

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

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

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).

CHAPTER TABLE OF CONTENTS**SUBCHAPTER 1. TAX CREDIT CERTIFICATE TRANSFER PROGRAM**

- 12A:2A-1.1 Applicability and scope
- 12A:2A-1.2 Definitions
- 12A:2A-1.3 Eligibility criteria
- 12A:2A-1.4 Requests for applications
- 12A:2A-1.5 Submission requirements
- 12A:2A-1.6 Application and review procedures
- 12A:2A-1.7 Appeals

SUBCHAPTER 2. SALES AND USE TAX EXEMPTION PROGRAM

- 12A:2A-2.1 Applicability and scope
- 12A:2A-2.2 Definitions
- 12A:2A-2.3 Eligibility criteria
- 12A:2A-2.4 Requests for applications
- 12A:2A-2.5 Submission requirements
- 12A:2A-2.6 Application and review procedures
- 12A:2A-2.7 Project approval agreement
- 12A:2A-2.8 Undertaking the project
- 12A:2A-2.9 Sales and use tax exemption limitations
- 12A:2A-2.10 Reporting requirements
- 12A:2A-2.11 Events of default
- 12A:2A-2.12 Remedies
- 12A:2A-2.13 Appeals
- 12A:2A-2.14 Severability

SUBCHAPTER 3. PAYMENT OF PREVAILING WAGES

- 12A:2A-3.1 Applicability and scope
- 12A:2A-3.2 Definitions
- 12A:2A-3.3 Payment of prevailing wages required
- 12A:2A-3.4 Assurances required
- 12A:2A-3.5 Contract provisions required
- 12A:2A-3.6 Violation

SUBCHAPTER 4. ENERGY SALES TAX EXEMPTION PROGRAM FOR CERTAIN COUNTIES

- 12A:2A-4.1 Applicability and scope
- 12A:2A-4.2 Definitions
- 12A:2A-4.3 Eligibility criteria and condition for exemption

- 12A:2A-4.4 Requests for applications and renewal applications
- 12A:2A-4.5 Application submission requirements
- 12A:2A-4.6 Application review procedures
- 12A:2A-4.7 Monitoring, inspection, and reporting
- 12A:2A-4.8 Rescission
- 12A:2A-4.9 Appeals

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, non-profit corporation, or any other form of business organization located either within or outside the State 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.

“Secretary” means the Chief Executive Officer and Secretary of the New Jersey Commerce, Economic Growth and Tourism Commission.

“Selling business” means a business that has unused BRRAG tax credits issued under P.L. 1996, c.25 (N.J.S.A. 34:1B-112 et seq.), as amended by P.L. 2004, c.65, and otherwise allowable which it wishes to “sell.”

“Total allowable relocation costs” means \$1,500 times the number of retained full-time jobs. “Total allowable relocation costs” does not include the amount of any bonus award authorized pursuant to section 5 of P.L. 2004, c.65 (N.J.S.A. 34:1B-115.1).

“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. 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.

“BEIP grant” means the grant made to a business by the New Jersey Economic Development Authority pursuant to the provisions of P.L. 1996, c.26 (N.J.S.A. 34:1B-124 et al).

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

“Commitment duration” means five years from the completion date specified in the project approval agreement entered into pursuant to sections 19 through 22 of P.L. 2004, c.65 (N.J.S.A. 34:1B-185 through 188).

“Completion date” generally means the earlier of the date of the issuance of a temporary certificate of occupancy with respect to an approved site or in cases where no temporary certificate of occupancy is issued, one year from the project commencement date, as specifically set forth in the project approval agreement.

“Construction contract” means for purposes of undertaking the project, any contract for the acquisition, construction, improvement or installation of those portions of the project subject to sales tax or installation of eligible property. For purposes of this definition, the term “installation” means installation by a contractor, which involves access to pipes or wires within walls or any other alteration or modification of the project, but shall not include the delivery, locating, relocating, moving, assembling or setting up or eligible property by the provider of such property or the business’s employees or any installation of such eligible property (including, but not limited to, machinery, apparatus and equipment) if such installation is made pursuant to a purchase contract by the provider of such property.

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

“Eligible affiliate” means any person with respect to which the business:

1. Possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of such person, whether through the ownership of voting securities, by contract or otherwise; and

2. Owns, either directly or indirectly, at least 51 percent of the voting stock or other equity or ownership interest of such person.

“Eligible property” means machinery, equipment, furniture and furnishings, fixtures, and building materials, but “eligible property” shall not include “motor vehicles” as defined pursuant to section 2 of P.L. 1966, c.30 (N.J.S.A. 54:32B-2), parts with a useful life of one year or less, or tools or supplies used in connection with the eligible property. Eligible property does not include machinery or equipment purchased, rented or leased by a project participant construction manager, contractor, or subcontractor under contract with the business for their own use on the project.

“Full-time employee” means a person who is employed for consideration for at least 35 hours a week, or who renders any other standard of service generally accepted by custom or practice as full-time employment, and who is determined by the Secretary to be employed in a permanent position according to criteria as the Secretary may prescribe. “Full-time employee” shall not include any person who works as an independent contractor or on a consulting basis for the business. “Full-time employee” shall not include a child, grandchild, parent or spouse of an individual who has direct or indirect ownership of at least five percent of the profits, capital, or value of the business.

“Headquarters” means the single location that serves as the national administrative center of a business or the worldwide administrative center of a key division of the business, at which the primary office of the chief executive officer or chief operating officer of the business or the key division of the business, as well as the offices of the management officials responsible for key businesswide functions such as finance, legal, marketing, and human resources, are located.

“Life sciences business” means a business engaged principally in the production of medical equipment, ophthalmic goods, medical or dental instruments, diagnostic substances, biopharmaceutical products; or physical and biological research; or biotechnology.

“Manufacturing facility” means a business location at which more than 50 percent of the business personal property that is housed in the facility is eligible for the sales tax exemption pursuant to subsection a. of section 25 of P.L. 1980, c.105 (N.J.S.A. 54:32B-8.13) for machinery, apparatus or equipment used in the production of tangible personal property.

“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.

“Program” means the sales and use tax exemption program established under the jurisdiction of the Commission and administered by the Secretary, pursuant to P.L. 2004, c.65 §§ 19 through 22 and this subchapter.

“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. In the event that the new business location will be at more than one location, the business may evidence that the application is for a single project through factors showing interrelatedness such as the same business event driving the relocation, moves timed together, and full-time jobs relocated from the same business location.

“Project participant” means an eligible affiliate of the business or any construction manager, contractor or subcontractor that performs acquisition, construction, equipping, installation or improvements for the project and any other entities working on the project that use the sales tax certificate.

“Research and development facility” means a business location at which more than 50 percent of the business personal property that is purchased for the facility is eligible for the sales tax exemption pursuant to section 26 of P.L. 1980, c.105 (N.J.S.A. 54:32B-8.14) for property used in research and development.

“Retained full-time jobs” means an eligible position that currently exists in New Jersey and is filled by a full-time employee but which, because of a relocation by the business, is at risk of being lost to another state or country. For the purposes of determining a number of retained full-time jobs, the eligible positions 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 eligible positions of a single employer. A retained full-time job is one that will not be included in the calculation of a BEIP grant subsequent to being moved to the approved project site.

“Sales tax certificate” means the sales and use tax exemption certificate issued by the Director to the business upon approval by the Secretary of the terms and conditions of the agreement.

“Sales tax exemption” means the sales and use tax exemption approved under an agreement pursuant to the Act, and for purposes of this program, the sales tax exemption shall be administered pro rata based on the number of **retained full-time jobs** relative to the number of total jobs

located at an approved project site during the commitment duration period.

“Sales tax repayment amount” means the sum of:

1. The amount of sales and use taxes which would have been payable on all eligible property purchased for the project if the property was not purchased with the sales tax certificate; provided that if repayment is the result of a default of the agreement during the commitment duration, this amount shall be reduced by an amount allocable to the proportionate amount of the sales and use tax that corresponds to the period of time in which the business was in compliance measured from the completion date until the date of default;

2. Interest on the repayment amount referred to in paragraph 1 above at the rate equal to the statutory rate for sales tax deficiencies plus any statutory penalties; and

3. All costs incurred by the Secretary and the Division of Taxation in connection with the pursuit of the sales tax repayment amount (including, but not limited, counsel fees, court costs and other costs of collection).

“Secretary” means the Chief Executive Officer and Secretary of the New Jersey Commerce, Economic Growth and Tourism Commission.

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

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

In definition “Business”, in the first sentence substituted “Subchapter S of Chapter One” for “subchapter S of chapter one”, inserted “of” preceding “1986” and substituted “either within or outside” for “within” and added the second sentence; and added the final sentence to definition “Project”.

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

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

In definition “Full-time employee”, deleted “whose wages are subject to withholding as provided in the New Jersey Gross Income Tax Act, N.J.S.A. 54A:1-1 et seq.,” following “full-time employment.”.

12A:2A-2.3 Eligibility criteria

(a) Program eligibility requires that:

1. A business shall have operated continuously in New Jersey, in whole or in part, in its current form or as a predecessor entity, for at least 10 years prior to filing an application with the Commission;

2. A business certify and represent that the availability of financial assistance from the State as would be provided in the approval of the business’s application for the program will be an important inducement to the business to undertake the project and to relocate full-time jobs in the State; and

3. A business shall satisfy at least one of the following four criteria:

- i. The business has 1,000 or more full-time employees in the State and the project involves relocating 500 or more full-time employees into a new business location or locations;

ii. The business is a life sciences business or a manufacturing facility and the project is: constructing one or more new research and development facilities, constructing one or more new manufacturing facilities in this State, or relocating to a new headquarters in this

State that will employ 250 or more full-time employees whose jobs are retained full-time jobs.

iii. The business is a life sciences business or a manufacturing business and the project is constructing a

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

specifically, 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 default

(a) The occurrence of any one or more of the following events (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 agreement:

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 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); or
5. 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 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. 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 State sales tax.

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.

12A:2A-2.12 Remedies

(a) 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.

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

(c) 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.

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.