

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1914 Session of
1993

INTRODUCED BY LESCOVITZ, MARKOSEK, FAJT, LaGROTTA, M. N. WRIGHT,
COLAFELLA, CLARK, VAN HORNE, KREBS, WOZNIAK, CAPPABIANCA,
D. W. SNYDER, ROONEY, RAYMOND, DeLUCA, FAIRCHILD, KENNEY,
STISH, PRESTON, GODSHALL, LEVDANSKY, ACOSTA, RUBLEY,
BATTISTO, KASUNIC, TANGRETTI, VEON, FLICK, TIGUE, DALEY,
TULLI, OLASZ, TRELLO, MARSICO, LAUGHLIN, KAISER, BELFANTI AND
CESSAR, JUNE 23, 1993

AS REPORTED FROM COMMITTEE ON BUSINESS AND ECONOMIC DEVELOPMENT,
HOUSE OF REPRESENTATIVES, AS AMENDED, SEPTEMBER 28, 1993

AN ACT

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

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

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

12 Section 1. Definitions.

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

16 * * *

17 "Contractor." A person who enters into a public contract

1 with a contracting body.

2 "DEFICIENCY ITEM." WORK PERFORMED BUT WHICH THE DESIGN <—
3 PROFESSIONAL, THE CONTRACTOR OR THE INSPECTOR WILL NOT CERTIFY
4 AS BEING COMPLETED ACCORDING TO THE SPECIFICATIONS OF THE PUBLIC
5 CONTRACT.

6 "Design professional." An architect licensed under the act
7 of December 14, 1982 (P.L.1227, No.281), known as the
8 "Architects Licensure Law," a professional engineer or
9 professional land surveyor licensed under the act of May 23,
10 1945 (P.L.913, No.367), known as the "Professional Engineers and
11 Professional Land Surveyors Registration Law," or a landscape
12 architect licensed under the act of January 24, 1966 (1965
13 P.L.1527, No.535), known as the "Landscape Architects'
14 Registration Law."

15 "INSPECTOR." THE CONTRACTOR OR PERSON AUTHORIZED OR ENGAGED <—
16 BY THE CONTRACTING BODY TO INSPECT THE WORK PERFORMED PURSUANT
17 TO A PUBLIC CONTRACT TO DETERMINE WHETHER THE WORK COMPLETED IS
18 IN COMPLIANCE WITH THE SPECIFICATIONS OF THE PUBLIC CONTRACT.

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

25 * * *

26 "Subcontractor." A person who has contracted to furnish
27 labor or materials to, or has performed labor for, a contractor
28 or another subcontractor in connection with a public contract.

29 * * *

30 Section 2. 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 payment obligations.

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

(b) If the public contract does not contain a term governing 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 to the contractor or design professional within 30 calendar days of the date the application for payment is received.

(c) Except as otherwise agreed by the parties, if any progress payment 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, one and one-half times the current commercial prime rate of interest on the amount due, compounded every 30 days.

(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

1 payment date required under this act.

2 Section 6.3. Contractors' and subcontractors' payment
3 obligations.

4 (a) Performance by a subcontractor in accordance with the
5 provisions of the contract shall entitle the subcontractor to
6 payment from the party with whom the subcontractor has
7 contracted.

8 (b) A contractor or subcontractor shall disclose to a
9 subcontractor, before a subcontract is executed, the due date
10 for receipt of progress payments from the contracting body.
11 Notwithstanding any other provisions of this act, if a
12 contractor or a subcontractor fails to accurately disclose the
13 due date to a subcontractor, the contractor or subcontractor
14 shall be obligated to pay the subcontractor as though the due
15 dates established in subsection (c) were met by the contracting
16 body. THIS SUBSECTION SHALL NOT APPLY TO A CHANGE IN DUE DATES <—
17 BECAUSE OF CONDITIONS OUTSIDE OF THE CONTRACTOR'S CONTROL,
18 INCLUDING, BUT NOT LIMITED TO, DESIGN CHANGES, CHANGE ORDERS OR
19 DELAYS IN CONSTRUCTION DUE TO WEATHER CONDITIONS.

20 (c) When a subcontractor has performed in accordance with
21 the provisions of the contract, a contractor shall pay to the
22 subcontractor, and each subcontractor shall in turn pay to its
23 subcontractors, the full or proportional amount received for
24 each such subcontractor's work and material, based on work
25 completed or services provided under the subcontract, 14 days
26 after receipt of a progress payment. PAYMENT SHALL BE MADE UNDER <—
27 THIS SECTION UNLESS IT IS BEING WITHHELD UNDER SECTION 6.4.

28 (d) If any progress payment is not made to a subcontractor
29 by the due date established in the contract or in subsection
30 (c), the contractor shall pay to the subcontractor, in addition

1 to the amount due, one and one-half times the current commercial
2 prime rate of interest on the amount due, compounded every 30
3 days.

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

10 ~~Section 6.4. Withholding of payment for good faith claims.~~ <—

11 ~~The contracting body may withhold payment for deficiency~~
12 ~~items in accordance with the terms of the public contract:~~
13 ~~Provided, however, That all other items appearing on the~~
14 ~~application for payment will be paid as per the schedule. If the~~
15 ~~contracting body withholds payment from a contractor or design~~
16 ~~professional pursuant to this section, it must notify the~~
17 ~~contractor or design professional of the deficiency within seven~~
18 ~~calendar days of the date that the application for payment is~~
19 ~~received. If a contractor withholds payment from subcontractors~~
20 ~~or suppliers pursuant to this section, it must notify the~~
21 ~~subcontractor or supplier and the contracting body of the reason~~
22 ~~within seven calendar days of the date the application for~~
23 ~~payment is received.~~

24 ~~SECTION 6.4. WITHHOLDING OF PAYMENT FOR GOOD FAITH CLAIMS.~~ <—

25 ~~(A) AUTHORITY TO WITHHOLD.--THE CONTRACTING BODY MAY~~
26 ~~WITHHOLD PAYMENT FOR DEFICIENCY ITEMS ACCORDING TO TERMS OF THE~~
27 ~~PUBLIC CONTRACT. THE CONTRACTING BODY SHALL PAY THE CONTRACTOR~~
28 ~~ACCORDING TO THE PROVISIONS OF THIS ACT FOR ALL OTHER ITEMS~~
29 ~~WHICH APPEAR ON THE APPLICATION FOR PAYMENT AND HAVE BEEN~~
30 ~~SATISFACTORILY COMPLETED. THE CONTRACTOR MAY WITHHOLD PAYMENT~~

1 FROM ANY SUBCONTRACTOR RESPONSIBLE FOR A DEFICIENCY ITEM. THE
2 CONTRACTOR SHALL PAY ANY SUBCONTRACTOR ACCORDING TO THE
3 PROVISIONS OF THIS ACT FOR ANY ITEM WHICH APPEARS ON THE
4 APPLICATION FOR PAYMENT AND HAS BEEN SATISFACTORILY COMPLETED.

5 (B) NOTICE.--IF A CONTRACTING BODY WITHHOLDS PAYMENT FROM A
6 CONTRACTOR FOR A DEFICIENCY ITEM, IT SHALL NOTIFY THE CONTRACTOR
7 OF THE DEFICIENCY ITEM WITHIN SEVEN CALENDAR DAYS OF THE DATE
8 THAT THE APPLICATION FOR PAYMENT IS RECEIVED. IF A CONTRACTOR
9 WITHHOLDS PAYMENT FROM A SUBCONTRACTOR FOR A DEFICIENCY ITEM, IT
10 MUST NOTIFY THE SUBCONTRACTOR OR SUPPLIER AND THE CONTRACTING
11 BODY OF THE REASON WITHIN SEVEN CALENDAR DAYS OF THE DATE AFTER
12 RECEIPT OF THE NOTICE OF THE DEFICIENCY ITEM FROM THE OWNER.

13 Section 6.5. Penalty and attorney fees.

14 (a) If arbitration or litigation is commenced to recover
15 payment due under this act and it is determined that the
16 contracting body, contractor or subcontractor has failed to
17 comply with the payment of terms of this act, the arbitrator or
18 court shall award, in addition to all other damages due, a
19 penalty equal to 1% per month of the amount that was wrongfully
20 withheld. An amount shall not be deemed to have been wrongfully
21 withheld to the extent it was withheld pursuant to section 6.4.

22 (b) Notwithstanding any agreement to the contrary, the
23 substantially prevailing party in any proceeding to recover any
24 payment under this act shall be awarded a reasonable attorney
25 fee in an amount to be determined by the court or arbitrator,
26 together with expenses.

27 Section 6.6. Public contracts involving Federal aid.

28 If any provision of this act conflicts with a Federal statute
29 or regulation or with conditions attached to the receipt of
30 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 bid on or after the effective date of this act.

(b) 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 designated for the specific project. Nothing in this act shall be construed to require payment of interest penalties by the Federal or State government.

(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 UNDER SECTION 301(B)(1) OF THAT ACT

<—

1 ARE OUTSTANDING AND PAYABLE.

2 (4) A CLAIM OUTSIDE OF THE ORIGINAL WRITTEN
3 SPECIFICATIONS OF THE PUBLIC CONTRACT WHICH IS UNDER THE
4 JURISDICTION OF THE BOARD OF CLAIMS CREATED BY THE ACT OF MAY
5 20, 1937 (P.L.728, NO.193), REFERRED TO AS THE BOARD OF
6 CLAIMS ACT.

7 SECTION 6.9. CLAIMS BY INNOCENT PARTIES.

8 (A) NONINVOLVEMENT.--ONCE THE CONTRACTING BODY HAS MADE
9 PAYMENT TO THE CONTRACTOR, THE CONTRACTING BODY WILL HAVE NO
10 OBLIGATION TO MAKE PAYMENT DIRECTLY TO THE SUBCONTRACTOR IF THE
11 CONTRACTOR HAS REFUSED TO MAKE PAYMENT TO THE SUBCONTRACTOR.

12 (B) THIRD-PARTY CLAIMS.--ONCE A CONTRACTOR HAS MADE PAYMENT
13 TO THE SUBCONTRACTOR ACCORDING TO THE PROVISIONS OF THIS ACT,
14 FUTURE CLAIMS FOR PAYMENT AGAINST THE CONTRACTOR BY PARTIES OWED
15 PAYMENT FROM THE SUBCONTRACTOR WHICH HAS BEEN PAID SHALL BE
16 BARRED.

17 Section 3. This act shall take effect in 60 days.