

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL
No. 2107 Session of
2015

INTRODUCED BY BAKER, MILLARD, SCHLOSSBERG, TOEPEL, PICKETT,
CUTLER, MURT, DeLUCA, WHEELAND, ZIMMERMAN, PHILLIPS-HILL,
WATSON, EVERETT, GROVE, PETRI, RAPP, FRANKEL, GILLEN, MOUL,
BENNINGHOFF, KLUNK, KAUFER, SAYLOR, MACKENZIE, DUSH,
SANTARSIERO AND MICCARELLI, MAY 27, 2016

AS AMENDED ON THIRD CONSIDERATION, IN SENATE, OCTOBER 25, 2016

AN ACT

1 Amending Title 62 (Procurement) of the Pennsylvania Consolidated
2 Statutes, in general provisions, providing for public access
3 to procurement records; in source selection and contract
4 formation, further providing for sole source procurement and
5 for emergency procurement; ~~and~~ providing for prohibited <--
6 contracts-; AND, IN CONTRACT CLAUSES AND PREFERENCE <--
7 PROVISIONS, FURTHER PROVIDING FOR DEFINITIONS, FOR CONTRACT
8 PROVISIONS AND FOR FUNDING.

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

11 Section 1. Title 62 of the Pennsylvania Consolidated
12 Statutes is amended by adding a section to read:

13 § 106.1. Public access to procurement records.

14 (a) General rule.--Records concerning a procurement shall be
15 made public, consistent with the act of February 14, 2008
16 (P.L.6, No.3), known as the Right-to-Know Law.

17 (b) Public posting and availability of procurement
18 information.--The purchasing agency shall post the following

procurement documents on the department's, or, in the case of an independent agency, its own publicly accessible Internet website or otherwise make available in the manner indicated below:

(1) Public notice of an invitation for bids or request for proposals may be given in accordance with section 512(c) (1) (relating to competitive sealed bidding) or 513(b) (relating to competitive sealed proposals) by posting the invitation for bids or request for proposals, including, if applicable, the written determination required by section 513(a), on the date issued and until the closing date for receipt of bids or proposals.

(2) Bid tabulations recording the name of each bidder and bid amount in accordance with section 512(d) shall be posted as soon as practicable after bid opening, unless the purchasing agency elects to cancel the invitation for bids.

(3) Notices of award pursuant to an invitation for bids shall be posted as soon as practicable after the purchasing agency elects to make an award in accordance with section 512(g).

(4) The written determination required by section 513(g) shall be posted upon receipt of the final negotiated contract signed by the selected offeror. Subject to proper redaction under the Right-to-Know Law, responsive proposals received by the purchasing agency and, until fully executed, the final negotiated contract are not required to be posted but shall be made available to the public upon request.

(5) Requests to award a contract pursuant to section 515(a) (1), (2), (4) and (10) (relating to sole source procurement) shall be posted for seven calendar days for public comment prior to approval of the request by the

1 department or independent purchasing agency. Upon approval of
2 a request by the department or independent purchasing agency,
3 the signed and written determination required under section
4 515(b) shall be posted.

5 (6) The written determinations required by section 516
6 (relating to emergency procurement) shall be posted in
7 advance, if feasible, but no later than seven calendar days
8 after authorization by the department or independent
9 purchasing agency.

10 (7) A contract resulting from a procurement under this
11 part shall be posted as soon as practicable upon its full
12 execution by the Commonwealth.

13 (8) Requests under section 515 or 516 to extend a
14 contract for which no further options, renewals or extensions
15 are available in the contract shall be posted for seven
16 calendar days for public comment prior to approval of the
17 request by the department or independent purchasing agency.
18 Upon approval of a request by the department or an
19 independent purchasing agency, the signed and written
20 determination required under section 515(b) or 516 shall be
21 posted.

22 (c) Access and retention.--Procurement documents specified
23 under subsection (b) must be accessible on the Internet website
24 for a minimum of 30 days from posting and further retained in
25 accordance with section 563 (relating to retention of
26 procurement records) and applicable agency record retention
27 policies.

28 Section 2. Sections 515 and 516 of Title 62 are amended to
29 read:

30 § 515. Sole source procurement.

1 (a) General rule.--A contract may be awarded for a supply,
2 service or construction item without competition if the
3 contracting officer first determines in writing that one of the
4 following conditions exists:

5 (1) Only a single contractor is capable of providing the
6 supply, service or construction.

7 (2) A Federal or State statute or Federal regulation
8 exempts the supply, service or construction from the
9 competitive procedure.

10 (3) The total cost of the supply, service or
11 construction is less than the amount established by the
12 department for small, no-bid procurements under section 514
13 (relating to small procurements).

14 (4) It is clearly not feasible to award the contract for
15 supplies or services on a competitive basis.

16 (5) The services are to be provided by attorneys or
17 litigation consultants selected by the Office of General
18 Counsel, the Office of Attorney General, the Department of
19 the Auditor General or the Treasury Department.

20 (6) The services are to be provided by expert witnesses.

21 (7) The services involve the repair, modification or
22 calibration of equipment and they are to be performed by the
23 manufacturer of the equipment or by the manufacturer's
24 authorized dealer, provided the contracting officer
25 determines that bidding is not appropriate under the
26 circumstances.

27 (8) The contract is for investment advisors or managers
28 selected by the Public School Employees' Retirement System,
29 the State Employees' Retirement System or a State-affiliated
30 entity.

1 (9) The contract is for financial or investment experts
2 to be used and selected by the Treasury Department or
3 financial or investment experts selected by the Secretary of
4 the Budget.

5 (10) The contract for supplies or services is in the
6 best interest of the Commonwealth.

7 (b) Written determination.--The written determination
8 authorizing sole source procurement shall be included in the
9 contract file. For procurements over \$250,000 made under
10 subsection (a)(10), the determination shall be signed by the
11 head of the purchasing agency.

12 (c) Approval required by board of commissioners of public
13 grounds and buildings.--With the exception of small procurements
14 under section 514 and emergency procurements under section 516
15 (relating to emergency procurement), if the sole source
16 procurement is for a supply, except for computer software
17 updates under \$50,000, for which the department acts as
18 purchasing agency, it must be approved by the Board of
19 Commissioners of Public Grounds and Buildings prior to the award
20 of a contract.

21 § 516. Emergency procurement.

22 The head of a purchasing agency may make or authorize others
23 to make an emergency procurement when there exists a threat to
24 public health, welfare or safety or circumstances outside the
25 control of the agency create an urgency of need which does not
26 permit the delay involved in using more formal competitive
27 methods. Whenever practical, in the case of a procurement of a
28 supply, at least two [bids] quotes shall be solicited. A written
29 determination of the basis for the emergency and for the
30 selection of the particular contractor shall be included in the

1 [contract file.] procurement file. No written contract may be
2 required. The supplier of the supply, service or construction
3 may be paid based on the emergency approval and approved
4 invoice.

5 Section 3. Title 62 is amended by adding a chapter to read:

6 CHAPTER 36

7 PROHIBITED CONTRACTS

8 Sec.

9 3601. Short title of chapter.

10 3602. Declaration of purpose.

11 3603. Definitions.

12 3604. Prohibition.

13 3605. Certification.

14 3606. Penalties for false certification.

15 § 3601. Short title of chapter.

16 This chapter shall be known and may be cited as the
17 Prohibited Contracts Act.

18 § 3602. Declaration of purpose.

19 The General Assembly finds and declares as follows:

20 (1) Pennsylvania is privileged to engage in
21 international trade and commercial activities.

22 (2) Israel is America's dependable, democratic ally in
23 the Middle East, an area of paramount strategic importance to
24 the United States.

25 (3) It is in the interest of the United States and the
26 Commonwealth to stand with Israel and other countries by
27 promoting trade and commercial activities and to discourage
28 policies that disregard that interest.

29 § 3603. Definitions.

30 The following words and phrases when used in this chapter

1 shall have the meanings given to them in this section unless the
2 context clearly indicates otherwise:

3 "Boycott." To blacklist, divest from or otherwise refuse to
4 deal with a person or firm when the action is based on race,
5 color, religion, gender or national affiliation or origin of the
6 targeted person or entity.

7 "Company." Any sole proprietorship, organization,
8 association, corporation, partnership, joint venture, limited
9 partnership, limited liability company or other entity or
10 business association qualified to do business in this
11 Commonwealth.

12 § 3604. Prohibition.

13 Notwithstanding any other provision of law, ~~the department~~ <--
14 AND, EXCEPT AS PROVIDED UNDER SECTION 516 (RELATING TO EMERGENCY <--
15 PROCUREMENT), A PURCHASING AGENCY may not contract with a
16 company to acquire or dispose of supplies, services or
17 construction THAT EXCEED THE APPLICABLE SMALL PURCHASE THRESHOLD <--
18 unless the company certifies that:

19 (1) the company is not currently engaged in a boycott of
20 a person or an entity based in or doing business with a
21 jurisdiction which the Commonwealth is not prohibited by
22 Congressional statute from engaging in trade or commerce; and

23 (2) the company will not during the duration of the
24 contract engage in a boycott of a person or an entity based
25 in or doing business with a jurisdiction where the
26 Commonwealth is not prohibited by Congressional statute from
27 engaging in trade or commerce.

28 § 3605. Certification.

29 The department shall make available a certification form
30 indicating that a company is eligible to contract with the

department under section 3604 (relating to prohibition). The
company shall provide a certification form to the department
prior to entering into a contract WHEN REGISTERING TO DO
BUSINESS AS A VENDOR WITH THE COMMONWEALTH.

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§ 3606. Penalties for false certification.

(a) Penalties.--A company shall pay a civil penalty in the
amount of \$250,000 or twice the amount of the contract,
whichever is greater, if the department determines that the
company provided a false certification form to the department
under section 3604 (relating to prohibition).

(b) Report of false certification.--The department shall
report to the Attorney General the name of the company that
submitted the false certification and the pertinent information
that led to the department's determination. No later than three
years after the department makes a determination under
subsection (a), the Attorney General shall determine whether to
bring a civil action against the company to collect the penalty
described in subsection (a). If a court determines the company
submitted a false certification, the company shall pay all
reasonable costs and fees incurred in the civil action.
Reasonable costs shall include the reasonable costs incurred by
the Commonwealth entity in investigating the authenticity of the
certification. Only one civil action against the company may be
brought for a false certification on a contract.

(c) No private right of action.--Nothing in this section may
be construed to create or authorize a private right of action.

SECTION 4. PARAGRAPHS (4) AND (13) OF THE DEFINITION OF
"ENERGY CONSERVATION MEASURE" IN SECTION 3752 OF TITLE 62 ARE
AMENDED AND THE SECTION IS AMENDED BY ADDING DEFINITIONS TO
READ:

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1 § 3752. DEFINITIONS.

2 THE FOLLOWING WORDS AND PHRASES WHEN USED IN THIS SUBCHAPTER
3 SHALL HAVE THE MEANINGS GIVEN TO THEM IN THIS SECTION UNLESS THE
4 CONTEXT CLEARLY INDICATES OTHERWISE:

5 * * *

6 "ENERGY CONSERVATION MEASURE." A PROGRAM, FACILITY
7 ALTERATION OR TECHNOLOGY UPGRADE DESIGNED TO REDUCE ENERGY,
8 WATER, WASTEWATER OR OTHER CONSUMPTION OR OPERATING COSTS. THE
9 TERM MAY INCLUDE, WITHOUT LIMITATION:

10 * * *

11 (4) HEATING, VENTILATING OR AIR CONDITIONING SYSTEM
12 MODIFICATIONS [OR], EXTENSION OF SYSTEMS TO NEW OR RENOVATED
13 AREAS OR SYSTEM REPLACEMENTS.

14 * * *

15 (13) [INDOOR AIR QUALITY IMPROVEMENTS.] SYSTEMS THAT
16 PROVIDE INDOOR AIR QUALITY IMPROVEMENTS OR IMPROVED CLIMATE
17 CONTROL.

18 * * *

19 "ENERGY-RELATED COST SAVINGS." AS FOLLOWS:

20 (1) A COST SAVING, EXCEPT FOR AN ENERGY SAVING, THAT
21 RESULTS FROM THE IMPLEMENTATION OF AN ENERGY CONSERVATION
22 MEASURE.

23 (2) SOURCES OF ENERGY-RELATED COST SAVINGS SHALL INCLUDE
24 ONLY THE FOLLOWING:

25 (I) AVOIDED CURRENT OR PLANNED CAPITAL EXPENSE.

26 (II) AVOIDED RENOVATION, RENEWAL OR REPAIR COSTS AS
27 A RESULT OF REPLACING OLD AND UNRELIABLE EQUIPMENT AND
28 SYSTEMS OR THERMAL IMPROVEMENTS TO THE BUILDING ENVELOPE.

29 "ENERGY SERVICES COMPANY." A QUALIFIED PROVIDER OF ENERGY
30 SOLUTIONS, INCLUDING DESIGNS AND IMPLEMENTATION OF ENERGY

1 SAVINGS PROJECTS, RETROFITTING, ENERGY CONSERVATION, ENERGY
2 INFRASTRUCTURE OUTSOURCING, POWER GENERATION AND ENERGY SUPPLY
3 AND RISK MANAGEMENT.

4 * * *

5 "OPERATING COSTS." AS FOLLOWS:

6 (1) REDUCTIONS IN EXPENSES, INCLUDING ENERGY-RELATED
7 COST SAVINGS, RELATED TO ENERGY AND WATER CONSUMING EQUIPMENT
8 OR THE BUILDING ENVELOPE.

9 (2) THE TERM INCLUDES:

10 (I) OPERATING AND MAINTENANCE SAVINGS.

11 (II) CAPITAL FUNDS BUDGETED FOR PROJECTS THAT, DUE
12 TO THE ENERGY SERVICES COMPANY PROJECT, WILL NOT BE
13 NECESSARY.

14 * * *

15 SECTION 5. SECTIONS 3754(A) AND 3755(C) OF TITLE 62 ARE
16 AMENDED TO READ:
17 § 3754. CONTRACT PROVISIONS.

18 (A) GENERAL RULE.--A GUARANTEED ENERGY SAVINGS CONTRACT MAY
19 PROVIDE THAT ALL PAYMENTS, EXCEPT OBLIGATIONS ON TERMINATION OF
20 THE CONTRACT BEFORE ITS SCHEDULED EXPIRATION, SHALL BE MADE OVER
21 A PERIOD OF TIME. EVERY GUARANTEED ENERGY SAVINGS CONTRACT THAT
22 REQUIRES PAYMENTS OVER A PERIOD OF TIME SHALL PROVIDE THAT,
23 AFTER THE INITIAL YEAR OF THE CONTRACT, THE SAVINGS IN EVERY
24 SUBSEQUENT YEAR ARE GUARANTEED TO THE EXTENT NECESSARY TO MAKE
25 PAYMENTS UNDER THE CONTRACT DURING THAT YEAR. A GUARANTEED
26 ENERGY SAVINGS CONTRACT, IN ADDITION TO THE QUANTIFICATION AND
27 GUARANTEE OF ENERGY SAVINGS, SHALL EXPRESSLY STATE, QUANTIFY AND
28 VALIDATE THE BUDGETARY SOURCES OF ALL ENERGY-RELATED COST
29 SAVINGS AND OPERATING COSTS UTILIZED TO SATISFY THE FINANCIAL
30 OBLIGATIONS AND PERFORMANCE DURING THE TERM OF THE AGREEMENT.

1 * * *

2 § 3755. FUNDING.

3 * * *

4 (C) GRANTS, SUBSIDIES OR OTHER PAYMENTS.--GRANTS, SUBSIDIES
5 OR OTHER PAYMENTS FROM THE COMMONWEALTH TO A GOVERNMENTAL UNIT
6 SHALL NOT BE REDUCED AS A RESULT OF ENERGY CONSERVATION MEASURE
7 COST SAVINGS OBTAINED AS A RESULT OF A GUARANTEED ENERGY SAVINGS
8 CONTRACT DURING THE LIFE OF THE CONTRACT.

9 Section ~~4~~ 6. This act shall take effect in 60 days. <--