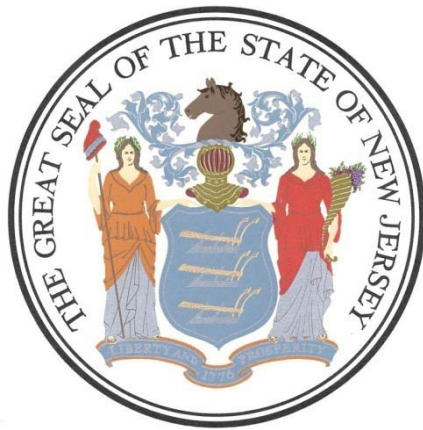


State of New Jersey

Office of the State Comptroller

A. Matthew Boxer, Comptroller




Procurement Report:

**Weaknesses in the
Pay-to-Play Law's
“Fair and Open”
Contracting System**

September 15, 2011

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I. Introduction

Public contracting laws in New Jersey generally are premised on the notion that the State benefits from promoting fairness and competition in the award of public contracts.¹ Exemptions from State bidding laws represent a departure from that approach and result in the award of what commonly have been referred to as “no-bid” contracts. Such no-bid contracts have been at the core of multiple public scandals relating to government entities awarding contracts to campaign donors as a means to reward them, a practice known as “pay to play.”²

Against this backdrop, in 2004 the State Legislature began enacting legislation directed at controlling the exchange of campaign contributions for contract awards and at promoting transparency in the award process.³ These new laws were designed to limit the ability of government entities to award contracts to vendors that had made disqualifying campaign contributions. The law ultimately imposed substantial restrictions on contracts awarded by the State of New Jersey, in

effect imposing a nearly wholesale ban on the award of such contracts to vendors that have made disqualifying contributions. At the local government level, however, the law created a significant exception by permitting such contract awards whenever the contract is awarded pursuant to a “fair and open” process, which is specifically defined in the law.⁴

The statutory mandate of the Office of the State Comptroller (OSC) includes the responsibility to “audit and monitor the process of soliciting proposals for, and the process of awarding, contracts made by” government entities throughout the State.⁵ In the course of those contract reviews, OSC has encountered a series of flaws and shortcomings in the fair-and-open contracting process and in local governments’ administration of that process. We issue this public report to document those weaknesses and offer recommendations for systemic improvement.

This report is not aimed at analyzing particular contracts that have been affected

by campaign contributions. Rather, the report seeks more generally to illuminate important vulnerabilities in the fair-and-open system of contracting that was designed to address corruption in the local public contracting process.⁶

The report begins by providing background concerning New Jersey public contracting laws and pay-to-play legislation, and then focuses on the fair-and-open exception and its flaws as identified in the course of our audits and other reviews. The final section of the report sets forth conclusions and recommendations aimed at systemic change.

II. How We Got Here: No-Bid Contracts and New Jersey's Pay-to-Play Response

Predicated on the notion that public funds are best protected through a competitive system of government contracting, New Jersey law generally requires that government entities award contracts through use of a formal bidding process.⁷ For example, the state's Local Public Contracts Law (LPCL) requires all New

Jersey municipalities to publicly advertise and seek bids on all contracts above a monetary threshold, unless the subject matter of the contract entitles it to a bidding exemption.⁸ Non-exempt contracts may be awarded only following formal, sealed bid submissions and public opening of the bids, and are to be awarded to the "lowest responsible bidder."⁹

The grounds for exemption from bidding requirements are set forth in New Jersey law. Most important for purposes of this report is the exemption for contracts to provide "professional services," which includes, for example, legal services, engineering services and financial services.¹⁰ This exemption from bidding requirements recognizes that the determination of the most desirable professional services vendor may involve subjective analysis of legitimate factors other than price. Thus, these contracts may be negotiated and awarded without public bidding, and are therefore not subject to the procedural safeguards associated with formal, sealed bids.

Removed from the system of sealed bids, contracts for professional services traditionally could be awarded through nearly any means and on nearly any conceivable basis. The absence of bidding or other requirements created an environment where campaign contributions theoretically could serve as the exclusive basis for a contract award, resulting in both actual and perceived awarding of contracts based on political motivations or other types of favoritism. This unregulated system permitted those with hidden motives to easily direct public funds to their vendor of choice. Such a system may have comported in some sense with New Jersey's notion of home-rule in that it vested local officials with nearly unlimited discretion in contracting. In so doing, however, it permitted those officials to make contract-award decisions, without oversight, that were contrary to the interests of the general public.

Since 2000, the LPCL has set forth an alternative to sealed bids for those local government contracts where lowest price is not necessarily an appropriate basis for

the award.¹¹ Known as "competitive contracting," that methodology involves advertisement of the contract opportunity, development of evaluation criteria, including cost, technical, and management-related criteria, submission of vendor proposals, application of the criteria resulting in a ranking of vendors, and a public report detailing the basis for the ranking.¹² For professional services contracts, however, the law presents "competitive contracting" only as an option, not a requirement. As a result, OSC's reviews have found its use in those contracts has been exceedingly rare in practice, resulting in a generally unregulated system in which government entities may simply negotiate with their vendor of choice. While calculating precisely the amount of public money spent on such unregulated local government contracts is difficult, based on our contract reviews we estimate it easily exceeds \$100 million annually in New Jersey.

In view of public concerns regarding pay-to-play in the unregulated environment of professional services contracting in New

Jersey, in 2004 State officials began taking steps to address the pay-to-play issue. Pay-to-play legislation was initially signed into law on June 16, 2004 and took effect in January 2006. As it applies to municipalities, counties and other local government entities, the law generally prohibits government agencies from awarding a contract with a value in excess of \$17,500 to a vendor that has made a contribution exceeding \$300 to specified types of political committees within the preceding year.¹³ The primary exception to that restriction is that a vendor that has made such contributions may nonetheless receive the government contract if the local government agency has awarded the contract “pursuant to a fair and open process.”¹⁴

The pay-to-play statute defines “fair and open process” as one in which the contract is:

- (1) “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”;

- (2) “awarded under a process that provides for public solicitation of proposals or qualifications”;
- (3) “awarded and disclosed under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications”; and
- (4) “publicly opened and announced when awarded.”¹⁵

The statute further provides that “[t]he decision of a public entity as to what constitutes a fair and open process shall be final.”¹⁶

The pay-to-play statute thus presents local government entities with two general options. They may use a “fair and open” award process and then accept proposals from vendors that have made what otherwise would have been disqualifying campaign contributions. Alternatively, if the agency is seeking to award the contract to a vendor that has not made disqualifying contributions, it may award the contract as it had before the enactment of pay-to-play restrictions, that is, without advertisement and through a process of simple negotiation. Such a process has become

known colloquially among local government officials as the “non-fair and open process.”

While the pay-to-play statute initially applied in a similar manner regardless of whether the contract was being awarded by a state agency or a local government agency, within a year of its enactment the fair-and-open exception was eliminated as an option for state government contracts, first through gubernatorial executive order and ultimately by statute.¹⁷ Thus, vendors that have made disqualifying contributions are entirely precluded from receiving contracts with any state department, agency or authority so long as the value of the contract exceeds \$17,500. At the local government level, however, the fair-and-open exception remains. Vendors thus confront very different regulatory systems at the state and local levels, especially considering the broad scope of the fair-and-open exception as explained later in this report.

In sum, qualifying contributions of \$300 or greater preclude the receipt of contracts at the state level and preclude the receipt of

contracts at the local level unless a fair-and-open process is used. Thus, New Jersey's pay-to-play legislation has the practical effect of lowering campaign contribution ceilings from the typical \$2,600 to \$300 in some instances, depending on the government entity in question and the process it uses to award its contracts.

While the State's public contracting laws and pay-to-play restrictions are obviously interrelated, they are set forth in separate statutes and administered by different State agencies. This contributes to a complicated legal environment for government agencies as well as the vendor community in addressing public procurement issues. For example, the LPCL is administered by the Division of Local Government Services within the State's Department of Community Affairs (DCA).¹⁸ In contrast, the State's pay-to-play requirements are set forth within the New Jersey Campaign Contributions and Expenditures Reporting Act, which primarily addresses the reporting of campaign contributions and is administered by the Election Law Enforcement Commission (ELEC).¹⁹

In a technical sense, the LPCL continues to operate as it had before the enactment of pay-to-play legislation. Contracts previously exempt from formal, sealed bidding remain exempt and, more importantly, those subject to bidding requirements still must be advertised and formally bid. Formal bidding procedures, by definition, satisfy the requirements of the pay-to-play law's fair-and-open process. So, for local government contracts, the pay-to-play law does not affect the vendor-evaluation process for contracts awarded on a low-bid basis.

However, the award of contracts involving bid-exempt goods and services, once largely unregulated under the LPCL, is now subject to pay-to-play regulations. Qualifying for the fair-and-open exception returns the local government entity to the traditional, unregulated system of contracting. As a result, the impact of the local government pay-to-play reform efforts hinges to a great extent on the scope of this exception.

III. The Fair-and-Open Exception and Its Flaws

OSC's contract reviews have revealed that a confluence of factors result in fair-and-open requirements presenting few, if any, real obstacles to a government entity seeking to award a contract to a politically favored vendor. We discuss these factors below.

Unlimited Discretion in the Vendor Selection Process

One of the hallmarks of New Jersey's traditional no-bid contracting system was the nearly unlimited discretion of the agency awarding the contract in selecting a politically favored vendor. In practice, fair-and-open requirements do not materially change that substantial discretion.

The only fair-and-open requirement directed at that discretion is the requirement that government entities award contracts "under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications."²⁰ That provision requires government agencies to set forth criteria, but it does not ensure that appropriate criteria are

selected, that those criteria are in fact used in the ultimate selection process, or that they are applied in a fair and appropriate manner. Even under fair-and-open, government entities are not required to adopt a prescribed, formal selection process.²¹ Nor does the fair-and-open process require that government entities justify their rationale for selection of a particular vendor.

In the course of recent OSC contract reviews at three separate municipalities, local officials acknowledged to OSC the absence of any formal, criteria-driven process in awarding their professional services contracts under fair-and-open. Our interviews and reviews of available documents confirmed that these municipalities had not evaluated vendor submissions in any meaningful way. As one municipality stated in writing to OSC, “no formal process was used since none was required by law, rule, or regulation.”

As noted previously, the LPCL itself sets forth a “competitive contracting” process for instances when the nature of a contract

calls for a vendor-selection methodology beyond simple consideration of price. The competitive contracting model requires a systematic evaluation and ranking of vendors, which includes a public report detailing the basis for the ranking.²² It also requires use of certain minimal criteria, such as cost, technical and management-related criteria. However, State law presents use of “competitive contracting” procedures only as an option for fair-and-open contracting, not a requirement. In short, none of these protective measures need to be used in order to comply with fair-and-open.

A related concern is the absence of requirements under fair-and-open that would specify what person or group of persons is to evaluate the competing proposals. In the context of OSC’s contract reviews, some local governments have claimed to award contracts by evaluation committee, but documents specifying individual committee participants and their relevant expertise often are absent or lacking in substance. For example, in an OSC review of four

municipalities, we found that only two of the municipalities were maintaining records concerning which municipal official(s) had evaluated the competing proposals from prospective vendors. Despite the benefits of using a review committee,²³ such use is not required under fair-and-open, thus permitting informal and individual review and an analysis of vendor documentation absent any formal review protocols.

No legal enforcement mechanism

The weaknesses associated with these vendor-evaluation requirements are compounded by the provision in the pay-to-play law that states that “[t]he decision of a public entity as to what constitutes a fair and open process shall be final.”²⁴ Through this provision, local governments are granted the exclusive authority to determine whether their own selection process complies with the law. This provision has the effect of rendering a contract award beyond scrutiny or challenge by an aggrieved vendor or local resident, even in a court of law.

Given the absence of a challenge mechanism, fair-and-open’s “requirements” are, in practice, essentially advisory.²⁵ The entities intended to be regulated by the law simultaneously act as their own regulator. As long as the contract opportunity is minimally advertised and selection criteria are drafted, there is no means to contest an award to an undeserving vendor. In contrast, in the context of sealed bid awards, established case law relating to bid challenges shows that judicial review of contracting procedures provides a real and meaningful incentive for legal compliance and for correction of unlawful practices.²⁶ Fair-and-open’s undemanding vendor-selection requirements, in combination with the absence of judicial or other review concerning those requirements, essentially results in a return to the traditional system of unlimited discretion concerning selection of professional service vendors.

No requirement to memorialize selection rationale or maintain documentation

The absence of legal requirements for government agencies to memorialize their vendor-selection rationale or retain related

documents in connection with fair-and-open compounds the weaknesses previously described. In OSC's contract review and audit capacities, we routinely request fair-and-open award rationale documents and rarely have found such documents to be maintained. Entities have responded to such requests by noting that written award justifications and retention of such documents are not required under State law. It is difficult, and often impossible, for aggrieved vendors to amass arguments concerning the validity of a purportedly fair-and-open process when documents underlying the selection decision either never existed or were not maintained.

Best practices in contracting call for contracting agencies to ensure that every step in their evaluative process be documented through: (1) scoring sheets; (2) a written record of what transpired during any permitted negotiations between vendors and procurement officials; (3) a written comparative analysis of competing proposals; and (4) a written award recommendation.²⁷ The award

recommendation should explain the factors that led to the award decision, offer qualitative discussion concerning the leading competing proposals and describe the specific characteristics of the winning vendor's proposal that resulted in its selection over the others.²⁸ No such documents are required to be created or maintained in the fair-and-open contracting system.

Consideration of cost not required

Although fair-and-open requires that selection criteria be established, it does not dictate the types of criteria that are to be considered or provide guidance concerning such criteria. Significantly, for example, there is no requirement that an agency consider a vendor's rate or cost among the evaluative components. While the LPCL's exemptions from bidding recognize that the award of some types of contracts should not be based solely on price, to exclude price entirely as an award criterion frequently is inconsistent with the interests of taxpayers. Taxpayers generally would consider cost as a factor in their own financial affairs and government should

exercise no less fiscal responsibility in spending the public's funds. DCA itself has similarly recommended that a vendor's "compensation proposal" be considered as a factor in the vendor-selection process.²⁹

Nonetheless, OSC frequently has found that cost is not included among fair-and-open award criteria. We have identified this deficiency in contracts for services ranging from legal services to audit services. The absence of cost as a criterion may facilitate the awarding of a contract to a politically favored vendor charging above-market fees.

Use of inappropriate selection criteria

In addition to failing to include cost as a criterion, government entities applying fair-and-open often use vague selection criteria that may easily be manipulated. For example, agencies sometimes include a generalized "catch-all" award criterion, such as "these and any other considerations the agency deems necessary," or "the agency reserves the right to consider criteria both inside and outside the proposal." Although fair-and-

open states that selection criteria must be "established in writing," agencies essentially avoid that requirement by setting forth these nondescript, catch-all considerations as criteria. Reserving the right to consider anything that may eventually be deemed relevant results in vendors not receiving appropriate notice of award criteria and greatly increases the likelihood of criteria being applied in a discriminatory or unfair manner.³⁰

OSC contract reviews have found that even when specific fair-and-open criteria are stated in advance, the criteria sometimes are set forth in the form of simple requirements, such as a requirement that the vendor have requisite experience, or employ sufficient staff or maintain the appropriate license(s). This approach appears to stem from historical use in New Jersey of vendor solicitation documents such as a "Request for Qualifications" (RFQ) or a "Request for Information" (RFI). While a statement of generic requirements in an RFQ or RFI is entirely appropriate, such requirements have far less meaning when adopted as

ultimate vendor-selection criteria, particularly when such requirements are the only criteria stated. Where more than one vendor meets the stated requirements, the government entity is left without true selection criteria through which it may determine which vendor is the most qualified.

Nevertheless, it appears that RFI and RFQ methods have become so firmly entrenched among local purchasing officials that many entities view them as a substitute for specific selection factors. By using such easily satisfied, generic requirements, the ability to ultimately select politically favored vendors is maximized.

Absence of regulatory requirements

Some of the weaknesses in fair-and-open might have been addressed through the issuance of strong administrative regulations. There has not, however, been official regulatory action further defining the statutory fair-and-open directive. That void stems in part from the practical problem mentioned previously in connection with fair-and-open's statutory

origins. That is, while fair-and-open speaks primarily to contracting issues, it is contained not in State contracting statutes, but rather in the State's campaign finance law. The agency empowered to adopt regulations under that law, i.e., ELEC, is particularly experienced in the area of campaign finance, but is not otherwise charged with expertise concerning the many contract-related issues that arise at government units throughout the state.

DCA, which is the State agency charged with administering the LPCL, has sought to assist by providing written guidance concerning fair-and-open. Specifically, DCA has issued a number of instructive reference materials intended to expand upon, explain and refine the statute's provisions. Most prominent among these materials is DCA's "Guide to the New Jersey Local Unit Pay-to-Play Law," which has served as a primary reference resource for local government units in implementing the law.³¹ DCA's website contains numerous other, similar guidance materials.³² From a legal perspective, however, none of those materials are

authoritative in that they do not carry the weight of law. They reflect DCA's advisory guidance, not regulatory mandates.

Perhaps as a result, OSC has found that many local fair-and-open processes remain undefined, and that there is substantial confusion among local officials as to the law's requirements. For example, in one instance, this office reviewed a contract award that under State law was subject to sealed bidding requirements. That is, it was not a bid-exempt item. Nonetheless, the municipality's lawyer mistakenly advised the municipality to use a non-fair-and-open contribution disclosure process instead of formal bidding procedures. The attorney thus misunderstood the law's basic requirement that the subject of a contract must first be bid-exempt to trigger pay-to-play processes. In other words, the absence of disqualifying political contributions by the winning vendor does not provide an exception from legal bidding requirements that otherwise would apply.

In an OSC audit of another municipality, we noted similar confusion in municipal

documentation concerning the difference between a fair-and-open process and a non-fair-and-open process. Moreover, municipal purchasing manuals, intended to educate local officials, often fail to provide appropriate direction. For example, the purchasing manual for one large municipality we reviewed noted the existence of pay-to-play and included disclosure forms for the non-fair-and-open process, but omitted any reference to how the fair-and-open process should work. We found similar voids in purchasing manuals at smaller municipalities as well as housing authorities. We also have seen in those manuals conflicting information about the interplay between fair-and-open and the LPCL. In short, we have seen widespread confusion about fair-and-open even among those officials personally responsible for implementing its provisions.

Varying pay-to-play rules and regimes

The confusion concerning fair-and-open may result, in part, from the varying state and local pay-to-play regimes. As noted previously, vendors that have made disqualifying contributions are entirely

precluded from receiving contracts from state government agencies as long as the value of the contract exceeds \$17,500. At the local government level, however, such vendors may continue to receive contracts through use of the fair-and-open exception. Especially in view of the broad scope of that exception, in practice the pay-to-play system at the state level is significantly different than the system in effect at the local level.

This disparity raises both philosophical and practical concerns. One result of the disparity is that there is no unified expression of New Jersey policy concerning the practice of pay-to-play. For purposes of state government operations, the practice has been deemed inappropriate. Policy-makers essentially have expressed a zero tolerance policy concerning such contract awards, in effect declaring them to be contrary to the public interest. For local government operations, however, pay-to-play is permitted through use of the fair-and-open exception. The result is two systems that function differently, each with its own set of

complications that confront vendors, public officials and their legal counsel.

The resulting confusion is compounded by differences in pay-to-play practices even among local government units. A January 2006 amendment to the LPCL permits local government entities to pass ordinances adopting more restrictive local pay-to-play procedures than those set forth in State law.³³ The result, according to ELEC, is that five counties and 159 municipalities, school districts and local authorities now have adopted their own pay-to-play laws.³⁴ Some, for example, have adopted a system more akin to that in effect at the state government level. Other municipalities, rather than formalize any local policy, use ad hoc procedures on a case-by-case basis. While local governments should not be discouraged from strengthening local laws to regulate the practice of pay-to-play, the varying rules among local government entities can be difficult to navigate. ELEC's executive director has himself noted that "[c]ontractors, candidates, treasurers and others find the current system highly confusing."³⁵

IV. Conclusions and Recommendations

In practice, the system of fair-and-open has multiple weaknesses. As a result, it presents few, if any, real obstacles to a government entity seeking to award a contract to a politically favored vendor. 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. In effect, no-bid contracts may be awarded to favored local vendors much as they had been prior to the passage of the pay-to-play law, and without regard to issues such as vendor cost. While no legislation can eliminate all risk associated with political corruption and donor influence in the government procurement setting, it is apparent nearly six years into its implementation that the fair-and-open system offers notably few hurdles for wrongdoers to overcome.

In arriving at that conclusion, we acknowledge that campaign contributions are an appropriate and necessary part of a

robust democratic process.³⁶ We further acknowledge that the award of contracts to vendors such as attorneys, auditors and other professionals naturally involves a degree of discretion and subjective preference. It is not unreasonable for local administrations to seek their own "cabinet" of trusted professionals. To the extent, however, that pay-to-play laws were intended to address harmful effects of campaign contributions on the contract-award process, the weaknesses of the fair-and-open system as discussed in this report are particularly germane.

The Governor, State legislators and ELEC itself all have called for changes to or elimination of the fair-and-open system. The following are offered as avenues to explore in attempting to bring about such reform and effect the sweeping change originally suggested by the pay-to-play law:

(a) One option is simply to eliminate the fair-and-open exception that currently may be invoked by local government entities. Such an approach has the benefit of simplicity in that it would reflect a bright

-line rule without exceptions: disqualifying contributions preclude vendors from obtaining government contracts. In addition, this approach would harmonize local pay-to-play law with the rules already governing state government entities. This would have the benefit of presenting a unified State policy concerning pay-to-play, and have positive practical implications in terms of reducing the confusion associated with the current system. The fact that this concept already has been tested, generally successfully, at the state level is an added benefit.

(b) Alternatively, rather than eliminate the fair-and-open exception, fair-and-open requirements could be strengthened so that they have greater effect. Strengthening as opposed to eliminating fair-and-open may be a more comfortable result for those concerned that stringent pay-to-play requirements could starve the political process of needed campaign contributions, thereby making elected office the exclusive province of the wealthy.³⁷ Specifically, to strengthen fair-and-open, the State could require use of the statutory “competitive

contracting” process to qualify for the fair-and-open exception.³⁸ Procedural safeguards should include requiring that government entities use a qualified selection committee whose members certify that they are not subject to any conflict of interest in recommending a contract award.³⁹ Requiring the use of such committees and some form of scoring of vendor submissions helps to ensure that a verifiable competitive process is being used. Government entities should be required to document and justify their application of the stated selection criteria and maintain those documents for a period of years.⁴⁰ The law should further provide for a means to contest the manner in which fair-and-open is applied in a particular case. In addition, DCA could be empowered to adopt supporting regulations that ensure, for example, development and application of appropriate selection criteria.

This option would, however, still allow for distinct pay-to-play laws at the state and local government levels. Perhaps more importantly, if fair-and-open requirements were not strengthened in a way that

eliminates the flaws detailed in this report, significant deficiencies would remain in the pay-to-play law.

(c) An additional and perhaps more comprehensive approach to reform would be one that addresses the underlying deficiencies in State contracting laws as they apply to local no-bid contracts generally. State law currently provides numerous broad exceptions to bidding requirements and, as noted previously, once a contract is removed from the LPCL's formal bidding process it becomes entirely unregulated, historically resulting in contracts being awarded to vendors for a variety of inappropriate reasons. While simply eliminating the fair-and-open exception might prevent contract awards specifically to campaign contributors, other problems created by no-bid contracting would not be cured. That is, hidden alliances could still be rewarded, transparency would not be ensured, and government units could continue to award no-bid contracts without use of the competitive practices that typically promote containment of costs.

There are middle grounds between strict, low-bidder contracting regimes and those systems in which contracts may be awarded through any means and on any basis. Use of the "competitive contracting" system previously referenced⁴¹ is one such option. Limiting the award of no-bid contracts across government would, without any specific reference to pay-to-play, address many of the problematic issues arising from contracts being awarded on the basis of political favoritism. It would simultaneously result in a procurement process that would be more professional, less prone to scandal and more in line with the public interest.

ENDNOTES

¹See, e.g., N.J.S.A. 40A:11-1 et seq.; N.J.S.A. 40A:11-13 (“Any specifications for the provision or performance of goods or services under this act shall be drafted in a manner to encourage free, open and competitive bidding.”).

²See, e.g., *United States v. Weldon*, U.S. Dist. Ct. (D.N.J. 02-750) (former Ocean Township mayor guilty of extorting cash from developers in connection with approval of building projects); *United States v. Schoor*, U.S. Dist. Ct. (D.N.J. 06-964) (founder of engineering firm indicted for payment of bribes to local officials to secure government business for his company); *United States v. Salahuddin*, U.S. Dist. Ct. (D.N.J. 10-104) (former deputy mayor of Newark indicted for using his influence to benefit his business partner and himself in connection with city demolition contract).

³See P.L. 2004, ch. 19; P.L. 2005, ch. 51.

⁴N.J.S.A. 19:44A-20.7.

⁵N.J.S.A. 52:15C-7.

⁶P.L. 2004, ch. 19 (Sponsor’s Statement). This report focuses on county and municipal government entities and their authorities, agencies and instrumentalities and does not specifically address contracts awarded by boards of education, which are subject to separate regulations. See N.J.A.C. 6A:23A-6.3.

⁷See N.J.S.A. 40A:11-1 et seq.

⁸N.J.S.A. 40A:11-4.

⁹*Id.*

¹⁰N.J.S.A. 40A:11-5(1)(a)(i).

¹¹N.J.S.A. 40A:11-4.1 to -4.5.

¹²N.J.S.A. 40A:11-4.4; N.J.S.A. 40A:11-4.5.

¹³N.J.S.A. 19:44A-20.4; N.J.S.A. 19:44A-20.5.

¹⁴N.J.S.A. 19:44A-20.5.

¹⁵N.J.S.A. 19:44A-20.7.

¹⁶*Id.*

¹⁷Executive Order No. 134 (2004); P.L. 2005, ch. 51.

¹⁸N.J.S.A. 40A:11-37; N.J.S.A. 40A:11-37.1.

¹⁹N.J.S.A. 19:44A-38.

²⁰N.J.S.A. 19:44A-20.7.

²¹E.g., New Jersey Department of Community Affairs, *Guide to the “New Jersey Local Unit Pay-to-Play” Law* (Nov. 2005), <http://www.state.nj.us/dca/lgs/p2p/refs/p2pguide.pdf>, at 7 (“[A] fair and open process is not the same as conventional public bidding or competitive contracting.”).

²²See N.J.S.A. 40A:11-4.5(d) (“The purchasing agent or counsel or administrator shall evaluate all proposals only in accordance with the methodology described in the request for proposals. After proposals have been evaluated, the purchasing agent or counsel or administrator shall prepare a report evaluating and recommending the award of a contract or contracts. The report shall list the names of all potential vendors . . . [and] shall rank vendors in order of evaluation . . . The report shall be made available to the public at least 48 hours prior to the awarding of the contract . . .”).

²³See, e.g., Kelly LeRoux, *Service Contracting: A Local Government Guide* 109-11 (ICMA Press 2007).

²⁴N.J.S.A. 19:44A-20.7.

²⁵See, e.g., *State v. Standard Oil Co.*, 5 N.J. 281, 295 (1950) (“The abrogation of the remedy is equally a violation of the right, for a right without a remedy is a mere shadow.”).

²⁶See, e.g., *Jen Electric, Inc. v. County of Essex*, 197 N.J. 627 (2009) (finding that supplier has standing to challenge illegal brand name specifications); *CFG Health Systems v. County of Hudson*, 413 N.J. Super. 306 (App. Div. 2011) (ordering re-bidding after unsuccessful bidder challenged material changes to contract following award to another vendor).

²⁷See, e.g., Federal Acquisition Regulation 15.305(a) (“The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.”).

²⁸See, e.g., Federal Acquisition Regulation 15.308.

²⁹New Jersey Department of Community Affairs, *Guide to the “New Jersey Local Unit Pay-to-Play” Law* (Nov. 2005), <http://www.state.nj.us/dca/lgs/p2p/refs/p2pguide.pdf>, at 29.

³⁰See, e.g., *Township of Hillside v. Sternin*, 25 N.J. 317, 322 (1957) (“The conditions and specifications must apply equally to all prospective bidders. Otherwise, there is no common standard of competition. Every element which enters into the competitive scheme should be required equally for all . . .”).

³¹The guide can be found at <http://www.state.nj.us/dca/lgs/p2p/refs/p2pguide.pdf>.

³² See, e.g., DCA's pay-to-play "Decision Tree" flow chart describing which process to follow based on the nature and amount of the contract, at http://www.state.nj.us/dca/lgs/p2p/refs/decision_tree.pdf, and DCA's "Frequently Asked Questions and Answers" posted at <http://www.state.nj.us/dca/lgs/p2p/refs/p2pfaq.pdf>. An index of other relevant materials can be found at <http://www.state.nj.us/dca/lgs/p2p/index.shtml>.

³³ See P.L. 2005, c. 27, now codified at N.J.S.A. 40A:11-51.

³⁴ Election Law Enforcement Commission, News Release (April 22, 2010), available at http://www.elec.state.nj.us/pdffiles/press_releases/pr_04222010.pdf.

³⁵ *Id.*

³⁶ See, e.g., N.J.S.A. 19:44A-20.13; *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 898 (2010); Melanie D. Reed, *Election Law: Regulating Political Contributions by State Contractors: The First Amendment and State Pay to Play Legislation*, 34 Wm. Mitchell L. Rev. 635, 645 (2008).

³⁷ Kevin Webber, Comment, *Unsuccessful Campaign Finance Reform: The Failure of New Jersey's 2004-2005 Pay-to-Play Reforms to Curb Corruption and the Appearance of Corruption*, 38 Seton Hall L. Rev. 1443, 1474 (2008).

³⁸ N.J.S.A. 40A:11-4.1 to -4.5.

³⁹ See, e.g., N.J.A.C. 5:34-4.3.

⁴⁰ See, e.g., N.J.S.A. 40A:11-4.5; N.J.A.C. 15:3-2.1.

⁴¹ N.J.S.A. 40A:11-4.1 to -4.5.