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May 16, 2006

OFFICIAL OPINION 2006-1

Honorable Connie Kay Nass
Auditor of State
Statehouse, Room 240
200 W. Washington Street
Indianapolis, Indiana 46204

Re: Ind. Code 4-13-2-14.8

Dear Auditor Nass:

You requested guidance concerning several matters related to Ind. Code section 4-13-2-14.8, which states in part:

(a) Notwithstanding any other law, rule, or custom, but subject to subsections (c) and (d), a person who has a contract with the state or submits invoices to the state for payment shall authorize in writing the direct deposit by electronic funds transfer of all payments by the state to the person. The person's written authorization must designate a financial institution and an account number to which all payments are to be credited.

The statute provides for a waiver of the requirement for a person who has no bank account and cannot open one without being charged a fee. The statute also provides for a waiver if the person's bank is unable to accept an electronic deposit.

You raised the following questions:

- (1) If the state is unable to make payment to a vendor because the vendor fails to submit information necessary for direct deposit, is the state liable for late payment penalties or interest?
- (2) Does section 4-13-2-14.8 require a local governmental unit that requests payment from the state to agree to payment through an electronic funds transfer?



(3) Does section 4-13-2-14.8 require a state employee who requests reimbursement for travel expenses incurred while on traveling on state business to agree to payment through electronic funds transfer?

Brief Answer

(1) The state is not liable for late payment penalties or interest if the vendor fails to provide the information necessary for an electronic funds transfer.

(2) A local governmental unit is a "person" for purposes of section 4-13-2-14.8, so the local government unit must agree to direct deposit of payments due under a contract or for an invoice, unless the unit qualifies for a waiver of this provision.

(3) A state employee seeking reimbursement for travel expenses incurred while traveling on state business is a person submitting invoices for purposes of section 4-13-2-14.8, so the employee must agree to direct deposit of payments for reimbursement, unless the employee qualifies for a waiver.

Analysis

(1) Liability for late payment penalties or interest

Section 4-13-2-14.8(a) states that "a person who has a contract with the state or submits invoices *shall* authorize in writing the direct deposit by electronic funds transfer of all payments by the state to the person." (emphasis added.) Subsection (b) of the statute states "[a]fter obtaining the authorization required by subsection (a), the auditor of state shall deposit a payment to the person in the financial institution and account designated by the person each time a payment is made to the person." The plain language of the statute requires that a person to whom the statute applies must authorize payment by direct deposit, and requires the auditor to deposit a payment to the person *after* the person has submitted the necessary authorization. In interpreting a statute, the express language controls. *Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572, 575 (Ind. 2001). The term "shall" is a mandatory term unless the context or purpose of a statute makes it clear that the legislature intended another meaning. *Sholes v. Sholes*, 760 N.E.2d 156 (Ind. 2001). The statute clearly requires those seeking payment to authorize direct deposit by electronic funds transfer, unless they receive a waiver.

Penalties for late payments of amounts due on public contracts are governed by Indiana Code section 5-17-5-1, which imposes a penalty of one percent (1%) per month when the state or a political subdivision fails to make timely payment. That statute defines timely payment in terms of payment by check or warrant. Section 5-17-5-1(b) states:

(b) Except as provided in subsection (c), for the purposes of this section, payment is timely if:

(1) a check or warrant is mailed or delivered on the date specified for the amount

specified in the applicable contract documents, or, if no date is specified, within thirty-five (35) days of:

- (A) receipt of goods and services; or
- (B) receipt of a properly completed claim.

(2) for any amount required to be withheld under state or federal law, a check or warrant is mailed or delivered in the proper amount on the date the amount may be released under the applicable law.

Although section 5-17-5-1 refers to payment by check or warrant, it also applies to payment by electronic funds transfer. Ind. Code section 26-1-4.1-406(b) provides that if payment is made by electronic funds transfer to satisfy an obligation, the obligation is discharged to the same extent that it would be if payment had been made in money. The electronic payment takes place for this purpose at the time the payee's bank accepts the payment order from the party making the payments. Therefore, the obligation to make timely payment imposed by section 5-17-5-1 is satisfied if the contractor's bank accepts the payment order within thirty-five days of receipt of a properly completed claim.

Section 5-17-5-1 does not impose a penalty for payments that are delayed due to the contractor's failure to authorize direct deposit because no payment is due to a contractor until direct deposit is authorized. Ind. Code section 4-13-2-7(2) requires the auditor to approve claims and issue warrants or authorize electronic payment if the claims are "legal, correct, and proper." Payments made for contracts or invoices submitted to the auditor on or after July 1, 2006 are directed by law to be paid by electronic funds transfer unless a waiver is granted. If a claim must be paid by electronic funds transfer under section 4-13-2-14.8, but the contractor fails to authorize electronic funds transfer, the claim is not "legal, correct, and proper," and it cannot be paid. Therefore, there is no "amount due" under section 5-17-5-1, nor is the claim properly completed. Section 5-17-5-1 expressly states that the thirty-five day time limit for claims payment begins when a properly completed claim is received. If a contractor fails to authorize the direct deposit as required by section 4-13-2-14.8, the claim is not "properly completed," so the thirty-five day deadline does not apply.

(2) Application of Section 4-13-2-14.8 to local government units

Section 4-13-2-14.8 requires "a person who has a contract with the state or submits invoices to the state for payment" to authorize payment by electronic funds transfer. A local government unit is a "person" for purposes of section 4-13-2-14.8. Ind. Code section 1-1-4-5 lists definitions that "apply to the construction of all Indiana statutes, unless the construction is plainly repugnant to the intent of the general assembly or of the context of the statute." Section 1-1-4-5 provides that "'person' extends to bodies politic and corporate." A municipal corporation is a body politic and corporate. 56 Am. Jur. 2d, *Municipal Corporations, Etc.* §1 (2005). Under Indiana law, municipal corporations include counties, municipalities, and townships, as well as school corporations, library districts, and other entities.¹

¹ Ind. Code section 36-1-2-10 defines a municipal corporation as a "unit, school corporation, library district, local housing authority, fire protection district, public transportation corporation, local building authority, local hospital authority or corporation, local airport authority, special service district, or other separate local governmental entity

Governmental entities will not be considered "persons" for purposes of statutes imposing criminal liability or treble damages. *See generally Brownsburg Community School Corporation v. Natore Corporation*, 824 N.E. 2d 336 (Ind. 2005). Section 4-13-2-14.8 imposes no criminal or punitive liability on local government units. It requires only that they authorize payments by electronic funds transfer. Therefore, there is no indication that the legislature did not intend section 4-13-2-14.8 to apply to local units of government.

Section 4-13-2-14.8 does not conflict with Ind. Code 4-8.1-2-7(c), regarding the duties of the state treasurer in payment of state funds. Section 4-8.1-2-7(c) provides:

If a political subdivision (as defined in IC 36-1-2-13) elects to receive distributions from the state or if a state employee elects to have wages deposited directly in a financial institution under IC 4-15-5.9-2 by means of an electronic transfer of funds, the treasurer of state shall have the funds transferred electronically.

Section 4-13-2-14.8 applies notwithstanding any other statute, therefore it requires political subdivisions to elect to receive payments by electronic funds transfer if those payments are made under a contract or as payment for an invoice. It applies to parties who contract with the state or "submit invoices." It would not require electronic funds transfer for payments that are not made pursuant to a contract or invoice. Therefore, local government units receiving payments from the state that are not pursuant to a contract or as payment of an invoice would continue to have the option of electing electronic funds transfer or a warrant under section 4-8.1-2-7. Neither does section 5-13-5-5, regarding the investment of public funds, conflict with section 4-13-2-14.8. Section 5-13-5-5 allows a political subdivision to transact business through the use of electronic funds transfer, and describes the process for authorizing electronic funds transfer.² It does not contain any language that could be interpreted to exempt political subdivisions from the requirements of section 4-13-1-14.8.

"Invoice" is not defined for purposes of section 4-13-2-14.8. Section 1-1-4-1 provides that "words and phrases shall be taken in their plain, or ordinary and usual, sense." Courts may consult English language dictionaries to ascertain the plain and ordinary meaning of a statutory term. *Kiel Bros. Oil Co., Inc. v. Ind. Dept. of Envtl. Mgt.*, 819 N.E.2d 892, 902 (Ind. Ct. App. 2004). The dictionary defines "invoice" as "an itemized statement furnished to a purchaser by a seller and usually specifying the price of goods or services and the terms of sale." Webster's Third New International Dictionary 1190 (1993). Black's Law Dictionary defines "invoice" as

that may sue and be sued. The term does not include special taxing district." Ind. Code section 36-1-2-23 defines "unit" as a county, municipality, or township.

² Sec. 5. Ind. Code 5-13-5-5 states:

(a) The fiscal body of any political subdivision may by ordinance or resolution authorize the proper legal officers of the political subdivision to transact the political subdivision's business with a financial institution or a retirement fund administered by the public employees' retirement fund through the use of electronic funds transfer.

(b) The ordinance or resolution must:

- (1) specify the types of transactions that may be conducted by electronic funds transfer; and
- (2) require the proper officers to maintain adequate documentation of the transactions so that they may be audited as provided by law.

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“an itemized list of goods or services furnished by a seller to a buyer, usually specifying the price and terms of sale; a bill of costs.” Black’s Law Dictionary 846 (8th ed. 2004).

Many claims submitted to the auditor may be “invoices”. In fact, the terms “invoice” and “claim” are used synonymously elsewhere in the Indiana Code. For example, section 5-11-10-1.6(b), dealing with issuance of warrants or checks by the fiscal officer of a governmental entity defines “claim” as “a bill or an invoice submitted to a governmental entity for goods or services.” Similar language is used in section 36-5-4-6 (payment of claims by towns) and section 36-4-8-7 (claims against a city).

In some cases, it may not be clear whether a claim is an “invoice” for purposes of section 4-13-2-14.8. In those cases, the auditor should be permitted to determine whether a claim is an “invoice” which must be paid by electronic funds transfer. “An interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.” *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000).

(3) Application of Section 4-13-2-14.8 to state employee travel reimbursement claims

A state employee is clearly a “person.” The question is whether a state employee submitting a claim for reimbursement of travel expenses is “a person who has a contract with the state or submits invoices to the state for payment.” As discussed above, an invoice is an itemized list of goods or services furnished by a seller to a buyer, specifying the price and terms of sale. A travel claim is an itemized list of goods and services for which payment is sought, therefore it can be considered an invoice for purposes of section 4-13-2-14.8. Although a state employee is not obviously a “seller” of travel services, the state pays the employee for travel expenses incurred while on state business. In effect, the state purchases the travel services. The employee submits an itemized bill detailing the expenses for which payment is requested. Itemized claims are required by statute and state policy. See Ind. Code §4-10-11-2 and Chapter 9, Indiana Department of Administration Financial Management Circular: 2003-1, January 1, 2004 available at http://www.in.gov/idoa/travel/travel_policy.pdf. A state employee submitting a travel reimbursement claim is a person submitting an invoice to the state for payment; therefore section 4-13-2-14.8 requires the employee to authorize direct deposit of the payment for the claim.

Sincerely,



Stephen Carter
Attorney General

Donna Stolz Sembroski