

No. 1983-45

AN ACT

SB 199

Regulating contractors, subcontractors and suppliers in dealings with governmental agencies; making certain activities unlawful; and providing penalties.

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

Section 1. Short title.

This act shall be known and may be cited as the Antibid-Rigging Act.

Section 2. Definitions.

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

“Bid-rigging.” The concerted activity of two or more persons to determine in advance the winning bidder of a contract let or to be let for competitive bidding by a governmental agency. It shall include, but not be limited to, any one or more of the following:

- (1) Agreeing to sell items or services at the same price.
- (2) Agreeing to submit identical bids.
- (3) Agreeing to rotate bids.
- (4) Agreeing to share profits with a contractor who does not submit the low bid.
- (5) Submitting prearranged bids, agreed upon higher or lower bids, or other complementary bids.
- (6) Agreeing to set up territories to restrict competition.
- (7) Agreeing not to submit bids.

“Governmental agency.” The Commonwealth and any of its departments, boards, agencies, authorities and commissions, any political subdivisions, municipal corporations, home rule municipalities, school districts and any of their agencies, boards, commissions or authorities.

“Person.” Any individual, partnership, corporation, association or other entity organized for the purpose of doing business as a contractor, subcontractor or supplier.

Section 3. Prohibited activities.

(a) Bid-rigging unlawful.—It shall be unlawful for any person to conspire, collude or combine with another in order to commit or attempt to commit bid-rigging involving:

- (1) A contract for the purchase of equipment, goods, services or materials or for construction or repair let or to be let by a governmental agency.
- (2) A subcontract for the purchase of equipment, goods, services or materials or for construction or repair with a prime contractor or proposed prime contractor for a governmental agency.

(b) Simultaneous bids.—Notwithstanding other provisions of this act, it shall not be unlawful for the same person to simultaneously submit bids for the same work, or a portion thereof, as a proposed prime contractor and subcontractor.

(c) Fines and imprisonment.—Every person who violates this section commits a felony of the third degree and shall, upon conviction, be sentenced to pay a fine not to exceed \$1,000,000, if an entity other than an individual, or a fine not to exceed \$50,000, if an individual, or to serve a term of imprisonment for not more than three years, or both.

(d) Alternative civil penalty.—In lieu of criminal prosecution for violation of this section, the Attorney General may bring an action for a civil penalty. In this action, a person found by a court to have violated this section shall be liable for a civil penalty of not more than \$100,000.

(e) Disposition of fines and penalties.—Criminal fines and civil penalties collected under subsections (c) and (d) shall be paid into the State Treasury and deposited in the appropriate fund.

(f) Factors to be considered in determining fines, imprisonment or civil penalties.—In determining the appropriate sanctions to be imposed for a violation of this section, the court shall consider at least the following three factors:

- (1) The prior record and the number of previous violations.
- (2) The net worth of the person.
- (3) The size and amount of the contract involved.

(g) Civil actions not barred.—Any conviction or civil penalty imposed under this section shall not bar the governmental agency from pursuing additional civil actions and administrative sanctions.

(h) Limitation on prosecution.—No criminal prosecution under this section shall be brought against a person who has been previously charged by information or indictment with a criminal violation of the Federal antitrust laws, based upon the same allegedly unlawful conduct upon which a criminal prosecution under this act could be based, where jeopardy has attached under the Federal prosecution.

Section 4. Civil action and damages.

(a) Governmental agency to have right of action.—Any governmental agency entering into a contract which is or has been the subject of activities prohibited by section 3 shall have a right of action against the participants in the prohibited activities to recover damages.

(b) Options.—The governmental agency shall have the option to proceed jointly and severally in a civil action against any one or more of the participants for recovery of the full amount of the damages. There shall be no right to contribution among participants not named defendants by the governmental agency.

(c) Measure of damages.—The measure of damages recoverable under this section shall be the actual damages, which damages shall be trebled plus the cost of suit, including a reasonable attorney's fee.

(d) When cause of action arises.—The cause of action shall arise at the time the governmental agency which entered into the contract discovered, or

should have discovered, the conduct amounting to the offense declared to be unlawful by this act. The action shall be brought within four years of the date that the cause of action arose. No civil action shall be maintained after the expiration of ten years from the date the contract was signed by the parties.

(e) Conviction to be dispositive of liability.—Any conviction under section 3 shall be dispositive of the liability of the participants with the only issues for trial being the fact of damage and amount of damages.

Section 5. Suspension or debarment.

(a) Maximum suspension or debarment.—A governmental agency proceeding under its rules and regulations to exclude or render ineligible a person from participation in contracts or subcontracts based upon conduct prohibited by section 3 shall limit the exclusion or ineligibility to a period not to exceed the following time periods:

(1) Three years in the case of a person found for the first time to have engaged in this conduct.

(2) Five years in the case of a person found to have engaged in this conduct for a second or subsequent time.

(b) Lists of persons excluded.—A governmental agency that lets a contract by competitive bidding shall maintain a current list of persons excluded or ineligible by reason of suspension or debarment for participation in contracts or subcontracts with that agency and shall furnish a copy of the list upon request to a person considering the submission of a bid as a prime contractor or as a subcontractor.

Section 6. Liability for increased costs.

A person who enters into a contract with a governmental agency, either directly as a contractor or indirectly as a subcontractor, during a period of suspension or debarment imposed upon that person by that agency under its rules and regulations shall be liable to the governmental agency and to an eligible contractor for increased costs incurred as a result of replacing the excluded or ineligible person.

Section 7. Noncollusion affidavits.

Noncollusion affidavits may be required by rule of any governmental agency from all persons. Any such requirement shall be set forth in the invitation to bid. Failure of any person to provide a required affidavit to the governmental agency may be grounds for disqualification of his bid. Any required noncollusion affidavit shall state whether or not the person has been convicted or found liable for any act prohibited by State or Federal law in any jurisdiction involving conspiracy or collusion with respect to bidding on any public contract within the last three years. Any required noncollusion affidavit shall also state that a person's affidavit stating that the person has been convicted or found liable for any act, prohibited by State or Federal law in any jurisdiction, involving conspiracy or collusion with respect to bidding on any public contract within the last three years, does not prohibit a governmental agency from accepting a bid from or awarding a contract to that person, but may be a ground for administrative suspension or debarment in the discretion of a governmental agency under the rules and regulations of

that agency, or, in the case of a governmental agency with no administrative suspension or debarment regulations or procedures, may be a ground for consideration on the question whether such agency should decline to award a contract to that person on the basis of a lack of responsibility. The provisions of this section are in addition to and not in derogation of any other powers and authority of any governmental agency.

Section 8. Responsibility for enforcement.

(a) **Criminal prosecution.**—The Office of Attorney General and the district attorneys of the several counties shall have concurrent jurisdiction for the investigation and prosecution of violations of section 3.

(b) **Civil actions.**—The Office of Attorney General shall have the authority to bring civil actions under section 4 on behalf of the Commonwealth and any of its departments, boards, agencies, authorities and commissions. Political subdivisions, municipal corporations, home rule municipalities and school districts shall have the right to bring a civil action under section 4. Upon the filing of a complaint, a copy thereof shall be served on the Attorney General. The plaintiff, at any time, may request the Attorney General to act on its behalf. The Attorney General, upon determining that it is in the best interest of the Commonwealth, shall have the authority to intervene on behalf of the Commonwealth in such actions.

Section 9. Investigation.

(a) **Required attendance.**—Whenever the Office of Attorney General believes that a person may be in possession, custody or control of documentary material or may have information relevant to the subject matter of a civil investigation for the purpose of ascertaining whether a person is or has been engaged in a violation of this act, he may require the attendance and testimony of witnesses and the production of books, accounts, papers, records, documents and files relating to the civil investigation; and, for this purpose, the Attorney General or his representatives may sign subpoenas, administer oaths or affirmations, examine witnesses and receive evidence during the investigation. A request for information shall state the subject matter of the investigation, the conduct constituting the alleged violation which is under investigation and the provisions of this act applicable to the alleged violation. A request for documentary material shall describe the material to be produced with reasonable particularity so as to fairly identify the documents demanded, provide a return date within which the material is to be produced and identify the member of the Attorney General's staff to whom the material shall be given. In case of disobedience of a subpoena or the contumacy of a witness appearing before the Attorney General or his representative, the Attorney General or his representative may invoke the aid of a court of record of the Commonwealth, and the court may thereupon issue an order requiring the person subpoenaed to obey the subpoena or to give evidence or to produce books, accounts, papers, records, documents and files relative to the matter in question. Failure to obey an order of the court may be punished by the court as a contempt.

(b) **Confidentiality.**—No information or documentary material produced under a demand under this section shall, unless otherwise ordered by a

court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to, a person other than the Attorney General or his representative without the consent of the person who produced the information or material; except that the Attorney General or his representative shall disclose information or documentary material produced under this section or information derived therefrom to officials of a governmental agency affected by the alleged violation, for use by that agency in connection with an investigation or proceeding within its jurisdiction and authority, upon the prior certification of an appropriate official of the agency that the information shall be maintained in confidence other than use for official purposes. Under reasonable terms and conditions as the Attorney General or his representative shall prescribe, the documentary material shall be available for inspection and copying by the person who produced the material or a duly authorized representative of that person. The Attorney General or his representative may use such documentary material or information or copies thereof as he determines necessary in the civil enforcement of this act, including presentation before any court. Material which contains trade secrets or other highly confidential matter shall not be presented except with the approval of the court in which a proceeding is pending after adequate notice to the person furnishing the material.

(c) Limitation on use.—No criminal prosecution under section 3 may be brought by either the Attorney General or a district attorney based solely upon information or documents obtained in a civil investigation under this section.

Section 10. Applicability.

This act shall apply to all contracts with governmental agencies entered into on or after the effective date of this act.

Section 11. Effective date.

This act shall take effect in 60 days.

APPROVED—The 28th day of October, A. D. 1983.

DICK THORNBURGH