

CHAPTER 2A**COMMISSION ASSISTANCE PROGRAMS****Authority**

N.J.S.A. 52:27C-73.1; P.L. 2004, c. 65, §§1-17 and 19-24;
and P.L. 2005, c. 374.

Source and Effective Date

R.2005 d.143, effective May 16, 2005.
See: 37 N.J.R. 237(a), 37 N.J.R. 1739(a).

Chapter Expiration Date

Chapter 2A, Commission Assistance Programs, expires on May 16, 2010.

Chapter Historical Note

Chapter 2A, Commission Assistance Programs, was adopted as R.2005 d.143, effective May 16, 2005. See: Source and Effective Date.

Subchapter 3, Payment of Prevailing Wages, was adopted as new rules by R.2005 d.380, effective November 7, 2005. See: 37 N.J.R. 2145(a), 37 N.J.R. 4275(b).

Subchapter 4, Energy Sales Tax Exemption for Certain Counties, was adopted as new rules by R.2006 d.323, effective September 5, 2006. See: 38 N.J.R. 1524(a), 38 N.J.R. 3619(a).

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SUBCHAPTER 1. TAX CREDIT CERTIFICATE TRANSFER PROGRAM**12A:2A-1.1 Applicability and scope**

(a) The rules in this subchapter are promulgated by the New Jersey Commerce, Economic Growth and Tourism Commission (the "Commission") to implement P.L. 1996, c.25, as substantially amended by P.L. 2004, c.65 (the "Act"), and specifically section 17 of the Act (N.J.S.A. 34:1B-120.2). The Act provides several incentive programs aimed at retaining in New Jersey the full-time jobs of businesses already active in this State. The Act established a business retention and relocation assistance grant program, a tax credit certificate transfer program (the "BRRAG Tax Credit Certificate Transfer Program" or "Program"), a sales and use tax exemption program, and an energy sales tax exemption program (for businesses located in New Jersey urban enterprise zones). The BRRAG Tax Credit Certificate Transfer Program is hereby established as a Program under the jurisdiction of the Commission and shall be administered by the Chief Executive Officer and Secretary of the Commission, in cooperation with the Division of Taxation in the Department of the Treasury. The Commission may also enter into a memorandum of understanding with the New Jersey Economic Development Authority, which administers the Technology Business Tax Certificate Transfer Program (see N.J.A.C. 19:31-12), to provide administrative assistance to the BRRAG Tax Credit Certificate Transfer Program, pursuant to N.J.S.A. 52:27C-73.

(b) The purpose of the Program is to allow businesses in this State with unused amounts of BRRAG tax credit to surrender those tax credits to other corporations desiring such credits which in exchange will provide private financial assistance to assist in the funding of costs incurred by the relocating business. A BRRAG tax credit may be applied against liability arising in the tax period in which the tax credit is issued and the tax period next following, and shall expire thereafter. However, it is possible that unused credits that remain stranded in the allowable periods may be utilized in the event of future additional liability, like an audit assessment. Therefore, eligibility for this program will require the business to certify that, to the best of its knowledge, it cannot

use the tax credits originally issued for the tax periods in which the credits are allowable.

12A:2A-1.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Act” means the Business Retention and Relocation Assistance Act, P.L. 2004, c.65.

“Agreement” or “project agreement” means an agreement between a business and the Commission that sets the forecasted schedule for completion and occupancy of the project, the date the commitment duration shall commence, the amount of the applicable grant of tax credits, and other such provisions which further the purposes of P.L. 1996, c.25 (N.J.S.A. 34:1B-112 et seq.), as amended by P.L. 2004, c.65 §§ 1 through 16 (N.J.S.A. 34:1B-112 through 123).

“Application” means the application submitted to the Commission from the seller of BRRAG tax credits, for approval of the BRRAG tax credit transfer certificate.

“Board of Directors” means the Board of Directors for the New Jersey Commerce, Economic Growth and Tourism Commission.

“BRRAG program” means the tax credit grant program created pursuant to P.L. 1996, c.25, as substantially amended by P.L. 2004, c.65 §§ 1 through 16 (N.J.S.A. 34:1B-112 through 123), and provided in N.J.A.C. 12A:2-1.

“BRRAG tax credit certificate transfer program” or “Program” means the Business Retention and Relocation Assistance Grant Tax Credit Transfer Program created pursuant to section 17 of the Act (N.J.S.A. 34:1B-120.2).

“Business” means an employer located in this State that has operated continuously in the State, in whole or in part, in its current form or as a predecessor entity for at least 10 years prior to filing an application to the program and which is subject to the provisions of N.J.S.A. 43:21-1 et seq. and may include a sole proprietorship, a partnership, or a 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 the State, such as a group of organizations under common control as defined in Section 414(b) or (c) of the Internal Revenue Code of 1986 and Federal Treasury regulations thereunder. For purposes of identifying full-time employees in eligible positions and retained State tax revenue, any such employees hired by or taxes paid by a professional employer organization (PEO) with which the business has entered into an employee leasing agreement shall be allocable to the business.

“Business retention or relocation grant of tax credits” or “grant of tax credits” means a grant which consists of the value of corporation business tax credits against the liability imposed pursuant to section 5 of P.L. 1945, c.162 (N.J.S.A. 54:10A-5) or credits against the taxes imposed on insurers pursuant to P.L. 1945, c.132 (N.J.S.A. 54:18A-1 et seq.), section 1 of P.L. 1950, c.231 (N.J.A.C. 17:32-15), and N.J.S.A. 17B:23-5, provided to fund a portion of retention and relocation costs pursuant to P.L. 1996, c.25 (N.J.S.A. 34:1B-112 et seq.), as amended by P.L. 2004, c.65, and pursuant to N.J.A.C. 12A:2-1.

“Business retention or relocation tax credit” or “BRRAG tax credit” means the tax credit that a business obtains through the BRRAG program.

“Buying business,” means a business with the financial ability to purchase the unused BRRAG tax credits from an unaffiliated selling business. For the purpose of this definition, the test of affiliation is whether the same entity directly or indirectly owns or controls five percent or more of the voting rights or five percent or more of the value of all classes of stock of both the selling and buying businesses.

“Certificate” or “BRRAG tax credit transfer certificate” means the certificate issued by the Division of Taxation certifying to the selling business amounts of unused BRRAG tax credit. The certificates are issued in the form of corporation business tax credit and insurance premiums tax credit transfer certificates.

“Commission” means the New Jersey Commerce, Economic Growth and Tourism Commission established pursuant to N.J.S.A. 52:27C-61 et seq.

“Director” means the Director of the Division of Taxation in the Department of the Treasury.

“New business location” means the premises that the business has either purchased or built or for which the business has entered into a purchase agreement or a written lease for a period of no less than eight years from the date of relocation. A new business location may also include the premises from which the business moves on a temporary basis due to the rehabilitation of permanent premises that also qualifies as reconstruction as “reconstruction” is defined in the Uniform Construction Code, N.J.A.C. 5:23-6.3. In that case, the move to the permanent premises will trigger availability of the grant of tax credits.

“Private financial assistance” means the assistance that the buying business provides the selling business to assist in the funding of costs incurred by the relocating business.

“Project” means the construction, renovation or expansion of facilities at the approved site as described in the project description in the application and the agreement that will become the business’s new business location.

12A:2A-1.3 Eligibility criteria

(a) A business shall be eligible to apply to the program if the business:

1. Entered into a BRRAG project agreement pursuant to P.L. 1996, c.25 (N.J.S.A. 34:1B-112 et seq.), as amended by P.L. 2000, c.65 and N.J.A.C. 12:2A-1 and is not in default of that BRRAG project agreement;
2. Has unused amounts of BRRAG tax credits issued and otherwise allowable;
3. Certifies, to the best of its knowledge, that it cannot use the BRRAG tax credits originally issued for the tax periods in which the credits are allowable; and
4. Has incurred or will incur expenses in connection with the operation of the business in the State, including, but not limited to, the expenses of fixed assets, such as the construction and acquisition and development of real estate, materials, start-up, tenant fit-out, working capital, salaries, research and development expenditures and any other expenses determined by the Secretary to be necessary to carry out the purposes of the Act.

12A:2A-1.4 Requests for applications

All application requests shall be made to the Secretary/CEO New Jersey Commerce, Economic Growth and Tourism Commission, 20 West State Street, PO Box 820, Trenton, New Jersey, 08625, in a manner prescribed and adopted by the Secretary, after recommendation from the Board of Directors, and the Director.

12A:2A-1.5 Submission requirements

(a) Each application to the Commission by a selling company shall include the following information in a format prescribed by the Secretary, after recommendation by the Board of Directors. Complete applications must be received by at least 120 days prior to the expiration of the second tax period, pursuant to N.J.A.C. 12A:2-1.11.

1. The name and address of the applicant;
2. A statement that all terms and conditions of the selling business' BRRAG project agreement have been and/or are continuing to be met;
3. A list of all corporations and affiliated groups of corporations that directly or indirectly owns or controls five percent or more of the voting rights or five percent or more of the value of all classes of stock of the selling business;
4. A statement that the selling business is operating and has no current intention to cease operating;
5. A certification that, to the best of the applicant's knowledge, the applicant cannot use the BRRAG tax credits originally issued for the tax periods in which the credits are allowable;

6. The proposed use of any private financial assistance that would be provided by a buying business, to assist in the funding of costs incurred by the relocating business;

7. Any other necessary and relevant information as determined by the Secretary for a specific application.

(b) Each application submitted by a selling business to the program shall be accompanied by a non-refundable application fee in the amount of \$1,000 and with payment in the form of a check, payable to the New Jersey Commerce, Economic Growth and Tourism Commission.

12A:2A-1.6 Application and review procedures

(a) Applicants shall submit to the Secretary a completed BRRAG Tax Credit Transfer Program application. The application shall bear either a legible post-mark date or a date received stamp from the Commission.

(b) The Commission, in cooperation with the Director, shall conduct a review of the applications commencing with the application bearing the earliest submission date. The Commission may require the submission of additional information to complete the application or may require the resubmission of the entire application, if incomplete. The Commission, in cooperation with the Director, shall review the applications to determine whether the applicant:

1. Complies with the eligibility criteria;
2. Satisfies the submission requirements; and
3. Adequately provides information for the subject application.

(c) Once the review in (b) above is completed, the Board of Directors shall recommend to either approve or deny a request. The minutes of the meeting at which such action occurs are submitted to the Governor for review and become effective 10 working days of the Governor's receipt of the minutes unless earlier approval or vetoed.

(d) The Secretary, after receipt and consideration of the recommendation from the Board of Directors, shall issue a preliminary approval, approval with modifications, or denial of an application in the program and so notify the applicant.

(e) In the event that the applicant receives notification of preliminary approval, that notification will state the conditions that must be met before the Secretary will issue a final approval. The notification of preliminary approval will state that the Secretary will forward the application to the Division of Taxation only upon receipt of the following:

1. A statement, dated the date of the closing of the sale of the tax credit transfer certificate that states, among other matters, that as of the date of the certificate, the selling business is operating and has no current intention to cease operating;

2. A completed Tax Benefit Identification Form that identifies the accumulated BRRAG tax credits, the amount intended to be sold, and the years that the BRRAG tax credit were incurred;

3. A Buying Business Information Sheet that identifies the buying business' name, address, telephone number, the estimated value of the tax credits to be transferred, and from whom and a certification that the buying business is not an affiliate;

4. An executed form of standard selling agreement between the buying and selling business defining the terms and conditions of the sale of the tax certificate(s), with the Private Financial Assistance Form attached as an exhibit;

5. A Private Financial Assistance Form specifying how the applicant will expend the private financial assistance for allowable expenditures for the expenses incurred in by the selling business in connection with the operation of the business in the State; and

6. Information evidencing that the amount of private financial assistance to be made by the buying business is equal to at least 75 percent of the amount of the to be surrendered BRRAG tax credit of the selling business.

(f) After approval of the tax credit by the Division of Taxation as evidenced by the issuance of the appropriate tax credit transfer certificate(s), the Secretary, after recommendation by the Board of Directors, will issue final approval of the application but only upon the receipt of a certificate from the applicant, dated the date of the closing of the sale of the tax credit transfer certificate that states, among other matters, that as of the date of the certificate, the business is not in default under the project agreement.

(g) In the event that an application is denied for either preliminary or final approval, the applicant shall be notified of the denial and the reasons for such denial.

12A:2A-1.7 Appeals

The procedure for appeals arising from the Secretary's action on an application to the program as well as appeals arising from other decisions of the Secretary relating to the program shall be the procedures set forth at N.J.A.C. 12A:2-1.16.

SUBCHAPTER 2. SALES AND USE TAX EXEMPTION PROGRAM

12A:2A-2.1 Applicability and scope

The rules in this subchapter are promulgated by the New Jersey Commerce, Economic Growth and Tourism Commission (the "Commission"), after consultation with the Director of the Division of Taxation in the Department of the Treasury, to implement sections 19 through 22 of the Business Retention and Relocation Assistance Act, P.L. 2004,

c.65 (the "Act"), which provides several incentive programs aimed at retaining in New Jersey the full-time jobs of businesses already active in this State. The sales and use tax exemption program ("Sales Tax Exemption Program" or "Program") is hereby established as a Program under the jurisdiction of the Commission and shall be administered by the Chief Executive Officer and Secretary of the Commission. The purpose of the Program is to encourage economic development and to preserve jobs that currently exist in New Jersey. Qualifying businesses will be exempt from sales and use tax for eligible property located or placed at a business location for a construction and or renovation project pursuant to the terms and conditions of a project approval agreement. The sales tax exemption certificate, which applies only to property purchased for installation in that approved project will allow the business to purchase machinery, equipment, furniture and furnishings, fixtures and building materials other than tools and supplies for placement at the project location without the imposition of sales and use tax until the new facility is functional, as further specified in this subchapter.

12A:2A-2.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Act" means the Business Retention and Relocation Assistance Act, P.L. 2004, c.65.

"Agreement" or "project approval agreement" means the project approval agreement between a business and the Commission governing the terms and conditions of the project approval for the sales tax exemption program. The Agreement describes the project, the date the commitment duration shall commence, the extent of sales tax exemption, the conditions and limitations of the sales tax exemption, the representations and reporting obligations of the business, and other such provisions which further the purposes of P.L. 2004, c.65 §§ 19 through 22 (N.J.S.A. 34:1B-185 through 188).

"Application" means the application submitted by a business for the sales tax exemption program, pursuant to P.L. 2004, c.65 §§ 19 through 22.

"Approved site" means the site of the project in the New Jersey Development and Redevelopment Plan designated Planning Area 1 or 2 locations; however, if the site of the project is not located in either of such Planning Areas, the project involves renovation or expansion of an existing facility, and the project satisfies all other criteria of the program, as determined by the Secretary, the site may also be an approved site.

"Board of Directors" means the board of directors of the New Jersey Commerce, Economic Growth and Tourism Commission.

new, or substantially rehabilitating a vacant, property that will separately or collectively:

- (1) Be predominantly a new research and development facility;
- (2) Be predominantly a new manufacturing facility;
- (3) House the headquarters of the business; or
- (4) Separately or collectively be a combination of (a)3iii(1), (2) and (3) above; provided, that the new or substantially rehabilitated facility will house a minimum of 250 full-time employees whose jobs are retained full-time jobs. For the purposes of this subparagraph, "predominantly" means a majority of the employees housed in the new facility are engaged in that activity; or a majority of the square footage of the new facility is used in that activity; or a majority of the total value of the investment made will be employed in that activity; or other measures of activity as may be determined by the Secretary that demonstrate that a critical concentration of research and development, manufacturing, or both, will occur at the new facility; or

iv. The business was, at the time of enactment of P.L. 2004, c.65, § 21, receiving a structured finance special guarantee pursuant to N.J.A.C. 19:31-2.1(c)3ii(5) for the project.

(b) For the purposes of determining a number of full-time employees pursuant to this section, the full-time employees of the members of a "controlled group of corporations" as defined pursuant to section 1563 of the Federal Internal Revenue Code of 1986, 26 U.S.C. § 1563, shall be considered the employees of a single employer.

(c) In addition to the eligibility criteria of (a) above, the project must be located at an approved site.

1. To be an approved site, the location for the project shall be situated in designated Planning Area 1 or 2, as defined in the State Development and Redevelopment Plan adopted by the State Planning Commission (pursuant to P.L. 1985, c.398 (N.J.S.A. 52:18A-196 et al.)).

2. Notwithstanding (c)1 above, a project involving the renovation or expansion of an existing facility that is not located in designated Planning Area 1 or 2 may be eligible to participate in the program, at the determination of the Secretary, if all other applicable criteria are satisfied.

3. A business located in an urban enterprise zone designated pursuant to the New Jersey Urban Enterprise Zones Act, P.L. 1983, c.303 (N.J.S.A. 52:27H-60 et seq.) as of June 30, 2004 shall not be eligible to participate in this program if the relocation project is from a facility within the urban enterprise zone to a facility outside an urban enterprise zone.

4. Notwithstanding (c)3 above, if the relocation is to a facility already owned or leased by the same business and that business already employs at least the same number of persons as those being relocated from the urban enterprise zone, it may be eligible to apply.

(d) Program eligibility further requires that a business shall provide evidence and certify that it is not in default with any other program administered by the State of New Jersey.

(e) A project may be completed in up to two phases provided that it will be the national headquarters of a life sciences or manufacturing company, and will include a significant research and development, a significant manufacturing facility, or combination thereof if:

1. The first completed phase will house at least 200 full-time employees and the second phase will house at least 100 additional employees; and

2. The project is pre-approved for phases and that all phases are completed within 30 months of project approval.

(f) If a project consists of both point-of-purchase retail facilities, as defined at N.J.A.C. 12A:2-1.2, and non-retail facilities, only the portion consisting of non-retail facilities shall be eligible for the sales tax exemption.

Amended by R. 2006 d.197, effective May 15, 2006.

See: 37 N.J.R. 3024(a), 38 N.J.R. 2165(b).

Added (f).

12A:2A-2.4 Requests for applications

All application requests shall be made to the Secretary/CEO New Jersey Commerce, Economic Growth and Tourism Commission, 20 West State Street, PO Box 820, Trenton, New Jersey 08625, on forms and/or in a manner prescribed by the Commission.

12A:2A-2.5 Submission requirements

(a) Each application to the Commission shall include the following information in an application format prescribed by the Commission:

1. Business information shall include the following:

- i. The name of the business;
- ii. The address of the business;
- iii. The type of business;
- iv. Principal products and services;
- v. The contact person for this application;
- vi. The New Jersey tax identification number;
- vii. The Federal tax identification number;
- viii. The total number of employees in New Jersey;

ix. The total number of years of operation in New Jersey including evidence that the business or a predecessor entity has been operating, in whole or in part, in this State for at least 10 years prior to the filing of the application;

x. Certification that the business applying for this program is not in default with any other program administered by the State of New Jersey;

xi. Certification that the availability of financial assistance from the State as provided in this program at the site proposed for approval is an important inducement to the business to undertake the project and to relocate the full-time jobs relating to the project in the State; and

xii. Any other necessary and relevant information as determined by the Secretary for a specific application.

2. Project information shall include the following:

- i. An overall description of the proposed project;
- ii. The current location(s) (address(es)) and number of employees for each site that is subject to this application;
- iii. The location(s) employees will be relocated from and identify the location(s) employees will be relocated to as per this application. Include number of employees for all sites;
- iv. A description of the quality of the full-time jobs retained, including, but not limited to, the salaries and benefits provided to retained full-time employees;
- v. A description of any capital investments made by the business at the new business location;
- vi. Identification of the site of the new business location and its consistency with the smart growth goals, strategies and policies of the State Development and Redevelopment Plan established pursuant to section 5 of P.L. 1985, c.398 (N.J.S.A. 52:18A-200) or if the site is outside the jurisdiction of the State Plan, evidence of approval under the applicable comprehensive management plan;
- vii. A project schedule that identifies projected move dates for each site;
- viii. A schedule of short-term and long-term employment projections of the business in the State based upon the relocation;
- ix. The terms of any lease agreements or details of the purchase or building of the new business location;
- x. An estimate of the projected retained State tax revenues resulting from the relocation;
- xi. A description of the type of contribution the business can make to the long-term growth of the State's

economy and a description of the potential impact on the State's economy if the jobs are not retained;

xii. Evidence of alternative relocation plans, such as an analysis of the cost effectiveness of remaining in this State versus relocation under the alternative plans; and

xiii. Any other necessary and relevant information as determined by the Secretary for a specific application.

3. The employee information shall include the following:

- i. A written certification the employees that will be the subject of this application are full-time employees and receive health care benefits;
- ii. The number of employees at the project site that are included in a BEIP grant calculation. Compare this to the number of employees that are subject to an application made under this section. Include the New Jersey Economic Development Authority BEIP project identification number;
- iii. Evidence that the New Jersey Economic Development Authority has been notified of the applicant's potential relocation to another site within New Jersey, if the applicant is a BEIP grantee;
- iv. A certification that the business will maintain 95 percent of the retained full-time jobs for at least the first two years of the commitment duration, and will maintain a minimum of 90 percent of the retained full-time jobs for the remainder of commitment duration; and
- v. Any other necessary and relevant information as determined by the Secretary for a specific application.

4. The business applying to the program shall submit the following non-refundable application fee, with payment in the form of a check in the amount of \$1,000, payable to the "New Jersey Commerce, Economic Growth and Tourism Commission."

12A:2A-2.6 Application and review procedures

(a) Applicants shall submit to the Secretary a completed Sales Tax Exemption Program application. The application shall bear either a legible post-mark date or a date received stamp from the Commission.

(b) The Commission shall conduct a review of the applications commencing with the application bearing the earliest submission date, including those applications submitted to the Commission prior to May 16, 2005. The Commission may require the submission of additional information to complete the application or may require the resubmission of the entire application, if incomplete. The Commission shall review, and provide a recommendation to the Secretary regarding, the applications to determine whether the applicant:

1. Complies with the eligibility criteria;

2. Satisfies the submission requirements; and

3. Adequately provides information for the subject application.

(c) The Secretary after receipt and consideration of the recommendation from the Board of Directors, shall approve, approve with modifications, or deny an application in the program.

(d) When the Board of Directors recommends to either approve or deny a request, the minutes of the meeting at which such action occurs are submitted to the Governor for review and become effective 10 working days of the Governor's receipt of the minutes unless earlier approval or vetoed.

(e) Upon completion of the review of an application pursuant to (b) above, the Secretary shall notify the applicant whether the application has been approved, approved with modifications, or denied.

(f) In the event that an application is approved, the Secretary will notify the Director of the terms and conditions of the project approval agreement and the Director shall issue a certificate pursuant to the terms and conditions of the project agreement. In the event that an application is denied, the applicant shall be notified of the denial and the reasons for such denial.

12A:2A-2.7 Project approval agreement

(a) If the Secretary approves the application to the program, participation in the program is conditioned upon the applicant executing a project approval agreement with the Secretary to establish the terms and the conditions of the project approval.

(b) The terms and conditions of the project approval agreement shall include, but not be limited to, the following:

1. Terms establishing the starting date, or event that will determine the starting date and ending date, of the commitment duration;

2. An agreement by the applicant that the four-year statute of limitations for the collection and assessment of sales and use tax will be extended to the period of the commitment duration;

3. Certifications by the business, including the following: eligibility for the program and participation in the program as an important inducement in the business' decision not to relocate outside of New Jersey and to relocate the project in the State;

4. Requirements for undertaking the project;

5. Requirements on maintaining the existence of the business and not relocating the project;

6. Representations that the business is in good standing, the project complies with all applicable law, and spe-

cifically, that the project does not violate any environmental law;

7. Indemnification and insurance requirements;

8. Limitations on the scope and use of the sales tax exemption;

9. Default and remedies; and

10. Reporting requirements.

12A:2A-2.8 Undertaking the project

(a) Once the project approval agreement is fully executed by the business and the Secretary, the business shall complete the project and seek a temporary certificate of occupancy and such other permits and approvals as may be required in a timely manner.

(b) The business shall design, acquire, install, and operate the project in compliance with all applicable Federal, State and local laws or ordinances (including rules and regulations) related to zoning, building, safety, and environmental quality.

(c) The business shall not use any hazardous substance on, from, or affecting the project in any manner which violates any environmental law, and shall keep or cause the project to be kept free of hazardous substances, except as provided in applicable environmental law.

(d) To the extent that the business or its project participants (and not an unaffiliated third party who is not a project participant) have undertaken the construction of the project, the business shall comply with the Commission's prevailing wage requirements, N.J.S.A. 52:27C-73.1 and implementing rules at N.J.A.C. 12A:2A-3, in the performance of construction contracts.

(e) The Commission encourages a business constructing a project to comply with the Commission's set-aside program goals and targets set forth at N.J.A.C. 12A:10 and Executive Order No. 71 (October 2, 2003).

Amended by R.2006 d.322, effective September 5, 2006.
See: 37 N.J.R. 4176(a), 38 N.J.R. 3618(a).

Rewrote (d); and added (e).

12A:2A-2.9 Sales and use tax exemption limitations

(a) The duration of the sales tax exemption shall be limited. In general, the sales tax certificate shall not apply to purchases initiated by the business after the date that the temporary certificate of occupancy is issued, or in cases where no temporary certificate of occupancy is issued shall not apply to purchases initiated by the business more than one year from the project commencement date; however, the duration of the sales tax certificate shall be pursuant to the terms and conditions of the project approval agreement.

(b) The scope of the sales tax exemption shall be limited. Any exemption from State sales and use taxes resulting from

or occasioned by a business's use of the sales tax certificate shall be limited to purchases of eligible property that will be located at the approved site that are made between the commencement and completion dates by the business or a project participant. The sales tax exemption shall:

1. Only be utilized for materials which shall be purchased, completed, constructed or installed by the business or a project participant in connection with the project (and not with any intention to sell, transfer or otherwise dispose of any such materials to another party); and

2. Not be available for any cost of motor vehicles, tools, and parts with a useful life of one year or less, utilities, cleaning service or supplies, maintenance or any otherwise taxable services or property.

(c) The use by project participants of the sales tax exemption shall be limited. If the business undertakes the project, in whole or in part pursuant to a contract with a project participant, the project participant may utilize the business's sales tax exemption for purchases of eligible property for the project, provided that each project participant shall comply with all of the terms and conditions of this subchapter, the project approval agreement, the sales tax certificate and any reporting requirements. A project participant may not use the sales tax certificate issued to the business, except as authorized by the project approval agreement, which shall be strictly construed to limit use, and the business and the project participant shall be jointly or severally liable for any misuse.

(d) Notifications of violations of the terms and conditions of the sales tax exemption shall be addressed as follows. In the event that a project participant utilizes the sales tax exemption provided pursuant to the sales tax certificate in violation of the terms and conditions of this subchapter and or the project approval agreement, and the business is aware of such violation, the business shall promptly deliver notice of the violation to the Secretary, and the business shall, upon demand by the Secretary, pay to the Division of Taxation the sales or use tax that would have been paid on purchases not authorized by the project approval agreement in an amount equal to all such authorized sales or use tax exemptions claimed, subject to the provisions of the State Uniform Tax Procedure Law, N.J.S.A. 54:48-1 et seq., with regard to unpaid sales or use tax, penalty and interest.

12A:2A-2.10 Reporting requirements

(a) During the term of the project approval agreement, on the 15th business day of the quarter, the business that is party to the agreement shall furnish to the Secretary a certified report of all purchases of eligible property made in the preceding quarter on which the sales tax exemption was claimed, including the date of purchase, an itemized description, amount of purchase, name of project participant that purchased the item, and name of vendor. "Certified" for purposes of this section means that the veracity of the report is

attested by the business, and does not entail a certification by an outside accountant based upon an audit of any type.

1. A business having difficulty obtaining the itemized information from subcontractors on third-party construction contracts may file an estimated allocation of the costs of eligible property incurred under the construction contract, pursuant to the percentage determined by the Board of Directors of the Commission, which shall be consistent with industry standards, and made available to the public upon its approval by the Board of Directors. Such estimated allocation shall be included in the certified report of all purchases of eligible property. The election of alternative reporting shall be set forth in the project approval agreement, and once selected, may not be revoked or the percentage changed, pursuant to the terms of that agreement.

(b) During the term of the project approval agreement, 30 days prior to each anniversary of the commencement date of the agreement, the business shall furnish to the Secretary a certified report in a format as may be determined by the Secretary which shall contain the following information:

1. A certification indicating whether or not the business is aware of any condition, event or act which constitutes a default or an event of default of the agreement, or which would constitute an event of default with the giving of notice or passage of time, or both, under the project approval agreement;

2. A written description of the present status of construction and use of the project and a description of any anticipated material change in the use of the project or in the number of employees located or to be located at the project;

3. For the applicable reporting year, the total amount of the sales tax that would have been paid on purchases of eligible property by or on behalf of the business but for the fact that the sales tax exemption provided was claimed and aggregated as a total from the commencement date; and

4. Any other reports required under the project approval agreement, such as the information provided to the Secretary demonstrating the number of retained full-time jobs maintained by the business.

Amended by R. 2006 d.197, effective May 15, 2006.

See: 37 N.J.R. 3024(a), 38 N.J.R. 2165(b).

In (a), inserted "made in the preceding quarter" in the first sentence and substituted "section" for "subchapter" in the second sentence of the introductory paragraph and added (a)1.

12A:2A-2.11 Events of recapture and default

(a) The occurrence of any one of the following events (whether such event shall be voluntary or involuntary or come about or be effected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule or regulations of any administrative or

governmental body) shall constitute an event of recapture under the project approval agreement:

1. The business reduces or relocates the retained full-time jobs, such that the number of retained full-time jobs falls below the number required pursuant to N.J.A.C. 12A:2A-2.5(a)3iv (greater than five percent during the first two years of the commitment duration; greater than 10 percent during the remainder of the commitment duration) but has relocated at least the threshold number for project eligibility, 250 or 500 (as applicable to the type of business and as may be reduced up to five percent or 10 percent, as applicable); or

2. The business notifies the Commission, prior to the commitment duration, that it will not relocate 100 percent of the retained full-time jobs set forth in the project approval agreement, but will relocate at least the threshold number for project eligibility, 250 or 500, as applicable to the type of business.

(b) The occurrence of any one or more of the events in (b)1 through 6 below (whether such events shall be voluntary or involuntary or come about or be effected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule or regulations of any administrative or governmental body) shall constitute an "event of default" under the project approval agreement. Violations of the "events of default" provision of the project approval agreement shall be cause for immediate termination of the sales tax certificate as provided by law and repayment of the State sales tax.

1. The business fails to strictly observe or comply with the limitations and conditions of the use of the sales tax exemption as set forth in this subchapter, the sales tax certificate and the project approval agreement;

2. Any representation or warranty made by the business in its application or in the project approval agreement that is false, misleading, or inaccurate in any material respect;

3. Failure to comply with any condition or requirement of the project approval agreement;

4. The business reduces or relocates the retained full-time jobs below the threshold number for project eligibility, either 250 or 500, as applicable to the type of business and as may be reduced up to five percent or 10 percent, as applicable;

5. The business fails to pay the sales tax recapture amount in a timely manner; or

6. The business fails to serve or perform in any other material respect any other term, covenant or condition of the business under the project approval agreement and this subchapter and such failure shall have continued for 30 days after the earlier of delivery to the business of written notice thereof from the Secretary or the business's actual or constructive knowledge of such failure; provided, however,

that if such failure is capable of cure, but cannot be cured by the payment of money or by diligent efforts within such 30-day period, but diligent efforts are properly commenced within the cure period and the business is diligently pursuing, and shall continue to pursue diligently, remedy of such failure, the cure period shall be extended for an additional period of time, not to exceed an additional 45 days and in no case to extend beyond the expiration of the project approval agreement.

Amended by R.2006 d.322, effective September 5, 2006.

See: 37 N.J.R. 4176(a), 38 N.J.R. 3618(a).

In the introductory paragraph of (a), substituted "events" for "event" following "whether such"; and rewrote (a)4.

Amended by R.2008 d.38, effective February 19, 2008.

See: 39 N.J.R. 3278(a), 40 N.J.R. 885(a).

Section was "Events of default". Added new (a); recodified former (a) as (b); in the introductory paragraph of (b), substituted "the events in (b)1 through 6 below" for "the following events" and "approval agreement." for "agreement;" and inserted the last sentence; in (b)4, substituted "below the threshold number for project eligibility, either 250 or 500, as applicable to the type of business and as may be reduced up to five percent or 10 percent, as applicable" for "above the percentages certified pursuant to N.J.A.C. 12A:2A-2.5(a)3iv (greater than five percent during the first two years of the commitment duration; greater than 10 percent during the remainder of the commitment duration)" and deleted "or" from the end; added new (a)5; recodified former (a)5 as (a)6; and in (a)6, inserted "the" preceding "business is diligently" and deleted the former last sentence.

12A:2A-2.12 Remedies

(a) Upon the occurrence of an event of recapture as described in N.J.A.C. 12A:2A-2.11 and the project approval agreement, the Secretary may demand the payment of the sales tax recapture amount, and in his or her sole discretion, may request that the Director of the Division of Taxation recover the sales tax recapture amount.

(b) Upon the occurrence of any event of default as described in N.J.A.C. 12A:2A-2.11 and the project approval agreement, the Secretary may, so long as such event of default is continuing, do one or more of the following as the Secretary in his or her sole discretion shall determine, without limiting any other right or remedy the Secretary or the Division of Taxation may have on account of such event of default:

1. The Secretary may require the surrender by the business to the Secretary of the sales tax certificate for suspension or cancellation; and/or

2. The Secretary may exercise any other right or remedy that may be available under applicable law or under the project approval agreement, including, without limitation:

i. Requesting the Division of Taxation recover the sales tax repayment amount and any additional repayment amount pursuant to the State Uniform Tax Procedure Law, N.J.S.A. 54:48-1 et seq.;

ii. Recovering damages for loss of a bargain for any default during the commitment duration which damages the parties agree that the Secretary's actual damages

would be difficult to predict, and that the sales tax repayment amount and any additional repayment amount represents a reasonable approximation of such amount;

- iii. Terminating the project approval agreement; or
- iv. Proceeding by appropriate court action (legal or equitable) to enforce the terms of the project approval agreement.

(c) In the event of default or recapture, statutory interest shall be calculated from the date of default or recapture through the date of payment for all purchases made by the business or project participant pursuant to the exemption certificate issued under the Act.

(d) The rights and remedies of the Secretary under this subchapter and the project approval agreement shall be cumulative and shall not exclude any other rights and remedies of the Secretary or the Division of Taxation allowed by law with respect to any event of default under this subchapter or the project approval agreement.

Amended by R.2008 d.38, effective February 19, 2008.

See: 39 N.J.R. 3278(a), 40 N.J.R. 885(a).

Added new (a); recodified former (a) through (c) as (b) through (d); and in (c), inserted "or recapture" twice.

12A:2A-2.13 Appeals

(a) The procedure for an appeal of the Secretary's action on an application to the program shall be as follows. An applicant may appeal the Secretary's action on an application to the program by submitting in writing to the Commission, within 30 days from the date of the Secretary's action, an explanation as to how the applicant has met the program criteria. Only the information that clarifies the application filed shall be reconsidered. In the event the application is reconsidered as eligible for the program, such application shall be presented for action at the next available Board of Directors' meeting.

(b) In general, appeals arising from decisions of the Secretary may be requested in writing, and an opportunity given for an informal hearing on the papers, in person or via telephone with Commission staff. Such written request for any informal hearing must be made within 30 days of the receipt of the Secretary's decision.

(c) In the event of an adverse decision after an informal hearing under (b) above, or if a business determines not to seek an informal hearing, and providing further, that the dispute or controversy is a contested case, as defined in N.J.S.A. 52:14B-2(b), a business may request, within 45 days of the written decision resulting from the informal hearing or the determination of the Secretary if any informal hearing is not sought, a formal hearing.

(d) Upon filing of the initial pleading in a contested case, the Secretary may either retain the matter for hearing directly or transmit the matter for hearing before the Office of

Administrative Law. Such hearings shall be governed by the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(e) Every determination of a dispute or controversy arising from this subchapter by the Commission, constituting final agency action by the Secretary shall be embodied in a written decision which shall set forth findings of fact and conclusions of law pursuant to the applicable rules of the Office of Administrative Law.

12A:2A-2.14 Severability

If any section, subsection, provision, clause, or portion of this subchapter is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remaining portions of this subchapter shall not be affected thereby.

SUBCHAPTER 3. PAYMENT OF PREVAILING WAGES

12A:2A-3.1 Applicability and scope

The rules in this subchapter shall apply to workers (and their employers) employed in the performance of any construction contract in excess of \$2,000 undertaken in connection with Commission financial assistance or undertaken to fulfill any condition of receiving Commission financial assistance. However, pursuant to N.J.S.A. 52:27C-73.1, this subchapter shall not be construed as requiring the payment of the prevailing wage for construction commencing more than two years after the assistance is received.

12A:2A-3.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

"Commission" means the New Jersey Commerce, Economic Growth and Tourism Commission.

"Commission financial assistance" means any loan, loan guarantee, grant, incentive, tax exemption or other financial assistance approved, funded, authorized, administered or provided by the Commission to any entity, including, but not limited to, all Commission financial assistance received by the entity pursuant to N.J.S.A. 34:1B-112 et seq., as amended by P.L. 2004, c.65, or other Commission programs authorized by P.L. 2004, c.65, that enables the recipient to engage in a construction contract.

"Construction contract" means any contract, subcontract or agreement, whether written or oral, for construction, reconstruction, demolition, alteration, custom fabrication, repair work, or maintenance work undertaken in connection with Commission financial assistance or undertaken to fulfill any condition of receiving Commission financial assistance.

“Department” means the New Jersey Department of Labor and Workforce Development.

“Prevailing wage rate” means the applicable prevailing wage rate determined by the Commissioner of the Department from time to time pursuant to the provisions of N.J.S.A. 34:11-56.25 et seq.

12A:2A-3.3 Payment of prevailing wages required

(a) Each recipient of Commission financial assistance, as a condition for receipt of such assistance, shall, in all construction contracts in excess of \$2,000, require that wages paid to workers employed in the performance of such construction contracts be not less than the prevailing wage rate for such work.

(b) Notwithstanding (a) above, payment of the prevailing wage rate shall not be required for construction commencing more than two years after the Commission financial assistance was received.

12A:2A-3.4 Assurances required

(a) Upon completion of work required under a construction contract, each recipient of Commission financial assistance shall deliver to the Commission (or its designated agent) a certificate, signed by an authorizing representative of the recipient, representing and confirming that:

1. The recipient has complied and has caused its contractors and subcontractors to comply with the requirements of N.J.A.C. 12A:2A-3.3; or
2. The recipient has not entered into any construction contracts subject to the provisions of N.J.A.C. 12A:2A-3.3.

12A:2A-3.5 Contract provisions required

(a) For construction contracts in excess of \$2,000, each recipient of Commission financial assistance shall apply or have the general contractor or each subcontractor apply to the Department for a wage determination for the locality where the construction contract is to be performed. The construction

contract shall specify the prevailing wage rate to be paid for each craft, trade or classification of work to be performed. In addition, the construction contract shall provide that:

1. The general contractor shall be the custodian of all records required by the provisions of this chapter. Each subcontractor shall provide the general contractor with the records required to be kept by (a)2 below, and the general contractor shall preserve such records for two years from the completion of performance of the construction contract;

2. The general contractor and each subcontractor shall keep accurate records showing, for each employee:

- i. His or her name, address, and social security number;
- ii. His or her craft or trade;
- iii. His or her actual hourly rate of pay;
- iv. The actual daily, overtime and weekly hours worked in each craft or trade;
- v. His or her gross pay, itemized deductions and net pay; and
- vi. Any fringe benefits paid to or on behalf of the employee; and

3. The general contractor and each subcontractor shall permit the Commissioner of the Department, or his or her authorized designee, and other interested parties, including, but not limited to, designated agents of the Commission and the recipient, complete access to employees working on the construction contract and to books, registers, payrolls or other records that relate to or affect wages, hours and other conditions of employment for such employees.

12A:2A-3.6 Violation

A violation of the provisions of this subchapter shall be deemed a violation of N.J.S.A. 34:11-56.25 et seq.