

# RESOLUTION

No. **19-329**

Approved as to Form and Legality

*John Morelli*  
JOHN MORELLI, CITY ATTORNEY  
Assistant

Date of Adoption

**JUL 02 2019**

Factual content certified by

*Wahab Onitiri*  
WAHAB ONITIRI, DIRECTOR OF PUBLIC WORKS

Councilman /woman

presents the following Resolution:

**RESOLUTION ACCEPTING A BID AND AWARDING A CONTRACT TO  
DIAMOND CONSTRUCTION, 35 BEAVERSON BLVD., SUITE 12C, BRICK, NEW  
JERSEY 08723 FOR THE RECONSTRUCTION OF FERRY STREET NJDOT TRUST  
FUND IN AN AMOUNT NOT TO EXCEED \$628,056.00- BID2019-25B**

**WHEREAS**, three (3) sealed bids were received on June 4, 2019, for The Reconstruction of Ferry Street NJDOT Trust Fund for the City of Trenton, Department of Public Works, Division of Traffic and Transportation; Work shall be completed within sixty (60) Calendar days from "Notice to Proceed".

**WHEREAS**, the bid of, Diamond Construction, 35 Beaverson Blvd., Suite 12C, Brick, New Jersey 08723 made pursuant to advertisement, be and is hereby accepted, as the legally lowest, responsive, responsible bidder complying with terms and specifications on file in the Division of Purchasing; and

**WHEREAS**, funds in an amount not to exceed \$628,056.00 have been certified to be available in the following account number(s): C-04-18-55-032C-001 (\$604,266.00) and 0-01- -55-5550-290 (\$23,790.00) contingent upon the FY'2020 temporary and or final budget.

**NOW, THEREFORE, IT IS RESOLVED**, by the City Council of the City of Trenton that the Mayor is hereby authorized to execute a contract with Diamond Construction, 35 Beaverson Blvd., Suite 12C, Brick, New Jersey 08723 for The Reconstruction of Ferry Street NJDOT Trust Fund for the City of Trenton, Department of Public Works, Division of Traffic and Transportation, for the said purposes in the manner prescribed by law.

	Aye	Nay	Abstain	Absent		Aye	Nay	Abstain	Absent		Aye	Nay	Abstain	Absent
BLAKELEY	<input checked="" type="checkbox"/>				MUSCHAL	<input checked="" type="checkbox"/>				MCBRIDE	<input checked="" type="checkbox"/>			
CALDWELL	<input checked="" type="checkbox"/>				RODRIGUEZ	<input checked="" type="checkbox"/>								
WILSON	<input checked="" type="checkbox"/>													
HARRISON	<input checked="" type="checkbox"/>				VAUGHN	<input checked="" type="checkbox"/>								

This Resolution was adopted at a Meeting of the City Council of the City of Trenton on

**JUL 02 2019**

*Verly McBride*  
President of Council

*Wahab Onitiri*  
City Clerk

**CITY OF TRENTON, NEW JERSEY**

**BID2019-25B  
RES. NO. 19-329**

**PREVAILING WAGE APPLIES**

This Agreement, entered into this 3rd Day of JULY 2019 between the City of Trenton, a municipal corporation of the State of New Jersey, ("CITY") **319 EAST STATE STREET, TRENTON, NEW JERSEY 08608** and **DIAMOND CONSTRUCTION, 5 BEAVERSON BLVD, SUITE 12C, BRICK, NEW JERSEY 08723** (Contractor"), witnesseth that:

**WHEREAS**, Contractor has bid, proposed or offered to furnish and deliver to the City the materials, supplies and/or goods to perform the services **IN AN AMOUNT NOT TO EXCEED \$628,056.00, WORK SHALL BE COMPLETED WITHIN SIXTY (60) CALENDAR DAYS FROM "NOTICE TO PROCEED"**.

**FIRST**, Contractor, under the penalty expressed in the bond hereinafter mentioned, will furnish, supply and deliver to the City of Trenton the following materials, supplies or services as authorized by:

**RESOLUTION ACCEPTING A BID AND AWARDING A CONTRACT TO DIAMOND CONSTRUCTION, 5 BEAVERSON BLVD, SUITE 12C, BRICK, NEW JERSEY 08723 FOR PTHE RECONSTRUCTION OF FERRY STREET NJDOT TRUST FUND FOR THE CITY OF TRENTON, DEPARTMENT OF PUBLIC WORKS, DIVISION OF TRAFFIC AND TRANSPORTATION**

**PERFORMANCE BOND AND LABOR MATERIAL REQUIRED WITH SIGNED CONTRACTS  
NO SUB-CONTRACTORS**

below in strict accordance with the terms and conditions of the bid specifications, the bid response and the authorizing resolution, which are included above and is incorporated by reference,. Additionally, Contractor will furnish good and ample security in a sum equal to the said contract price for the said articles and services.

**SECOND.** The City of Trenton will pay Contractor the total sum mentioned herein when the appropriate Department Director has executed a certification that the said articles or services have been furnished, delivered and accepted in full conformity to the aforementioned specifications and offer or proposal.

**THIRD.** The City of Trenton reserves the right to order a greater or lesser quantity, not to exceed twenty-five percent, of any or all of the articles named in the said offer or proposal than is stated therein, and it is distinctly agreed between the said parties that the price quoted in the offer or proposal of Contractor shall be regarded as a standard of prices, and the total sum mentioned herein as the consideration of this contract shall not be regarded as limiting the right of the City of Trenton to order such greater or lesser quantity.

**FOURTH.** In the event of the failure of Contractor to deliver to the City of Trenton, such articles or perform such work or labor as described in such quantities as ordered at the time stated for such delivery by the City of Trenton, or in the event that such articles as are delivered or work and labor performed do not meet the specifications or standards, as established by the City of Trenton for such articles or acceptance of such work and labor, then such delivery shall be rejected by telephone or written notice to the Agent or address indicated by the Contractor and by simultaneous and like notice to his surety. Additionally, if Contractor or his surety does not cure the default within the time set by the said Agent on behalf of the City of Trenton, then the said Agent on behalf of the City, shall have the right to procure such services or purchase such articles in their place and stead in the open market as are needed for replacement, and from the best source available in the judgment of the said Agent and to charge the expense of such articles or work performed to Contractor and to deduct the amount thereof from any moneys due or to become due to Contractor by virtue of this agreement. Provided, however, that the surety on the bond of Contractor for the faithful performance of this agreement shall be first notified of the necessity for such replacement, and given the same time allowance for such replacement as is given Contractor.

**FIFTH.** This contract shall not be amended, assigned or subcontracted without the consent of the City of Trenton in writing (if the total compensation payable thereunder shall thereby exceed \$2,500.00, approval

by Resolution of the Governing Body shall be required), and any breach of this covenant shall authorize the City of Trenton, by its said Agent, to declare this contract null and void and to refuse to make any further payments thereunder to Contractor.

SIXTH. In case of any conflict between the provisions of this agreement and of any of the provisions of the specifications, the latter shall govern and control.

Applicable for Public Construction Contracts Only: "Dispute Resolution Procedures (NJSA 40A:11-50). Disputes arising under this contract shall be subject to mediation or non-binding arbitration at the sole discretion of the City of Trenton, before a construction industry mediator or arbitrator or panels thereof. The City of Trenton shall have the right to select a third party to mediate any disputes arising under this agreement and the mediation shall be conducted informally in a manner decided upon by the mediator".

SEVENTH. Contractor hereby agrees to pay all workmen as a minimum the prevailing wages rate in accordance with Chapter 150 of the New Jersey Laws of 1963, Prevailing Wages on Public Contracts and U.S. Department of Labor Wage Rates with the higher rate for any given occupation being the governing rate, and N.J.S.A. 10:2-1 et seq., prohibiting discrimination in employment on public contracts.

EIGHTH. During the performance of this contract, the contractor agrees as follows:

a. CONTRACTOR or subcontractor, where applicable, will not discriminate against any employee or applicant for employment because of age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, or sex. CONTRACTOR will take affirmative action to ensure that such applicants are recruited and employed, and that employees are treated during employment, without regard to their age, race, creed, color, national origin, ancestry, marital status, gender identity or expression, affectional or sexual orientation, disability, nationality or sex. Such action shall include, but not be limited to the following: employment, up-grading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. CONTRACTOR agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause. (N.J.S.A. 10:5-33; N.J.A.C. 17:27-3.4)

b. CONTRACTOR or subcontractor, where applicable will, in all solicitations or advertisements for employees placed by or on behalf of CONTRACTOR, state that all qualified applicants will receive consideration for employment without regard to age, race, creed, color, national origin, ancestry, marital status, gender identity or expression, affectional or sexual orientation, disability, nationality or sex. (N.J.S.A. 10:5-33; N.J.A.C. 17:27-3.4)

c. CONTRACTOR or subcontractor where applicable, will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of CONTRACTOR's commitments under this act and shall post copies of the notice in conspicuous places available to employees and applicants for employment. (N.J.S.A. 10:5-33; N.J.A.C. 17:27-3.4)

d. CONTRACTOR or subcontractor, where applicable, agrees to comply with any regulations promulgated by the Treasurer pursuant to P.L. 1975, c.127, as amended and supplemented from time to time. (N.J.A.C. 17:27-3.4)

Note: A public works contract for a subcontractor with a total work force of four or fewer employees or for a contractor or subcontractor performing under an existing Federally approved or sanctioned affirmative action program shall contain as mandatory language only paragraphs a, b, and c above, and the contract shall not contain any other mandatory language prescribed by N.J.A.C. 17:27. (N.J.A.C. 17:27-3.4) (c)

e. All bidders and all contractors who are negotiating for a procurement or service contract with the public agency which is not subject to a federally approved or sanctioned affirmative action program are required to submit to the public agency, prior to or at the time the contract is submitted for signing by the public agency (in accordance with

N.J.A.C. 17:27-4.3 promulgated by the Treasurer pursuant to P.L. 1975, c. 127), one of the following three documents:

1. Appropriate evidence that the contractor is operating under an existing federally approved or sanctioned affirmative action program; or

2. A certificate of employee information report approval issued in accordance N.J.A.C. 17:27-4; or

3. An initial employee information report consisting of forms provided by the affirmative action office and completed by the contractor in accordance with N.J.A.C. 17:27-4. (N.J.A.C. 17:27-3.3) (a)

f. CONTRACTOR or subcontractor agrees to attempt in good faith to employ minority and female workers consistent with the applicable county employment goals prescribed by N.J.A.C. 17:27-5.2 promulgated by the Treasurer pursuant to P.L. 1975, c. 127, as amended and supplemented from time to time or in accordance with a binding determination of the applicable county employment goals determined by the affirmative action office pursuant to N.J.A.C. 17:27-5.2 promulgated by the Treasurer pursuant to P.L. 1975, c. 127, as amended and supplemented from time to time. (N.J.A.C. 17:27-5.3)(a) (1)

g. CONTRACTOR or subcontractor agrees to inform in writing appropriate recruitment agencies in the area, including employment agencies, placement bureaus, colleges, universities, labor unions, that it does not discriminate on the basis of age, creed, color, national origin, ancestry, marital status or sex, gender identity or expression, and that it will discontinue the use of any recruitment agency which engages in direct or indirect discriminatory practices. (N.J.A.C. 17:27-5.3) (a) (2)

h. CONTRACTOR or subcontractor agrees to revise any of its testing procedures, if necessary, to assure that all personnel testing conforms with the principles of job-related testing, as established by the statutes and court decisions of the State of New Jersey and as established by applicable Federal law and applicable Federal court decisions. (N.J.A.C. 17:27-5.3) (a) (3)

i. CONTRACTOR or subcontractor agrees to review all procedures relating to transfer, upgrading, downgrading and layoff to ensure that all such actions are taken without regard to age, creed, color, national origin, ancestry, marital status or sex, and conform with the applicable employment goals, consistent with the statutes and court decisions of the State of New Jersey, and applicable Federal law and applicable Federal court decisions. (N.J.A.C. 17:27-5.3) (a) (4)

j. CONTRACTOR agrees that in the hiring of persons for the performance of work under this contract or any subcontract hereunder, or for the procurement, manufacture, assembling or furnishing of any such materials, equipment, supplies or services to be acquired under this contract, no contractor, nor any person acting on behalf of such contractor or subcontractor, shall, by reason of race, creed, color, national origin, ancestry, marital status, gender identity, or expression, affectional or sexual orientation or sex, discriminate against any person who is qualified and available to perform the work to which the employment relates. (N.J.S.A. 10:2-1) (a)

k. No contractor, subcontractor, nor any person on his behalf shall, in any manner, discriminate against or intimidate any employee engaged in the performance of work under this contract or any subcontract hereunder, or engaged in the procurement, manufacture, assembling or furnishing of any such materials, equipment, supplies or services to be acquired under such contract, on account of race, creed, color, national origin, ancestry, marital status, gender identity or expression, affectional or sexual orientation or sex. (N.J.S.A. 10:2-1) (b)

l. There may be deducted from the amount payable to the contractor by the contracting public agency, under this contract, a penalty of \$50.00 for each person for each calendar day during which such person is discriminated against or intimidated in violation of the provisions of the contract. (N.J.S.A. 10:2-1) (c)

m. This contract may be canceled or terminated by the contracting public agency, and all money due or to become due hereunder may be forfeited, for any violation of this section of the contract

occurring after notice to the contractor from the contracting public agency of any prior violation of this section of the contract. (N.J.S.A. 10:2-1) (d)

n. The parties of this contract do hereby agree that the provisions of N.J.S.A. 10:2-1 through 10:2-4, dealing with discrimination in employment on public contracts, and the rules and regulations promulgated pursuant thereto, are hereby made a part of this contract and are binding upon them. (N.J.A.C. 13:6-1.1)



o. Contractor and subcontractor agree and guarantee to afford equal opportunity in performance of the contract and, except with respect to affectional or sexual orientation, and gender identity or expression in accordance with an affirmative action program approved by the State Treasurer. (N.J.S.A. 10:5-32 and 10:5-35) (a)

p. The parties of this contract do hereby agree that the provisions of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. Section 12101 et seq., which prohibits discrimination on the basis of disability by public entities in all services programs and activities provided or made available by public entities, and the rules and regulations promulgated pursuant thereto, are made a part of this contract. The contractor agrees to conduct all activities in compliance with the provisions of Title VI of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and the U.S. Department of Labor's regulations at 29 CFR Parts 31, 32 and 34.

Contractor shall cooperate with any state or federal reviews aimed at determining compliance with nondiscrimination laws and regulations authorized by State Law and expressly specified herein.



IN WITNESS WHEREOF, the City of Trenton has caused this agreement to be signed by the Mayor of the City of Trenton and its corporate seal to be hereto affixed, attested by the City Clerk, and Contractor has likewise caused this agreement to be executed the day and year first above written.

**CITY OF TRENTON**

Attest:  <b>Dwayne M. Harris</b> Municipal Clerk	 <b>W. Reed Gusciora, Esq., Mayor</b>
Date <u>9/5/19</u>	Date <u>8-30-19</u>

and

**DIAMOND CONSTRUCTION, 5 BEAVERSON BLVD, SUITE 12C, BRICK, NEW JERSEY 08723**

Attest:  <b>MARGUERITE LOBMAN</b> NOTARY PUBLIC OF NEW JERSEY Commission Expires 12/28/2022 Date <u>8/14/19</u>	 President <b>John A. Kovacs, President</b>
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*Dianna*

- ITEM 20 HOT MIX ASPHALT 9.5M64 SURFACE COURSE, 2" THICK  
1180 TONS @ \$ 110<sup>00</sup> Per TON \$ 129,800<sup>00</sup>  
ONE HUNDRED & TEN DOLLARS  
(Write UNIT price for Item 20 in Words and Numbers)
- ITEM 21 MILLING OF HOT MIX ASPHALT, 3" OR LESS  
8340 S.Y. @ \$ 8<sup>00</sup> Per S.Y. \$ 66,720<sup>00</sup>  
EIGHT DOLLARS  
(Write UNIT price for Item 21 in Words and Numbers)
- ITEM 22 HOT MIX ASPHALT DRIVEWAY, 4" THICK  
9 S.Y. @ \$ 68<sup>00</sup> Per S.Y. \$ 567.<sup>00</sup>  
SIXTY EIGHT DOLLARS 612.00 (2) 4/18/19  
(Write UNIT price for Item 22 in Words and Numbers)
- ITEM 23 SMALL DECIDUOUS TREE, 3-3.5" CAL., B&B  
3 UNIT @ \$ 300<sup>00</sup> Per UNIT \$ 900<sup>00</sup>  
THREE HUNDRED DOLLARS  
(Write UNIT price for Item 23 in Words and Numbers)
- ITEM 24 TRAFFIC STRIPES, LONG LIFE, EPOXY RESIN, 4"  
200 L.F. @ \$ 6<sup>00</sup> Per L.F. \$ 1200<sup>00</sup>  
SIX DOLLARS  
(Write UNIT price for Item 24 in Words and Numbers)
- ITEM 25 TRAFFIC MARKINGS, THERMOPLASTIC  
1800 S.F. @ \$ 7<sup>00</sup> Per S.F. \$ 12,600<sup>00</sup>  
SEVEN DOLLARS  
(Write UNIT price for Item 25 in Words and Numbers)
- ITEM 26 REGULATORY AND WARNING SIGNS  
41 S.F. @ \$ 30<sup>00</sup> Per S.F. \$ 1230<sup>00</sup>  
THIRTY DOLLARS  
(Write UNIT price for Item 26 in Words and Numbers)

**LFN 2006-21**

**November 1, 2006**

# Local Finance Notice

**Jon S. Corzine**  
Governor

**Susan Bass Levin**  
Commissioner

**Susan Jacobucci**  
Director

## Contact Information

### Director's Office

V. 609.292.6613

F. 609.292.9073

### Local Government Research

V. 609.292.6110

F. 609.292.9073

### Financial Regulation and Assistance

V. 609.292.4806

F. 609.984.7388

### Local Finance Board

V. 609.292.0479

F. 609.633.6243

### Local Management Services

V. 609.292.7842

F. 609.633.6243

### Authority Regulation

V. 609.984.0132

F. 609.984.7388

### Mail and Delivery

101 South Broad St.

PO Box 803

Trenton, New Jersey

08625-0803

Web: [www.nj.gov/dca/lgs](http://www.nj.gov/dca/lgs)

E-mail: [dlgs@dca.state.nj.us](mailto:dlgs@dca.state.nj.us)

## Distribution

Municipal and Freeholder Clerks

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Financial Officers

Authority and Fire District Board  
of Commissioners

School Business Administrators

## PROMPT PAYMENT OF CONSTRUCTION CONTRACTS P.L. 2006, c. 96

On September 1, 2006 Governor Corzine signed Senate Bill 1726 into law as P.L. 2006, c.96 of the Laws of 2006. Known as the "Prompt Payment" Law, Chapter 96 establishes timing standards for the payment of bills by both public and private sector organizations for a wide range of construction-related contractors. The "default" payment procedure in the law may conflict with existing procedures in some government agencies. The bill, however, provides alternate procedures for these local units (see Section III).

Codified as N.J.S.A. 2A:30A-1 et seq., the law took effect immediately upon signing. It affects construction-related contracts of all local units (municipalities, schools, counties, fire districts, local authorities, etc.) that **took effect after September 1, 2006**. Given that the law is currently in effect, immediate attention must be paid by all local units to ensure their interests are protected.

The law intends to ensure that contractors submitting bills for completed work are paid on a timely, established schedule, and that the full chain of subcontractors receive timely payment from their hiring contractor. When payments are not made pursuant to the schedule, the law allows contractors to receive interest on the outstanding balance and, under certain circumstances, to halt work without being subject to breach of contract clauses.

**The law affects all contracts for "improvements" (defined below) regardless of dollar amount.** This means it affects contracts for which public bidding is required as well as those **contracts under the bid threshold** that are traditionally authorized through solicitation of quotes.

This Local Finance Notice reviews the general provisions of the law. Section VI is a "to-do" list local units should consider in meeting the obligations of the law. Because local units have a wide range of policies regarding payment of bills, careful analysis and application of the law is warranted.

Local payment procedures should **immediately** be reviewed by the chief financial officer, purchasing agent, legal counsel, consulting engineers, and other staff as appropriate in order to develop local procedures to meet the requirements of the law.

## I. Definitions

The law affects contracts for above and below ground “improvements” to real property and structures. The law defines the term “structure” to mean any part of a building and other improvements to real property. The law defines the term “improve” to mean the following:

- ...to build, alter, repair or demolish any structure upon, connected with, on or beneath the surface of any real property;
- to excavate, clear, grade, fill or landscape any real property;
- to construct driveways and private roadways on real property;
- to furnish construction related materials, including trees and shrubbery, for any of the above purposes;
- ...or to perform any labor upon a structure, including any design, professional or skilled services furnished by an architect, engineer, land surveyor or landscape architect licensed or registered pursuant to the laws of this State.

This is an expansive definition and includes **all** improvements to real property. Real property is defined as “real estate” – which includes publicly owned property – including traditional infrastructure: roads, bridges, underground utilities, rights-of-way, and easements.

**In other words, the law affects contracts for improvements to any land (regardless of ownership or use) and its appurtenances.**

With respect to local units, the law covers contracts with general or “prime contractors.” While this term may have specific meaning for certain kinds of construction contracts under the Local Public and Public School Contracts Laws, for Prompt Payment purposes, it means any contractor that has contracted directly with a local unit for construction of improvements. It permits separate identification of “prime” contractors from any subcontractors working for the prime contractor – subs have their own rights to timely payment under the law. This Notice uses “prime contractor” and “contractor” interchangeably.

## II. Billing Dates and Payment Cycles

While the law does not define the term “bill,” local units should interpret the term as being the same as an invoice, voucher, warrant, or whatever term the local unit uses to describe the documents a vendor submits to request payment.

The law uses the phrase “periodic payment, final payment and retainage monies” as the types of bills that are submitted on a “billing date.” In the case of a periodic billing, the law defines the “billing date” as the “date specified in the contract.” This requirement implies that local units should establish a periodic billing date in contracts whenever a contract will have more than one payment.

The law does not define billing dates for final payments and payments of retainage. To avoid confusion, **local unit bid specifications and contracts should define billing date for final and retainage payments as “the date the bill is received by the local unit.”** The Division’s position is that a fixed billing date can not be set for final or retainage payments – bills must be processed as they are received.

Local units subject to the Local Public Contracts Law should also include payments required by N.J.S.A. 40A:11-16.2, in its periodic billing schedule. This section requires a monthly payment for construction projects in excess of \$100,000. This provision does not apply to the Public School Contracts Law.

N.J.S.A. 40A:5-17 establishes procedures local units (except schools) must follow for payment of bills. The law requires governing bodies to approve all bills, unless the local unit adopts other procedures that permit payments without governing body approval. Many local units have used this authority to permit the chief financial officer to pay bills in between governing body meetings, and submit a list of bills paid at the following meeting for inclusion in the official minutes. Similarly, N.J.S.A. 18A:19-1 et seq. and associated rules at N.J.A.C. 6A:23-2.11(a)<sup>1</sup> set forth procedures to be used by public schools.

Finally, the law uses the phrase “payment cycle” to describe when actual payment is made after the governing body has approved payment. While not directly required by the law, it is concluded that the law intends that contractors have some certainty of when they will receive payment. To meet this expectation, local units should formally adopt a payment cycle and provide the information to contractors so they know when payments will be made.

### III. Required Procedures and Processes

N.J.S.A. 2A:30A-2a sets out two procedures: a **default**, covering **any public or private entity** that enters into a contract for described services; and an “alternate,” specifically created for public entities where the governing body must vote to authorize the payment of bills.

The **default procedure** applies to local units that **do not require governing body approval** to authorize the payment of bills. It imposes the following payment process:

- If the contractor has performed in accordance with the contract; and
- The work has been approved and certified by the owner or the owner’s “authorized approving agent,”
- The owner shall pay the bill not more than 30 calendar days after the billing date;
- Provided that the billing shall be deemed “approved” and “certified” 20 calendar days after the owner receives it, unless the owner provides, **before the end** of the 20-day period, a written statement of the amount withheld and the reason for withholding payment.

The **alternate procedure** for local units applies when local policies **require governing body approval** authorizing the payment of bills. In addition to ensuring the contractor has performed in accordance with the contract and that the work has been approved and certified by the owner or the owner’s “authorized approving agent,” the following provisions apply:

- The 20th calendar day deadline of the default procedure to approve and certify, or decide to withhold full or partial payment is **deferred until the public meeting following 20 calendar days of the billing date**, at which time the bill must be approved for payment or notice provided as to why the bill or any portion of it will not be approved.
- If the billing is approved, the 30-day payment requirement of the default is replaced by the requirement that the bill be paid in the payment cycle following the meeting.

- The law anticipates prompt and timely notice to the contractor of any denial of payment, its deficiency, and what is required to resolve it.
- The alternate procedure must be defined in bid specifications and contract documents to have effect.

Because the law allows the local unit to set the “billing date” by establishing a “periodic billing date” in the contract, the local unit can control when periodic bills are submitted, and to a degree the timing of the payment process. This date should be carefully coordinated with internal or external professionals with responsibility to review bills.

**It is important to note the law uses the term “public meeting” as the time when bills are approved. This includes any meeting of the governing body that is open to the public, in addition to the traditional meetings where formal action is taken. This includes “workshop,” “agenda,” 48-hour notice, or special meetings (but not closed or executive sessions or emergency meetings). It does not permit a local unit to designate that bills will only be approved at public meetings where “formal action” is routinely taken. Local units must arrange their meeting agendas and internal review procedures to accommodate bill payment to take place at any meeting following an established billing date.**

The payment cycle is independent of meetings – the law does not require that a meeting trigger its own payment cycle.

#### **IV. Setting Dispute Resolution Policies**

Subsection “f” of N.J.S.A. 2A:30A-2 provides that all contracts for improvements **shall** include a provision that disputes **may be** submitted to an alternative dispute resolution (ADR) procedure for bills (or portions) that are not approved. While not precisely drafted, it appears that the intent of the bill is to provide that either party may submit a claim to ADR.

This is consistent with N.J.S.A. 40A:11-50 that requires local units covered by the Local Public Contracts Law to include an ADR provision in all construction contracts (regardless of value), that covers the construction work, as well as related professional service (i.e., architect, engineer) contracts.

**Considering these two elements, the law requires that all local units provide for an ADR process in their bid specifications and contracts for improvements that can be used by either party.**

Local units can refer to Local Finance Notice AU-98-4 for details of N.J.S.A. 40A:11-50, a general explanation of the ADR process, and suggested ADR procedures. While that law does not pertain to them, local units that fall under the Public School Contracts Law or the County College Contracts Law may find the Notice instructive.

As a general approach to ADR, the Division recommends immediate communication between the parties as a first step, with discussions at successively higher levels in the organization, then the use of an outside mediator or arbitrator as attempts to resolve the matter before court action is taken. The specific steps and procedures are the local unit’s decision and should be reflected in bid specifications and contracts.

The law specifically states that ADR provisions **do not apply** to disputes concerning the bid solicitation or award process or formation of contracts.

Local units that awarded contracts after September 1, 2006 that did not include Prompt Payment provisions in their contracts should work with their contractors to develop reasonable procedures or contract amendments that do not conflict with either the Prompt Payment Law or N.J.S.A. 40A:5-17.

If an amount is withheld, the local unit is obligated to take good faith action to resolve the matter. Failure to make a timely payment permits a contractor to add interest to unpaid amounts and can, barring a good faith effort to resolve the matter, result in a work stoppage.

If the local unit challenges the billing, it should reach a clear determination of what is not satisfactory, and act accordingly to accept or reject portions of the bill. The local unit must then provide prompt and timely notice to the contractor as to why the bill was rejected and what is necessary to cure the defect. Finally, the local unit must pay the undisputed portion of the bill. Denial of payment to an entire bill should occur when the circumstances warrant it.

Combining an ADR process with other policies, including documentation to address billing disputes, can lead to what the Prompt Payment law refers to as a “good faith effort to resolve the reason for the withholding.” [N.J.S.A. 2A:30A-2(d)] Engaging in a good faith effort will reduce the possibility of a contractor stopping work due to the local unit’s failure to make payment.

Without a good faith effort on the part of the local unit, a contractor can stop work and not be held liable for a breach of contract (See Section V). The local unit should include in its bid specifications, contracts, and if appropriate, purchase orders covered by Prompt Payment an explanation of its ADR policies.

## **V. Enforcement and Exceptions**

The law has enforcement provisions a contractor can use when the contractor is not paid in full as required; either by 30 calendar days after submitting the bill or, in the alternate, after the payment date of the payment cycle following the meeting where the bill was to have been approved.

There are two enforcement provisions:

1. N.J.S.A. 2A:30A-2(c) permits contractors to charge interest when a bill is not paid in accordance with the schedule and notice has not been provided as to why a bill or portion of it was not paid.

In this case, a contractor can charge interest at the prime rate<sup>1</sup> plus one percent from the day after the required payment date and ending on the day the check for payment is drawn. Thus, it is exceptionally important that if a bill is not fully paid in accordance with the local unit’s established schedule, the contractor is notified in writing of the amount withheld and the reasons for the withholding. It is presumed that the written notice will contain information as to how the deficiency can be cured.

If payment is not made in a timely manner and notice is not given, the contractor may be able to recover interest. Further, care should be taken and legal counsel consulted when deciding to withhold payment. Depending on the specific circumstances, a local unit could be responsible for paying interest, if the reason for withholding payment is found to be without merit.

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<sup>1</sup> This web link leads to an explanation of the prime rate, how it is calculated, and the current figure. The prime rate at the time of debt is incurred should be maintained until the payment is made.

If such an interest payment becomes due, the local unit is required to appropriate the necessary funds from project reserves, contingency amount, or other account.

2. N.J.S.A. 2A:30A-2(d) permits the contractor to suspend work without penalty for breach of contract. This can be implemented by the contractor after providing seven calendar days written notice to the owner if:
  - a. Payment was not made as required under the law; and,
  - b. The contractor was not provided a written statement of the amount withheld and the reason for the withholding; and,
  - c. The payor is not engaged in a good faith effort to resolve the reason for the withholding.

In any civil action brought to collect payments the action shall be conducted inside of New Jersey and the prevailing party shall be awarded reasonable costs and attorney fees.

It is important to note that the law exempts from its provisions any transportation project as defined in N.J.S.A. 27:1B-3, if that project receives federal funding and the application of this provision would jeopardize the funding because the owner could not meet the federal standards for financial management systems as outlined in 49 C.F.R. 18.20.

## VI. Actions Local Units Should Take

Local units that authorize bills to be paid without governing body approval should review internal procedures and controls to ensure staff is prepared to meet the 20 day approval/30 day payment cycle deadlines. These controls can include establishing “periodic billing dates” in contracts.

If governing body approval is **required**, local units must immediately review their policies and develop procedures and internal controls to comply with the law.

Regardless of the method of bill payment, local units can consider several courses of action, with appropriate variations based on local practices:

1. **Review bill paying procedures, resolution, or ordinance.** N.J.S.A. 40A:5-17 sets forth the “normal” process for authorizing payment of bills (which requires governing body approval), but allows local units to adopt their own procedure. Local policies can establish different practices depending on the type of obligation being paid; i.e., a policy for construction contracts.
2. **Establish or define billing dates for contracts covered by Prompt Payment.** This can be done as a standard for all contracts, or established on a contract-by-contract basis in specifications. This should include the “periodic payment” date for contracts with more than one payment, and the “billing date” for all other contracts and payments (i.e., the date the bill is received by the local unit). This provision can also provide that if a fixed billing date is missed, the bill is deferred to the next cycle.
3. **Establish dates for the unit’s “payment cycle.”** The payment cycle should provide for a reasonable time for payment to be made after approval of bills. It should be consistent with other bills approved at the same time. It is in the local unit’s interest to let their contractors know when they can expect payment.
4. **Review paper flow and contractual arrangements for review of bills.** This may involve amending contracts with professionals (i.e., engineers or architects) that review bills to set requirements for their timely review of bills. This also applies to training internal staff on new

procedures. In particular, finance staff should be trained to pay careful attention to incoming bills, and if appropriate, ensure logging, transmittal, and tracking of bills.

5. When governing bodies approve bills, add **“payment of bills” as a routine agenda item for all public meetings** to allow the governing body to approve or reject any bills or portion of one whenever they meet.
6. When a bill or portion of a bill is denied, immediately notify the contractor **in writing** of any denial of payment, its deficiency, and what is required to remedy the deficiency.
7. **Add a bill payment provision/schedule to bid specifications and contracts.** The law permits use of the alternate governing body approval practice **only** if it is reflected in bid specifications and contract documents. All bid specifications, contract documents, and purchase order “boilerplate” text (as appropriate to local circumstances) should be amended to describe the process used by the local unit for approval and payment of bills, including billing dates and payment dates.
8. **Update outstanding contracts and bid proposals.** The law does not apply to contracts for the improvement of structures awarded before the effective date of September 1, 2006. Local units may currently have outstanding bid advertisements or have received bids but not yet awarded contracts. In these cases, local officials should act, as appropriate to amend bid specifications through the addenda process, or work with legal counsel to amend pending or issued contracts to include the appropriate language, or work with contractors to otherwise meet the intent of the law.
9. **Review alternative dispute resolution provisions for construction contracts.** N.J.S.A. 40A:11-50 has required for several years that all construction contracts include an alternative dispute resolution process. Local units should carefully review their existing procedure in context of Prompt Payment and update it as appropriate.

## VII. Conclusion

The Prompt Payment Law presents new challenges to local units in managing their payment procedures. Its immediate effect adds to that challenge. Local unit officials should act expeditiously to ensure they do not violate the law while they consider implementing long-term policies.

Local finance officials can use GovConnect to share information via the Discussion Forums. They can submit sample language to the Division for posting in the Chief Financial Officer, Authority, and Fire District Document Libraries.

As there are many variations on policies that can be adopted, the Division is not at this time recommending specific language for inclusion in bid specifications and contracts. Local units are urged to carefully review this Notice and the law to adopt practices that meet their needs, and the intent and spirit of the law.

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Approved: Susan Jacobucci, Director

## Table of Web Links

Page	Shortcut text	Internet Address
4	<a href="#">Local Finance Notice</a>	<a href="#">Local Finance Notice AU-98-4</a>
5	<a href="#">Prime Rate</a>	<a href="#">Wall Street Journal Prime Rate</a>

## PROMPT PAYMENT STATUTORY REFERENCES

### CHAPTER 96, P.L. 2006

AN ACT concerning the prompt payment of construction contracts and amending P.L.1991, c.133.

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

1. Section 1 of P.L.1991, c.133 (C.2A:30A-1) is amended to read as follows:

#### C.2A:30A-1 Definitions.

1. As used in this act:

"Billing" means, in accordance with the terms and definitions of the applicable contract, any periodic payment, final payment, written approved change order or request for release of retainage.

"Prime contractor" means a person who contracts with an owner to improve real property.

"Improve" means: to build, alter, repair or demolish any structure upon, connected with, on or beneath the surface of any real property; to excavate, clear, grade, fill or landscape any real property; to construct driveways and private roadways on real property; to furnish construction related materials, including trees and shrubbery, for any of the above purposes; or to perform any labor upon a structure, including any design, professional or skilled services furnished by an architect, engineer, land surveyor or landscape architect licensed or registered pursuant to the laws of this State.

"Structure" means all or any part of a building and other improvements to real property.

"Owner" means any person, including any public or governmental entity, who has an interest in the real property to be improved and who has contracted with a prime contractor for such improvement to be made. "Owner" shall be deemed to include any successor in interest or agent acting on behalf of an owner.

"Prime rate" means the base rate on corporate loans at large United States money center commercial banks.

"Real property" means the real estate that is improved upon or to be improved upon.

"Subcontractor" means any person who has contracted to furnish labor, materials or other services to a prime contractor in connection with a contract to improve real property.

"Subsubcontractor" means any person who has contracted to furnish labor, materials or other services to a subcontractor in connection with a contract to improve real property.

2. Section 2 of P.L.1991, c.133 (C.2A:30A-2) is amended to read as follows:

C.2A:30A-2 Payment to prime contractor, subsubcontractor, timely payment; exceptions; disputes; resolution.

2. a. If a prime contractor has performed in accordance with the provisions of a contract with the owner and the billing for the work has been approved and certified by the owner or the owner's authorized approving agent, the owner shall pay the amount due to the prime contractor for each periodic payment, final payment or retainage monies not more than 30 calendar days after the billing date, which for a periodic billing, shall be the periodic billing date specified in the contract. The billing shall be deemed approved and certified 20 days after the owner receives it unless the owner provides, before the end of the 20-day period, a written statement of the amount withheld and the

reason for withholding payment, except that in the case of a public or governmental entity that requires the entity's governing body to vote on authorizations for each periodic payment, final payment or retainage monies, the amount due may be approved and certified at the next scheduled public meeting of the entity's governing body, and paid during the entity's subsequent payment cycle, provided this exception has been defined in the bid specifications and contract documents.

b. If a subcontractor or subsubcontractor has performed in accordance with the provisions of its contract with the prime contractor or subcontractor and the work has been accepted by the owner, the owner's authorized approving agent, or the prime contractor, as applicable, and the parties have not otherwise agreed in writing, the prime contractor shall pay to its subcontractor and the subcontractor shall pay to its subsubcontractor within 10 calendar days of the receipt of each periodic payment, final payment or receipt of retainage monies, the full amount received for the work of the subcontractor or subsubcontractor based on the work completed or the services rendered under the applicable contract. In the case of ongoing work on the same project for which partial payments are made, the amount of money owed for work already completed shall only be payable if the subcontractor or subsubcontractor is performing to the satisfaction of the prime contractor or subcontractor, as applicable.

c. If a payment due pursuant to the provisions of this section is not made in a timely manner, the delinquent party shall be liable for the amount of money owed under the contract, plus interest at a rate equal to the prime rate plus 1%. Interest on amounts due pursuant to this section shall be paid to the prime contractor, subcontractor or subsubcontractor for the period beginning on the day after the required payment date and ending on the day on which the check for payment has been drawn. The provisions of this subsection c. shall not apply to any transportation project as defined in section 3 of P.L. 1984, c.73 (C.27:1B-3), if that project receives federal funding and the awarding agency has been notified by the federal government that it will be classified as a high risk grantee pursuant to 49 C.F.R. 18.12.

d. A prime contractor, subcontractor or subsubcontractor may, after providing seven calendar days' written notice to the party failing to make the required payments, suspend performance of a construction contract, without penalty for breach of contract, until the payment required pursuant to this section is made, if the contractor, subcontractor or subsubcontractor: is not paid as required by this section; is not provided a written statement of the amount withheld and the reason for the withholding; and the payor is not engaged in a good faith effort to resolve the reason for the withholding. The provisions of this subsection d. shall not apply to any transportation project as defined in section 3 of P.L. 1984, c.73 (C.27:1B-3), if that project receives federal funding and the application of this provision would jeopardize the funding because the owner could not meet the federal standards for financial management systems as outlined in 49 C.F.R. 18.20.

e. (1) The rights, remedies or protections provided by this section for prime contractors, subcontractors and subsubcontractors shall be in addition to other remedies provided pursuant to any other provision of State law. To the extent that the provisions of this section provide greater rights, remedies or protections for prime contractors, subcontractors and subsubcontractors than other provisions of State law, the provisions of this section shall supersede those other provisions.

(2) No provision of this section shall be construed as restricting in any way the rights or remedies provided by any other applicable State or federal law to an owner who is a resident homeowner or purchaser with respect to the real property being improved.

f. All contracts for the improvement of structures entered into after the effective date of P.L.2006, c.96 between owners, prime contractors, subcontractors or subsubcontractors shall provide that disputes regarding whether a party has failed to make payments required pursuant to this section may be submitted to a process of alternative dispute resolution. Alternative dispute resolution permitted by this section shall not apply to disputes concerning the bid solicitation or award process, or to the

formation of contracts or subcontracts. In any civil action brought to collect payments pursuant to this section, the action shall be conducted inside of this State and the prevailing party shall be awarded reasonable costs and attorney fees.

3. This act shall take effect immediately, but shall not apply to contracts for the improvement of structures entered into before the effective date.

Approved September 1, 2006.

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**40A:5-17. Approval and payment of claims and required general books of account**

Approval and payment of claims and required general books of account. a. Approval of claims. The governing body shall approve or disapprove all claims. In the case of a county, other than a county which has adopted a form of government pursuant to the "Optional County Charter Law," P.L. 1972, c. 154 (C. 40:41A-1 et seq.), the governing body may, by resolution, designate one person who may approve claims between meetings of the governing body. The specified designee shall be chosen from the following positions: the certified financial officer, chief fiscal officer, county administrator, director of finance, treasurer or comptroller. Any approval by the designated person shall be presented to the county governing body at its next meeting for ratification, except that, prior to being paid, such vouchers shall be brought to the attention of the freeholder who has responsibility for the designee. The county governing body may establish a maximum dollar amount for which payment may be approved without prior approval of the governing body. Claims shall be approved or disapproved in the manner prescribed by rules made and promulgated by the bureau unless the governing body adopts an ordinance or resolution, as may be appropriate, in the case of a county, or an ordinance, in the case of a municipality, including the following provisions:

- (1) Designating an approval officer with the title of certifying and approval officer;
- (2) Prescribing the duties of the approval officer, including the making of certifications required by 40A:5-16b., ascertaining the existence of proper and sufficient appropriations for the payments to be made and determining that there is legal authority for the payments, evidenced by action of a purchasing department or agent or officer in respect to the goods or services ordered and the incurring of the expense therefor;
- (3) Prescribing the procedure for approving and certifying to the proper officer claims for payments and drawing checks therefor;
- (4) Prescribing the procedure for certifying approved claims to the governing body and regulating its action of approval or disapproval thereon.

b. Payment of claims. A resolution or an ordinance adopted pursuant to this section may also provide a method of disbursing moneys or payment of claims approved, but if it does not so provide the method shall be as follows:

- (1) In the case of a county organized pursuant to the provisions of the "Optional County Charter Law" (P.L. 1972, c. 154; C. 40:41A-1 et seq.), by check issued upon the requisition of and signed by the chief executive officer and countersigned by the treasurer, and in all other counties by check issued upon requisition of the clerk of the board of chosen freeholders, signed by the county treasurer and countersigned by such other officer or officers as are designated by ordinance or resolution of the governing body;

(2) In the case of a municipality, by check drawn on the municipality, signed by the mayor or other chief executive officer and the municipal clerk and countersigned by such other officer or officers as are designated by ordinance.

c. Required general books of account. The bureau shall prescribe the kind and manner of keeping of general books of account for the financial officers of the local units and said officers shall be required to keep and maintain said books.

Amended by L. 1985, c. 127, s. 1, eff. April 12, 1985.

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#### **40A:11-16.2 Partial payments; deposit bonds.**

1. Any contract, the total price of which exceeds \$100,000.00, entered into by a contracting unit involving the construction, reconstruction, alteration, repair or maintenance of any building, structure, facility or other improvement to real property, shall provide for partial payments to be made at least once each month as the work progresses, unless the contractor shall agree to deposit bonds with the contracting unit pursuant to P.L.1979, c.152 (C.40A:11-16.1).

L.1979,c.464,s.1; amended 1999, c.440, s.25.

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#### **40A:11-50. Process of resolution for construction contract disputes**

1. All construction contract documents entered into in accordance with the provisions of P.L.1971, c.198 (C.40A:11-1 et seq.) after the effective date of P.L.1997, c.371 (C.40A:11-50) shall provide that disputes arising under the contract shall be submitted to a process of resolution pursuant to alternative dispute resolution practices, such as mediation, binding arbitration or non-binding arbitration pursuant to industry standards, prior to being submitted to a court for adjudication. Nothing in this section shall prevent the contracting unit from seeking injunctive or declaratory relief in court at any time. The alternative dispute resolution practices required by this section shall not apply to disputes concerning the bid solicitation or award process, or to the formation of contracts or subcontracts to be entered into pursuant to P.L.1971, c.198 (C.40A:11-1 et seq.).

Notwithstanding industry rules or any provision of law to the contrary, whenever a dispute concerns more than one contract, such as when a dispute in a contract involving construction relates to a contract involving design, architecture, engineering or management, upon the demand of a contracting party, other interested parties to the dispute shall be joined unless the arbitrator or person appointed to resolve the dispute determines that such joinder is inappropriate. Notwithstanding industry rules or any provision of law to the contrary, whenever more than one dispute of a similar nature arises under a construction contract, or related construction contracts, upon the demand of a contracting party, the disputes shall be joined unless the arbitrator or person appointed to resolve the dispute determines that the disputes are inappropriate for joinder.

For the purposes of this section, the term "construction contract" means a contract involving construction, or a contract related thereto concerning architecture, engineering or construction management

L.1997, c.371.

