribution Disclosure required

Approval of “Public Exigencies” – Other

- Goods and services:
 - Must be provided by a specific vendor; and,
 - Timing of procurement does not make Chapter 19 fair and open compliance possible; and,
 - Procurement is consistent with pay-to-play (not a loophole)
- File request with DLGS
- DLGS makes recommendation to Treasurer who makes decision
- Requires a Political Contribution Disclosure

Aggregation

- The \$17,500 threshold is subject to the principle of aggregation rules in NJAC 5:34-8.2 et seq.
- But based on the value of contracts to the same vendor instead of goods and services

How to Use Aggregation

- Estimate the remainder of this year, plus next year's projected need
 1. No P2P impact if the increase is less than \$2,625
 2. If between \$2,625 and \$35,000 – governing body votes on action to take
 3. If over \$35,000, immediately apply P2P

Other Issues

- Cooperative purchasing bid contracts: applies only to the awarding agency (Local and State)
- Land use boards can make their own decisions
- Constitutional officer's committees are included on County Disclosure Certifications
- Affirmative Action forms needed for all contracts over bid threshold
- Fair and open contracts solicitation requires a sealed proposal and public opening
- Permitted charitable donations not covered

More Issues

- Mayor and Council roles in Faulkner Act
 - Mayor can decide F&O or Non-F&O in absence of Council direction
 - Can have different policies for different contracts
 - Must be worked out locally
 - Mayor considered “governing body” for BED-C forms
- Employees as contractors
 - Not covered if all salary, or salary and employment contract
 - Covered if salary and professional services contract
 - Escrow funds count toward \$17,500 decisions

Different Issues

- Can substitute “non-fair” and open with other terms that meet the law: contracts not awarded pursuant to a fair and open process
- State fiscal year doesn’t change anything.
 - Non-fair and open vendors should not make contributions during 2006 – no exception
- No special resolution required for fair and open contracts; but they should note it is awarded as fair and open pursuant to NJSA 19:44A-20.4 et seq.
- PCD required for bank and insurance contracts, but not with public utilities for regulated services
 - Resolution naming a bank (depository) is a “contract:” PCD required 10 days prior to resolution (but, BED-C and no Stockholder Certification).

C. 271 (Section 3): Vendor ELEC Reporting

- Businesses receiving more than \$50,000 a year in public contracts must file an annual disclosure of contributions with the ELEC
- Threshold is based on total of all public contracts
- Includes contributions to:
 - Candidate for or the holder of any public office having responsibility for the awarding of public contracts, or...
 - Political party committee, legislative leadership committee, political committee or continuing political committee
- Requirement should be included in bid specs - sample content in LFN 2006-1
- No vendor activity required until ELEC adopts regulations (summer/fall)

Implementing C.271

- File any adopted pay-to-play ordinance or resolution with Secretary of State
- Implement the PCD form for all non-fair and open contracts
- Adopt internal procurement procedures to get PCD 10 days in advance of awarding non-fair and open contracts
- If the timing of the adoption of the law and local non-fair and open contract awards overlapped and PDC forms were not submitted, obtain them for file purposes as soon as possible

Recap: Required Forms

- Non-fair and open over \$17,500 only
- **Both PCD and Business Entity Disclosure Certification** are required
 - **PCD** – vendor disclosure of contributions made: must be on file 10 days prior to award
 - **Stockholder Disclosure Certification** – with PCD to allow for analysis of ownership
 - **BED-C** – made no contributions that bar award; will not make any that bar award. Anytime prior to award
- Filing only; no local responsibility to review
- Complaints of inaccuracy or inconsistency get referred with ELEC

Open Pay-to-Play Questions

- Status of non-profits – some aspects don't make sense
- Handling of contract renewals/extensions for existing contracts
- County colleges
- SID, redevelopment and tax abatement contracts
- Confidential law enforcement equipment contracts

DLGS Resources

- **Local Finance Notices**
 - 2005-30 and 2005-32, 2006-1, and 2006-7.
- **Web site: www.nj.gov/dca/lgs/p2p**
- **Questions on the contracting process contact the Division of Local Government Services at lpcl@dca.state.nj.us**
- **Questions about contributions? Contact the Election Law Enforcement Commission at: 888-313-ELEC (3532)**