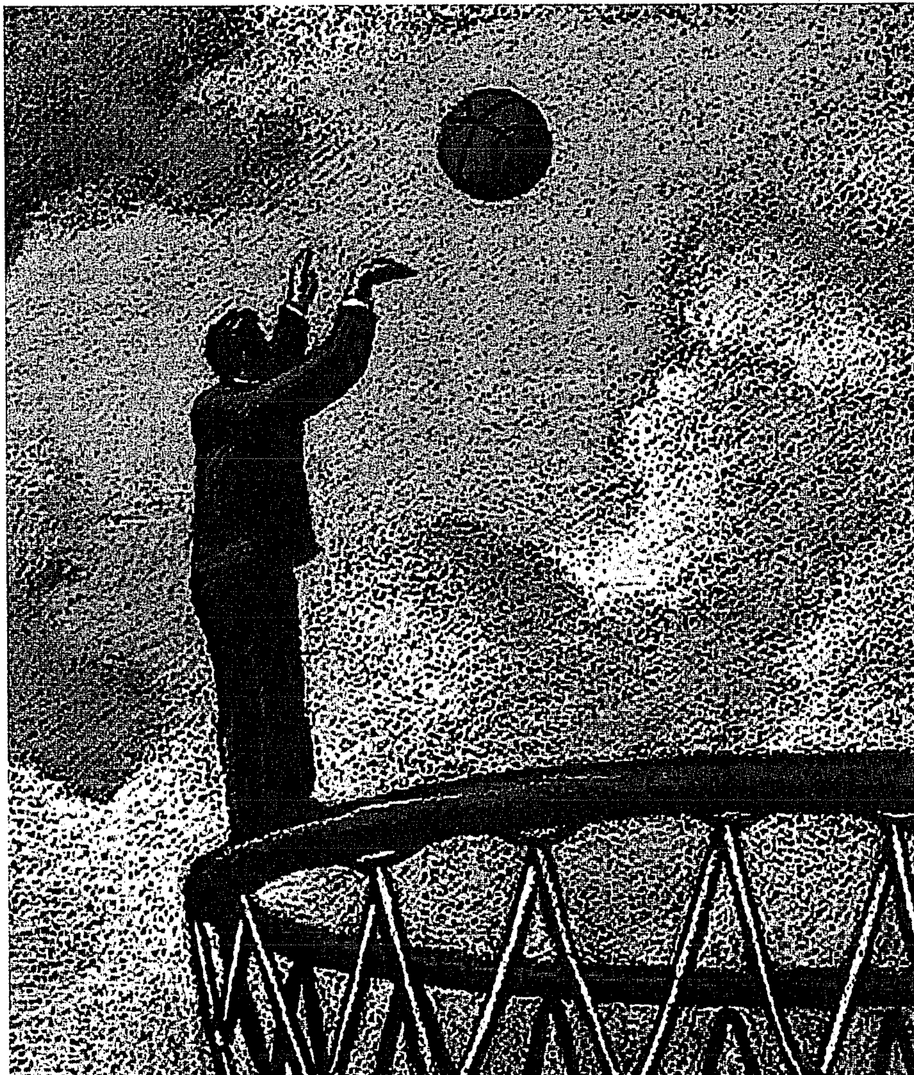
How To Cut Through the Confusion of "Pay to Play"

Rebecca Moll Freed
Attorney, Genova, Burns & Vernoia

Over the past eighteen months, a series of "pay-to-play" laws have swept the Garden State. Although the purpose of these laws is clear—to avoid favoritism in the award of public contracts—these "pay-to-play" laws have left a great deal of confusion in their wake.

The uncertainty surrounding New Jersey's series of recently enacted "pay-to-play" laws grew on January 1, 2006 when the "pay-to-play" law, commonly known as S-2, P.L. 2004, c. 19 (June 16, 2004), took effect.[1] Although the effective date of S-2 generated confusion among the regulated community, this confusion was augmented a few weeks earlier when, on December 8, 2005, the State Senate passed A-3013.[2]



Interpreting S-2 as of January 1, 2006, a county, municipality or any instrumentality thereof has generally been prohibited from awarding a contract worth more than $17,500 to a business entity that has made a "reportable" contribution to an elected official presiding over the award of that contract or to that official's political party committee (at the level of government where the contract is awarded) unless the contract is awarded through a "fair and open" process.

Under S-2, the term "business entity" includes natural or legal persons, business corporations, professional services corporations, limited liability companies, partnerships, business trusts, associations and any other legal commercial entity. The definition also includes principals who own and/or control more than 10 percent of the profits, assets or stock in a business entity and, if the business entity is a natural person (i.e. a sole proprietor), the definition also includes that person's resident spouse and children. The definition of a "business entity," under S-2, does not include subsidiaries and/or political action committees controlled by a business entity.

The term "fair and open" process means that, at a minimum, the contract is publicly advertised in newspapers or on the Internet website maintained by the government entity in sufficient time to give advance notice of the contract. "Sufficient notice" has been interpreted to mean, at a minimum, ten calendar days. Although a "fair and open" process is not the same as conventional public bidding, if a government entity awards a contract through a competitive bidding process that entity will have met the standards of a "fair and open" process.

Absent a "fair and open" process, the government entity awarding the contract must review a business entity's "reportable" contributions during the 12-month period preceding contract negotiations. If a business entity has made a "reportable" contribution during the restricted period,[3] except in the case of a public exigency, the government entity is prohibited from awarding the contract to that business entity. Further, if a government entity learns that a business entity performing a post-December 31, 2005 government contract, awarded through a "non-fair and open" process, has made a "reportable" contribution during the term of such a contract that business entity may be disqualified from performing the contract at issue and may be subject to additional penalties under the law. A business entity may cure a violation of the law by requesting a refund, in writing, within 60 days of the date on which the business entity made a contribution in violation of S-2.

S-2 requires business entities to file both pre- and post-contract award certifications with the New Jersey Election Law Enforcement Commission (ELEC). At a minimum, these disclosures will require a business entity to certify that it has not knowingly made a reportable contribution that would render it ineligible for a government contract under S-2.

The penalties for and consequences of violating S-2 are severe. A business entity that makes a reportable contribution in violation of the law is likely to be disqualified from its current government contracts at the level of government where the violation occurred. It may also be fined up to $3,000 for the first offense and up to $6,000 for each subsequent offense. Further, if a business entity willfully and intentionally makes a contribution in violation of the law that business entity may be liable for a penalty up to the value of its contract and may be debarred from performing government contracts for up to five years. Any person, including an elected official, who willfully and intentionally accepts a contribution in violation of the law may be subject to monetary penalties and may be required to forfeit his or her public office. The penalties for willfully making and/or accepting a contribution in violation of S-2 range from $5,000 to $100,000 depending on the amount of the contribution(s) at issue. In addition, ELEC can fine any person who intentionally violates the law up to four times the amount of the contribution at issue.

Finally, S-2 contains an "anti-wheeling" provision that prohibits a county committee of a political party from making a contribution to any other county political party committee between Jan. 1 and June 30 (primary election season) of each calendar year. Any person who violates the terms of this provision may be fined up to four times the amount of the contribution at issue.

The definition of a "business entity," under S-2, does not include subsidiaries and/or political action committees controlled by a business entity.

A-3013 Currently, approximately 50 municipalities and three counties throughout the State of New Jersey have their own "pay-to-play" ordinances in effect.[4] Although it had been unclear whether S-2 would preempt these ordinances, legislation (A-3013) has passed both Houses of the State Legislature preserving county and municipal pay-to-play ordinances in effect as of January 1, 2006 (when S-2 took effect) and those enacted thereafter. At the time this article was written, the legislation was awaiting Acting Governor Codey's signature. If, as anticipated, A-3013 was signed into law, business entities are now governed by S-2, as described above, in all counties and municipalities and are also governed by varying local ordinances where adopted. In an attempt to minimize the confusion created by varying, overlapping and sometimes contradictory local pay-to-play laws, A-3013 requires all counties and municipalities with their own pay-to-play ordinances to file copies of those ordinances with the Secretary of State.

If Acting Governor Codey signed A-3013 into law without proposing any changes, in addition to preserving the local ordinances in effect as of January 1, 2006 and those enacted thereafter, A-3013 contains a broader definition of "business entity" and sets forth new disclosure requirements in addition to those already in place.

First, where a business entity is other than a natural person, A-3013 defines contributions by a "business entity" to include contributions by all principals, partners, officers or directors of the business entity (regardless of interest), contributions by the spouses of the

aforementioned individuals and contributions by subsidiaries and political action committees directly or indirectly controlled by the business entity.

Second, A-3013 sets forth new pre-contract award disclosure requirements in addition to those already in place. Under A-3013, a business entity must not later than 10 days prior to entering any contract with a state agency, county, municipality, independent authority, board of education or fire district, having an anticipated value of more than $17,500 (except for a contract that is required by law to be publicly advertised for bids), submit along with its bid or price quote, a list of all "reportable" contributions required to be disclosed under A-3013. The "reportable" contributions that a business entity is required to disclose vary depending on whether the business entity is seeking a contract at the state, county or municipal level.

Finally, A-3013 sets forth new post-contract award disclosure requirements in addition to those already in place. A-3013 requires business entities that receive government contracts aggregating more than $50,000 in a calendar year to file an annual financial disclosure statement with ELEC setting forth all "reportable" contributions made by that business entity during the 12-month period preceding the reporting deadline.

Thus, depending on the level of government at which a business entity is doing business, a business entity may be subject to varying disclosure requirements under more than one "pay-to-play" law.

Reform Often Led to Confusion

When statewide "pay-to-play" reform began in the Garden State over eighteen months ago, the goal was to create uniform standards governing the relationship between political contributions and the award of public contracts at all levels of government. Unfortunately, as additional laws have passed and the laws already in place were amended, the standards governing the relationship between political contributions and the award of public contracts in the State of New Jersey have became far from uniform.

Rather, these laws have become a complex and often incomprehensible labyrinth of differing and often conflicting provisions, which have left the regulated community wondering which law to follow and under what circumstances. Although the regulated community may be confused, one thing is certain. Although the interplay among New Jersey's "pay-to-play" laws may not be clear, because violations may lead to civil penalties, loss of government contracts, loss of public office and ruined reputations; the regulated community must do its best to make sense of these laws and to comply with their often confusing and conflicting provisions. ▲

1 The requirements of S-2 are different than the requirements of the other "pay-to-play" law (commonly known as "EO 134" and codified into law as P.L. 2005, c.51), which has been in effect for Executive Branch contracts since October 15, 2004.

2. The State Assembly passed A-3013 on November 15, 2004. At the time this article was written, Acting Governor Codey had not yet signed A-3013 into law.

3. Contracts awarded and contributions made before January 1, 2006 are not subject to S-2.

4. Most of these ordinances were passed as stand-alone "pay-to-play" ordinances, but at least one ordinance was passed as part of a locality's code of ethics.