

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 980 Session of
2007

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SAYLOR, SCAVELLO AND SCHRODER, MAY 29, 2007

REFERRED TO COMMITTEE ON STATE GOVERNMENT, MAY 29, 2007

AN ACT

1 Amending Title 62 (Procurement) of the Pennsylvania Consolidated
2 Statutes, providing for public-private partnerships.

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

5 Section 1. Title 62 of the Pennsylvania Consolidated
6 Statutes is amended by adding a chapter to read:

7 CHAPTER 47

8 PUBLIC-PRIVATE PARTNERSHIPS

9 Sec.

10 4701. Definitions.

11 4702. Prerequisite for operation.

12 4703. Approval by responsible government agency.

13 4704. Service contracts.

14 4705. Affected local jurisdictions.

15 4706. Dedication of public property.

16 4707. Powers and duties of operator.

1 4708. Comprehensive agreement.
2 4709. Federal, State and local assistance.
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6 4713. (Reserved).
7 4714. Governmental immunity.
8 4715. Procurement.
9 4716. Regulations.
10 § 4701. Definitions.

11 The following words and phrases when used in this chapter
12 shall have the meanings given to them in this section unless the
13 context clearly indicates otherwise:

14 "Affected local jurisdiction." A political subdivision in
15 which all or a portion of a qualifying project is located.

16 "Bureau." The Corporation Bureau.

17 "Comprehensive agreement." The comprehensive agreement
18 between the operator and the responsible government agency.

19 "Government agency." Any of the following:

20 (1) The Commonwealth or any of its agencies, authorities
21 or instrumentalities.

22 (2) A political subdivision or any of its agencies,
23 authorities or instrumentalities.

24 "Lease payment." A form of payment, including a land lease,
25 by a government agency to the operator for the use of a
26 qualifying project.

27 "Material default." A default by the operator in the
28 performance of its duties under section 4707(e) (relating to
29 powers and duties of operator) which jeopardizes adequate
30 service to the public from a qualifying project.

1 "Operator." The private or other nongovernmental entity that
2 is responsible for a qualifying project or a portion of a
3 qualifying project, including acquisition, design, construction,
4 improvement, renovation, expansion, equipping, maintenance and
5 operation.

6 "Private entity." An individual, corporation, limited
7 liability company, partnership, joint venture or other private
8 business entity.

9 "Qualifying project." Any of the following:

10 (1) An educational facility. This paragraph includes:

11 (i) a school building;

12 (ii) a facility which is functionally related and
13 subordinate to a school building, including a stadium or
14 other facility primarily used for school events;

15 (iii) land which is functionally related and
16 subordinate to a school building; or

17 (iv) depreciable property provided for use in an
18 educational facility operated as part of the public
19 school system or as an institution of higher education.

20 (2) A building or facility for principal use by a
21 government agency.

22 (3) An improvement, together with equipment, necessary
23 to enhance public safety and security of a building to be
24 principally used by a government agency.

25 (4) Utility and telecommunications and other
26 communications infrastructure.

27 "Responsible government agency." A government agency that
28 has the power to acquire, design, construct, improve, renovate,
29 expand, equip, maintain or operate the applicable qualifying
30 project.

1 "Revenue." Any of the following generated by a qualifying
2 project:

3 (1) A user fee.

4 (2) A lease payment.

5 (3) A service payment.

6 "Service contract." A contract entered into between a
7 government agency and the operator.

8 "Service payment." Payment to the operator of a qualifying
9 project pursuant to a service contract.

10 "User fee." The rate or other charge imposed by the operator
11 of a qualifying project for use of the qualifying project
12 pursuant to the comprehensive agreement.

13 § 4702. Prerequisite for operation.

14 A private entity seeking authorization under this act to
15 acquire, design, construct, improve, renovate, expand, equip,
16 maintain or operate a qualifying project must obtain approval of
17 the responsible government agency under section 4703 (relating
18 to approval by responsible government agency). The private
19 entity may initiate the approval process by requesting approval
20 under section 4703(a) or the responsible government agency may
21 request proposals or invite bids under section 4703(b).

22 § 4703. Approval by responsible government agency.

23 (a) Request for approval.--A private entity may request
24 approval of a qualifying project by the responsible government
25 agency. A request shall be accompanied by the following material
26 and information unless waived by the responsible government
27 agency:

28 (1) A topographic map of 1:2,000 or other appropriate
29 scale indicating the location of the qualifying project.

30 (2) A description of the qualifying project, including

1 the conceptual design of the facility or a conceptual plan
2 for the provision of services and a schedule for the
3 initiation of and completion of the qualifying project to
4 include the proposed major responsibilities and timeline for
5 activities to be performed by both the government agency and
6 private entity.

7 (3) A statement setting forth the method by which the
8 operator proposes to secure any necessary property interests
9 required for the qualifying project. The statement shall
10 include all of the following:

11 (i) The names and addresses, if known, of the
12 current owners of the property needed for the qualifying
13 project.

14 (ii) The nature of the property interests to be
15 acquired.

16 (iii) Any property that the responsible government
17 agency expects it will be requested to condemn.

18 (4) Information relating to the current plans for
19 development of facilities to be used by a government agency
20 that are similar to the qualifying project being proposed by
21 the private entity of each affected local jurisdiction.

22 (5) A list of all permits and approvals required for the
23 qualifying project from Federal, State or political
24 subdivisions and a projected schedule for obtaining the
25 permits and approvals.

26 (6) A list of public utility facilities that will be
27 crossed by the qualifying project and a statement of the
28 plans of the operator to accommodate the crossings.

29 (7) A statement setting forth the operator's general
30 plans for financing the qualifying project including the

1 sources of the operator's funds.

2 (8) The names and addresses of the persons who may be
3 contacted for further information concerning the request.

4 (9) User fees, lease payments and other service payments
5 included in the comprehensive agreement, including frequency
6 of assessments and the methodology and circumstances for
7 changes to the user fees, lease payments and other service
8 payments.

9 (10) Any additional material and information as the
10 responsible government agency may reasonably request.

11 (b) Proposals or bids.--The responsible government agency
12 may request proposals or invite bids from private entities for
13 the acquisition, design, construction, improvement, renovation,
14 expansion, equipping, maintenance or operation of qualifying
15 projects.

16 (c) Grant of approval.--

17 (1) If the government agency deems that a project is a
18 qualifying project and that the project serves the public
19 purpose under paragraph (2), it may grant approval of any of
20 the following:

21 (i) Acquisition, construction, improvement,
22 renovation, expansion, maintenance or operation of the
23 educational facility or other public infrastructure or
24 government facility.

25 (ii) The design or equipping of a qualifying project
26 under subparagraph (i).

27 (2) The responsible government agency may determine that
28 the acquisition, design, construction, improvement,
29 renovation, expansion, equipping, maintenance or operation of
30 the project serves a public purpose, which shall enable the

1 project to be deemed as a qualifying project, if all of the
2 following apply:

3 (i) There is a public need for or benefit derived
4 from the project of the type the private entity proposes
5 as a qualifying project.

6 (ii) The estimated cost of the project is reasonable
7 in relation to similar facilities.

8 (iii) The private entity's plans will result in the
9 timely acquisition, design, construction, improvement,
10 renovation, expansion, equipping, maintenance or
11 operation of the project.

12 (3) In evaluating a request under this subsection, the
13 responsible government agency may rely upon internal staff
14 reports prepared by personnel familiar with the operation of
15 similar facilities or the advice of outside advisers or
16 consultants having relevant experience.

17 (d) Fee.--The responsible government agency may charge a
18 reasonable fee to cover the costs of processing, reviewing and
19 evaluating the request, including reasonable attorney fees and
20 fees for financial and other necessary advisers or consultants.

21 (e) Comprehensive agreement.--The approval of the
22 responsible government agency shall be subject to the private
23 entity's entering into a comprehensive agreement with the
24 responsible government agency.

25 (f) Date.--In connection with its approval of the qualifying
26 project, the responsible government agency shall establish a
27 date for the commencement of activities related to the project.
28 The responsible government agency may extend the date.

29 (g) Public access.--Any documents created by or provided to
30 a government agency under this chapter shall be subject to

inspection and copying only to the extent already required under the act of June 21, 1957 (P.L.390, No.212), referred to as the Right-to-Know Law.

(h) Debt capacity.--Nothing in this chapter or in a comprehensive agreement entered into under this chapter shall be deemed to enlarge, diminish or affect the authority otherwise possessed by the responsible government agency to take action that would impact the debt capacity of the Commonwealth or any of its political subdivisions.

§ 4704. Service contracts.

In addition to any authority conferred by statute, a government agency may contract with an operator for the delivery of services to be provided as part of a qualifying project in exchange for service payment and other consideration as the government agency may deem appropriate.

§ 4705. Affected local jurisdictions.

(a) Notification.--A private entity requesting approval from or submitting a proposal to a responsible government agency under section 4703 (relating to approval by responsible government agency) shall notify each affected local jurisdiction by furnishing a copy of its request or proposal to each affected local jurisdiction.

(b) Comments.--Each affected local jurisdiction that is not a responsible government agency for the respective qualifying project shall, within 60 days after receiving the notice, submit any comments it may have in writing on the proposed qualifying project to the responsible government agency and indicate whether the facility is compatible with the local comprehensive plan, local infrastructure development plans, the capital improvements budget or other government spending plan. The

1 comments shall be given consideration by the responsible
2 government agency prior to entering a comprehensive agreement
3 with a private entity.

4 § 4706. Dedication of public property.

5 A government agency may dedicate any property interest,
6 including land, improvements and tangible personal property,
7 that it has for public use in a qualifying project if it finds
8 that doing so will serve the public purpose under section
9 4703(c)(2) (relating to approval by responsible government
10 agency) by minimizing the cost of a qualifying project to the
11 government agency or reducing the delivery time of a qualifying
12 project. In connection with the dedication, a government agency
13 may convey any property interest that it has, subject to the
14 conditions imposed by law, to the operator, subject to the
15 provisions of this chapter, for consideration as the government
16 agency may determine. The Commonwealth may not convey any
17 interest in real estate belonging to the Commonwealth without
18 the approval of the General Assembly, in accordance with section
19 514 of the act of April 9, 1929 (P.L.177, No.175), known as The
20 Administrative Code of 1929. The consideration may include the
21 agreement of the operator to operate the qualifying project.

22 § 4707. Powers and duties of operator.

23 (a) Powers.--The operator shall have all power allowed by
24 law generally to a private entity having the same form of
25 organization as the operator and shall have the power to
26 acquire, design, construct, improve, renovate, maintain, expand,
27 equip or operate the qualifying project and collect lease
28 payments, impose user fees or enter into service contracts in
29 connection with the use of its power.

30 (b) Right.--The operator may own, lease or acquire any other

1 right to use or operate the qualifying project.

2 (c) Financing.--

3 (1) Notwithstanding paragraph (2), any financing of the
4 qualifying project may be in an amount and upon terms and
5 conditions as may be determined by the operator.

6 (2) The operator may issue debt, equity or other
7 securities or obligations, enter into sale and leaseback
8 transactions and secure any financing with a pledge of,
9 security interest in or lien on any or all of its property,
10 including all of its property interests in the qualifying
11 project.

12 (d) Operation.--In operating the qualifying project, the
13 operator may do all of the following:

14 (1) Make classifications according to reasonable
15 categories for assessment of user fees.

16 (2) With the consent of the responsible government
17 agency, make and enforce reasonable rules to the same extent
18 that the responsible government agency may make and enforce
19 rules with respect to similar facilities.

20 (e) Duties.--The operator shall do all of the following:

21 (1) Acquire, design, construct, improve, renovate,
22 expand, equip, maintain or operate the qualifying project in
23 accordance with the comprehensive agreement.

24 (2) Keep the qualifying project open for use by members
25 of the public at all times or as appropriate based upon the
26 use of the facility after its initial opening upon payment of
27 the applicable user fee, lease payment or service payment
28 except that the qualifying project may be temporarily closed
29 because of emergencies or with the consent of the responsible
30 government agency, to protect the safety of the public or for

1 reasonable construction or maintenance procedures as set
2 forth under the comprehensive agreement.

3 (3) Maintain or provide by contract for the maintenance
4 of the qualifying project, if required by the comprehensive
5 agreement.

6 (4) Cooperate with the responsible government agency in
7 making best efforts to establish any interconnection with the
8 qualifying project requested by the responsible government
9 agency.

10 (5) Comply with the comprehensive agreement and any
11 service contract.

12 (f) Additional services.--Nothing in this section shall
13 prohibit an operator of a qualifying project from providing
14 additional services for the qualifying project to government
15 agencies or private entities other than the responsible
16 government agency if the provision of additional service does
17 not impair the operator's ability to meet its commitments to the
18 responsible government agency under the comprehensive agreement.

19 § 4708. Comprehensive agreement.

20 (a) Contents.--Prior to acquiring, designing, constructing,
21 improving, renovating, expanding, equipping, maintaining or
22 operating the qualifying project, the private entity shall enter
23 into a comprehensive agreement with the responsible government
24 agency. The comprehensive agreement shall provide for all of the
25 following:

26 (1) Delivery of maintenance, performance and payment
27 bonds or letters of credit in connection with the
28 acquisition, design, construction, improvement, renovation,
29 expansion, equipping, maintenance or operation of the
30 qualifying project, in the forms and amounts satisfactory to

1 the responsible government agency.

2 (2) Review of plans and specifications for the
3 qualifying project by the responsible government agency and
4 approval by the responsible government agency if the plans
5 and specifications conform to standards acceptable to the
6 responsible government agency. This paragraph may not require
7 the private entity to complete design of a qualifying project
8 prior to the execution of a comprehensive agreement.

9 (3) Inspection of the qualifying project by the
10 responsible government agency to ensure that the operator's
11 activities are acceptable to the responsible government
12 agency in accordance with the comprehensive agreement.

13 (4) Maintenance of a policy of liability insurance,
14 copies of which shall be filed with the responsible
15 government agency accompanied by proofs of coverage, self-
16 insurance, in form and amount satisfactory to the responsible
17 government agency and reasonably sufficient to insure
18 coverage of tort liability to the public and employees and to
19 enable the continued operation of the qualifying project.

20 (5) Monitoring of the practices of the operator by the
21 responsible government agency to ensure that the qualifying
22 project is properly maintained.

23 (6) Reimbursement to be paid to the responsible
24 government agency for services provided by the responsible
25 government agency.

26 (7) Filing of appropriate financial statements on a
27 periodic basis.

28 (8) Policies and procedures governing the rights and
29 responsibilities of the responsible government agency and the
30 operator in the event the comprehensive agreement is

1 terminated or there is a material default by the operator.

2 The policies and procedures shall include conditions
3 governing assumption of the duties and responsibilities of
4 the operator by the responsible government agency and the
5 transfer or purchase of property or other interests of the
6 operator by the responsible government agency.

7 (b) Fees.--The comprehensive agreement shall provide for a
8 user fee, lease payment or service payment. A copy of any
9 service contract shall be filed with the responsible government
10 agency. When negotiating user fees under this section, the
11 parties shall establish payments or fees that are the same for
12 persons using the facility under like conditions and that will
13 not materially discourage use of the qualifying project. The
14 execution of the comprehensive agreement or any amendment to the
15 comprehensive agreement shall constitute conclusive evidence
16 that the user fee, lease payment or service payment provided for
17 comply with this chapter. User fees or lease payments
18 established in the comprehensive agreement as a source of
19 revenue may be in addition to or in lieu of a service payment.

20 (c) Grants or loans.--In the comprehensive agreement, the
21 responsible government agency may agree to make grants or loans
22 to the operator from amounts received from the Federal or State
23 government or a political subdivision or from one of their
24 agencies or instrumentalities.

25 (d) Duties.--The comprehensive agreement shall incorporate
26 the duties of the operator under this chapter and may contain
27 other terms and conditions that the responsible government
28 agency determines serve the public purpose under section 4703
29 (relating to approval by responsible government agency). The
30 comprehensive agreement may contain any of the following:

1 (1) Provisions under which the responsible government
2 agency agrees to provide notice of default and cure rights
3 for the benefit of the operator and the persons specified in
4 the notice as providing financing for the qualifying project.

5 (2) Other lawful terms and conditions to which the
6 operator and the responsible government agency mutually
7 agree, including provisions regarding unavoidable delays or
8 provisions providing for a loan of public funds to the
9 operator to acquire, design, construct, improve, renovate,
10 expand, equip, maintain or operate one or more qualifying
11 projects.

12 (3) Provisions under which the authority and duties of
13 the operator under this chapter shall cease and the
14 qualifying project is dedicated to the responsible government
15 agency or, if the qualifying project was initially dedicated
16 by an affected local jurisdiction, to the affected local
17 jurisdiction for public use.

18 (e) Amendments.--Change in the terms of the comprehensive
19 agreement, as may be agreed upon by the parties, shall be added
20 to the comprehensive agreement by written amendment.

21 (f) Submittal of copy.--If a responsible government agency
22 that is not an agency, authority or instrumentality of the
23 Commonwealth enters into a comprehensive agreement under this
24 chapter it shall, within 30 days, submit a copy of the
25 comprehensive agreement to the Auditor General.

26 § 4709. Federal, State and local assistance.

27 The responsible government agency may obtain assistance from
28 the Federal or State government or one of its political
29 subdivisions for a qualifying project in accordance with the
30 purposes under section 4703 (relating to approval by responsible

1 government agency) and may enter into a contract in order to
2 receive the assistance. If a State agency is the responsible
3 government agency, funds received from the Federal or State
4 government shall be subject to appropriation by the General
5 Assembly. The responsible government agency may pay any portion
6 of the costs of a qualifying project directly or indirectly from
7 the proceeds of a grant or loan made by the Federal or State
8 government or one of its political subdivisions.

9 § 4710. Material default and remedies.

10 (a) General rule.--If there is a material default by the
11 operator of a qualifying project, the responsible government
12 agency may assume the responsibilities and duties of the
13 operator, in which case it shall succeed to all of the right,
14 title and interest in the project, subject to any liens on
15 revenue previously granted by the operator to any person
16 providing financing.

17 (b) Condemnation.--A responsible government agency having
18 the power of condemnation under State law may exercise the power
19 of condemnation to acquire the qualifying project in the event
20 of a material default by the operator. A person who has provided
21 financing for the qualifying project, and the operator to the
22 extent of its capital investment, may participate in the
23 condemnation proceedings with the standing of a property owner.

24 (c) Termination.--For cause shown, the responsible
25 government agency may terminate the comprehensive agreement and
26 exercise any other rights and remedies that may be available at
27 law or in equity.

28 (d) Claims.--The responsible government agency may make or
29 cause to be made any appropriate claims under maintenance,
30 performance or payment bonds or lines of credit required under

1 section 4708(a)(1) (relating to comprehensive agreement).

2 (e) Procedure after takeover.--If a responsible government
3 agency takes over a qualifying project pursuant to subsection
4 (a), it may acquire, design, construct, improve, renovate,
5 operate, expand, equip or maintain the qualifying project,
6 impose user fees, impose and collect lease payments for the use
7 of the project and comply with service contracts as if it were
8 the operator. Revenue subject to a lien shall be collected for
9 the benefit of and paid to secured parties, as their interests
10 may appear, to the extent necessary to satisfy the operator's
11 obligations to secured parties, including the maintenance of
12 reserves. Liens shall be correspondingly reduced and released
13 when they are paid off. Before any payment to or for the benefit
14 of secured parties, the responsible government agency may use
15 revenue to pay current operation and maintenance costs of the
16 qualifying project, including compensation to the responsible
17 government agency for its services in operating and maintaining
18 the qualifying project. The right to receive payment, if any,
19 shall be considered just compensation for the qualifying
20 project. The full faith and credit of the responsible government
21 agency shall not be pledged to secure any financing of the
22 operator by the election to take over the qualifying project.
23 Assumption of operation of the qualifying project shall not
24 obligate the responsible government agency to pay any obligation
25 of the operator from sources other than revenue.

26 § 4711. Condemnation.

27 At the written request of the operator, the responsible
28 government agency may exercise its power of condemnation, if
29 any, to acquire lands, estates and interests therein to the
30 extent that the responsible government agency finds that such

1 action serves a public purpose under section 4703(c)(2)
2 (relating to approval by responsible government agency). Amounts
3 to be paid in a condemnation proceeding shall be paid by the
4 operator.

5 § 4712. Utility crossing.

6 (a) General rule.--The operator and each public service
7 company, public utility, railroad and cable television provider
8 whose facilities are to be crossed or affected shall cooperate
9 fully in planning and arranging the manner of the crossing or
10 relocation of the facilities. A government agency possessing the
11 power of condemnation is expressly granted authority to exercise
12 that power in connection with moving or relocating facilities to
13 be crossed by the qualifying project or facilities that must be
14 relocated, to the extent that moving or relocation is made
15 necessary or desirable by construction of, renovation to or
16 improvements to the qualifying project, which shall be construed
17 to include construction of, renovation to or improvements to
18 temporary facilities for the purpose of providing service during
19 the period of construction or improvement. Any amount to be paid
20 for the crossing, construction, moving or relocating facilities
21 shall be paid by the operator.

22 (b) Disputes.--If the operator and a public service company,
23 public utility, railroad or cable television provider are unable
24 to agree upon a plan for the crossing or relocation, the bureau
25 may determine the manner in which the crossing or relocation is
26 to be accomplished and any damages due arising out of the
27 crossing or relocation. The determination shall be made within
28 90 days of notification by the private entity that the project
29 will cross utilities subject to the bureau's jurisdiction. The
30 bureau may employ expert engineers who shall examine the

location and plans for such crossing or relocation, hear any objections, consider modifications and make a recommendation to the bureau, and the cost of the experts shall be borne by the operator.

§ 4713. (Reserved).

§ 4714. Governmental immunity.

Nothing in this chapter shall be construed or deemed to constitute a waiver of the governmental immunity of the Commonwealth, a responsible government agency or an affected local jurisdiction with respect to participation in or approval of a qualifying project or its operation, including interconnection of the qualifying project with any other infrastructure or project. Any political subdivision in which a qualifying project is located shall possess governmental immunity with respect to its design, construction and operation.

§ 4715. Procurement.

(a) General rule.--Except as provided under subsections (b) and (c), a responsible government agency shall enter into a comprehensive agreement under this chapter through competitive sealed bidding under section 512 (relating to competitive sealed bidding).

(b) Services.--A responsible government agency may enter into a comprehensive agreement for services other than professional services using competitive sealed proposals under section 513 (relating to competitive sealed proposals). A responsible government agency shall proceed in accordance with subsection (a) unless it determines that proceeding under this subsection is likely to be advantageous based upon the probable scope, complexity or urgency of the project or upon risk sharing, added value, increase in funding or an economic benefit

1 from the project that would not otherwise be available. When a
2 determination is made to proceed under this subsection, the
3 reasons for doing so shall be stated in writing by the
4 responsible government agency.

5 (c) Comprehensive agreement.--A responsible government
6 agency shall enter into a comprehensive agreement for the
7 services of accountants, clergy, physicians, lawyers, dentists
8 and other professional services which are not performed by other
9 Commonwealth employees using the competitive selection
10 procedures enumerated under section 518 (relating to competitive
11 selection procedures for certain services).

12 (d) Adoption of procedures.--A responsible government agency
13 shall not consider a request by a private entity for approval of
14 a qualifying project under section 4703 (relating to approval by
15 responsible government agency) until the responsible government
16 agency has adopted and made publicly available procedures
17 sufficient to enable the responsible government agency to comply
18 with this chapter, including provisions for posting and
19 publishing public notice of a government agency's request for
20 approval of the qualifying project and a reasonable period of
21 time of not less than 45 days, during which the responsible
22 government agency will receive competing proposals under section
23 4703(a).

24 (e) Special approval.--A responsible government agency that
25 is a political subdivision may enter into a comprehensive
26 agreement under this chapter only with the approval of its
27 governing body.

28 (f) Exclusivity.--The provisions of this section, and
29 regulations adopted in accordance with section 4716 (relating to
30 regulations), shall constitute the exclusive method of

procurement for agreements entered into under this chapter,
notwithstanding any other law to the contrary. In the event of a
conflict with any other statute or regulation, the provisions of
this chapter and the regulations promulgated under this chapter
shall govern.

§ 4716. Regulations.

The Department of General Services, in cooperation with the
Department of Education, shall within 18 months of the effective
date of this section adopt regulations as are necessary to
implement the provisions of this chapter.

Section 2. This act shall take effect as follows:

(1) The following provisions shall take effect
immediately:

(i) The addition of 62 Pa.C.S. § 4716.

(ii) This section.

(2) The remainder of this act shall take effect in 90
days.