PAY TO PLAY: IMPLEMENTATION AND APPLICATION
RUTGERS ANNUAL PUBLIC PURCHASING EDUCATIONAL FORUM
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TODAY’S AGENDA

- Pay to Play basics
- Non-Fair and Open Contracts
- Fair and Open Contracts
  - Fact Pattern discussion
- Best Practices for Service Contracts
PAY TO PLAY: THE BASICS
THE STATE & STATE AGENCIES

- State Departments, agencies and independent authorities,
  State colleges and universities (except Rutgers)
- Prohibited from entering into a contract valued over $17,500
  - If during the preceding **18 month period** the vendor has made
    a reportable contribution (in excess of $300);
  - Look back period: 18 months immediately preceding the
    “commencement of negotiations”
    - In re Langan Engineering & Environmental Services, Inc., 425
      N.J. Super. 577 (App. Div 2012) – commencement of
      negotiations = the date the bid was submitted

PAY TO PLAY: THE BASICS
THE STATE & STATE AGENCIES

- State: Reportable and Prohibited Contributions
  - Contribution(s), including in-kind contributions, in excess of
    $300 in the aggregate per election made to election funds of
    candidates for Governor/Lieutenant Governor and per
    calendar year made to a State Political Party Committee,
    County Political Party Committee, Legislative Leadership
    Committee or a Municipal Political Party Committee.
  - Currency contribution in any amount to the entities listed
    above.
PAY TO PLAY: THE BASICS
THE STATE & STATE AGENCIES

- State and State agencies must:
- Always obtain Chapter 51 clearance before entering into a contract valued at greater than $17,500
- Department of the Treasury provides a 2 year certification for vendors

PAY TO PLAY: THE BASICS
SCHOOL DISTRICTS

- Pursuant to N.J.A.C. 6A:23A-6.3, School districts are required to have a Pay to Play Policy that:
- Prohibits the BOE from entering into a contract valued over $17,500, if during the preceding one-year period the vendor has made a reportable contribution
  - A contribution in excess of $300 to any member of the district BOE during the preceding one-year period;
- Prohibits a vendor (and spouse or child) from making a reportable contribution during the term of the contract;
- Requires the vendor to submit a Chapter 271 disclosure even if the contract is required by law to be publicly advertised for bids.
PAY TO PLAY: THE BASICS
LOCAL GOVERNMENTS

- Municipalities and counties (and any agency or instrumentality thereof)
- Prohibited from entering into a contract valued over $17,500
  - If during the preceding one-year period the vendor has made a reportable contribution;
    - A contribution in excess of $300 during the preceding one-year period to a municipal/county committee of a political party in that 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
  - Unless the government entity has engaged in a “fair and open process”

PAY TO PLAY QUIZ

Which of the following scenarios is a Pay to Play violation:

A. Vendor who donated $10,000 to a County freeholder committee is awarded a multi-million County contract via a Fair and Open process.

B. Vendor who donated $299.00 to a County freeholder committee is awarded a multi-million County contract via Non-Fair and Open process.

C. Vendor who donated $10,000 to a municipal mayoral candidate is awarded a multi-million dollar County contract via a Non-Fair and Open process.

D. Vendor who donated $301 to a County freeholder is awarded a multi-million contract through a Non-Fair & Open process.
PAY TO PLAY QUIZ

Which of the following scenarios is a Pay to Play violation:

A. Vendor who donated $10,000 to a County freeholder committee is awarded a $17,499 County contract via a Non-Fair and Open process.

B. Vendor who donated $10,000 to a County freeholder committee 12 months and a day prior to being awarded a multi-million County contract via Non-Fair and Open process.

C. All of the above.

D. None of the above.

WHAT IS A NON-FAIR AND OPEN PROCESS?

- The non-fair and open process does not require the competitive elements of the fair and open process.
- The local unit may award a contract up to the bid limit for goods and services required to be bid, or for any amount for those services that are exempt from bidding under N.J.S.A. 40A:11-5 subject to vendor contribution reporting requirements and certifications by the bidder.
- A bidder receiving a non-fair and open contract cannot have contributed more than $300 to a political party or candidate committee of a member of the governing body in the year prior to the award of the contract and cannot contribute during the life of the contract.
NON-FAIR AND OPEN AGGREGATION

- If the value of all contracts awarded to a vendor during a year exceeds $17,500, the contract that brings the total amount over $17,500 is subject to the pay to play law and triggers a determination to use either a fair and open process or a non-fair and open process for the goods or services.
- Vendors with contracts through a fair and open process (a bid or state contract, for example) that provide a non-fair and open quote for goods not covered under the bid or state contract are subject to pay to play.
- The aggregation rules found in the NJ Administrative Code (N.J.A.C. 5:34-8.2) discuss aggregation in terms of the goods or services purchased, however, the pay-to-play law means that the aggregation determination is applied to the vendor.

NON-FAIR AND OPEN INDIVIDUAL CONTRACTS

- Each time goods or services are needed, and quotes are obtained, such purchase is a new contract requiring a new set of pay to play forms and determination of value.
- It is not permissible to use a single set of pay to play forms for future purchases by the same vendor during a calendar year.
C. 271 POLITICAL CONTRIBUTION DISCLOSURE FORM

Part I: Vendor Information
Vendor Name: [Redacted]
Address: [Redacted]
City: [Redacted]
State: [Redacted]
Zip: [Redacted]

The undersigned being authorized to certify hereby certifies that the disclosures provided herein represent compliance with the provisions of N.J.S.A. 19:44A-20.36 and as represented by the instructions accompanying this form.

Print Name: [Redacted]
Title: [Redacted]

Part II: Contribution Disclosure

☐ Check here if disclosure is provided in electronic form.

Contributor Name  Receiver Name  Date  Dollar Amount

☐ Check here if the information is continued on subsequent page(s)

Determination of Value & Certification


Contract to be Awarded as "Non-Fair and Open"

Estimated Value: $11,900.00

Length/term of contract: One Time Purchase

Description of service: Body Cameras

*Name of Contractor: [Redacted]

I hereby certify that the estimated amount of this contract exceeds $17,000 and or the total for the year will exceed the $17,000 threshold.

By: [Redacted]

Signature

Name: Anna Maria Wright
Title: Purchasing Agent
Date: February 13, 2019

*Required to submit Business Entity Disclosure Certification prior to award of contract.
NON-FAIR AND OPEN
EXAMPLE #1

■ ABC car company provides vehicles per state contract. Your entity purchased several cars this year from ABC totaling $95,000. A quote is solicited from ABC for car parts in the amount of $2,000; the car parts are not on state contract. You have not purchased car parts from any vendor yet this year.

■ Do you need to obtain pay to play forms from ABC?

NON-FAIR AND OPEN
EXAMPLE #2

■ ABC Company has contracts with three separate contracting agencies (as defined pursuant to the Local Public Contracts Law) in a county: One is with the County proper, one is with the County Improvement Authority, and one is with the County Library. All three contracts are less than $17,500 each but combined total more than $17,500.

■ Does the aggregation principle apply, making the contracts subject to the Law?
PAY TO PLAY: THE BASICS
LOCAL GOVERNMENTS – FAIR AND OPEN

- Fair and Open Process, *means at a minimum*, 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;
  - Awarded and disclosed under criteria established in writing prior to the solicitation of proposals or qualifications;
  - Publicly opened and announced when awarded.
- N.J.S.A. 19:44A-20.7

PAY TO PLAY: THE BASICS
LOCAL GOVERNMENTS – FAIR AND OPEN

- Local governments may employ the Fair and Open Process when awarding a contract that is exempt from public bidding.
  - Professional Services;
  - Extraordinary Unspecifiable services;
  - Insurance, including insurance coverage and consultant services.
FAIR AND OPEN
FACT PATTERN

- City is looking to procure health insurance for its employees for fiscal year 2020. City is under a tight deadline to have the contract awarded at its annual reorganization meeting, which is two months away.

- City's insurance broker emails the current insurance carrier seeking a quote for the next year. A quote is sent to the broker by email. The broker reviews the quote and recommends purchasing insurance from Best Health Insurance Company, the current insurance provider, to the QPA.

- The annual premium is $3.6 million.

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FAIR AND OPEN
FACT PATTERN

- The insurance provider does not complete Pay to Play disclosure forms.

- Because the deadline to submit this contract for approval by the Board is fast approaching, the QPA decides to add this contract to a list of awarded professional services contracts that the Board will be approving through a blanket resolution.

- The resolution does not identify any information other than the fiscal year for the contract, the amount of the contract and names BHIC as the company servicing the contract.
The QPA does not prepare any recommendation of award documentation for this contract.

The QPA also decides that because there were a lot of reporters at the annual reorganization meeting, there was no need to print a notice in the newspaper.

The contract would be on file and available for public inspection should someone want to review it.

The blanket resolution awarding the contract as a professional service is approved and the contract is awarded to BHIC.

Did the City follow the appropriate process for this procurement?

How should health insurance for City be procured?

Did the City satisfy the “fair and open process”?

If yes, how was this satisfied?

If no, what should have been done?

Was there a Pay to Play violation?
## PAY TO PLAY: THE BASICS
LOCAL GOVERNMENTS – FAIR AND OPEN

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<tbody>
<tr>
<td>Contract shall be publicly advertised in a newspaper or on internet website maintained by the government entity</td>
<td>Must Solicit Competitive Quotations</td>
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<td>Must provide sufficient advance notice of the contract</td>
<td>QPA or other designated official must file a certificate with the governing body describing why the contract satisfies EUS (for insurance need only state that insurance contracts satisfy EUS exception.)</td>
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<tr>
<td>Awarded under a process that provides for public solicitation of proposals or qualifications</td>
<td>Resolution awarding the contract must state the reasons for the award. For insurance, state that insurance contracts satisfy EUS exception.</td>
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<tr>
<td>Awarded and disclosed under criteria established in writing by the public entity prior to the solicitation of proposals</td>
<td>Publish in official newspaper a notice stating the nature, duration, services and amount of the contract.</td>
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<tr>
<td>Publicly opened and announced when awarded</td>
<td>Resolution and contract must be made available for public inspection</td>
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## BEST PRACTICES
SERVICE CONTRACTS

- The pool of contractors solicited should be as expansive as possible.
- Statements of work should be drafted in clear unambiguous terms.
- Proposals should be judged on the basis of predetermined, merit-based criteria, made known to vendors before proposals are submitted.
BEST PRACTICES
SERVICE CONTRACTS

- The evaluative criteria should be judged by a qualified evaluation committee.
- The evaluation process should be explainable to evaluators and competing vendors and capable of withstanding scrutiny under a protest challenge.
- The scoring process and award recommendations should be well-documented and retained.

Recommend reading from the Office of the State Comptroller:

*Best Practices for Awarding Service Contracts*, March 4, 2010

*Weaknesses in the Pay-to-Play Law’s “Fair and Open” Contracting System*, September 15, 2011