

PROCUREMENT (62 PA.C.S.) - PUBLIC ACCESS TO PROCUREMENT RECORDS,
SOLE SOURCE PROCUREMENT, EMERGENCY PROCUREMENT, PROHIBITED
CONTRACTS, CONTRACT PROVISIONS AND FUNDING

Act of Nov. 4, 2016, P.L. 1216, No. 163

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No. 2016-163

HB 2107

AN ACT

Amending Title 62 (Procurement) of the Pennsylvania Consolidated Statutes, in general provisions, providing for public access to procurement records; in source selection and contract formation, further providing for sole source procurement and for emergency procurement; providing for prohibited contracts; and, in contract clauses and preference provisions, further providing for definitions, for contract provisions and for funding.

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

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

§ 106.1. Public access to procurement records.

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

(b) **Public posting and availability of procurement 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 department or independent purchasing agency. Upon approval of a request by

the department or independent purchasing agency, the signed and written determination required under section 515(b) shall be posted.

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

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

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

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

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

§ 515. Sole source procurement.

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

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

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

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

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

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

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

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

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

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

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

(b) **Written determination.**--The written determination authorizing sole source procurement shall be included in the contract file. **For procurements over \$250,000 made under**

subsection (a) (10), the determination shall be signed by the head of the purchasing agency.

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

§ 516. Emergency procurement.

The head of a purchasing agency may make or authorize others to make an emergency procurement when there exists a threat to public health, welfare or safety or circumstances outside the control of the agency create an urgency of need which does not permit the delay involved in using more formal competitive methods. Whenever practical, in the case of a procurement of a supply, at least two [bids] **quotes** shall be solicited. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the [contract file.] **procurement file. No written contract may be required. The supplier of the supply, service or construction may be paid based on the emergency approval and approved invoice.**

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

**CHAPTER 36
PROHIBITED CONTRACTS**

Sec.

3601. Short title of chapter.

3602. Declaration of purpose.

3603. Definitions.

3604. Prohibition.

3605. Certification.

3606. Penalties for false certification.

§ 3601. Short title of chapter.

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

§ 3602. Declaration of purpose.

The General Assembly finds and declares as follows:

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

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

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

§ 3603. Definitions.

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

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

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

§ 3604. Prohibition.

Notwithstanding any other provision of law and except as provided under section 516 (relating to emergency procurement), a purchasing agency may not contract with a company to acquire or dispose of supplies, services or construction that exceed the

applicable small purchase threshold unless the company certifies that:

- (1) the company is not currently engaged in a boycott of a person or an entity based in or doing business with a jurisdiction which the Commonwealth is not prohibited by Congressional statute from engaging in trade or commerce; and
- (2) the company will not during the duration of the contract engage in a boycott of a person or an entity based in or doing business with a jurisdiction where the Commonwealth is not prohibited by Congressional statute from engaging in trade or commerce.

§ 3605. Certification.

The department shall make available a certification form 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 when registering to do business as a vendor with the Commonwealth.

§ 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:
§ 3752. Definitions.

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

* * *

"Energy conservation measure." A program, facility alteration or technology upgrade designed to reduce energy, water, wastewater or other consumption or operating costs. The term may include, without limitation:

* * *

(4) Heating, ventilating or air conditioning system modifications [or], **extension of systems to new or renovated areas or system** replacements.

* * *

(13) [Indoor air quality improvements.] **Systems that provide indoor air quality improvements or improved climate control.**

* * *

"Energy-related cost savings." As follows:

(1) A cost saving, except for an energy saving, that results from the implementation of an energy conservation measure.

(2) Sources of energy-related cost savings shall include only the following:

(i) Avoided current or planned capital expense.

(ii) Avoided renovation, renewal or repair costs as a result of replacing old and unreliable equipment and systems or thermal improvements to the building envelope.

"Energy services company." A qualified provider of energy solutions, including designs and implementation of energy savings projects, retrofitting, energy conservation, energy infrastructure outsourcing, power generation and energy supply and risk management.

* * *

"Operating costs." As follows:

(1) Reductions in expenses, including energy-related cost savings, related to energy and water consuming equipment or the building envelope.

(2) The term includes:

(i) Operating and maintenance savings.

(ii) Capital funds budgeted for projects that, due to the energy services company project, will not be necessary.

* * *

Section 5. Sections 3754(a) and 3755(c) of Title 62 are amended to read:

§ 3754. Contract provisions.

(a) General rule.--A guaranteed energy savings contract may provide that all payments, except obligations on termination of the contract before its scheduled expiration, shall be made over a period of time. Every guaranteed energy savings contract that requires payments over a period of time shall provide that, after the initial year of the contract, the savings in every subsequent year are guaranteed to the extent necessary to make payments under the contract during that year. **A guaranteed energy savings contract, in addition to the quantification and guarantee of energy savings, shall expressly state, quantify and validate the budgetary sources of all energy-related cost savings and operating costs utilized to satisfy the financial obligations and performance during the term of the agreement.**

* * *

§ 3755. Funding.

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(c) Grants, subsidies or other payments.--Grants, subsidies or other payments from the Commonwealth to a governmental unit shall not be reduced as a result of energy **conservation measure cost** savings obtained as a result of a guaranteed energy savings contract during the life of the contract.

Section 6. This act shall take effect in 60 days.

APPROVED--The 4th day of November, A.D. 2016.

TOM WOLF