

No. 1994-142

AN ACT

HB 1914

Amending the act of November 26, 1978 (P.L.1309, No.317), entitled "An act regulating the awarding and execution of certain public contracts; providing for contract provisions relating to the retention, interest, and payment of funds payable under the contracts; and repealing inconsistent acts," further providing for prompt payment schedules and for bidder lists.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 1 of the act of November 26, 1978 (P.L.1309, No.317), referred to as the Public Works Contract Regulation Law, is amended by adding definitions to read:

Section 1. Definitions.

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

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"Contractor." A person who enters into a public contract with a contracting body.

"Deficiency item." Work performed but which the design professional, the contractor or the inspector will not certify as being completed according to the public contract.

"Design professional." An architect licensed under the act of December 14, 1982 (P.L.1227, No.281), known as the "Architects Licensure Law," a professional engineer or professional land surveyor licensed under the act of May 23, 1945 (P.L.913, No.367), known as the "Engineer, Land Surveyor and Geologist Registration Law," or a landscape architect licensed under the act of January 24, 1966 (1965 P.L.1527, No.535), known as the "Landscape Architects' Registration Law."

"Inspector." The person authorized or engaged by the contracting body to inspect the work performed and materials furnished pursuant to a public contract to determine whether the work completed is in compliance with the public contract.

"Local government unit." Any county, city, borough, incorporated town, township, school district, vocational school district, county institution, local authority or any joint or cooperative body of local government units or any instrumentality, authority or corporation thereof which has authority to enter into a public contract.

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“Subcontractor.” A person who has contracted to furnish labor or materials to or has performed labor for a contractor or another subcontractor in connection with a public contract.

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Section 2. Section 2 of the act is amended to read:

Section 2. Time for awarding contracts; *list of bidders.*

(a) Every public contract shall be awarded by the contracting body to the lowest responsible bidder within 60 days of the date of bid opening or all bids shall be rejected except as otherwise provided in this section.

If the award is delayed by a required approval of another government agency, the sale of bonds, the award of a grant or grants, the contracting body shall reject all bids or award the contract to the lowest responsible bidder within 120 days of the date of bid opening.

Thirty-day extensions of the date for the award may be made by the mutual written consent of the contracting body and the lowest responsible bidder.

(b) *All contracting bodies of the Commonwealth or any State-aided institution shall be required to provide a list of the bidders and their bid amount on each public contract within ten working days of the bid opening to interested parties for a fee to be determined by the contracting body to cover the cost of developing such list. This requirement shall not apply to the contracting bodies of any political subdivision or local authority which has the authority to enter into a public contract.*

Section 3. The act is amended by adding sections to read:

Section 6.1. Performance by contractor or subcontractor.

(a) *Performance by a contractor in accordance with the provisions of a public contract shall entitle the contractor to payment by the contracting body.*

(b) *Performance by a subcontractor in accordance with the provisions of a contract shall entitle the subcontractor to payment from the contractor with whom the subcontractor has contracted.*

Section 6.2. Contracting body's progress payment obligations.

(a) *The contracting body shall pay the contractor or design professional strictly in accordance with the public contract.*

(b) *If the public contract does not contain a term governing the time for payment, the contractor or design professional shall be entitled to make application for payment from the contracting body for progress payments, and the contracting body shall make payment less the applicable retainage amount as authorized in section 5¹ to the contractor or design professional within 45 calendar days of the date the application for payment is received.*

¹"4" in enrolled bill.

(c) Except as otherwise agreed by the parties, if any progress payment less the applicable retainage amount as authorized in section 5¹ is not made to a contractor or design professional by the due date established in the contract or in subsection (b), the contracting body shall pay to the contractor or design professional, in addition to the amount due, interest on the amount due, and the interest shall be computed at the rate determined by the Secretary of Revenue for interest payments on overdue taxes or the refund of taxes as provided in sections 806 and 806.1 of the act of April 9, 1929 (P.L.343, No.176), known as "The Fiscal Code," and any subsequent amendments to those sections.

(d) In the event that the public contract does not contain a grace period and if a contractor or design professional is not paid by the payment date required by subsection (b), no interest penalty payment required under this section shall be paid if payment is made on or before the 15th calendar day after the payment date required under this act.

Section 6.3. Contractors' and subcontractors' payment obligations.

(a) Performance by a subcontractor in accordance with the provisions of the contract shall entitle the subcontractor to payment from the party with whom the subcontractor has contracted. For purposes of this section, the contract between the contractor and subcontractor is presumed to incorporate the terms of the public contract.

(b) A contractor or subcontractor shall disclose to a subcontractor, before a subcontract is executed, the due date for receipt of progress payments from the contracting body. Notwithstanding any other provisions of this act, if a contractor or a subcontractor fails to accurately disclose the due date to a subcontractor, the contractor or subcontractor shall be obligated to pay the subcontractor as though the due dates established in subsection (c) were met by the contracting body. This subsection shall not apply to a change in due dates because of conditions outside of the contractor's control, including, but not limited to, design changes, change orders or delays in construction due to weather conditions.

(c) When a subcontractor has performed in accordance with the provisions of the contract, a contractor shall pay to the subcontractor and each subcontractor shall in turn pay to its subcontractors the full or proportional amount received for each such subcontractor's work and material, based on work completed or services provided under the subcontract, 14 days after receipt of a progress payment. Payment shall be made under this section unless it is being withheld under section 6.4.

(d) If any progress payment is not made to a subcontractor by the due date established in the contract or in subsection (c), the contractor shall pay to the subcontractor, in addition to the amount due, interest as computed in section 6.2(c).

¹"4" in enrolled bill.

(e) In the event that the contract does not contain a grace period and if a subcontractor is not paid by the payment date required by subsection (c), no interest penalty payment required under this section shall be paid if payment is made on or before the 15th calendar day after the payment date required under this act.

Section 6.4. Withholding of payment for good faith claims.

(a) The contracting body may withhold payment for deficiency items according to terms of the public contract. The contracting body shall pay the contractor according to the provisions of this act for all other items which appear on the application for payment and have been satisfactorily completed. The contractor may withhold payment from any subcontractor responsible for a deficiency item. The contractor shall pay any subcontractor according to the provisions of this act for any item which appears on the application for payment and has been satisfactorily completed.

(b) If a contracting body withholds payment from a contractor for a deficiency item, it shall notify the contractor of the deficiency item within the time period specified in the contract or 15 calendar days of the date that the application for payment is received. If a contractor withholds payment from a subcontractor for a deficiency item, it must notify the subcontractor or supplier and the contracting body of the reason within 15 calendar days of the date after receipt of the notice of the deficiency item from the owner.

Section 6.5. Penalty and attorney fees.

(a) If arbitration or a claim with the Board of Claims or a court of competent jurisdiction is commenced to recover payment due under this act and it is determined that the contracting body, contractor or subcontractor has failed to comply with the payment of terms of this act, the arbitrator, the Board of Claims or the court may award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious. An amount shall not be deemed to have been withheld in bad faith to the extent it was withheld pursuant to section 6.4.

(b) Notwithstanding any agreement to the contrary, the prevailing party in any proceeding to recover any payment under this act may be awarded a reasonable attorney fee in an amount to be determined by the board of claims, court or arbitrator, together with expenses, if it is determined that the contracting body, contractor or subcontractor acted in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious.

Section 6.6. Public contracts involving Federal aid.

If any provision of this act conflicts with a Federal statute or regulation or with conditions attached to the receipt of Federal aid, this act shall not

operate to prevent receipt of the Federal aid in accordance with any Federal statute or regulation.

Section 6.7. Certain provisions unenforceable.

A provision in the public contract making it subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occurs in another state shall be unenforceable.

Section 6.8. Applicability.

(a) This act shall apply to public contracts entered into on or after the effective date of this act.

(b) (1) Section 6.2 shall not apply when the State government unit's nonpayment on a particular project is caused by the failure of the General Assembly to enact a budget for the fiscal year of payment.

(2) Section 6.2 shall not apply when a local government unit's nonpayment on a particular project is caused by failure of the Federal or State government to pay funds due and payable to the local government unit.

(3) Section 6.2 shall not apply when a contracting body's nonpayment on a particular project is caused by the failure of the General Assembly to enact an operating budget for the fiscal year of payment or a capital budget for the capital project or by failure of the Federal, State or local government to pay funds designated or to be designated for the specific project.

(4) Nothing in this act shall be construed to require payment of interest penalties by the Federal or State government if the municipality is liable for such interest.

(c) This act shall not apply to any of the following:

(1) A municipality determined to be distressed under the act of July 10, 1987 (P.L.246, No.47), known as the "Municipalities Financial Recovery Act."

(2) A school district which has been determined to be a distressed school district under section 691 of the act of March 10, 1949 (P.L.30, No.14), known as the "Public School Code of 1949."

(3) A city of the first class that has entered into the Intergovernmental Cooperation Agreement under the act of June 5, 1991 (P.L.9, No.6), known as the "Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class," for so long as any deficit-reducing bonds issued by the authority pursuant to section 301(b)(1) of that act are outstanding and payable.

(4) Any corporate entity or school district as defined in the "Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class."

Section 6.9. Claims by innocent parties.

(a) The contracting body shall have no obligation to any third parties for any claim.

(b) Once a contractor has made payment to the subcontractor according to the provisions of this act, future claims for payment against the contractor or the contractor's surety by parties owed payment from the subcontractor which has been paid shall be barred.

Section 4. This act shall take effect in 60 days.

APPROVED—The 12th day of December, A.D. 1994.

ROBERT P. CASEY