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State Comptroller report exposes fatal flaws in NJ's Pay-to-Play law

An easily satisfied exception to the Pay-to-Play law leaves few obstacles for local government entities seeking to reward politically favored vendors

Relying on evidence gathered from its contract reviews, the Office of the State Comptroller (OSC) released a report today that illustrates how a series of fatal flaws have essentially rendered New Jersey's Pay-to-Play law meaningless in the effort to prevent local governments from steering contracts to politically favored vendors.

Specifically, the OSC report examined an exception to the Pay-to-Play law that allows local governments to award contracts to campaign donors with virtually unlimited discretion as long as it uses what the law defines as a "fair and open" process. The "fair and open" exception does not apply at the state level, where vendors who make disqualifying campaign contributions are simply banned from receiving state contracts.

The OSC report, and the contract reviews used to support it, found that "fair and open" requirements present few, if any, real obstacles to government entities seeking to reward politically favored vendors with government contracts.

"What our report found is that the fair-and-open exception is more than just a loophole that weakens the local government Pay-to-Play law," State Comptroller Matthew Boxer said. "Qualifying for the fair-and-open exception returns the local government entity to the essentially unregulated system of contracting that existed before the Pay-to-Play law - and qualifying is ridiculously easy."

One of the more startling weaknesses discussed in the report is that a public entity seeking a "fair and open" exemption from the Pay-to-Play law is the sole arbiter in deciding whether it qualifies for the exemption. The public entity's decision is final, and

the public and competing vendors are not afforded an opportunity to challenge that decision.

“In effect, the entities that the Pay-to-Play law intends to regulate act as their own regulator,” Boxer said.

Another weakness detailed in the report is that the “fair and open” exception requires government agencies to set forth vendor-selection criteria before awarding a contract, but it sets no guidelines as to the type of criteria that may be used, nor does it ensure that those criteria are in fact used in the ultimate selection process or applied in a fair and appropriate manner.

For example, OSC found in its contract reviews that cost frequently is not among the vendor-selection criteria used in awarding “fair and open” contracts. Often included, on the other hand, are vague and easily manipulated criteria, such as “these and any other considerations the agency deems necessary.”

Other contracts reviewed by OSC included criteria so generic that they exclude no one, such as a requirement that the vendor employ sufficient staff or maintain the appropriate licenses. By using such easily satisfied, vague requirements, the government entity is left without true selection criteria to determine the most qualified vendor and has a greater opportunity to award the contract to a politically favored company.

“Fair and open” also fails to require local governments to document their rationale for selecting a particular vendor, the report concluded. An OSC review of four municipalities found that two of the municipalities were not even maintaining records that would indicate which municipal officials had evaluated the competing proposals from prospective vendors. The OSC report found that absent such documentation it is difficult, if not impossible, for aggrieved vendors to amass arguments concerning the validity of a purportedly “fair and open” process.

“Under the fair-and-open exception, as long as the contract opportunity is minimally advertised and selection parameters of any kind are drafted, the ultimate award is within the entity’s discretion and immune from outside review,” Boxer said. “While perhaps no legislation can eliminate all risk associated with donor influence in government contracting, it is apparent nearly six years into its implementation that the fair-and-open system offers notably few hurdles for wrongdoers to overcome.”

The OSC report also found that the separate pay-to-play rules for the state government and local governments have led to additional complications, causing confusion for public officials and vendors seeking to navigate the different systems.

The Governor, state legislators and the Election Law Enforcement Commission (ELEC) all have called for changes to or elimination of the fair-and-open system. The OSC report offers three remedial options for policymakers to consider:

- Eliminate the fair-and-open exception;
- Strengthen fair-and-open guidelines to require a more competitive contracting process that addresses the concerns outlined in the OSC report;
- Reform New Jersey's contract law across the board so that a more competitive vendor-selection process is required regardless of whether the Pay-to-Play law applies.

At a press conference this morning, Boxer was joined by ELEC Executive Director Jeffrey Brindle in calling for reform.