

IC 4-13.6-7

Chapter 7. Bonding, Escrow, and Retainages

IC 4-13.6-7-0.1

Application of certain amendments to chapter

Sec. 0.1. The amendments made to this chapter by P.L.133-2007 apply only to public works contracts entered into after June 30, 2007. *As added by P.L.220-2011, SEC.37.*

IC 4-13.6-7-1

Application of chapter

Sec. 1. The director may apply the retainage provisions of this chapter to public works projects with an estimated cost less than the amount specified in section 2 of this chapter.

As added by P.L.24-1985, SEC.7. Amended by P.L.133-2007, SEC.2.

IC 4-13.6-7-2

Contract provisions for retainage of payments; escrow accounts and agreements

Sec. 2. (a) If the estimated cost of a public works project is one million dollars (\$1,000,000) or more, the division shall include as part of the public works contract provisions for the retainage of portions of payments by the division to the contractor, by the contractor to subcontractors, and for the payment of subcontractors and suppliers by the contractor. The contract must provide that the division may withhold from the contractor sufficient funds from the contract price to pay subcontractors and suppliers as provided in section 4 of this chapter.

(b) A public works contract and contracts between contractors and subcontractors, if portions of the public works contract are subcontracted, may include a provision that at the time any retainage is withheld, the division or the contractor, as the case may be, may place the retainage in an escrow account, as mutually agreed, with:

- (1) a bank;
- (2) a savings and loan institution;
- (3) the state of Indiana; or
- (4) an instrumentality of the state of Indiana;

as escrow agent. The parties to the contract shall select the escrow agent by mutual agreement. The parties to the agreement shall enter into a written agreement with the escrow agent.

(c) The escrow agreement must provide the following:

- (1) The escrow agent shall promptly invest all escrowed principal in the obligations that the escrow agent selects, in its discretion.
- (2) The escrow agent shall hold the escrowed principal and income until it receives notice from both of the other parties to the escrow agreement specifying the percentage of the escrowed principal to be released from the escrow and the persons to whom this percentage is to be released. When it receives this notice, the escrow agent shall promptly pay the designated

percentage of escrowed principal and the same percentage of the accumulated escrowed income to the persons designated in the notice.

(3) The escrow agent shall be compensated for its services as the parties may agree. The compensation shall be a commercially reasonable fee commensurate with fees being charged at the time the escrow fund is established for the handling of escrow accounts of like size and duration. The fee must be paid from the escrowed income of the escrow account.

(d) The escrow agreement may include other terms and conditions that are not inconsistent with subsection (c). Additional provisions may include provisions authorizing the escrow agent to commingle the escrowed funds held under other escrow agreements and provisions limiting the liability of the escrow agent.

As added by P.L.24-1985, SEC.7. Amended by P.L.22-1997, SEC.3; P.L.160-2006, SEC.4; P.L.172-2011, SEC.7.

IC 4-13.6-7-3

Amount of retainage withheld

Sec. 3. (a) To determine the amount of retainage to be withheld, the division shall elect one (1) of the following options:

(1) To withhold no more than six percent (6%) of the dollar value of all work satisfactorily completed until the public work is fifty percent (50%) complete, and nothing further after that.

(2) To withhold no more than three percent (3%) of the dollar value of all work satisfactorily completed until the public work is substantially complete.

(b) If upon substantial completion of the work there are any remaining uncompleted minor items, the division shall withhold, until those items are completed, an amount equal to four hundred percent (400%) of the value of each item as determined by the architect-engineer.

As added by P.L.24-1985, SEC.7.

IC 4-13.6-7-4

Payment of subcontractors and suppliers; certification of previous payments; incorrect certification

Sec. 4. (a) Within ten (10) days of receipt of any payment by the state or the escrow agent, the contractor or escrow agent shall pay each subcontractor and each supplier the appropriate share of the payment the contractor received based upon the service performed by the subcontractor or the materials received from the supplier.

(b) The contractor shall furnish to the division a sworn statement or certification at the time of payment to it that all subcontractors and suppliers have received their share of the previous payment to the contractor.

(c) If a contractor makes an incorrect certification, the department may do any of the following:

(1) Consider the incorrect certification a breach of contract and do any of the following:

- (A) Cancel the contract.
 - (B) Collect from the contractor all funds paid to the contractor under the contract.
 - (C) Exercise all of the state's rights set out in the contract.
- (2) Pursue remedies against the contractor for falsifying an affidavit.
- (3) Revoke the contractor's qualification under IC 4-13.6-4-13(b).
- (4) Use the incorrect certification as a basis for finding the contractor not responsible when awarding other contracts.
- As added by P.L.24-1985, SEC.7. Amended by P.L.5-1993, SEC.12.*

IC 4-13.6-7-5

Bid bonds

Sec. 5. (a) The director:

- (1) may require each contractor of a public works project with an estimated cost of not more than two hundred thousand dollars (\$200,000); and
- (2) shall require each contractor of a public works project with an estimated cost of more than two hundred thousand dollars (\$200,000);

to submit a good and sufficient bid bond with the bid. The bid bond may equal any percentage of the estimated cost of the public works project that the director requires.

(b) The division may accept bonds provided on forms specified by the department or on forms given by surety companies.

As added by P.L.24-1985, SEC.7. Amended by P.L.133-2007, SEC.3.

IC 4-13.6-7-6

Payment bonds

Sec. 6. (a) If the estimated cost of the public works project is more than two hundred thousand dollars (\$200,000), the division shall require the contractor to execute a good and sufficient payment bond to the department for the state in an amount equal to one hundred percent (100%) of the total contract price. The bond shall include at least the following provisions:

- (1) The contractor, its successors and assigns, whether by operation of law or otherwise, and all subcontractors, their successors and assigns, whether by operation of law or otherwise, shall pay all indebtedness that may accrue to any person on account of any labor or service performed or materials furnished in relation to the public work.
- (2) The bond shall directly inure to the benefit of subcontractors, laborers, suppliers, and those performing service or who may have furnished or supplied labor, material, or service in relation to the public work.
- (3) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of

the contract shall affect or operate to release or discharge the surety in any way.

(4) The provisions and conditions of this chapter shall be a part of the terms of the contract and bond.

(b) The division may permit the bond given by the contractor to provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal the total contract price.

(c) The division may accept bonds provided on forms specified by the division or on forms given by surety companies.

(d) The division shall hold the bond of a contractor for the use and benefit of any claimant having an interest in it and entitled to its benefits.

(e) The division shall not release sureties of a contractor until the expiration of one (1) year after the final settlement with the contractor.

(f) If the estimated cost of the public works project is less than or equal to two hundred thousand dollars (\$200,000), the director may require one (1) of the following:

(1) The contractor must execute a good and sufficient payment bond. The director may determine the amount of the bond to be any percentage, but no more than one hundred percent (100%), of the cost of the project.

(2) The division will withhold retainage under this chapter in an amount of ten percent (10%) of the dollar value of all payments made to the contractor until the public work is substantially completed.

As added by P.L.24-1985, SEC.7. Amended by P.L.14-1986, SEC.9; P.L.26-1989, SEC.13; P.L.22-1997, SEC.4; P.L.133-2007, SEC.4.

IC 4-13.6-7-7

Performance bonds

Sec. 7. (a) If the estimated cost of the public works project is:

(1) at least two hundred thousand dollars (\$200,000), the division shall; or

(2) less than two hundred thousand dollars (\$200,000), the division may;

require the contractor to execute a good and sufficient performance bond to the department for the state in an amount equal to one hundred percent (100%) of the total contract price.

(b) The bond required under subsection (a) shall include at least the following provisions:

(1) The contractor shall well and faithfully perform the contract.

(2) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of the contract shall affect or operate to release or discharge the surety in any way.

(3) The provisions and conditions of this chapter shall be a part

of the terms of the contract and bond.

(c) The division may permit the bond given by the contractor to provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal the total contract price.

(d) The division may accept bonds provided on forms specified by the division or on forms given by surety companies.

(e) The division shall not release sureties of a contractor until the expiration of one (1) year after the final settlement with the contractor.

As added by P.L.24-1985, SEC.7. Amended by P.L.26-1989, SEC.15; P.L.22-1997, SEC.5; P.L.133-2007, SEC.5.

IC 4-13.6-7-8

Final settlement with contractor

Sec. 8. (a) Except for amounts withheld from the contractor under section 3 of this chapter for uncompleted minor items, the division may make a full, final, and complete settlement with a contractor, including providing for full payment of all escrowed principal and escrowed income, within sixty-one (61) days following the date of substantial completion if:

- (1) the contractor has materially fulfilled all of its obligations under the public works contract;
- (2) the division has received no claims from subcontractors or suppliers under this chapter; and
- (3) the contractor has furnished satisfactory evidence showing full payment of all subcontractors and suppliers in the performance of the contract.

(b) After the division makes a final settlement with a contractor, all claims by subcontractors and suppliers to funds withheld from that contractor under section 2 of this chapter are barred.

As added by P.L.24-1985, SEC.7.

IC 4-13.6-7-9

Payment of subcontractors and suppliers by division; proration of claims; disputed claims

Sec. 9. (a) If a subcontractor or a supplier files a claim with the division under section 10 of this chapter, and the claim is undisputed, the division shall:

- (1) pay the claimant from the amounts retained from the contractor under section 2 of this chapter;
- (2) take a receipt for each payment; and
- (3) deduct the total amount paid to subcontractors and suppliers from the balance due the contractor.

(b) If there is not a sufficient amount owing to the contractor to pay all subcontractors and suppliers making undisputed claims under section 10 of this chapter, then the division shall prorate the amount withheld from the contractor and shall pay the prorated amount to each subcontractor and supplier entitled to a portion of the amount.

(c) If there is a dispute among the contractor, the subcontractors,

and the suppliers to the funds withheld by the division, the division shall retain sufficient funds until the dispute is settled and the correct amount to be paid to each person is determined. When the dispute is resolved, the division shall make payments to persons making claims as provided in this section.

As added by P.L.24-1985, SEC.7.

IC 4-13.6-7-10

Claims of subcontractors and suppliers; verification; notice to contractors and sureties; actions upon bond

Sec. 10. (a) In order to receive payment under section 9 of this chapter or to proceed against the bond of the contractor required under section 6 of this chapter, any subcontractor or supplier making a claim for payment on account of having performed any labor or having furnished any material or service in relation to a public works project must file a verified claim with the division within sixty (60) days from the last labor performed, last material furnished, or last service rendered. The claim shall state the amount due and owing to the person and shall give as much detail explaining the claim as possible. The division shall notify the contractor of any filed claims before taking action under section 9 of this chapter.

(b) In order to proceed against the bond of the contractor required under section 6 of this chapter, the claimant must notify the surety of the contractor by sending a copy of the claim required by subsection (a) to the surety company. The claimant shall also inform the division that the surety has been notified. The division shall supply the claimant with any information the claimant requires to notify the surety.

(c) The claimant may not file suit against the contractor's surety on the contractor's bond until the expiration of thirty (30) days after filing of the claim with the division. If the claim is not paid in full at the expiration of the thirty (30) day period, the claimant may bring an action in a court of competent jurisdiction in the claimant's own name upon the bond.

As added by P.L.24-1985, SEC.7.

IC 4-13.6-7-11

Limitation of actions against sureties

Sec. 11. Unless the bond provides a greater period of time, all suits must be brought against a surety on a bond required by this chapter within one (1) year after final settlement with the contractor under section 8 of this chapter. All suits against the surety after this time are barred.

As added by P.L.24-1985, SEC.7.

IC 4-13.6-7-12

Construction of chapter with other laws

Sec. 12. This chapter is intended to supplement all other laws protecting labor, subcontractors, or suppliers and shall not be construed as conflicting with them.

As added by P.L.24-1985, SEC.7.