NJ BUSINESS SOLUTIONS

Protect Your Business: Complying with New Jersey's "Pay-to-Play" Laws

NJ BUSINESS SOLUTIONS is a service to the members of the New Jersey Business & Industry Association and the readers of New Jersey Business Magazine. *These articles are intended to help New Jersey employers deal with practical issues affecting their business operations.*

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An opportunity comes along to sell goods or services to an agency of state, county or municipal government. Your business bids to be awarded that contract. But before your bid is accepted, the agency requires you to complete forms addressing political contributions you and persons connected with your business have made.

Welcome to "pay-to-play" regulation. In June, the New Jersey Business & Industry Association (NJBIA) conducted a well-attended program discussing the twists and turns of three new state laws and numerous local ordinances that limit eligibility for government contracts based on political contributions and/or require business entities to report contributions when seeking government contracts. As a business owner, it is important to be aware of these laws and to put in place procedures addressing contributions, so as not to lose your opportunity to win government contracts.

This article summarizes these new laws, highlighting requirements that apply to contracting with different levels of government and includes basic recommendations for compliance.

State Contracting Restrictions[1]

In September 2004, then Governor James E. McGreevey issued an executive order banning pay-to-play for state contracts. Effective October 15, 2004, this law – now codified by statute (Chapter 51) – generally prohibits the state (and any of its purchasing agents, agencies or independent authorities) from awarding bid and no-bid contracts worth more than $17,500 for goods or services, or for the sale, acquisition or lease of land or buildings, if the prospective contractor has made and/or solicited a "reportable" contribution (i.e., greater than $300) to a gubernatorial candidate committee, state political party committee or county political party committee. This contribution limitation applies during specified periods both prior to and during the term of the contract.

Chapter 51 applies not only to contributions by the prospective contractor itself, but also to contributions by: (i) principals who own or control more than 10 percent of its profits, assets or stock, and (ii) subsidiaries and political action committees (a.k.a continuing political committees) that it controls. If you seek a state contract as a sole proprietor, the contribution limit also applies to your spouse and children living at home.

You must certify compliance with Chapter 51 before being awarded the contract. Chapter 51 also contains various "anti-circumvention" measures, such as a requirement to report contributions made to continuing political committees during the preceding four years (but not before Oct. 15, 2004). This disclosure obligation continues during the term of the contract. These disclosures are subject to review by the State Treasurer to determine whether the contributions pose a conflict of interest, which could disqualify you from receiving the contract or be deemed a material breach of contract.

County, Municipal and Legislative Contracting Restrictions[2]

Effective January 1, 2006, counties, municipalities and the State Legislature are generally prohibited from awarding contracts worth more than $17,500, if you (or associated persons and entities) made a reportable contribution to any candidate committee of the elected official with the ultimate responsibility for awarding the contract and/or to the political party committee (at the level of government where the contract is awarded) of which that elected official is a member. This $300-contribution limit applies during the year preceding the award of contract (but not before Jan. 1, 2006) and continues during the term of the contract. Chapter 19's contribution limits do not apply to contracts awarded through a "fair and open process." At a minimum, "fair and open" requires: (i) advance public advertising of the contract: (ii) public solicitation of proposals or qualifications and award based on pre-established written criteria; and (iii) public opening of proposals and announcement of the award.

Chapter 19 limits contributions by the prospective contractor, principals who own or control more than 10 percent of its profits, assets or stock, and, if a sole proprietor, that person's resident spouse and children. But, unlike Chapter 51, it does not restrict contributions by subsidiaries and/or political action committees.

You must certify compliance prior to the contract award and report prohibited contributions to the New Jersey Election Law Enforcement Commission (ELEC) during the term of contract. Civil penalties apply for violations.

General Disclosure Requirements[3]

No later than 10 days before entering into a contract worth more than $17,500 with the state's Executive Branch, State Legislature, a county, municipality, independent authority, board of education or fire district, you must disclose reportable contributions made during the preceding 12 months. The contributions subject to disclosure vary according to the level of government at which a contract is awarded. For example, if the contract is awarded by a county, you must disclose contributions to any candidate committee of a candidate for, or holder of, an elective office of (i) the county, (ii) another public entity within that county, or (iii) a legislative district, which includes all or part of the county in addition to contributions to any (iv) state, county, or municipal political party committee, (v) legislative leadership committee and (vi) continuing political committee.

In addition, a business entity that has received $50,000 or more through government contracts in a calendar year must submit to ELEC an annual report of contributions.

Chapter 271 also covers a broader range of contributors: (i) the prospective contractor, (ii) persons or business entities who own or control more than 10 percent of its profits, assets or stock, (iii) its principals, partners, officers and directors (regardless of their interest) and their spouses, and (iv) any subsidiaries and political action committees that it controls. Again, in the case of sole proprietors, the limitation extends to spouses and children residing at home.

Local Ordinances

More than 70 local pay-to-play ordinances have also been adopted across the state. Chapter 271 generally upholds these ordinances against possible preemption challenges. While the provisions of these local ordinances vary, many include elements more stringent than Chapter 19: (i) coverage of no-bid professional service contracts, without an exception for "fair and open process," (ii) imposition of contribution limits and prohibitions, including aggregate annual limits, on a broad range of persons and entities associated with the prospective contractor, and (iii) application to contributions made

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or solicited during time periods extending more than one year before the contract is awarded.

General Recommendations for Compliance

The new pay-to-play laws are certainly having an impact; one might even call it a chilling effect. According to a June 2006 *Star-Ledger* analysis, many major contractors have slashed or stopped their political giving.

On the other hand, it is your constitutional right to participate in the political process and you may continue to do so without losing opportunities to do business with state and local government. But this now requires a strategy for maintaining compliance with the pay-to-play regulations. Here are a few suggestions:

1. Identify persons and entities subject to the requirements of each law and alert them of the restrictions, prohibitions and disclosure requirements of the relevant law(s).

2. Track and review all contributions by covered persons and entities to prevent inadvertent violations. If an inadvertent violation occurs, request an immediate refund in writing.

3. Use contribution cover letters with protective language to alert recipients that the contributor is a business entity subject to "pay-to-play" restrictions.

4. Adopt a company policy governing the making and solicitation of political contributions. Distribute the policy to all officers, members, directors, stockholders and employees.

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1 P.L. 2005, c.51 (formerly known as Executive Order 134 and codified as N.J.S.A. 19:44A-20.13 - 20.25) ("Chapter 51").

2 P.L. 2004, c.19 (formerly known as "S-2" and codified as N.J.S.A. 1944A-20.4-11.3) ("Chapter 19").

3 P.L. 2005, c.271 (codified as N.J.S.A. 19:44A-20.26) ("Chapter 271").

For More Information Contact:

New Jersey Election Law Enforcement Commission
Phone: 1.888.313.ELEC
Web site: http://www.elec.state.nj.us/

New Jersey Department of Community Affairs
Email: lpcl@dca.state.nj.us
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