

CHAPTER 136

AN ACT concerning certain public contracts with private entities and supplementing Title 52 of the Revised Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

C.52:18-42 Definitions relative to public contracts with private entities.

1. As used in this act:

"Business" means a corporation; sole proprietorship; partnership; corporation that has made an election under Subchapter S of Chapter One of Subtitle A of the Internal Revenue Code of 1986, or any other business entity through which income flows as a distributive share to its owners; limited liability company; nonprofit corporation; or any other form of business organization located either within or outside this State, but excluding any public or private institution of higher education.

"Environmental infrastructure project" means the acquisition, construction, improvement, repair or reconstruction of all or part of any structure, facility or equipment, or real or personal property necessary for or ancillary to any (1) wastewater treatment system project, including any stormwater management or combined sewer overflow abatement projects; or (2) water supply project, as authorized pursuant to P.L.1985, c.334 (C.58:11B-1 et seq.) or P.L.1997, c.224 (C.58:11B-10.1 et al.), including any water resources project, as authorized pursuant to P.L.2003, c.162, but excluding the acquisition, construction, repair, or reconstruction of any building or other improvements to real property, or the acquisition or installation of any equipment or other personal property, that, upon completion, shall constitute a qualified employment incentive facility.

"Financial assistance" means funds made available as a grant or loan, including funds derived as proceeds from the issuance of tax-exempt bonds by the entity providing such assistance.

"Lead public agency" means the public entity designated by the State Treasurer pursuant to section 4 of this act to serve as the point of contact between a business and every State governmental entity having oversight of, or involvement in, a project for which the entity or entities are providing or will provide the business with financial assistance.

"Public entity" means the State, other than the Judicial branch of State government, any county, municipality, district, or other political subdivision thereof, and any agency, authority, or instrumentality of the foregoing, including, but not limited to, any county improvement authority and any economic development agency, authority, or other entity.

"Qualified employment incentive facility" means any building or other structure or portion of a building or other structure that, following the date on which occupation of the building or structure shall have commenced, shall be used exclusively as the premises of a project, related to the creation, relocation, or retention of jobs, that qualifies for incentives under the Business Retention and Relocation Assistance Grant Program established by section 3 of P.L.1996, c.25 (C.34:1B-114), the Business Employment Incentive Program established by section 3 of P.L.1996, c.26 (C.34:1B-126), the corporation business tax credit and insurance premium tax credit certificate transfer program established pursuant to section 17 of P.L.2004, c.65 (C.34:1B-120.2), the sales and use tax exemption certificate program established pursuant to section 20 of P.L.2004, c.65 (C.34:1B-186), the exemption of retail sales of energy and utility service to qualified businesses within an urban enterprise zone from the sales and use tax pursuant to section 23 of P.L.2004, c.65 (C.52:27H-87.1), the urban transit hub tax credit program established pursuant to section 3 of P.L.2007, c.346 (C.34:1B-209), or any other program as the State Treasurer shall deem to be of similar kind and purpose; provided, however, that such exclusive use shall continue for the minimum

period of time prescribed by the applicable law or any regulation adopted pursuant thereto, or under any project agreement or other contract executed pursuant to such law or regulation, or if no such minimum period shall be so prescribed, for a period of four years.

"Redevelopment project" means a specific work or improvement, including lands, buildings, structures, improvements, real and personal property or any interest therein, including lands under water, riparian rights, space rights and air rights, acquired, owned, cleared, graded, developed or redeveloped, constructed, reconstructed, rehabilitated or improved, undertaken by a developer, but excluding the acquisition, construction, repair, or reconstruction of any building or other improvements to real property, or the acquisition or installation of any equipment or other personal property, that, upon completion, shall constitute a qualified employment incentive facility.

"Remediation" or "remediate" means all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge of contaminants, including, as necessary, the preliminary assessment, site investigation, remedial investigation, and remedial action, provided, however, that "remediation" or "remediate" shall not include the payment of compensation for damage to, or loss of, natural resources, and shall not include the acquisition, construction, repair, or reconstruction of any building or other improvements to real property, or the acquisition or installation of any equipment or other personal property, that, upon completion, shall constitute a qualified employment incentive facility.

"State governmental entity" means the Executive and Legislative branches of the State government, any agency or instrumentality of the State, including any board, bureau, commission, corporation, department, or division, any independent State authority, including, but not limited to, any economic development authority or agency, and any State institution of higher education. A county, municipality, or school district, or any agency or instrumentality thereof, shall not be deemed a State governmental entity.

C.52:18-43 Conditions for financial assistance from public entity.

2. Notwithstanding any law, rule, regulation, or order to the contrary, any business receiving any financial assistance for the cost of undertaking any redevelopment project, project involving remediation, or environmental infrastructure project pursuant to any contract with any public entity shall include in that contract, as a condition of the public entity's agreement thereto, provisions requiring that upon disbursement to the business, by or through that or any other public entity, of such financial assistance with respect to the project in an aggregate amount totaling \$50 million or more:

a. With respect to the cost of the entire project, the amount that the business shall spend of funds from sources other than a public entity shall be not less than a minimum of \$1 for every \$5 in financial assistance received from any public entity for expenditure on any project cited in the contract, except that this provision shall not apply if the financial assistance is provided pursuant to a statute, or subject to a rule or regulation, requiring that expenditure by the business of funds from sources other than a public entity on the project exceed one-fifth of the amount of financial assistance received from the public entity;

b. The public entity shall retain a percentage, not exceeding 10 percent of the total amount of financial assistance provided for in the contract, which retainage amount shall not be disbursed to the business until the successful completion of the project as certified by the public entity. The requirements of this subsection shall not apply if the financial assistance is provided pursuant to a statute, or subject to a rule or regulation, requiring that the public entity shall retain or place into an escrow account more than 10 percent of the amount of that financial assistance for disbursement only upon completion of the project;

c. The public entity shall review, at any time during the term of the contract, the qualifications of any subcontractor hired to perform work on the project or projects; and

d. The business shall submit payment of a performance bond which shall be in an amount equal to 110 percent of the total price of the publicly funded improvements under the project and otherwise comply with all applicable State laws, including, but not limited to the business's submission of a surety disclosure statement and certification which complies with the requirements of N.J.S.2A:44-143, except that this provision shall not apply if the financial assistance is provided pursuant to a statute, or subject to a rule or regulation, requiring that the business obtain for the performance of work on the project a bond that shall amount to more than 110 percent of the total price of those publicly funded improvements.

C.52:18-44 Filing of audited financial statements, reports.

3. a. Notwithstanding any law, rule, regulation, or order to the contrary, any business to which there is disbursed, by or through that or any other public entity, any financial assistance in an aggregate amount totaling \$50 million or more, for the cost of undertaking any redevelopment project, project involving remediation, or environmental infrastructure project pursuant to one or more contracts with any public entity, shall file with the public entity and with the State Treasurer, not later than the 30th day following such disbursement, and annually thereafter for the duration of such contract or contracts, audited financial statements and reports concerning the activities of the project or projects and of such business, including any parent or holding company of the business, as prepared by an independent certified public accountant. Such financial statements shall include, but not be limited to, a balance sheet, statement of income or loss, and statement of changes in financial position. If the financial statements are not received by the public entity by the deadlines established hereinabove, the public entity shall increase the amount of the percentage of funds retained or placed into an escrow account in accordance with the provisions of subsection b. of section 2 of this act by:

(1) five percent for any statement 120 or fewer days past the deadline;

(2) ten percent for any statement more than 120 but less than 181 days past the deadline; and

(3) 15 percent for any statement 181 or more days past the deadline.

b. The provisions of this section shall not apply to any business that is required to file such financial statements under federal law or other State law.

c. Each business reporting under this section shall disclose to the public entity on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the business as the public entity determines is necessary or useful for the protection of the public interest. This information shall be expressed in plain English and, if the public entity so requires, shall include trend and qualitative information and graphic presentations.

C.52:18-45 Notification to State Treasurer of contract, designation of lead public agency.

4. If any State governmental entity enters into a contract or contracts with a business to which the provisions of section 2 of this act apply, the State governmental entity shall notify the State Treasurer of such contract and shall include the name of the project, the nature of the project-related activity for which the financial assistance is to be given, and any other information necessary for the implementation of the provisions of this act. The State Treasurer shall monitor the notifications received pursuant to the provisions of this section

with respect to each project and, when the aggregate amount of financial assistance disbursed to a business with respect to a project shall equal or exceed \$50 million or at any other time the State Treasurer deems it necessary, shall designate the public entity that, as of the date of such designation, shall have disbursed the greatest amount of financial assistance to the business with respect to the project under those contracts, as the lead public agency to serve as the sole point of contact between the business and every State governmental entity having any manner or degree of oversight of or involvement in the project to which that contract or contracts relates. The lead public agency shall document all State governmental entity activities associated with the project.

The lead public agency shall, upon designation, perform or cause to be performed an assessment of the degree of risk that the business will be financially unable to complete the project and, based upon the results of that assessment, require that, before further disbursements of funds from a public entity under any such contract in connection with the project, the business shall make an investment of its own funds in the project, which investment shall not be less than 10 percent of total project costs.

C.52:15C-17 Additional powers, responsibilities of State Comptroller.

5. In addition to the powers and responsibilities of the State Comptroller, prescribed in P.L.2007, c.52 (C.52:15C-1 et seq.), upon the designation, with respect to the undertaking by any business of a project, of a lead public agency pursuant to section 4 of this act, the State Comptroller is authorized to audit: a. the uses of all financial assistance that shall have been or shall thereafter be received in connection with the project by a business from a public entity pursuant to any contract to which the provisions of section 2 of this act apply; and b. the expenditure by the business, in connection with the project, of funds from sources other than a public entity, as required under the provisions of subsection a. of that section. The audit shall include, but not be limited to, the amount of financial assistance funds that were provided by the public entity to the business and how such funds were spent by the business.

C.52:15C-18 Financial assistance to be used in accordance with terms of contract.

6. Upon the designation, with respect to the undertaking of a project by any business, of a lead public agency pursuant to section 4 of this act, the State Comptroller shall require that any financial assistance received by the business from a public entity in connection with the project pursuant to any contract to which the provisions of section 2 of this act apply shall be spent in accordance with the terms of the contract.

C.52:18-46 Certification by business filing financial statement.

7. Each business filing a financial statement under section 3 of this act shall attach thereto a certification that:

- a. the business officer signing the financial statement has reviewed the statement;
- b. based on the officer's knowledge, the financial statement does not contain any untrue statement of a material fact or omit the statement of a material fact necessary in order to ensure that the statements made, in light of the circumstances under which such statements were made, were not misleading;
- c. based on such officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the business as of, and for, the periods presented in the report; and
- d. the signing officer:

- (1) is responsible for establishing and maintaining internal controls;
- (2) has designed such internal controls to ensure that material information relating to the business and its consolidated subsidiaries is made known to such business officers by others within those entities, particularly during the period in which the reports are being prepared;
- (3) has evaluated the effectiveness of the business' internal controls as of a date within 90 days prior to the financial statement;
- (4) has presented in the financial statement the officer's conclusions about the effectiveness of the business' internal controls based on the evaluation as of that date;
- (5) has disclosed to the business' auditors and the audit committee of the board of directors or those persons fulfilling the equivalent function:
 - (a) all significant deficiencies in the design or operation of internal controls which could adversely affect the business' ability to record, process, summarize, and report financial data and have identified for the business' auditors any material weaknesses in internal controls; and
 - (b) any fraud, whether or not material, that involves management or other employees who have a significant role in the business' internal controls; and
- (6) has indicated in the financial statement whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

C.52:18-47 Duties of CPA relative to preparation of audit report.

8. For any audit report for which a financial statement shall have been filed under section 3 of this act, an independent certified public accountant shall:

- a. prepare, and retain for a period of not less than seven years, audit work papers, and other information related to the audit report, in sufficient detail to support the conclusions reached in the report;
- b. provide a concurring or second partner review and approval of the audit report and other related information, and concurring approval in its issuance, by a qualified person associated with the public accounting firm, other than the person in charge of the audit, or by an independent reviewer;
- c. describe in the audit report the scope of the auditor's testing of the internal control structure and procedures of the business, and present in such report or in a separate report:
 - (1) the findings of the auditor from such testing;
 - (2) an evaluation of whether such internal control structure and procedures:
 - (a) include maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the business;
 - (b) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the business are being made only in accordance with authorizations of management and directors of the business; and
- (3) a description, at a minimum, of material weaknesses in such internal controls, and of any material noncompliance found on the basis of such testing;
- d. provide a statement to the public entity that, contemporaneously with the audit:
 - (1) the auditor has not provided the business any non-audit service, including any bookkeeping or other services related to the accounting records or financial statements of the business;

(2) the lead or coordinating audit partner having primary responsibility for the audit, or the audit partner responsible for reviewing the audit, has not performed audit services for that business in each of the five previous fiscal years of that business;

(3) the auditor has provided a timely report to the audit committee of the business stating that:

(a) all critical accounting policies and practices were used;

(b) all alternative treatments of financial information within generally accepted accounting principles have been discussed with management officials of the business, the ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the registered public accounting firm;

(c) other material written communications between the registered public accounting firm and the management of the business, such as any management letter or schedule of unadjusted differences, were reported to the business; and

(d) concerning any audit service conducted under this section, whether a chief executive officer, controller, chief financial officer, chief accounting officer, or any person serving in an equivalent position for the business, was employed by that registered independent public accounting firm and participated in any capacity in the audit of that business during the one-year period preceding the date of the initiation of the audit; and

e. present the financial information included in any such financial statement in a manner that:

(1) does not contain an untrue statement of a material fact or omit a material fact necessary in order to make the pro forma financial information, in light of the circumstances under which it is presented, not misleading; and

(2) reconciles it with the financial condition and results of operations of the business under generally accepted accounting principles.

C.52:18-48 Internal control report.

9. a. Each audited financial statement prepared pursuant to the provisions of section 3 of this act shall contain an internal control report, which shall:

(1) state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and

(2) contain an assessment, as of the end of the most recent fiscal year of the business, of the effectiveness of the internal control structure and procedures of the business for financial reporting.

b. With respect to the internal control assessment required by subsection a. of this section, each registered public accounting firm that prepares or issues the audit report for the business shall attest to, and report on, the assessment made by the management of the business. Any such attestation shall not be the subject of a separate engagement.

C.52:18-49 Failure to adhere to requirements, refund of financial assistance.

10. a. Any business, receiving financial assistance from a public entity under a contract to which the provisions of section 2 of this act apply, that knowingly fails to submit a financial statement or report, or that makes a material misrepresentation in any application, report, or other disclosure, that the recipient business is required to make pursuant to this act shall refund the amount of financial assistance to the granting public entity or entities. The granting public entity or entities shall include provisions for the refund as part of an agreement to provide financial assistance and may pursue an action to collect the amount of the refund plus any attorney fees and other costs of the action.

b. Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any public entity in relation to any provision of this act, shall be subject to the provisions of subsection a. of this section.

C.52:15C-19 Rules, regulations.

11. The State Comptroller shall, pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), adopt such rules and regulations as shall be necessary to implement the provisions of this act in accordance with the purposes thereof, including, but not limited to, the establishment of guidelines for determining the scope of a project.

12. This act shall take effect immediately except that section 5 shall apply to any contract awarded during calendar year 2004 and thereafter.

Approved October 12, 2009.