

[Fourth Reprint]

ASSEMBLY, No. 2650

STATE OF NEW JERSEY
213th LEGISLATURE

INTRODUCED MAY 12, 2008

Sponsored by:

Assemblyman GARY S. SCHAER

District 36 (Bergen, Essex and Passaic)

Assemblyman FREDERICK SCALERA

District 36 (Bergen, Essex and Passaic)

Co-Sponsored by:

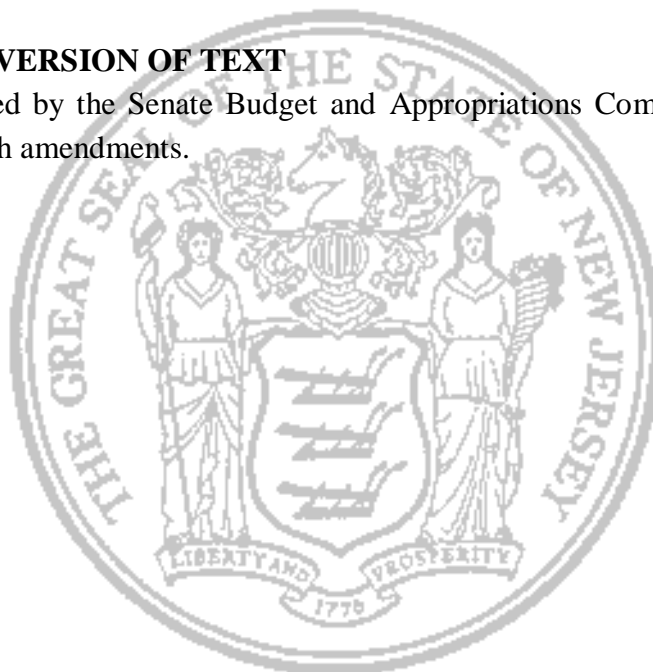
Senators Gordon, Weinberg, Sarlo and Turner

SYNOPSIS

Establishes requirements concerning certain public contracts with private firms.

CURRENT VERSION OF TEXT

As reported by the Senate Budget and Appropriations Committee on June 22, 2009, with amendments.



(Sponsorship Updated As Of: 6/26/2009)

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

3

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

6

7 1. As used in this act:

8 "Business" means a corporation; sole proprietorship; partnership;
9 corporation that has made an election under Subchapter S of
10 Chapter One of Subtitle A of the Internal Revenue Code of 1986, or
11 any other business entity through which income flows as a
12 distributive share to its owners; limited liability company; nonprofit
13 corporation; or any other form of business organization located
14 either within or outside this State², but excluding any ⁴public or⁴
15 private institution of higher education ⁴[that finances or refinances
16 capital facilities through bonds issued by the New Jersey
17 Educational Facilities Authority that are secured solely by private
18 funds or assets²]⁴.

19 "Environmental infrastructure project" means the acquisition,
20 construction, improvement, repair or reconstruction of all or part of
21 any structure, facility or equipment, or real or personal property
22 necessary for or ancillary to any (1) wastewater treatment system
23 project, including any stormwater management or combined sewer
24 overflow abatement projects; or (2) water supply project, as
25 authorized pursuant to P.L.1985, c.334 (C.58:11B-1 et seq.) or
26 P.L.1997, c.224 (C.58:11B-10.1 et al.), including any water
27 resources project, as authorized pursuant to P.L.2003, c.162², but
28 excluding the acquisition, construction, repair, or reconstruction of
29 any building or other improvements to real property, or the
30 acquisition or installation of any equipment or other personal
31 property, that, upon completion, shall constitute a qualified
32 employment incentive facility².

33 ⁴"Financial assistance" means funds made available as a grant or
34 loan, including funds derived as proceeds from the issuance of tax-
35 exempt bonds by the entity providing such assistance.⁴

36 ²"Lead public agency" means the public entity designated by the
37 State Treasurer pursuant to section 4 of this act to serve as the point
38 of contact between a business and every State governmental entity
39 having oversight of, or involvement in, a project for which the
40 entity or entities are providing or will provide the business with
41 financial assistance.²

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Assembly ASG committee amendments adopted May 22, 2008.

²Assembly AAP committee amendments adopted December 8, 2008.

³Senate SSG committee amendments adopted February 26, 2009.

⁴Senate SBA committee amendments adopted June 22, 2009.

1 "Public entity" means the State, ¹other than the Judicial branch
2 of State government, ¹ any county, municipality, district^{2,2} or other
3 political subdivision thereof, and any agency, authority^{2,2} or
4 instrumentality of the foregoing ², including, but not limited to, any
5 county improvement authority and any economic development
6 agency, authority, or other entity².

7 ²"Qualified employment incentive facility" means any building
8 or other structure or portion of a building or other structure that,
9 following the date on which occupation of the building or structure
10 shall have commenced, shall be used exclusively as the premises of
11 a project, related to the creation, relocation, or retention of jobs,
12 that qualifies for incentives under the Business Retention and
13 Relocation Assistance Grant Program established by section 3 of
14 P.L.1996, c.25 (C.34:1B-114), the Business Employment Incentive
15 Program established by section 3 of P.L.1996, c.26 (C.34:1B-126),
16 the corporation business tax credit and insurance premium tax credit
17 certificate transfer program established pursuant to section 17 of
18 P.L.2004, c.65 (C.34:1B-120.2), the sales and use tax exemption
19 certificate program established pursuant to section 20 of P.L.2004,
20 c.65 (C.34:1B-186), the exemption of retail sales of energy and
21 utility service to qualified businesses within an urban enterprise
22 zone from the sales and use tax pursuant to section 23 of P.L.2004,
23 c.65 (C.52:27H-87.1), ⁴the urban transit hub tax credit program
24 established pursuant to section 3 of P.L.2007, c.346 (C.34:1B-
25 209), ⁴ or any other program as the State Treasurer shall deem to be
26 of similar kind and purpose; provided, however, that such exclusive
27 use shall continue for the minimum period of time prescribed by the
28 applicable law or any regulation adopted pursuant thereto, or under
29 any project agreement or other contract executed pursuant to such
30 law or regulation, or if no such minimum period shall be so
31 prescribed, for a period of four years.²

32 "Redevelopment project" means a specific work or improvement,
33 including lands, buildings, structures, improvements, real and
34 personal property or any interest therein, including lands under
35 water, riparian rights, space rights and air rights, acquired, owned,
36 cleared, graded, developed or redeveloped, constructed,
37 reconstructed, rehabilitated or improved, undertaken by a developer
38 ², but excluding the acquisition, construction, repair, or
39 reconstruction of any building or other improvements to real
40 property, or the acquisition or installation of any equipment or other
41 personal property, that, upon completion, shall constitute a qualified
42 employment incentive facility².

43 "Remediation" or "remediate" means all necessary actions to
44 investigate and clean up or respond to any known, suspected, or
45 threatened discharge of contaminants, including, as necessary, the
46 preliminary assessment, site investigation, remedial investigation,
47 and remedial action, provided, however, that "remediation" or

1 "remediate" shall not include the payment of compensation for
 2 damage to, or loss of, natural resources², and shall not include the
 3 acquisition, construction, repair, or reconstruction of any building
 4 or other improvements to real property, or the acquisition or
 5 installation of any equipment or other personal property, that, upon
 6 completion, shall constitute a qualified employment incentive
 7 facility².

8 "State governmental entity" means the Executive¹,¹ and¹
 9 Legislative ¹[and Judicial]¹ branches of the State government, any
 10 agency or instrumentality of the State, including any board, bureau,
 11 commission, corporation, department, or division, any independent
 12 State authority, ²including, but not limited to, any economic
 13 development authority or agency,² and any State institution of
 14 higher education. A county, municipality, or school district, or any
 15 agency or instrumentality thereof, shall not be deemed a State
 16 governmental entity.

17
 18 2. Notwithstanding any law, rule, regulation¹,¹ or order to the
 19 contrary, any business receiving any ¹[compensation,]¹ ⁴[grant,
 20 loan¹,¹ or other type of]⁴ financial assistance ²[in an aggregate
 21 amount totaling \$25 million or more,]² for the cost of undertaking
 22 any redevelopment project, project involving remediation, or
 23 environmental infrastructure project pursuant to ²[one or more
 24 contracts] any contract² with any public entity shall include ²[the
 25 following]² in ²[any such] that² contract ²[or contracts], as a
 26 condition of the public entity's agreement thereto, provisions
 27 requiring that upon disbursement to the business, by or through that
 28 or any other public entity, of such financial assistance with respect
 29 to the project in an aggregate amount totaling \$50 million or more²:

30 a. ²[a provision that the] With respect to the cost of the entire
 31 project, the amount that the² business shall spend ²of funds from
 32 sources other than a public entity shall be not less than² a minimum
 33 of \$1 for every \$5 ⁴in financial assistance⁴ received from ²any²
 34 public ²[funds] entity for expenditure² on any project cited in the
 35 contract, except that this provision shall not apply if the financial
 36 assistance is provided pursuant to a statute, or subject to a rule or
 37 regulation, requiring that expenditure by the business ²of funds
 38 from sources other than a public entity² on the project exceed
 39 ¹[one-fifth] ²[one-sixth]¹ one-fifth² of the amount ⁴of financial
 40 assistance⁴ received from ²the² public ²[funds] entity²;

41 b. ²[except as provided in subsection a. of section 3 of this act, a
 42 provision that the]² The public entity shall ²[place] retain
 43 percentage, not exceeding² 10 percent of the total amount of
 44 ⁴[funds] financial assistance⁴ provided for in the contract ²[in an
 45 escrow account],² which ²retainage amount² shall not be disbursed

1 to the business until the successful completion of the project as
2 certified by the public entity ²[, except that this provision]. The
3 requirements of this subsection² shall not apply if the financial
4 assistance is provided pursuant to a statute, or subject to a rule or
5 regulation, requiring that ²[expenditure by the business on the
6 project] the public entity² shall ²retain or² place ²into an escrow
7 account² more than 10 percent of ⁴[those funds] the amount of that
8 financial assistance⁴ ²[in such an account] for disbursement only
9 upon completion of the project²;

10 c. ²[a provision that the] The² public entity shall review, at any
11 time during the term of the contract, the qualifications of any
12 subcontractor hired to perform work on the project or projects; and

13 d. ²[a provision that the] The² business shall submit payment of
14 a performance bond which shall be ²[of] in² an amount equal to
15 110 percent of the total ²[contract]² price ²of the publicly funded
16 improvements under the project² and otherwise comply with all
17 applicable State laws, including, but not limited to the ³[business']
18 business's³ submission of a surety disclosure statement and
19 certification which complies with the requirements of N.J.S.2A:44-
20 143, except that this provision shall not apply if the financial
21 assistance is provided pursuant to a statute, or subject to a rule or
22 regulation, requiring that ³[expenditure by]³ the business ³obtain
23 for the performance of work³ on the project ³a bond that³ shall
24 ²[place] amount to² more than 110 percent of the total ²[contract]²
25 price ²of those publicly funded improvements².

26
27 3. a. Notwithstanding any law, rule, regulation^{1,1} or order to the
28 contrary, any business ²[receiving] to which there is disbursed, by
29 or through that or any other public entity,² any ¹[compensation,]¹
30 ⁴[grant, loan^{1,1} or other type of]⁴ financial assistance in an
31 aggregate amount totaling ²[\$25] \$50² million or more, for the cost
32 of undertaking any redevelopment project, project involving
33 remediation, or environmental infrastructure project pursuant to one
34 or more contracts with any public entity ⁴[²awarded otherwise than
35 through a fair and open process as defined by section 6 of P.L.2004,
36 c.19 (C.19:44A-20.7)²]⁴, shall file with the public entity and with
37 the State Treasurer, ²[by the first day of the 18th month following
38 the awarding of the contract] not later than the 30th day following
39 such disbursement², and annually thereafter for the duration of such
40 contract or contracts, audited financial statements and reports
41 concerning the activities of the project or projects and of such
42 business, including any parent or holding company of the business,
43 as prepared by an independent certified public accountant. Such
44 financial statements shall include, but not be limited to, a balance
45 sheet, statement of income or loss, and statement of changes in

1 financial position. If the financial statements are not received by
2 the public entity by the deadlines established hereinabove, the
3 public entity shall increase the amount of the percentage of funds
4 ²[in the escrow account] retained or placed into an escrow account
5 in accordance with the provisions of subsection b. of section 2 of
6 this act² by:

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

9 (2) ten percent for any statement more than 120 but less than
10 181 days past the deadline; and

11 (3) 15 percent for any statement 181 or more days past the
12 deadline.

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

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

24
25 4. If any State governmental entity enters into a contract or
26 contracts with a business to which the provisions of section 2 of this
27 act apply, the State governmental entity shall notify the State
28 Treasurer of such contract and shall include the name of the project,
29 the nature of the project-related activity for which the financial
30 assistance is to be given, and any other information necessary for
31 the implementation of the provisions of this act. The State
32 Treasurer shall ²monitor the notifications received pursuant to the
33 provisions of this section with respect to each project and, ³[upon
34 determining that] when³ the aggregate amount of financial
35 assistance disbursed to a business with respect to a project shall
36 equal or exceed \$50 million ³or at any other time the State
37 Treasurer deems it necessary³, shall² designate ²[an employee of a
38 single State governmental entity] the public entity that, as of the
39 date of such designation, shall have disbursed the greatest amount
40 of financial assistance to the business with respect to the project
41 under those contracts^{3, 3} as the lead public agency² to serve as the
42 sole point of contact between the business and every State
43 governmental entity having any manner or degree of oversight of or
44 involvement in the project to which that contract or contracts
45 relates. The ²[employee] lead public agency² shall document all
46 State governmental entity activities associated with the project.

1 ²The lead public agency shall, upon designation, perform or
2 cause to be performed an assessment of the degree of risk that the
3 business will be financially unable to complete the project and,
4 based upon the results of that assessment, require that, before
5 further disbursements of funds from a public entity under any such
6 contract in connection with the project, the business shall make an
7 investment of ³its own³ funds in the project, which investment shall
8 not be less than 10 percent of total project costs.²
9

10 5. In addition to the powers and responsibilities of the State
11 Comptroller, prescribed in P.L.2007, c.52 (C.52:15C-1 et seq.),
12 ²upon the designation, with respect to the undertaking by any
13 business of a project, of a lead public agency pursuant to section 4
14 of this act,² the State Comptroller is authorized to audit²: a.² the
15 uses of ¹[those]¹ ²all² ⁴[funds] financial assistance⁴ ¹[provided
16 to] ²that shall have been or shall thereafter be² received ²in
17 connection with the project² by¹ a business from a public entity
18 pursuant to any contract ¹[and require that funds provided by a
19 public entity are spent in accordance with the terms of the contract]
20 to which the provisions of section 2 of this act apply¹ ²; and b. the
21 expenditure by the business, in connection with the project, of funds
22 from sources other than a public entity, as required under the
23 provisions of subsection a. of that section². The audit shall include,
24 but not be limited to, the amount of ⁴financial assistance⁴ funds that
25 were provided by the public entity to the business and how such
26 funds were spent by the business.
27

28 ¹6. ²[The] Upon the designation, with respect to the
29 undertaking of a project by any business, of a lead public agency
30 pursuant to section 4 of this act, the² State Comptroller shall require
31 that ²[the expenditure by a business of] any² ⁴[funds] financial
32 assistance⁴ received ²by the business ⁴from a public entity⁴ in
33 connection with the project² ⁴[from a public entity]⁴ pursuant to
34 any contract to which the provisions of section 2 of this act apply
35 shall be spent in accordance with the terms of the contract.¹
36

37 ¹[6.] ^{7.}¹ Each business filing a financial statement under
38 section 3 of this act shall attach thereto a certification that:

39 a. the business officer signing the financial statement has
40 reviewed the statement;

41 b. based on the officer's knowledge, the financial statement does
42 not contain any untrue statement of a material fact or omit the
43 statement of a material fact necessary in order to ensure that the
44 statements made, in light of the circumstances under which such
45 statements were made, were not misleading;

1 c. based on such officer's knowledge, the financial statements,
2 and other financial information included in the report, fairly present
3 in all material respects the financial condition and results of
4 operations of the business as of, and for, the periods presented in
5 the report; and

6 d. the signing officer:

7 (1) is responsible for establishing and maintaining internal
8 controls;

9 (2) has designed such internal controls to ensure that material
10 information relating to the business and its consolidated subsidiaries
11 is made known to such business officers by others within those
12 entities, particularly during the period in which the reports are being
13 prepared;

14 (3) has evaluated the effectiveness of the business' internal
15 controls as of a date within 90 days prior to the financial statement;

16 (4) has presented in the financial statement the officer's
17 conclusions about the effectiveness of the business' internal
18 controls based on the evaluation as of that date;

19 (5) has disclosed to the business' auditors and the audit
20 committee of the board of directors or those persons fulfilling the
21 equivalent function:

22 (a) all significant deficiencies in the design or operation of
23 internal controls which could adversely affect the business' ability
24 to record, process, summarize, and report financial data and have
25 identified for the business' auditors any material weaknesses in
26 internal controls; and

27 (b) any fraud, whether or not material, that involves management
28 or other employees who have a significant role in the business'
29 internal controls; and

30 (6) has indicated in the financial statement whether or not there
31 were significant changes in internal controls or in other factors that
32 could significantly affect internal controls subsequent to the date of
33 their evaluation, including any corrective actions with regard to
34 significant deficiencies and material weaknesses.

35

36 '[7.] 8.' For any audit report for which a financial statement
37 shall have been filed under section 3 of this act, an independent
38 certified public accountant shall:

39 a. prepare, and retain for a period of not less than seven years,
40 audit work papers, and other information related to the audit report,
41 in sufficient detail to support the conclusions reached in the report;

42 b. provide a concurring or second partner review and approval
43 of the audit report and other related information, and concurring
44 approval in its issuance, by a qualified person associated with the
45 public accounting firm, other than the person in charge of the audit,
46 or by an independent reviewer;

- 1 c. describe in the audit report the scope of the auditor's testing
2 of the internal control structure and procedures of the business, and
3 present in such report or in a separate report:
- 4 (1) the findings of the auditor from such testing;
5 (2) an evaluation of whether such internal control structure and
6 procedures:
- 7 (a) include maintenance of records that in reasonable detail
8 accurately and fairly reflect the transactions and dispositions of the
9 assets of the business;
- 10 (b) provide reasonable assurance that transactions are recorded
11 as necessary to permit preparation of financial statements in
12 accordance with generally accepted accounting principles, and that
13 receipts and expenditures of the business are being made only in
14 accordance with authorizations of management and directors of the
15 business; and
- 16 (3) a description, at a minimum, of material weaknesses in such
17 internal controls, and of any material noncompliance found on the
18 basis of such testing;
- 19 d. provide a statement to the public entity that,
20 contemporaneously with the audit:
- 21 (1) the auditor has not provided the business any non-audit
22 service, including any bookkeeping or other services related to the
23 accounting records or financial statements of the business;
- 24 (2) the lead or coordinating audit partner having primary
25 responsibility for the audit, or the audit partner responsible for
26 reviewing the audit, has not performed audit services for that
27 business in each of the five previous fiscal years of that business;
- 28 (3) the auditor has provided a timely report to the audit
29 committee of the business stating that:
- 30 (a) all critical accounting policies and practices were used;
31 (b) all alternative treatments of financial information within
32 generally accepted accounting principles have been discussed with
33 management officials of the business, the ramifications of the use of
34 such alternative disclosures and treatments, and the treatment
35 preferred by the registered public accounting firm;
- 36 (c) other material written communications between the registered
37 public accounting firm and the management of the business, such as
38 any management letter or schedule of unadjusted differences, were
39 reported to the business; and
- 40 (d) concerning any audit service conducted under this section,
41 whether a chief executive officer, controller, chief financial officer,
42 chief accounting officer, or any person serving in an equivalent
43 position for the business, was employed by that registered
44 independent public accounting firm and participated in any capacity
45 in the audit of that business during the one-year period preceding
46 the date of the initiation of the audit; and
- 47 e. present the financial information included in any such
48 financial statement in a manner that:

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

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

8
9 **'[8.] 9.'** a. Each audited financial statement prepared pursuant
10 to the provisions of section 3 of this act shall contain an internal
11 control report, which shall:

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

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

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

24
25 **'[9.] 10.'** a. Any business¹ receiving financial assistance
26 from a public entity **'[pursuant] under a contract'** to **'which'** the
27 provisions of section 2 of this act **'apply.'** that knowingly fails to
28 submit a financial statement or report, or that makes a material
29 misrepresentation in any application, report¹ or other disclosure¹
30 that the recipient business is required to make pursuant to this act
31 shall refund the amount of financial assistance to the granting
32 public entity or entities. The granting public entity or entities shall
33 include provisions for the refund as part of an agreement to provide
34 financial assistance and may pursue an action to collect the amount
35 of the refund plus any attorney fees and other costs of the action.

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

43
44 ²11. The State Comptroller shall, pursuant to the provisions of
45 the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1
46 et seq.), adopt such rules and regulations as shall be necessary to
47 implement the provisions of this act in accordance with the

1 purposes thereof, including, but not limited to, the establishment of
2 guidelines for determining the scope of a project.²

3

4 ¹~~[10.]~~ ²~~[11.]~~ 12.² This act shall take effect immediately
5 except that ¹~~[the provisions of sections]~~ section¹ 5 ¹~~[and 9]~~¹ shall
6 apply to any contract awarded during calendar year 2004 and
7 thereafter.