

Procurement Code Attorney Fee Award

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Scott Enterprises, Inc. v. City of Allentown, 142 A.3d 779 (Pa. 2016) — Pennsylvania Supreme Court held that a jury finding of bad faith does not mandate a trial court to award penalties and attorney fees under the Pennsylvania Procurement Code.

SUMMARY AND FACTUAL BACKGROUND

The City of Allentown contracted with A. Scott Enterprises, Inc., to construct a new public road. After arsenic-contaminated soil was discovered at the worksite, Allentown suspended work on the project. Following testing, it was determined construction could resume if precautions were taken. Allentown instructed ASE to obtain revised permits and to proceed with the project. However, the existing contract did not include terms regarding the potential for contaminated soil, despite the fact Allentown was aware there might be contamination prior to entering into the contract, and ASE declined to proceed, explaining it would incur substantial additional costs due to the contaminated soil. The parties made several attempts to reach an agreement in which ASE would continue the construction, but to no avail.

Consequently, ASE sued Allentown to recover its losses on the project, as well as interest and a statutory penalty and attorneys' fee award for violations of the prompt pay provisions of the Procurement Code. The Procurement Code is a statute that governs construction project contracting by public bodies, including school districts. Section 3935 of the Procurement Code provides that, upon a finding that payments have been withheld from a contractor by a public body acting in bad faith, the court may award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith and the contractor's attorneys fees.

After a trial, a jury found Allentown breached its contract with ASE and also withheld payments in bad faith. Despite this finding of the jury, the trial court declined to award penalties or attorneys' fees. ASE argued that the ruling effectively disregarded the jury's finding of bad faith. While acknowledging that the amount of a Procurement Code award is discretionary, ASE asserted that the trial court could not deny outright a penalty and fee award where bad faith was determined.

On appeal, the Pennsylvania Commonwealth Court agreed with ASE's interpretation of the Procurement Code, reasoning that the trial court's failure to award penalties and attorneys fees rendered the jury's finding of bad faith a meaningless exercise with no consequence. On further appeal, the Supreme Court disagreed with and reversed the Commonwealth Court's decision.

DISCUSSION

The Supreme Court concluded that, upon a finding of bad faith conduct by a public body, the award to a contractor of penalties and attorneys fees is discretionary, not mandatory, pursuant to the Procurement Code. The Supreme Court explained that "Although 'may' can mean the same as 'shall' where a statute directs the doing of a thing for the sake of justice, it ordinarily is employed in the permissive sense."

The court noted that the use of the term "may" within Section 3935 of the Procurement Code contrasts with a similar provision contained in the Contractor and Subcontractor Payment Act, a statute that governs prompt payment by contractors of their subcontractors. The relevant provision of CASPA states that a court "shall" award penalties and legal fees upon a finding of bad faith withholding, which the court noted indicated a deliberately different legislative intent.

The court stressed that its holding that Section 3935 does not mandate an award in every case where bad faith has been established does not mean a court can arbitrarily decline to issue an award. Thus, a court refusing to award penalties and legal fees must provide a rational basis for that decision. Furthermore, given the extreme conduct necessary to support a finding of bad faith, the court offered its observation that instances where a finding of bad faith is deemed not to require a Section 3935 award at all presumably will be rare.

PRACTICAL ADVICE

The Procurement Code requires that school districts comply with the payment terms established by their construction contracts. The withholding of monies from payments otherwise due to contractors must be justified by a contractor's failure of performance and be commensurate in amount with the actual loss or cost of correction resulting from the contractor's default. An arbitrary withholding of monies from a contractor payment or the withholding of an amount more than is required to protect the school district's interests can result in a finding of bad faith, for which the Procurement Code allows an assessment of penalties and legal fees.

Although the *Scott Enterprises, Inc. v. City of Allentown* decision establishes that the imposition of penalties and fees is within the discretion of the court, as cautioned by the Supreme Court, unique circumstances would be required to avoid such an award. Accordingly, the withholding of monies from payments otherwise due to contractors must be carefully weighed and calibrated in consideration of the extent and actual impact of a contractor's default.

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