

## No. 2002-118

## AN ACT

## SB 483

Amending the act of May 20, 1937 (P.L.728, No.193), entitled, as amended, "An act providing for the creation of a Board of Claims arising from contracts with the Commonwealth; providing for and regulating the procedure in prosecuting claims before such board; defining the powers of the board; and fixing the compensation of members and employes thereof; providing that the awards of such board shall be final; providing for the payment of awards; and authorizing an appropriation," further providing for compensation for members of the Board of Claims and its hearing panels, for the jurisdiction of the hearing panels and for authority to resolve protests of solicitations or awards; and making a repeal.

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

Section 1. Sections 1 and 1.1 of the act of May 20, 1937 (P.L.728, No.193), referred to as the Board of Claims Act, reenacted and amended or added December 5, 1988 (P.L.1118, No.143), are amended to read:

Section 1. **[Be it enacted, &c., That there]** *There* is hereby created an independent administrative board known as the Board of Claims, the duty of which shall be to arbitrate claims against the Commonwealth arising from contracts entered into by the Commonwealth, and to adjust and settle certain other claims against the Commonwealth formerly handled by the Auditor General and State Treasurer acting as the Board of Claims. Any reference in this or any other act to this board shall be deemed a reference to the Board of Claims. Administrative services for the Board of Claims shall be provided by the Department of the Auditor General. **[Such]** *The* board shall consist of three members appointed by the Governor by and with the advice and consent of a majority of the elected members of the Senate, one of whom shall be learned in the law and shall be chairman of the board, another of whom shall be a registered civil engineer. The third member of the board shall be a citizen and resident of the Commonwealth. The lawyer member shall hold the title of chief administrative judge, one member shall have the title of engineer member and one member shall have the title of citizen member. Two members of the board shall constitute a quorum. The members shall be appointed for terms of four, six and eight years, and shall serve until their respective successors shall be duly appointed and qualified. Their successors shall each be appointed for a term of eight years. In the event any member shall die or resign during his term of office the Governor shall appoint a successor who shall hold office for such unexpired term. **[Each member of the board shall receive an annual compensation as may be fixed by the Executive Board and each]** *The annual rate of compensation for the chairman and members of the board shall be established by the Executive Board and shall be subject to the annual cost-of-living adjustment as provided for in section 3(e) of the act of*

*September 30, 1983 (P.L.160, No.39), known as the "Public Official Compensation Law."* Each member of the board and the executive secretary of the board shall also be entitled to all necessary traveling and other expenses incurred by him in the discharge of his official duties. Each member of the board shall be required to devote full-time to the duties imposed by this act and shall perform no duties inconsistent with their duties and responsibilities as board members.

The Board of Claims may, in its discretion appoint three hearing panels consisting of two individuals each, one of whom shall be a registered engineer and the other of whom shall be learned in the law and shall be the chairman. These individuals shall receive actual traveling expenses and per diem compensation at the rate [of one hundred fifty dollars (\$150)] per day *established by the Executive Board* for the time actually devoted to the business of the board, but no panel member shall be paid more than [ten thousand dollars (\$10,000)] *twenty-five thousand dollars (\$25,000)* per diem compensation in any calendar year. [The hearing panels shall be denominated the Eastern, Middle and Western District Hearing Panel, respectively, and shall have jurisdiction in areas of the Commonwealth coterminous with the three judicial districts of the United States District Courts in the Commonwealth established by section 118 of the Judicial Code and Judiciary, act of June 25, 1948, as amended June 2, 1970 (Public Law 91-272), 28 U.S.C. section 118.]

**Section 1.1.** Notwithstanding section 1, beginning with the effective date of this section, the compensation for members of the hearing panels established in section 1 shall be two hundred dollars (\$200) per day for the time actually devoted to the business of the board, but no panel member shall be paid more than fifteen thousand dollars (\$15,000) per diem compensation in any calendar year.]

**Section 2.** (a) Notwithstanding 62 Pa.C.S. § 1711 (relating to authority to resolve protests of solicitations or awards), the following apply:

(1) A bidder or offeror, a prospective bidder or offeror or a prospective contractor that is aggrieved in connection with the solicitation or award of a contract under 62 Pa.C.S. Pt. I (relating to Commonwealth Procurement Code) except as provided in 62 Pa.C.S. § 521 (relating to cancellation of invitations for bids or requests for proposals) may protest to the head of the purchasing agency in writing.

(2) If the protestant is a bidder or offeror or a prospective contractor, the protest shall be filed with the head of the purchasing agency within seven days after the aggrieved bidder or offeror or prospective contractor knew or should have known of the facts giving rise to the protest except that in no event may a protest be filed later than seven days after the date the contract was awarded. If the protestant is a prospective bidder or offeror, a protest shall be filed with the head of the purchasing agency prior to the bid opening time or the proposal receipt date. If a bidder or offeror, a prospective bidder or offeror or a prospective contractor fails to

file a protest or files an untimely protest, the bidder or offeror, the prospective bidder or offeror or the prospective contractor shall be deemed to have waived its right to protest the solicitation or award of the contract in any forum. Untimely filed protests shall be disregarded by the purchasing agency.

(3) A protest shall state all grounds upon which the protestant asserts the solicitation or award of the contract was improper. The protestant may submit with the protest any documents or information it deems relevant to the protest.

(4) Response and reply.—Within 15 days of receipt of a protest, the contracting officer may submit to the head of the purchasing agency and the protestant a response to the protest, including any documents or information he deems relevant to the protest. The protestant may file a reply to the response within ten days of the date of the response.

(5) The head of the purchasing agency or his designee shall review the protest and any response or reply and may request and review such additional documents or information he deems necessary to render a decision and may at his sole discretion conduct a hearing. The head of the purchasing agency or his designee shall provide to the protestant and the contracting officer a reasonable opportunity to review and address any additional documents or information deemed necessary by the head of the purchasing agency or his designee to render a decision.

(6) Upon completing an evaluation of the protest in accordance with paragraph (5), the head of the purchasing agency or his designee shall issue a written determination stating the reasons for the decision. The determination shall be issued within 60 days of the receipt of the protest unless extended by consent of the head of the purchasing agency or his designee and the protestant. The determination shall be the final order of the purchasing agency. If the head of the purchasing agency or his designee determines that the solicitation or award of the contract was contrary to law, he may enter an order authorized by 62 Pa.C.S. Ch. 17 Subch. D (relating to solicitations or awards in violation of law).<sup>1</sup>

(7) Within 15 days of the mailing date of a final determination denying a protest, a protestant may file an appeal with Commonwealth Court. Issues not raised by the protestant before the purchasing agency are deemed waived and may not be raised before the court.

(8) The record of determination for review by the court shall consist of the solicitation or award; the contract, if any; the protest; any response or reply; any additional documents or information considered by the head of the purchasing agency or his designee; the hearing transcript and exhibits, if any; and the final determination.

(9) The court shall hear the appeal, without a jury, on the record of determination certified by the purchasing agency. The court shall affirm

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<sup>1</sup>§ 1711.2 (relating to solicitations or awards contrary to law)." in enrolled bill.

the determination of the purchasing agency unless it finds from the record that the determination is arbitrary and capricious, an abuse of discretion or is contrary to law.

(10) If the determination is not affirmed, the court may enter any order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals), provided that, if the court determines that the solicitation or award of a contract is contrary to law, then the remedy the court shall order is limited to canceling the solicitation or award and declaring void any resulting contract.

(11) Stay of procurement during pendency of protest.—In the event a protest is filed timely under this section and until the time has elapsed for the protestant to file an appeal with Commonwealth Court, the purchasing agency shall not proceed further with the solicitation or with the award of the contract unless and until the head of the purchasing agency, after consultation with the head of the using agency, makes a written determination that the protest is clearly without merit or that award of the contract without delay is necessary to protect substantial interests of the Commonwealth.

(12) This section shall be the exclusive procedure for protesting a solicitation or award of a contract by a bidder or offeror, a prospective bidder or offeror or a prospective contractor that is aggrieved in connection with the solicitation or award of a contract. The provisions of 2 Pa.C.S. (relating to administrative law and procedure) shall not apply to this section.

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

“Bidder.” A person that submits a bid in response to an invitation for bids.

“Board.” The Board of Claims established in the act.

“Claimant.” A contractor or Commonwealth agency that files a claim with the Board of Claims.

“Contract.” A type of written agreement, regardless of what it may be called, for the procurement or disposal of supplies, services or construction and executed by all parties in accordance with the act of October 15, 1980 (P.L.950, No.164), known as the Commonwealth Attorneys Act.

“Contractor.” A person that has entered into a contract with a Commonwealth agency in accordance with 62 Pa.C.S. Pt. I (relating to Commonwealth Procurement Code).

“Invitation for bids.” All documents, including those either attached or incorporated by reference, used for soliciting bids under 62 Pa.C.S. Pt. I (relating to Commonwealth Procurement Code).

“Offeror.” A person that submits a proposal in response to a request for proposals.

**“Request for proposals.”** All documents, including those either attached or incorporated by reference, used for soliciting proposals under 62 Pa.C.S. Pt. I (relating to Commonwealth Procurement Code).

**“Respondent.”** A contractor or Commonwealth agency against which a claim filed with the Board of Claims is asserted.

**“Responsible bidder.”** A bidder that has submitted a responsive bid and that possesses the capability to fully perform the contract requirements in all respects and the integrity and reliability to assure good faith performance.

**Section 3.** Section 3(b.1) of the act of September 30, 1983 (P.L.160, No.39), known as the Public Official Compensation Law, is repealed insofar as it establishes the salaries of the chairman and members of the Board of Claims.

**Section 4.** This act shall take effect immediately.

APPROVED—The 2nd day of October, A.D. 2002.

MARK S. SCHWEIKER