

Chapter 19 - Frequently Asked Questions

1. What is a “fair and open process”?

Under N.J.S.A. 19:44A-20.4 et seq., a “fair and open” process is a competitive process compliant with the rules and restrictions set forth by the State’s Local Unit Pay-to-Play law. Specifically, the “fair and open” process shall include, at minimum:

- Public advertisement (either conventionally in newspapers OR posted on the entity’s website) with “sufficient time to give notice,” and
- Award under “a process that provides for public solicitation of proposals OR qualifications,” and
- Established on the basis of an award and disclosure process documented in writing prior to any solicitation, and
- Publicly opened and announced when awarded.

2. How does the non-fair and open or alternate process differ?

The non-fair and open process does not require the competitive elements of the [fair and open](#) process. In the non-fair and open or alternate process, the local unit may award a contract subject to vendor reporting requirements and certifications submitted by the vendor. These requirements are intended to ensure that no prohibited contributions were made to the political committees of the local unit (see N.J.S.A. 19:44A-20.4 and/or N.J.S.A. 19:44A-20.5) and to disclose the vendor’s broader candidate contributions as defined by N.J.S.A. 19:44A-20.26.

3. Can contractors awarded contracts through a [fair and open](#) process (including public bids or competitive contracting) make reportable contributions to municipal or county candidates or political committees?

Yes, under ELEC regulations, only the [non-fair and open](#) process prohibits the business entity from making contributions in the year prior to award and during the term of a contract.

If a business entity makes a reportable contribution (in excess of \$300) while engaged in a contract awarded under the [fair and open](#) process, it may preclude the entity from receiving a subsequent [non-fair and open](#) award.

4. Is the threshold for the governing body to award a [fair and open](#) contract \$17,500 or the agency’s bid threshold pursuant to the Local Public Contracts Law?

The amount is \$17,500, not the bid threshold under the Local Public Contracts Law. Under Pay-To-Play, the Purchasing Agent cannot award fair and open window contracts (those between \$17,500 and the agency’s bid threshold); governing body approval by resolution is required.

5. Under a [non-fair and open](#) process, may a purchasing agent make an award up to the local unit's bid threshold?

Yes, under a [non-fair and open](#) process, a purchasing agent may make the award or the governing body may also reserve the authority to make the award.

6. Are contracts that are exempt from bidding (pursuant to N.J.S.A. 40A:11-5) subject to Pay-To-Play?

Yes. All contracts in excess of \$17,500 are subject to a [fair and open](#) process or must comply with the reporting requirements of a [non-fair and open](#) process.

7. Are contracts with any New Jersey government or federal government agencies covered under the Law?

No. Under this Pay-To-Play law, only contracts with business entities are covered.

8. Are contracts with non-profit organizations covered under the Law?

At this time this question is under review by State officials. This will be updated as soon as a determination is made. (9/20/2007)

9. A contractor has certified that no contributions were made to trigger the restrictions established by this Law, but there is reason to believe they have in fact made contributions. In light of the certification, must a local official disclose that belief or may the contract be awarded based on the "certification?"

Contact ELEC to review the specifics of the issue. Furthermore, if there is a question regarding a contractor's eligibility, officials should seek the advice of their local counsel.

10. A contractor said that he made a contribution to a political action committee (PAC) within our county, but they have not made any direct contributions to the local officials in office. The county PAC supports a political party that is represented within our governing body. Is that contractor eligible for a [non-fair and open](#) contract?

Yes. If the contractor has made contributions to a county PAC they are not precluded from doing [non-fair and open](#) business with a municipality in that county.

11. May a business entity that has made a reportable contribution re-establish eligibility for a contract by requesting that the contribution be returned?

Yes, provided that the contribution is returned within sixty (60) days of said contribution. ELEC should be consulted for additional information.

12. How does the Law apply to multi-year contracts?

- a. The value of the contract over its entire term is considered for determining if the \$17,500 threshold is met.
- b. A contractor receiving a [non-fair and open](#) contract cannot make reportable contributions during the life of the contract.

13. A business entity has contracts with three separate contracting agencies (as defined pursuant to the Local Public Contracts Law) in a county: One is with the county itself, one is with the County Park Commission, and one is with the County Library. All three contracts are less than \$17,500. Does the aggregation principle apply, making the contracts subject to the Law?

No - these are three separate contracting units. The aggregation rule only applies to contracts issued by a single contracting agency.

14. If a quote process (under \$17,500 or for a [non-fair and open](#) under the agency's bid-threshold) is used, when must a business registration certificate [BRC] be submitted?

The BRC must be on file prior to award made by either the purchasing agent or the governing body.

15. Is a contract for an underwriter to sell bonds subject to Pay-to-Play?

Yes, the exception is when the underwriter is a New Jersey bank that is otherwise statutorily barred from making contributions, In that case, c. 19 restrictions would not apply, however, other reporting requirements under both c. 19 and c. 271 remain in effect.

16. Must anything be done to revise the non-collusion affidavit in bid specifications with regard to Pay to Play?

No. If required in the specifications, the affidavit certifies that there has been no business-to-business collusion and therefore is not affected by the provisions of Chapter 19.

17. Are professionals who receive in excess of \$17,500 through a combination of non-salary budgeted retainer and various escrow sources covered by Pay to Play?

Yes. Where professionals are paid (even in part) through escrow funds the law applies when the aggregate amount to be paid over a year (regardless of the number of applications) is estimated to be in excess of \$17,500. The calculation is based on the total annual amount the professional will receive while serving in the appointed capacity, regardless of the revenue source.

18. After soliciting responses through a [fair and open](#) process, what process should be followed when an agency receives no responses or all responses received are rejected?

When the value of the contract exceeds the bid threshold, local units should apply the principles of the Local Public Contracts Law for receipt of formal bids. The LPCL [N.J.S.A. 40A:11-5(3)] permits negotiations with vendors when responses to bid requests are either high bids or no bids submitted after two attempts. In this circumstance, negotiations are permitted if the procedure was initiated through a [fair and open process](#). If the value is under the bid threshold, local units can take action that they deem in their best interest (i.e., negotiate immediately). N.J.S.A. 40A:11-13.2

19. After awarding an open-ended contract, is the governing body required to award all subsequent purchase orders each time goods or services are needed?

No. After the initial open-ended contract is awarded by the governing body, the purchasing agent is authorized to issue a purchase order each time goods or services are needed. The purchase order is based on the terms and conditions of the initial open-ended contract (N.J.A.C. 5:30-11.10).

20. Do solid waste and recycling collection services fall under Pay-to-Play requirements?

Yes. Solid waste and recycling collection contracts are covered under Pay-to-Play requirements. They are not rate regulated by the BPU - there is licensing by DEP, and anything the BPU may require is only a registration - not rate regulation. These businesses are not public utilities.

21. Are permits for services from DEP or other State or federal agencies subject to Pay-to-Play?

No. The Pay-to-Play law does not apply to other government agencies.

22. A local unit contracts with doctors (either individually or in a group practice) for Medicaid/ Medicare services at public nursing homes. The local unit does not pay the costs since the doctors directly bill Medicaid/Medicare for their services. In these situations do doctors or other medical professionals fall under Pay-to-Play requirements?

Yes. Doctors and professionals that are compensated pursuant to contracts with the local unit are covered. They are paid on a "pass through basis" from Medicaid/Medicare. If it is anticipated in a given year that monies paid to any contractor will exceed \$17,500 for services rendered, then the underlying contract is subject to the Law, regardless of the source of the funds.

23. *If professional services are contracted through a [fair and open process](#), is the 40A:11-5(1)(a)(i) public notice after award required?*

No. The [fair and open process](#) provides adequate public notice of the award.

24. *Are grants awarded by a governing body considered contracts under the law? For example: Workforce Investment Board [WIB] job training grants, non-profit housing grants, or Community Development Block Grants.*

Generally grants are considered contracts and are covered under the law, however, when grants are subject to an open, statutory process which is consistent with fair and open disclosure themes, they are afforded the same flexibility as any fair and open award.

Alternatively, grants to individuals or payments to businesses on behalf of individuals for social services (i.e., housing, medical support) are entitlements on behalf of the person and the government is not a participant in who is selected to get the money. The government merely facilitates the transaction.

25. *How does Pay-to-Play affect land and building transactions?*

The Local Lands and Buildings Law (N.J.S.A. 40A:12-1 et seq.) provides [a fair and open process](#) for selling land. When the law is followed, no additional action is needed.

Acquiring real property:

A State program (i.e., Farmland Preservation or Garden State Trust) that provides a public process for identifying and choosing parcels is considered [fair and open](#).

When a specific parcel is desired for other purposes, the government unit can apply for exigency approval if [fair and open](#) or [non-fair and open](#) processes are not practicable.

26. *Are health care purchases made by public hospitals or nursing homes under contracts awarded through the New Jersey Hospital Association pursuant to N.J.S.A. 30:9-87 considered [fair and open](#)?*

Yes – the Division has reviewed the procedures used by the NJHA and their cooperative purchasing partner and find that they meet the substantive requirements of [the fair and open process](#). To ensure compliance, however, the public agency should include a web link on its website linking to bid calendar information on the website of the contractor conducting the procurement process (www.novationco.com/suppliers/bids.asp).

This procedure does not eliminate the responsibility of the public agency to publish notices of award pursuant to N.J.S.A. 30:9-88.

27. *If a contract is awarded to procure a single good does the term of the contract extend beyond delivery? Does this change if the contract includes a service agreement?*

No. The term of a contract for a specific item expires when that item is accepted, even if the item carries a warranty period as provided by the manufacturer. If there is a separate

agreement or rider to the contract that establishes an ongoing maintenance or service agreement then the term of the contract will expire with the expiration of the service agreement.

28. Are there specific wording requirements for [fair and open](#) contract award resolutions, i.e., must they include specific language, similar to that which would be done for [non-fair and open](#) contracts?

It is advisable that language such as “Whereas, the contract was awarded through a [fair and open](#) process, pursuant to N.J.S.A. 19:44A-20.4 et seq.” be included in the award resolution, however this is not a requirement. A special resolution is not required.

29. What responsibility does a contracting unit have to check the forms submitted by vendors?

Generally, if a government agency has information that could confirm a certification the agency is responsible to act accordingly. In this case, the following actions should be taken to review [non-fair and open](#) contracts:

1. The local unit should ensure that recipients of contributions listed on a Political Contribution Disclosure Form (c.271, N.J.S.A. 19:44A-20.26) are not the names of the individuals or committees listed on the Business Entity Disclosure Certification (c.19, N.J.S.A. 19:44A-20.4 et seq.).
2. If there is a PCD contribution to a BED-C listed recipient, review the organization’s Stockholder Disclosure Certification to ensure that the individual that made the contribution in question is not listed as an “interest holder” controlling 10% or more of the assets of the business or firm.
3. If the contributor in question is found on the Stockholder Disclosure Certification, carefully confirm that the contribution was made to the contracting unit’s officials or their committees by a 10% interest holder to the contracting unit, that individual (and their business) can not properly certify that they have made no contributions that would bar the award of a [non-fair and open](#) contract. Legal counsel and/or ELEC should then be consulted as appropriate for guidance under the law.

30. Do the state “pay to play” regulations apply to state cooperative purchasing contracts?

Contracts awarded pursuant to a State Contract are considered “[fair and open](#)” under PL 2004, c. 19, therefore the first steps of the contracting unit’s [fair and open](#) process are covered, i.e., advertising, establishing the award criteria, opening of proposals and vendor selection. The remaining responsibility for the contracting unit is to award the contract by Resolution of the governing body.

31. Does “pay to play” apply to a cooperative purchasing lead agency when awarding a contract?

Yes. The lead agency has met [fair and open](#) requirements through compliance with cooperative purchasing rules. Contracts awarded by participating agencies, or “members” pursuant to a local Cooperative Purchasing Contract are considered [fair and open](#) because of the lead agency’s compliance, therefore the first few steps of the contracting unit’s [fair and open process](#) are covered, i.e., advertising, establishing the award criteria, opening of proposals and vendor selection. The remaining responsibility for the cooperative contract “members” is to award the contract by Resolution of their respective governing bodies and ensuring the contract documents reference the code number of the issuing agency.

32 a. Is a quotation process for a “window” contract acceptable as a [fair and open](#) contract?

No, because by definition a quotation does not satisfy the elements of a [fair and open](#) process.

32 b. When obtaining quotes for a [non-fair and open](#) award, must the contracting unit validate a vendor’s eligibility to receive a contract?

Yes, if the value exceeds \$17,500, then the contracting unit or its designee must ensure that the vendor is eligible to receive a [non-fair and open](#) award, i.e., the vendor made no prohibited reportable contributions (see [N.J.S.A. 19:44A-20.4](#) et seq.)

33a. Does the immediate procurement of goods or services necessitated by an emergency require compliance with the reporting requirements of Chapter 19?

Yes. Chapter 19 provides exceptions from a formalized award process for emergencies impacting the public health, safety and welfare, however, a report documenting the emergency procedures followed shall be submitted to the Division of Local Government Services. Details concerning this report are available on the Division’s [website](#).

33b. Do the Pay-to-Play rules change if the procurement of goods or services classifies as an “Exigency” but not an “Emergency?”

Yes. Other exigencies (those which do NOT affect the public health, safety and welfare of the community) may be eligible for relief from Pay-to-Play as granted by the State Treasurer. Please refer to the Division’s guidelines regarding the application of the “Request for a Waiver of [N.J.S.A. 19:44A-20.4](#) -- [Pay-To-Play Exigency Request](#)” which may be found on the Division’s [website](#) on the Pay-to-Play resources page.

34. The governing body plans to award a professional services contract for legal services and suggested two potential attorneys. Both individuals gave \$1000.00 to the mayor’s

campaign committee in the last 12 months. The governing body chooses to follow a [non-fair and open](#) process for the appointment of legal counsel. Does the effect of Pay-to-Play differ for a solo practitioner versus a partner of a large firm, if both made a reportable contribution to one of the town's elected officials?

The solo would not be eligible under a non-“fair and open” as the individual holds more than a 10% interest in the solo practice and made a “reportable contribution” in the prior 12 months. The partner in the national firm may be eligible if that partner controls less than 10% of the national firm’s interests. Both individuals would still be required to disclose the contribution on the firm’s PCD form but since the contract is with the firm and not the individual partner the partner may be eligible if the partner’s share of control is less than 10%.

35. A county must obtain property from private owners to widen county roads. The property will be obtained following an eminent domain process. No other land than that in question can satisfy the county's needs in this case. Are those purchases subject to Pay-to-Play?

As long as the county procures the property through an established legal process, such as eminent domain, the intent of [fair and open](#) is satisfied, as it is a transparent and public process. Similar to “state contracts”, “cooperative purchase agreements” and “eminent domain” or anything subject to the “Local Lands and Buildings Law”, the board or governing body still must publicly award the contract to satisfy the remaining requirement of [fair and open](#).

Chapter 271 Frequently Asked Questions

General

1. Given the sometimes confusing text of Chapter 271 and its relationship to Chapter 19, what resources are available to local units to interpret the law?

Interpretations of Chapter 271 are facilitated by taking into consideration the two statutes, their legislative history and the Governor's "Statement upon Signing" S-1987 (Chapter 271). The guidance provided to local units by the Division of Local Government Services takes these into account, along with guidance from the Division of Law.

Section 1 – Local Pay-to-Play Regulations

1. What local units are affected by Chapter 271?

Chapter 271 explicitly lists "county, municipality, independent authority, board of education, or fire district" as those entities covered by the law. When considered within the context of the intent of Chapter 19 and taking into account guidance provided by the Division of Law, the Division of Local Government Services suggests that the laws must be read consistently and broadly; including the broader Chapter 19 reference to county and municipal "agencies and instrumentalities." To the extent that Chapter 271 provides for additional agencies, such as boards of education, they are only required to comply with Chapter 271.

2. Under Chapter 271, can local units adopt local policies (ordinances or resolutions as appropriate to the local unit) to supersede Chapter 19?

Yes, but only to the extent that the local policy does not conflict with the pay-to-play themes provided in Chapters 19 and 271. Given the myriad of possible variations on the themes of Chapter 19, each local unit must make its own decisions on how their provisions relate to Chapter 19.

3. What is an example of where the "themes" of pay-to-play law could affect local pay-to-play policies?

Some existing local ordinances substitute \$500 for the reportable threshold over which contributions may not be allowed for non-fair and open contracts, while Chapter 19 calls for a \$300 threshold. Local officials might conclude that such a difference is not significant and therefore, consistent with pay-to-play themes. Similarly, local officials might conclude that setting a "reportable" threshold of \$2,600, the maximum contribution allowed under ELEC law to a candidate committee, would be inconsistent with the "themes".

4. Does Chapter 271 require local pay-to-play policies to be filed with the State?

Yes. Any policy adopted by a local unit must be filed with the Secretary of State's office. Failure to file the policy does not void the policy, but could result in legal liability on the part of the local unit for failing to follow the law.

5. Does Chapter 271 require Boards of Education to comply with Chapter 19?

No. Section 1 of Chapter 271 is permissive and Chapter 19 excludes Boards of Education. Boards must, however, comply with Section 2 of Chapter 271.

6. What action is required to adopt local pay-to-play policies?

In the case of a municipality, an ordinance is required; for all other local units, a resolution adopted by the governing body is appropriate.

Section 2 – Political Contribution Disclosure Certifications

1. Does Chapter 271 require Boards of Education to comply with any Pay-to-Play disclosure requirements for contracting?

Yes. Section 2 specifically includes Boards of Education in the reporting requirements for contracts not required by law to receive public bids. While not otherwise required to comply with Chapter 19, Boards of Education may only avoid these form requirements through voluntarily adhering to a "[fair and open](#)" process.

2. What contracts are affected by the Political Contribution Disclosure requirement of Section 2?

Contracts over \$17,500 that are not awarded pursuant to a [fair and open process](#), i.e., those awarded pursuant to a non-fair and open" process. Boards of education should refer to the definition of [a fair and open process](#) at N.J.S.A. 19:44A-20.7 to apply this provision.

3. What must the governing body have on file to award a [non-fair and open](#) contract over \$17,500?

Anytime prior to award:

- a Business Entity Disclosure Certification (as required by Chapter 19 except for schools); and
- a Political Contribution Disclosure Form (at least 10 days prior to award, as required by Chapter 271) and,
- a Business Registration Certificate, and

- a Determination of Value, (except for schools).

4. What is the content of the Political Contribution Disclosure Form vendors must submit at least 10 days prior to award of a non-fair and open contract award over \$17,500?

The form submitted by the vendor must include all reportable political contributions made during the twelve month period preceding the award of the contract. "Reportable political contributions" are those defined as reportable, pursuant to ELEC's guidelines in N.J.S.A 19:44A-1 et seq. (the provisions of a local pay-to-play policy do not supersede this requirement).

The entities for which the law requires that contributions must be disclosed include:

- any State, county, or municipal committee of a political party, any legislative leadership committee, and,
- any candidate committee of a candidate for, holder of, an elective office of:
 - the public entity
 - that county in which that public entity is located
 - another public entity within that county
 - a legislative district in which that public entity is located
 - when the public entity is a county, of any legislative district which includes all or part of the county; and
- any continuing political committee.

The form shall include the date, dollar amount and named recipient of each contribution. The Division has provided a model form on the Pay-to-Play [website at www.nj.gov/dca/lgs/p2p](http://www.nj.gov/dca/lgs/p2p).

5. Does the immediate procurement of goods or services necessitated by an emergency require compliance with the reporting requirements of Chapter 271?

No. Chapter 271 provides an exception for emergencies. Agencies covered under c. 19 are still required to comply with c. 19 rules pertaining to emergency and/or exigent procurements.

6. Are Political Contribution Disclosure Statements required for banks, insurance companies, and public utilities, as they are exempt from Chapter 19 non-fair and open requirements?

Because PCDs reflect contributions made by partners, boards of directors, spouses, etc., they are required when contract awards are made to insurance companies and banks. For banks, a contract is effectively awarded when the governing body passes a resolution designating the bank as an official depository. The PCD would be required 10 days prior

to the passage of a depository designation resolution. ELEC rules can be consulted for definition of the range of individuals that are required to report.

PCDs are not required for regulated public utility services, as the agency is required by the Board of Public Utilities to use the utility. The governing body does not “award” a contract to a specific utility, as the agency has no choice but to use the company. This exception does not apply to non-regulated public utility services, such as non-tariffed generated energy, or long-distance phone services where other procurement practices are used.

7. Are not-for-profit groups required to fill out the c. 271 PCD form?

At this time this question is under review by State officials. This will be updated as soon as a determination is made.(9/20/2007).

8. Are Chapter 271 PCD forms needed for all awards between \$17,500 and an agency's bid threshold, or only those classified as non-fair and open?

Yes, a PCD form is required for non-fair and open awards in excess of \$17,500, and those in excess of an agency's bid threshold based on Governor Codey's "Statement upon Signing" noting that the requirement for the PCD covers all “non-fair and open” contracts.

9. Are publishers who supply textbooks subject to the law?

Yes. The law does not provide a waiver for the procurement of textbooks and other educational materials under Chapter 271. Boards of Education are not subject to Chapter 19 therefore no contractual prohibitions are applicable; however the disclosures under Chapter 271 are still required.

Section 3 – Annual ELEC Filing

1. When do vendors have to file the “Section 3” contribution disclosure with ELEC

The Division has consulted with the Election Law Enforcement Commission concerning the “Section 3” report required under Chapter 271. This section requires vendors that receive, in the aggregate, more than \$50,000 in public monies annually report political contributions to ELEC.

The Commission's rules have been adopted and are in effect (as of publication in the N.J. Register on April 16, 1007) for the annual filing of “Form BE.”. The regulations for the Annual Disclosures require submission by March 30th of each year covering contracts and contributions for the prior calendar year. Delayed filing was authorized for the 2007 submission covering calendar year 2006, due to the timing of the adoption. The deadline for 2007 is September 28, 2007. The instructions and form are on the [ELEC website](#).