

IC 5-16-5.5

Chapter 5.5. Retainage, Bonds, and Payment of Contractors and Subcontractors

IC 5-16-5.5-0.1

Application of certain amendments to chapter

Sec. 0.1. The amendments made to section 2 of 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.98.

IC 5-16-5.5-1

Definitions

Sec. 1. As used in this chapter:

"State agency" means the state of Indiana or any commission or agency created by law.

"Agent" shall include any board, commission, trustee, officer or agent which acts on behalf of a state agency.

"Public building", "public work" and "public improvement" or combinations thereof shall be construed to include all buildings, work or improvements the cost of which is paid for from public funds but shall not include highways, roads, streets, alleys, bridges and appurtenant structures situated on streets, alleys, railroad projects (as defined in IC 8-5-15-1) and dedicated highway rights-of-way.

"Substantial completion" shall be construed to mean the date when the construction of a structure or building is sufficiently completed, in accordance with the plans and specifications, as modified by any completed change orders agreed to by the parties, so that the state agency can occupy the structure or building for the use for which it was intended. Furthermore, the warranty period shall commence no later than the date of substantial completion.

"Contractor" shall mean any person, firm, limited liability company, or corporation who is party to a contract with a state agency to construct, erect, alter or repair any public building or is any way involved in public work or public improvement.

"Subcontractor" shall mean and include any person, firm, limited liability company, or corporation who is a party to a contract with the contractor and who furnishes and performs on-site labor on any public building, work or improvement. It also shall include materialmen who supply contractors or subcontractors as contained herein.

"Retainage" means any amount to be withheld from any payment to a contractor or subcontractor pursuant to the terms of a contract until the occurrence of a specified event.

"Escrowed principal" shall mean the value of all cash and securities or other property at the time placed in an escrow account.

"Escrowed income" shall mean the value of all property held in an escrow account over the escrowed principal in such account.

(Formerly: Acts 1972, P.L.44, SEC.1.) As amended by Acts 1977,

P.L.60, SEC.1; Acts 1981, P.L.57, SEC.12; P.L.8-1993, SEC.64; P.L.160-2006, SEC.5.

IC 5-16-5.5-2

Contracts governed by this chapter

Sec. 2. To the extent that this chapter is applicable, all contracts between a contractor and a state agency concerning any public building, work, or improvement entered into after May 1, 1972, and which contracts are in excess of two hundred thousand dollars (\$200,000) are to be governed by the provisions of this chapter, as are the rights and duties among the parties to the contract and any subcontractors who do any work under the contract. A state agency may elect to have a contract that is for not more than two hundred thousand dollars (\$200,000) be governed by this chapter. All contracts governed by the provisions of this chapter shall include provisions for the retainage of portions of payments by a state agency to contractors, by contractors to subcontractors, and for the payment of subcontractors.

(Formerly: Acts 1972, P.L.44, SEC.1.) As amended by P.L.25-1986, SEC.91; P.L.133-2007, SEC.6.

IC 5-16-5.5-3

Retainage; escrow agreement

Sec. 3. Any state agency which enters into a contract for any public building, work or improvement, and any contractor subcontracting portions of such contract, which contracts contain provision for retainage shall include in their respective contracts a provision that at the time any retainage is withheld, the state agency and/or contractor shall place such retainage in an escrow account, with a bank, savings and loan institution, or the State of Indiana or an instrumentality thereof, as escrow agent selected by mutual agreement between the affected contract parties, pursuant to a written agreement among the bank or savings and loan institution, the state agency, and the contractor as appropriate. The escrow agreement shall provide as follows:

(a) The escrow agent shall promptly invest all escrowed principal in such obligations as shall be selected by the escrow agent in its discretion.

(b) The escrow agent shall hold the escrowed principal and income until receipt of notice from the state agency and the contractor, or the contractor and the subcontractor, specifying the portion or portions of the escrowed principal to be released from the escrow and the person or persons to whom such portion or portions are to be released. Upon receipt of such notice the escrow agent shall promptly remit the designated portion of escrowed principal and the same proportion of then escrowed income to such person or persons.

(c) The escrow agent shall be compensated for its services as the parties may agree on a commercially reasonable fee commensurate with fees then being charged 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 agreement may include such other terms and conditions not inconsistent with the foregoing paragraphs (a), (b) and (c) including but not limited to provisions authorizing the escrow agent to commingle the escrowed funds with funds held pursuant to other escrow agreements and limiting the liability of the escrow agent.

(Formerly: Acts 1972, P.L.44, SEC.1.) As amended by Acts 1977, P.L.60, SEC.2.

IC 5-16-5.5-3.1

Escrow accounts; establishment and maintenance; fee; schedule

Sec. 3.1. The treasurer of state may charge a reasonable fee for services that the treasurer renders in connection with the establishment and administration of escrow accounts. If the treasurer charges such fee, the treasurer shall prepare a fee schedule and make it available to the contractor. Any fee must be paid by the contractor at the time the escrow account is established.

As added by P.L.69-1987, SEC.1.

IC 5-16-5.5-3.5

Retainage; options to determine amount

Sec. 3.5. (a) To determine the amount of retainage to be withheld, a state agency shall elect one (1) of the following options:

(1) Withhold no more than ten percent (10%) nor less 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) Withhold no more than five percent (5%) nor less 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, an amount computed under section 6 of this chapter shall be withheld until those items are completed.

As added by Acts 1980, P.L.33, SEC.1. Amended by P.L.133-2007, SEC.7.

IC 5-16-5.5-4

Performance bond; incremented bonding; release or discharge of surety

Sec. 4. At the time of entering into any contract covered by the provisions of this chapter, the contractor shall furnish a valid performance bond which is acceptable to the state agency involved in an amount equal to his total contract price. If it is acceptable to the state agency involved, this performance bond may provide for incremental bonding in the form of multiple or chronological bonds which, when taken as a whole, equal the total contract price. The surety on the bond shall not be released for a period of one (1) year after final settlement with the contractor. No change, modification, omission or addition in and to the terms or conditions of said

contract, plans, specifications, drawings or profile or any irregularity or defect in said contract or in the proceedings preliminary to the letting and awarding thereof shall in any way affect or operate to release or discharge the surety.

(Formerly: Acts 1972, P.L.44, SEC.1.) As amended by Acts 1978, P.L.15, SEC.3.

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Payment of subcontractor; certification of receipt

Sec. 5. Within ten (10) days of the receipt of any payment by the state agency or escrow agent, the contractor or escrow agent shall pay all subcontractors with whom he has contracted their share of the payment the contractor received based upon the service performed by the subcontractor. The contractor shall furnish upon request a sworn statement or certification at the time of payment to him that the subcontractor has received his share of the previous payment to the contractor. The making of an incorrect certification may be considered a breach of contract by the state agency, and it may exercise all of its prerogatives set out in the contract in addition to the remedies for falsifying an affidavit. Such an action may also result in a suspension of prequalification with the certification board established under IC 4-13.6-3-3.

(Formerly: Acts 1972, P.L.44, SEC.1.) As amended by P.L.33-1983, SEC.16; P.L.24-1985, SEC.15.

IC 5-16-5.5-6

Payment of contractor; uncompleted minor items

Sec. 6. The contractor shall be paid in full including all escrowed principal and escrowed income by the state agency and escrow agent within sixty-one (61) days following the date of substantial completion, subject to IC 1971, 5-16-5. If at that time there are any remaining uncompleted minor items, an amount equal to two hundred percent (200%) of the value of each item as determined by the architect-engineer shall be withheld until said item or items are completed.

(Formerly: Acts 1972, P.L.44, SEC.1.)

IC 5-16-5.5-7

Suit against surety; time limitation

Sec. 7. All suits must be brought against a surety on a bond required by this chapter within one (1) year after the completion of the work or service in question.

(Formerly: Acts 1972, P.L.44, SEC.1.)

IC 5-16-5.5-8

Conflicting laws

Sec. 8. This chapter shall not be construed as conflicting with any other laws for the protection of labor, subcontractors or materialmen, but is supplemental thereto.

(Formerly: Acts 1972, P.L.44, SEC.1.)

