

# Testimony before Sustainable Water Infrastructure Task Force

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Infrastructure Needs  
Financing Today and Tomorrow  
Efficient Use of Available Funds

May 22, 2008

Presented By: Timothy D. Greenland of Greenland Construction, Inc.  
representing Pennsylvania Utility Contractors Association

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## Opening Remarks

Good afternoon, my name is Timothy Greenland. I am the current President of the Pennsylvania Utility Contractors Association (PUCA), which represents sewer and water contractors and suppliers across the state of Pennsylvania. I am also the CEO and part owner of Greenland Construction, Inc. We are a utility pipeline contractor specializing in water and sewer lines, treatment plants and pumping stations throughout much of Pennsylvania. We are currently in our 33rd year of business and we employ approximately 75 to 100 individuals. I appreciate this opportunity to offer testimony on Pennsylvania's critical need to find a solution for its water and sewer infrastructure needs.

I would also like to mention that representatives of this Task Force received testimony on May 8<sup>th</sup>, 2008 from Mr. Bruce Hottle who also represents PUCA. I concur with his testimony and appear here today in support of it.

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Throughout my 30 years of experience managing the construction of public contracts I have worked with numerous boroughs, townships and municipalities throughout our State as well as their professional engineers and representatives from various State agencies. I have been involved in several multiple contractor projects working along side many of my competitors which has helped me gain a broader insight into the most common problems encountered by all within our industry. I hope that my testimony will, in some way, assist the Task Force in fulfilling the charge given them by the Governor.

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Timothy D. Greenland  
Greenland Construction, Inc.

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## Infrastructure Needs

Our need for clean water and the effective collection and treatment of waste is fast approaching crisis level in the state of Pennsylvania. Some would argue that crisis level was reached years ago and is deepening with each passing day. The truth is that our needs are great but our available funding remains scarce at best.

The number of communities with failing or substandard water and wastewater systems is increasing for a variety of reasons. A good number of these systems were built many years ago and have been in operation much longer than originally intended. They are mechanically worn out. Some systems have experienced failure due to the lack of adequate maintenance, in most cases due to the unavailability of local funds to perform proper maintenance. Other systems are inadequate today simply because effluent standards have increased beyond the capability of yesterday's technology. In many areas of the State, expansion of the user base has pushed old treatment

facilities to their limit forcing a moratorium on new residential, commercial and industrial construction which acts to stall economic growth in the State. Many systems in use today have failing collection and interceptor pipe lines that allow ground water and runoff from rain events to infiltrate causing huge increases in flows that exceed the treatment capacity of the already failing plants. Some of these pipe line systems built many years ago were designed as combined sanitary-storm water systems with built in overflow provisions. When the sanitary sewer becomes overloaded, raw sewage spills into the storm water system and flows directly untreated into our rivers and streams and eventually into the very water we use for consumption.

There are many communities still without managed water and sewer systems. Some contain private sewer lines installed long ago without adequate septic systems. Of those constructed with septic systems, many are failing. Both result in raw sewage spilling into our water source, and in some cases, visibly running through storm water systems and open ditches. This contributes to contamination of our fresh water supply which requires the use of additional funding to provide clean, safe water for consumption.

The 2004 Clean Water Needs Survey Report to Congress by the U.S. Environmental Protection Agency documented that the 20-year capital investment need for Pennsylvania's publicly owned water and sewer infrastructure was more than \$20 billion dollars. With the recent sharp increases in the cost of oil and major construction materials, the annual increase of our unfunded needs is rising at an exponential rate. The longer we wait to institute an effective solution, the greater our chance of failure.

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## Financing, Now and in the Future

There are currently four main sources of funding available in Pennsylvania for water and sewer infrastructure projects: the Pennsylvania Infrastructure Investment Authority (PENNVEST), the federal Rural Utilities Service (RUS), the US Army Corps of Engineers and local government bond issues.

Of these sources, PENNVEST has been the most viable and successful because it is structured as a State Revolving Fund allowing it to be, at least, partially self sustaining. RUS funds are available as loans at a rate of 4% and grants are

only available on a restricted basis. Grants through the Corps of Engineers are extremely difficult to obtain and their availability has been diminishing. Many communities, especially the smaller ones in rural Pennsylvania, do not have the financial strength or expertise to issue bonds to fund their infrastructure needs.

PENNVEST was created as a result of the Clean Water Act, more formerly known as the Federal Water Pollution Control Act which provided federal funds to seed the Clean Water State Revolving Fund (SRF), required State matching funds and mandated that the future principal and interest payments from borrowers would be returned to the fund to be made available for future water and sewer infrastructure projects. The achievement of self sustainability allows the State to eventually leverage every federal dollar into the future, theoretically increasing the funds available as time goes by. However, the theory depends on two critical factors: an initial level of federal funds high enough to overcome the amortization of the infrastructure needs, and a commitment to federally fund the program consistently from year to year, foregoing the urge to cut funding in times of national economic downturn.

In recent years, the annual funding available through PENNVEST has decreased from \$320 million in loans and grants to \$262 million, due mostly to reductions in federal funds. At this rate, the total funding available from PENNVEST on an yearly basis will not even cover the annual rate of construction cost inflation. We are effectively leveraging our crisis to higher levels with each passing day.

Earlier this year, PUCA hosted an informational event in Harrisburg at which we assembled a panel of state and federal experts in the water and sewer infrastructure funding arena. Included were top representatives from PENNVEST, the Pennsylvania Department of Environmental Protection, PennFuture, the Clean Water Council, the Senate Minority Environmental Committee, the House Majority Finance Committee and the California University of PA - Institute for Law and Public Policy. The presentations of these esteemed panelists acknowledged the crisis situation that exists in Pennsylvania and warned against the perils of depending too heavily on federal funding which has been decreasing and is expected to continue to trend downward in the foreseeable future.

Recognizing the need for a sustainable funding source at the time PENNVEST was instituted, PUCA promoted the idea of a



Clean Water Trust Fund to operate through and in conjunction with PENNVEST to provide additional, self sustaining funds to insure the success of the SRF.

Today, we continue to present and promote this initiative as a major component of the funding solution for the future. The Clean Water Trust Fund will provide a self sustaining funding source that is dedicated solely to the water and sewer infrastructure needs of Pennsylvania. This would generate an estimated \$240 million dollars annually by instituting a user fee for all public water and waste water systems at a rate of 20 cents per thousand gallons of usage. This would amount to a charge of \$2.00 per average household. Under the proposal, one-third of the funds collected would remain with the local municipality or authority to be accumulated for use as the local community's portion of funding for solving water and waste water problems in that community. The balance of the funds collected would go into a trust fund that would be distributed through PENNVEST, an agency already equipped to process such funds, for statewide water and sewer infrastructure projects. One half of the trust fund contributions would be distributed as grants to enable the residents of Pennsylvania's communities to more easily afford the present cost of construction. The other half would be

placed into revolving loan funds to be distributed to local municipalities at a favorable rate of interest. Repayments to the trust by the borrowers would increase funds available in the trust for future infrastructure needs.

It is critical that legislation be passed to adopt this Clean Water Trust Fund Initiative to insure the proper distribution and use of the generated funds and to prevent diversion of the funds for other purposes. The fact that these new funds would be channeled through PENNVEST offers solid assurance of this since a new bureaucracy would not be necessary to manage this new flow of funding. The data required data collection system is already in place which would enable the Trust Fund to begin almost immediately. I encourage you to take a close look at the Clean Water Trust Fund legislation proposed by PUCA as a major viable, self sustaining part of the solution to our critical clean water infrastructure needs.

There are some municipalities in the Commonwealth that would argue they can readily satisfy their own local needs through institution of rate increases on their own user base. Most of these have not truly considered the full cost, including long term maintenance needs, necessary not only to

retrofit and sustain existing systems, but to also allow for future expansion needs. Statewide assessment of the most critical needs, together with application of statewide funding sources to those needs will result in the lowest possible cost to each locality receiving funds under the Clean Water Trust Fund Initiative. PENNVEST is already capable of distributing funds on a prioritized, as needed basis.

Pennsylvania is unique among many states with regards to the availability of fresh water. If we do not develop the best way to collect it, treat it, protect it from contamination and distribute it to the end users we will unnecessarily forego our potential for economic growth.

Attached to this testimony is a summary of the PUCA Clean Water Trust Fund initiative for your review and consideration.

It is time for Pennsylvania to realize and acknowledge that we cannot continue to depend on federal solutions to local problems. It is time for Pennsylvania to take legislative action to correct its water and sewer infrastructure needs and devise a plan for the future of the Commonwealth.

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## Efficient Use of Available Funds

In addition to the creation of new, self sustaining sources of funding, the solution to our water and sewer infrastructure needs now and in the future must include corrective measures to insure the efficient and effective use of all available public funding.

You may be shocked to learn that the current methods of administering public works projects for water and sewer infrastructure projects in Pennsylvania result in substantial waste of what precious little funding that is available. Without the adoption of corrective measures, the amount of waste will grow even larger if funding is increased from new sources. It is estimated that at least 10% of the current expenditures for water and sewer infrastructure projects is lost due to our Sales Tax Code, our antiquated public works Procurement Code, our current Disadvantaged Business Enterprise program requirements and the lack of standardized contract documents.

As inconceivable as it may seem, Pennsylvania, while constantly struggling to provide enough funds just to keep

pace with construction cost inflation on water and sewer infrastructure projects, imposes and collects sales tax on many of the materials and services incorporated into these projects. Under current regulations, all materials used in the construction of buildings or other permanent improvements to real estate for water or sewage treatment facilities are subject to the 6% sales tax, even though they are necessary to house tax exempt water or sewer treatment and processing equipment. The installation of new storm water systems, even those projects designated to remove sewage overflows from entering our rivers and streams are subject to sales tax. The large number of contractors who primarily build the water and sewer treatment plants, pumping stations and pipe lines are required to pay tax on the equipment and tools necessary to perform that work. The tax assessed on these costs is included in the bid prices for public works projects in Pennsylvania. With the cost of equipment and tools for even a small to mid size contractor in the millions of dollars, together with the cost of materials and services expended on water and sewer treatment plant and storm water projects throughout the State, the amount of sales tax collected is a direct diversion of badly needed water and sewer infrastructure funds. Why do we collect sales tax on the expenditure of publicly collected funds? This is clearly an

inefficient use of public funds. PUCA has promoted broad tax exemptions for public works projects and I encourage the Task Force to explore the savings associated with this initiative.

Another major waste of currently available funding for our public works water and sewer infrastructure projects is the direct result of our outdated Procurement Code. Act 57 of 1998 combined various procurement legislation into a new Commonwealth Procurement Code but failed to update the individual pieces of legislation to include necessary technical corrections or to include language needed to conform to the Federal Acquisition Regulations (FARs) or commonly accepted standards in private contracts for similar work such as the American Institute of Architects (AIA) or the Engineer's Joint Contract Documents Council (EJCDC).

Over the years, PUCA has promoted revisions to the Procurement Code which have evolved through Senate Bill 770 of 2003 and House Bill 652 of 2005 into our current initiative that includes 15 proposed changes designed to provide fairer, more consistent public works contract language that will encourage more competitive bidding and result in lower project costs on a statewide basis. Details of the proposed

initiative are contained within the documents attached to this testimony. To briefly summarize, the changes provide for:

1. Extension of time for reasons beyond the control of the contractor.
2. Handling of concealed or unknown conditions encountered in a contract - to mirror provisions in the Federal Acquisition Regulations (FARs)
3. Revised limits for contract retainage.
4. Return of one-half retainage at 50% completion will not be unreasonably withheld.
5. Construction financing plans including interim financing to be prepared prior to the bid.
6. Consistent monthly payments to the contractor and provisions for interest on late payments.
7. Award of penalties (already provided for under the current legislation) shall be awarded in cases where the local government unit improperly withheld payment.
8. Mandatory notice to bidders when the local government unit contract is not subject to the Code.
9. Value engineering suggestion programs.
10. Assurance that an architect or engineer employed by the local government unit will perform as required under the Code.

11. Disputes by the contractor or local government unit may be resolved by the use of expedited arbitration.
12. Payment of amounts withheld for completion of minor items.
13. Choice of arbitration procedures shall be the choice of the claimant.
14. Disputes to be submitted to mediation by either party.
15. Architects and engineers shall be the representative of the local government unit and they shall be impartial and carry out their duties in a competent manner.

Many of these changes merely propose to update Pennsylvania's Code to mirror federal provisions, contract practices already established or upheld by the Courts and standards currently adhered to voluntarily by the private sector.

To further understand the proposed changes, consider that the very nature of the competitive bidding process for public works contracts in Pennsylvania results in non-negotiable contracts for the bidders. By submission of its bid, the bidder is bound by all terms contained within the contract



specification book and the project drawings. Unlike the private sector where the terms of the contract, and therefore the price offered, are negotiable prior to entering into the construction agreement, the bidder's only technical recourse on a public works project is to not offer a bid and thereby forego the opportunity for a chance to perform the work. With the lack of non standardized contract documents in our public works projects and the practice of some local municipal authorities or their professional engineers to include contract provisions that put the contractor at a disadvantage, the only way for a contractor to survive in the public works market is to accept risks that far exceed those in the private sector. Because prices are fixed at the time of bid receipt and contracts are not negotiable after the bids are opened, bidders are necessarily forced to calculate their added risk and include contingency dollars in their respective bids to protect their financial interests. Again, due to contract provisions that are non negotiable and which are not regulated by State legislation, many authorities or their professional engineers craft language to assign the cost of these added risks as "inclusive" to the contract, allowing no separate measurement of the item for payment to the contractor should the risk actually be encountered during construction. This practice results in the municipal authority paying the

contractor's full contingency price even if the risk never materialized during construction. If the authority would accept the risk that is rightfully theirs, they would only incur the cost of risks that actually occur. If you give a contractor fair contract language and pay him on time, in turn, he will offer the most competitive pricing he can. On a statewide basis, this would substantially reduce the cost of water and sewer infrastructure projects.

In my 33 years of experience in this industry sector, I have administered many contracts containing provisions so unfair that which, if contained in private sector contracts, would have certainly resulted in no bids being offered for the work. I have even encountered public works contract language that, while in clear and direct violation of the current Procurement Code, was considered to be valid by the project engineer simply because they chose to write it into the contract. How can anyone expect to receive competitive bid pricing in such an environment?

For more detailed information regarding my personal experiences under the current Procurement Code, I would invite the members of the Task Force to obtain and review a copy of

my testimony on House Bill 652 of 2005 offered on August 10, 2005. I would be happy to provide copies upon request.

If contract documents, including specifications, standard drawing details, measurement and payment provisions and line item bid schedules were standardized for all public works projects at the local government level, very substantial savings would be experienced.

The attached flowchart depicts forms of standardization existing at the various levels of private and public construction projects. All governing regulators in both the private and public construction sectors adhere to standards with the exception of local government units. They do so because they have learned that standardization results in lower overall project costs when risk is properly assigned and confusion is eliminated for the contractors offering bids. Standardized contract documents encourage more competitive bidding by allowing contractors to base their prices for a particular project on their ability to obtain certain levels of production rather than by forcing them to assume undue contract risks and to essentially exercise clairvoyance in the computation of their bid.

If standardized contract documents are developed for public works projects at the local government unit level, it is imperative that legislation be enacted to compel all local government units utilizing public funds, and their professional engineers, to comply with the standards. Otherwise, they will not be utilized and the time and cost expended to produce them will have been wasted.

I would like to offer comments on one final cost reduction strategy for water and sewer infrastructure projects. The current Disadvantaged Business Enterprise program (DBE/MBE/WBE) adds unnecessary cost to public works projects and does not appear to be accomplishing its original goal.

All bidders on projects federally funded under the PENNVEST Clean Water and Drinking Water State Revolving Fund loan programs are required to demonstrate their good faith efforts with detailed documentation showing compliance with the DBE requirements. These good faith efforts must occur prior to the bid opening and often times result in the mandatory submission of hundreds of pages of documentation with each bid offered. Countless hours are spent by staff personnel for bidders, municipal authorities, their professional engineers

and State regulatory agencies to comply, report and review performance under the program. Bidders ultimately include these costs in their bid prices for the project.

The program seeks to encourage participation of disadvantaged businesses through the award of subcontracts for construction related services and/or the procurement of materials and supplies. To be deemed truly successful, the end result should be the eventual transformation of disadvantaged businesses into thriving, competitive companies that no longer need to rely on the DBE program to participate in the publicly funded construction marketplace. This can occur only if they are trained and/or mentored to successfully compete under free market rules and they are required to meet performance standards along the way to eventually exit the program. Instead of accomplishing this, the current program requires the market rules to be changed with respect to conducting business with disadvantaged firms. As a result, DBE firms are rarely competitive enough to win subcontracts and/or purchase orders and are thereby restricted from participation in the public contract. And, they do not receive the necessary training and experience to exit the program and function as a competitive business.

PUCA proposes an overhaul of the current DBE program to focus on training. The dollars currently being spent and wasted for administration by government agencies and for compliance by bidders and municipal authorities could be much more efficiently utilized for teaching disadvantaged businesses how to function and compete in our economy.

Educational efforts must also be directed towards municipal authorities and other local government units, especially those in small rural communities that may have never administered a major public works project, and towards their professional engineers and solicitors. Many lack the experience to properly and efficiently administer public works contracts which can lead to unnecessary contract disputes adding substantial litigation costs that further stress available funding, increase user rates and delay other projects from being constructed.

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## Closing

Contractor and associate members of the Pennsylvania Utility Contractors Association have long promoted the ideas

presented within this testimony. The unique perspective gained by our collective years of experience within the public works water and sewer infrastructure market leads us to believe that our ideas and suggestions can play a major role in preparing Pennsylvania for the future. However, since we operate in the public arena, they will remain just 'ideas and suggestions' unless the legislature takes action to:

1. provide dedicated, self sustaining sources of funding;
2. amend the Sales Tax Code to allow full exemption;
3. revise our outdated Procurement Code;
4. reform inefficient processes such as the DBE program;
5. adopt standardized contract documents;
6. and provide for contract administration education.

PUCA stands ready to provide any assistance the Task Force desires as it works towards water and sewer infrastructure solutions that will increase the health and safety of the Commonwealth's residents and spur economic growth by allowing Pennsylvania to collect, protect and deliver one of its most precious resources, clean water.

Thank you for your time and attention. If you wish, I will attempt to answer any questions you may have regarding my testimony.



# CLEAN WATER TRUST FUND

For more information, please call Brenda Reigle, Executive Director at PUCA at 717.234.8055 or [ed@puca.org](mailto:ed@puca.org).

## WHAT IS THE CLEAN WATER TRUST FUND?

The Clean Water Trust Fund is a perpetual fund that would generate over \$200 million annually in grants and loans for water and sewer projects. The program is a pay-as-you-go proposal rather than a state bond proposal.

## HOW WOULD FUNDING BE PROVIDED?

A user fee of 20 cents per 1000 gallons would be applied to the water meter of treatment facilities for water and sewer. The average cost per household would be \$2 per month (combined water & sewer).

## HOW WOULD THE FUNDING BE DIVIDED?

Thirty-five percent (35%) of the fee collected would be retained by the public utility and deposited into an escrow account for capital improvement projects. Sixty-five percent (65%) of the fee imposed would be credited to the Clean Water Trust Fund in PENNVEST. Thirty-two and one-half percent (32.5%) of the revenue would be for grants for projects and thirty-two and one-half percent (32.5%) of the revenue would be for loans.

## HOW WOULD A STATE TRUST FUND BENEFIT PENNSYLVANIA?

Thirty-five percent (35%) of the fee collected would be retained by the public utility and deposited into an escrow account for capital improvement projects. Sixty-five percent (65%) of the fee imposed would be credited to the Clean Water Trust Fund in PENNVEST. Thirty-two and one-half percent (32.5%) of the revenue would be for grants for projects and thirty-two and one-half percent (32.5%) of the revenue would be for loans.

## DOES THE PUBLIC SUPPORT THIS LEGISLATION?

**Statewide survey commissioned by Joint Conservation Committee shows majority willing to pay more for services**

**1,700 Pennsylvanians responding to Mansfield University's Public Mind 2002 survey**

*“Of those in favor, most (51.2 percent) indicated that they would prefer paying up to \$2/month more in increased rates to provide the increased funding. Just over 22 percent favored the state borrowing money, while 13.4 percent favored a voluntary insurance program funded by ratepayers.”*

QUOTE FROM June 5, 2002 News Release by Rep. Scott E. Hutchinson (R-64)

Mansfield University's *The Public Mind* is an annual statewide telephone survey of randomly selected Pennsylvania adults covering a variety of public policy issues. Professor of Sociology Dr. Timothy Madigan, Ph.D. directed the 2002 survey, which has a margin for error of plus or minus two percent.

### **HAS THE STATE ADDRESSED PENNSYLVANIA'S CLEAN WATER NEEDS?**

No, not really. The majority of funding for Pennsylvania's Clean Water Needs comes from three major sources 1) PENNVEST (which is partially funded by decreasing Federal monies and revolving funds from paid-back loans), RUS (Rural Utility Services –Federal monies for rural communities), and Community Block Grants. Pennsylvania is unable to keep pace with our ever growing clean water needs according to the most recent EPA Clean Water Needs Survey.

*“The 1996 EPA Clean Water Needs Survey estimates that Pennsylvania's 20-year capital investment needs for publicly owned water and wastewater infrastructure came to \$11.6 billion. The 1999 EPA Needs Gap Study updating the 1996 survey suggested the 1996 figures may be underestimated by nearly 50 percent.”*

Infiltration Task Force News Release February 7, 2002

On February 4, 2002 The Joint Legislative Air and Water Pollution Control and Conservation Committee's Infiltration Task Force recommended the following in their “Inflow and Infiltration” Report:

**RECOMMENDATION #10.** “The state should consider the creation of a Pennsylvania Infrastructure Advisory Board. The Advisory Board would help target state infrastructure investment toward resolving high-priority problems. Among the issues that might be examined by the Advisory Board is alternative funding for wastewater projects. Specifically, two funding alternatives that should be considered are a “Clean Water Trust Fund” and “Lateral Insurance Programs.”

The introduction of the Clean Water Trust Fund legislation is necessary to ensure clean water for our children and for the future development of the Commonwealth.

### **POSSIBLE SUPPORTERS OF THE AMENDMENT**

**Environmental Groups  
Health Organizations  
Youth Organizations  
Sportsmen's Groups  
Concerned Citizens**

**WHAT IS THE PENNSYLVANIA UTILITY CONTRACTORS ASSOCIATION'S (PUCA)  
POSITION ON THE CLEAN WATER TRUST FUND?**

The Pennsylvania Utility Contractors Association, (PUCA) representing nearly 300 members and over 5,500 employees, representing both union and non-union companies, believes in the importance of clean water for the future of the Commonwealth and recognizes that Federal Funding is inadequate. Therefore, the PUCA **supports a responsible solution to Pennsylvania's drinking and sewer infrastructure needs.**

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AN ACT

1	<u>Providing incentive funding for the modernization of existing</u>	5
2	<u>water and wastewater systems; imposing a fee on certain</u>	9
3	<u>public utilities and providing for its collection; providing</u>	10
4	<u>for the establishment of the Clean Water Trust Fund and for</u>	12
5	<u>grant eligibility; imposing powers and duties on the</u>	13
6	<u>Department of Revenue; and providing penalties.</u>	

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15	Section 8. Grant eligibility from the Clean Water Trust Fund.	24
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17	wastewater collected.	26
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1	Section 12. Records.	29
2	Section 13. Imposition of fee.	30
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5	Section 16. Departure or removal of property from Commonwealth	33
6	or discontinuing business.	34
7	Section 17. Failure to pay fee.	35
8	Section 18. Failure to report or pay fee.	36
9	Section 19. Time for payment of fees, penalties and interest.	37
10	Section 20. Payment and recovery of fees, penalties and	38
11	interest.	39
12	Section 21. Penalties.	40
13	Section 22. Availability of records of other agencies.	41
14	Section 23. Regulations.	42
15	Section 24. Timely mailing treated as timely filing and	43
16	paying.	44
17	Section 25. Effective date.	45
18	<u>The General Assembly of the Commonwealth of Pennsylvania</u>	47
19	<u>hereby enacts as follows:</u>	48
20	<u>Section 1. Short title.</u>	50
21	<u>This act shall be known and may be cited as the Clean Water</u>	53
22	<u>Trust Fund Act.</u>	
23	<u>Section 2. Legislative intent.</u>	55
24	<u>The General Assembly finds and declares as follows:</u>	58
25	<u>(1) The health of millions of Commonwealth residents has</u>	59
26	<u>been advanced by the success of the Pennsylvania</u>	60
27	<u>Infrastructure Investment Authority (PENNVEST) in funding</u>	61
28	<u>improvements to substandard and deteriorated water supply and</u>	62
29	<u>sewage disposal systems and in providing for necessary</u>	63
30	<u>infrastructure for community economic development</u>	64

1 opportunities and public safety fire protection.

2 (2) In spite of the success of PENNVEST over the years 65  
 3 of its existence, many water and sewage systems in this 66  
 4 Commonwealth remain outmoded, aged, inadequate or 67  
 5 deteriorated or operate above capacity, and many areas 68  
 6 continue to have to limit their growth solely due to lack of 69  
 7 proper water supply and sewage disposal, which is primarily 70  
 8 due to the insufficient availability of funds to address the 71  
 9 massive and broad-based environmental infrastructure needs of 72  
 10 Commonwealth residents.

11 (3) The economic revitalization of this Commonwealth 73  
 12 continues to be stifled by a lack of clean water and adequate 74  
 13 sewage facilities. 75

14 (4) Financing of water and sewage projects at affordable 76  
 15 costs remains currently unavailable in many areas of this 77  
 16 Commonwealth.

17 (5) In order to assist in financing projects to promote 78  
 18 the health and safety of the residents of this Commonwealth 79  
 19 and to promote the economic development of Pennsylvania, it 80  
 20 is necessary to establish a fund to provide for necessary 82  
 21 funding of PENNVEST.

22 Section 3. Definitions. 84

23 The following words and phrases when used in this act shall 86  
 24 have the meanings given to them in this section unless the 87  
 25 context clearly indicates otherwise: 88

26 "Association." A partnership, limited partnership or any 89  
 27 other form of unincorporated enterprise owned by two or more 90  
 28 persons.

29 "Clean Water Trust Fund" or "fund." An account or accounts 91  
 30 to be established by the Pennsylvania Infrastructure Investment 92

1	<u>Authority for the securing, protection and distribution of water</u>	93
2	<u>user fees as may be collected by the Department of Revenue.</u>	94
3	" <u>Corporation.</u> " A corporation or joint stock association	95
4	organized <u>under the laws of this Commonwealth, the United States</u>	96
5	or any <u>other state, territory or foreign country or dependency.</u>	97
6	" <u>Department.</u> " The Department of Revenue of the <u>Commonwealth.</u>	99
7	" <u>Operations.</u> " Operations of all public utilities whether	100
8	owned <u>by or leased to the public utility who operated them or</u>	101
9	causes <u>them to be operated.</u>	102
10	" <u>PENNVEST.</u> " The Pennsylvania Infrastructure Investment	103
11	<u>Authority created under the act of March 1, 1988 (P.L.82,</u>	105
12	No.16), <u>known as the Pennsylvania Infrastructure Investment</u>	106
13	<u>Authority Act.</u>	
14	" <u>Person.</u> " A natural person, association or <u>corporation.</u>	108
15	<u>Whenever used in any provision of this act prescribing and</u>	109
16	<u>imposing a fine or imprisonment, or both, the term as applied to</u>	110
17	<u>association shall mean the partners or members thereof and as</u>	111
18	<u>applied to corporations the officers thereof.</u>	112
19	" <u>Public utility.</u> " Any entity or any person engaged in the	113
20	treatment <u>and distribution of potable water or engaged in the</u>	114
21	<u>collection and treatment of wastewater.</u>	115
22	" <u>Sewage</u> " or " <u>wastewater.</u> " Water which is unfit for human	116
23	<u>consumption due to use by commercial, residential or industrial</u>	117
24	<u>customers of the public utility.</u>	118
25	<u>Section 4. Rate of fee.</u>	120
26	<u>A public utility shall pay a fee of 20¢ per 1,000 gallons of</u>	123
27	<u>water passing through the master meter of each of the primary</u>	124
28	<u>treatment facilities of the public utility for purposes of</u>	125
29	<u>public consumption. Additionally, a public utility shall pay a</u>	126
30	<u>fee of 20¢ per 1,000 gallons of wastewater delivered to and then</u>	127

1	through <u>the</u> master effluent meter of each of the sewage	128
2	treatment <u>facilities</u> of the public utility.	129
3	<u>Section 5.</u> Due date.	131
4	<u>Sixty-five</u> percent of the fee imposed shall be paid by each	133
5	public utility quarterly <u>to</u> the department on or before the last	134
6	day of April, July, <u>October</u> and January of each year and	135
7	calculated upon the <u>amount</u> of 1,000 gallons of water or	136
8	wastewater, or both, used <u>in</u> its operations within this	137
9	Commonwealth by each public <u>utility</u> during the quarter ending	138
10	with the last day of the <u>preceding</u> month. <u>Thirty-five</u> percent of	140
11	the fee collected shall be retained <u>by</u> the public utility and	141
12	shall be deposited into an escrow account <u>for</u> costs related to	142
13	projects as defined in section 3 of the <u>act</u> of March 1, 1988	143
14	(P.L.82, No.16), <u>known</u> as the Pennsylvania Infrastructure	144
15	Investment Authority Act.	
16	<u>Section 6.</u> Fees as revenues to Clean Water Trust Fund.	146
17	<u>All</u> fees, penalties and interest paid under this act shall be	148
18	<u>credited</u> to and are appropriated to a separate fund, known as	149
19	<u>the</u> Clean Water Trust Fund, within the Pennsylvania	150
20	Infrastructure <u>Investment</u> Authority, created under the <u>act</u> of	152
21	March 1, 1988 (P.L.82, No.16), <u>known</u> as the Pennsylvania	153
22	Infrastructure Investment Authority Act. <u>The</u> fees, penalties and	154
23	interest paid under this act shall be <u>utilized</u> by PENNVEST for	155
24	grants and loans to be distributed in the <u>following</u> manner:	156
25	<u>(1)</u> Thirty-two and one-half percent of revenue generated	157
26	by <u>this</u> act would be set aside for grants for projects as	158
27	<u>defined</u> in section 3 of the Pennsylvania Infrastructure	159
28	Investment <u>Authority</u> Act.	160
29	<u>(2)</u> Thirty-two and one-half percent of revenue generated	161
30	by <u>this</u> act would be set aside for loans for projects as	162



1	defined in section 3 of the Pennsylvania Infrastructure	163
2	Investment Authority Act.	
3	<u>Section 7. Reallocation of fees.</u>	165
4	<u>The public utility shall be entitled to reallocate the fees</u>	167
5	<u>upon their master meter at a rate not to exceed the statutory</u>	168
6	<u>fee limit of 20¢ per 1,000 gallons of water or wastewater per</u>	169
7	<u>user. Section 8. Grant eligibility from the Clean Water Trust</u>	170
8	<u>Fund.</u>	
9	<u>A public utility shall be entitled to a grant, upon two</u>	172
10	<u>years' fee contribution to the Clean Water Trust Fund, to a</u>	173
11	<u>maximum of 35% of the total of all trust fund fees paid by that</u>	174
12	<u>public utility into the fund, that grant to be made solely for</u>	175
13	<u>the purpose of construction of capital facilities of the public</u>	176
14	<u>utility which must be completed for purposes of grant</u>	177
15	<u>eligibility. Public utilities applying for grants or loans from</u>	178
16	<u>the Clean Water Trust Fund must meet the guidelines as provided</u>	180
17	<u>for in the act of March 1, 1988 (P.L.82, No.16), known as the</u>	182
18	<u>Pennsylvania Infrastructure Investment Authority Act.</u>	
19	<u>Section 9. Calculation of amount of water distributed or</u>	184
20	<u>wastewater collected.</u>	185
21	<u>The amount of water or wastewater distributed, conveyed or</u>	187
22	<u>treated by a public utility within this Commonwealth shall be</u>	188
23	<u>the proportion of the total amount of the water distributed or</u>	189
24	<u>wastewater collected within its entire operations within and</u>	190
25	<u>outside this Commonwealth.</u>	191
26	<u>Section 10. Report requirements.</u>	193
27	<u>A public utility subject to the fee imposed by this act shall</u>	195
28	<u>on or before the last day of April, July, October and January of</u>	196
29	<u>each year make to the department reports of its operations</u>	197
30	<u>during the quarter ending the last day of the preceding month as</u>	198

1 the department may require and other reports from time to time 199  
2 as the department may deem necessary. The department by 201  
3 regulation may exempt from the quarterly reporting requirements 202  
4 of this section those public utilities operating solely within 203  
5 this Commonwealth and require in those instances an annual  
6 affidavit if in its discretion the enforcement of this act would 204  
7 not be adversely affected by the regulation. 205  
8 Section 11. Average consumption. 207  
9 In the absence of adequate records showing the number of 209  
10 gallons collected, conveyed, distributed or treated by a public 210  
11 utility, the department may make a determination of water usage 211  
12 based upon pumping capacities, storage capacities, treatment 212  
13 capacities or other evidence as the department may determine. 213  
14 Section 12. Records. 215  
15 (a) General rule.--A public utility shall keep records in 217  
16 the form as the department reasonably may prescribe that will 218  
17 enable the public utility to report and enable the department to 219  
18 determine:  
19 (1) The total number of gallons of water effluent 220  
20 distributed by the entire operations of the public utility as 221  
21 recorded on the master flow meter as reported to the 222  
22 Department of Environmental Protection. 223  
23 (2) The total number of gallons of wastewater effluent 224  
24 as recorded on the master flow meter of the wastewater 225  
25 treatment plan as reported to the Department of Environmental 226  
26 Protection by the entire operations of the public utility. 227  
27 (b) Preservation of records.--All records shall be safely 228  
28 preserved for a period of three years in a manner as to insure 229  
29 their security and availability for inspection by the department 230  
30 in the administration of this act. Upon application in writing, 232

1	stating the reasons therefor, the <u>department</u> may, in its	233
2	discretion, consent to the destruction <u>of</u> records at any time	234
3	within the three-year period if the records <u>pertain</u> to a period	235
4	which has been audited by the department.	
5	<u>Section 13. Imposition of fee.</u>	237
6	<u>The</u> fees imposed on public utilities by this act are in	239
7	addition <u>to</u> any fees or taxes of whatever character imposed on	240
8	public <u>utilities</u> by any other provision of law.	241
9	<u>Section 14. Filing of bond.</u>	243
10	<u>A</u> public utility may give a surety company bond in the amount	245
11	of <u>\$10,000</u> payable to the Commonwealth and conditioned that the	246
12	public <u>utility</u> will pay all fees due and to become due under	247
13	this act from <u>the</u> date of the bond to the date when either the	248
14	public <u>utility</u> <u>or</u> the bonding company notifies the department	249
15	that the bond has <u>been</u> canceled. <u>The</u> surety shall be a	251
16	corporation authorized to write surety bonds <u>in</u> this	252
17	Commonwealth. <u>So</u> long as the bond remains in force the board may	253
18	order refunds <u>to</u> the public utility in the amounts appearing to	254
19	be due on <u>applications</u> filed by the public utility under section	255
20	4, without <u>first</u> auditing the records of the public utility,	256
21	including the <u>penalties</u> and interest provided in section 18,	257
22	even though the <u>assessment</u> is made after cancellation of the	258
23	bond, but only for <u>fees</u> due and payable while the bond was in	259
24	force and <u>penalties</u> and interest on those fees.	260
25	<u>Section 15. False statements; penalties.</u>	262
26	<u>Any</u> person who willfully and knowingly makes, publishes,	264
27	delivers <u>or</u> utters a false statement orally or in writing for	265
28	the purpose <u>of</u> obtaining or attempting to obtain or to assist	266
29	any other person <u>to</u> obtain or attempt to obtain a credit or	267
30	refund or reduction of <u>liability</u> for fees under this act commits	268

1	a misdemeanor and shall, <u>upon conviction</u> , be sentenced to pay a	269
2	fine of not more than \$500, <u>or to imprisonment</u> for not more than	270
3	one year, or both.	
4	<u>Section 16.</u> Departure or removal of property from Commonwealth	272
5	<u>or discontinuing business.</u>	273
6	<u>If the department ascertains that a public utility designs</u>	275
7	<u>quickly to depart from this Commonwealth, or to remove its</u>	276
8	<u>property from this Commonwealth, or any property used by the</u>	277
9	<u>public utility in operations subject to this act, or to</u>	278
10	<u>discontinue businesses to do any other act tending to prejudice</u>	279
11	<u>or render wholly or partly ineffectual proceedings to assess or</u>	280
12	<u>collect the fees imposed, whereby it becomes important that such</u>	281
13	<u>proceedings be brought without delay, the department may</u>	282
14	<u>immediately make an arbitrary assessment of the amount of fees</u>	283
15	<u>due, whether or not any report is then due by law, and may</u>	284
16	<u>proceed under the arbitrary assessment to collect the fees or</u>	285
17	<u>compel security for the same, and thereafter shall cause notice</u>	286
18	<u>of this finding to be given to the public utility, together with</u>	287
19	<u>a demand for an immediate report and immediate payment of the</u>	288
20	<u>fees.</u>	
21	<u>Section 17.</u> Failure to pay fee.	290
22	<u>(a) Failure to pay fee.--If any public utility fails to pay</u>	292
23	<u>any fee imposed by this act for which it is liable, the</u>	293
24	<u>department is authorized to make a determination of additional</u>	294
25	<u>fee and interest due by the public utility based upon any</u>	295
26	<u>information within its possession or that shall come into its</u>	296
27	<u>possession. All determinations shall be made so that notice</u>	297
28	<u>thereof shall reach the parties against whom made within three</u>	298
29	<u>years after the due date of the fee.</u>	299
30	<u>(b) Redetermination.--Promptly after the date of a</u>	300

1 determination under subsection (a), the department shall, by 301  
2 certified mail, forward a copy thereof to the public utility 302  
3 against whom it was made. Within 90 days after the date upon 303  
4 which the copy of the determination was mailed, the public 304  
5 utility may file with the department a petition for 305  
6 redetermination of the fees. Every petition for redetermination 306  
7 shall state specifically the reasons which the petitioner 307  
8 believes entitles the public utility to the redetermination, and 308  
9 it shall be supported by affirmation that it is not made for the 309  
10 purpose of delay and that the facts set forth in the petition 310  
11 are true. It shall be the duty of the department within six 311  
12 months after the date of any determination to dispose of any 312  
13 petition for redetermination. Notice of the action taken upon 314  
14 any petition for redetermination shall be given to the 315  
15 petitioner promptly after the date of redetermination by the 316  
16 department.

17 (c) Right to review.--Any public utility shall have the 317  
18 right to review by the Board of Finance and Revenue and appeal 318  
19 to Commonwealth Court, in the same manner and within the same 319  
20 time as provided by law in the case of capital stock and 320  
21 franchise taxes imposed upon corporations. 321

22 Section 18. Failure to report or pay fee. 323

23 When a public utility fails to file a report within the time 325  
24 prescribed by this act, the public utility shall pay as a 326  
25 penalty to the Clean Water Trust Fund for each day thereafter, 327  
26 Saturdays, Sundays and other legal holidays excluded, until the 328  
27 report is filed, the sum of \$5. In addition to this penalty, any 330  
28 unpaid fee caused by failure to file a report shall bear 331  
29 interest at the rate of 1% per month or fraction thereof until 332  
30 the same is paid. The penalties and interest charges imposed 333

1 shall be paid to the department in addition to the fee due. The 335  
2 department, if satisfied that the failure to file the report or 336  
3 pay the fee was excusable, may remit or waive the payment of the 337  
4 whole or part of any penalty and the portion of the interest  
5 charge as is in excess of 6% a year. 338

6 Section 19. Time for payment of fees, penalties and interest. 340

7 All fees, penalties and interest assessed pursuant to this 342  
8 act, unless earlier payment is provided in this act, shall be 343  
9 paid within 15 days after notice and demand shall have been 344  
10 mailed to the public utility by the department. If fees, 346  
11 penalties and interest so assessed pursuant to sections 16, 17 347  
12 and 18 are not paid within 15 days, there shall be added to the 348  
13 amount of assessment, in addition to interest as already  
14 provided and any other penalties provided by law, a sum 349  
15 equivalent to 5% of the fee. 350

16 Section 20. Payment and recovery of fees, penalties and 352  
17 interest. 353

18 (a) Manner of recovery.--All penalties and interest when 355  
19 imposed under this act shall be payable to and recoverable by 357  
20 the department in the same manner as if they were part of the 358  
21 fee imposed.

22 (b) Debt of public utility.--The fees, interest and 359  
23 penalties imposed under this act, from the time the same shall 360  
24 be due, shall be a debt of a public utility who does not 361  
25 maintain premises for the transaction of business within this 362  
26 Commonwealth, recoverable in the Commonwealth Court in an action 363  
27 of assumpsit in the name of the Commonwealth. The debt, whether 365  
28 sued upon or not, shall be a lien on all the property of the 366  
29 debtor except as against an innocent purchaser for value without 367  
30 notice thereof and shall have priority both in lien and 368

1 distribution of the assets of the public utility, whether in 369  
2 bankruptcy, insolvency or otherwise. The proceeds of any 370  
3 judgment or order obtained under this section shall be paid to 371  
4 the department. The service of all papers in the action of 372  
5 assumpsit shall be upon the Secretary of the Commonwealth, with 373  
6 a copy mailed by certified mail to the last known address of the 374  
7 defendant.

8 (c) Lien against real and personal property.--Any fee 375  
9 determined to be due from any person who maintains premises for 376  
10 the conduct of a public utility business in this Commonwealth 377  
11 and remaining unpaid after demand for the same, and all 378  
12 penalties and interest thereon, shall be a lien in favor of the 379  
13 Commonwealth upon the property, both real and personal, of such 380  
14 person but only after the lien has been entered and docketed of 381  
15 record by the prothonotary of the county where the property is 382  
16 situated. The department may at any time transmit to the 383  
17 prothonotaries of the respective counties certified copies of 384  
18 all liens for fees, penalties and interest, and it shall be the 385  
19 duty of each prothonotary receiving the lien to enter and docket 386  
20 the same of record in his office, which lien shall be indexed as 387  
21 judgments are now indexed. A writ of execution may directly 388  
22 issue upon the lien, without the issuance and prosecution to 389  
23 judgment of a writ of scire facias. However, not less than ten 390  
24 days before issuance of any execution on the lien, notice of the 391  
25 filing and the effect of the lien shall be sent by registered 392  
26 mail to the fee payer at his last known post office address. No 394  
27 prothonotary shall require as a condition precedent to the entry  
28 of such liens the payment of any costs incident thereto. 395

29 (d) Lien priority.--The lien imposed under this section 396  
30 shall have priority from the date of its recording and shall be 397

1 fully paid and satisfied out of the proceeds of any judicial 398  
2 sale of property subject thereto, before any other obligation, 399  
3 judgment, claim, lien or estate to which the property may 400  
4 subsequently become subject, except costs of the sale and of the 401  
5 writ upon which the sale was made, and real estate taxes and 402  
6 municipal claims against the property, but shall be subordinate 403  
7 to mortgages and other liens existing and recorded or entered of 404  
8 record prior to the recording of the lien. In the case of a 406  
9 judicial sale of property subject to a lien imposed under this 407  
10 section, the sale shall discharge the lien imposed under this 408  
11 section, to the extent only that the proceeds are applied to its 409  
12 payment, and the lien shall continue in full force and effect as 410  
13 to the balance remaining unpaid.

14 (e) Duration of lien.--A lien imposed under this section 411  
15 shall continue for five years from the date of its entry of 412  
16 record and may be renewed and continued in the manner now or 413  
17 hereafter provided for the renewal of judgments. 414

18 Section 21. Penalties. 416

19 A public utility or any person who violates this act, not 418  
20 covered by any other penalty provisions contained in this act, 419  
21 commits a misdemeanor of the third degree and shall, upon 420  
22 conviction, be sentenced to pay a fine of not more than \$500, or 421  
23 undergo imprisonment for not more than one year, or both. If the 423  
24 person convicted is a corporation, any imprisonment imposed  
25 shall be served by the responsible corporate officer. 424

26 Section 22. Availability of records of other agencies. 426

27 The records of any other Commonwealth agency, board or 429  
28 commission to the extent that the same may be pertinent to the 430  
29 administration and enforcement of this act, and the 431  
30 determination of liability thereunder, shall be available to the 432



1	department.	
2	<u>Section 23. Regulations.</u>	434
3	<u>The department shall promulgate regulations as may be</u>	436
4	<u>necessary for the effective enforcement of this act.</u>	437
5	<u>Section 24. Timely mailing treated as timely filing and paying.</u>	440
6	<u>With respect to all reports, claims, statements and other</u>	442
7	<u>documents required to be filed and all payments required to be</u>	443
8	<u>made under this act, any report, claim, statement and other</u>	444
9	<u>document or payment of fee withheld shall be considered as</u>	445
10	<u>timely filed if the report, claim, statement or other document,</u>	446
11	<u>or payment which has been received by the department, is</u>	447
12	<u>postmarked by the United States Postal Services on or prior to</u>	448
13	<u>the final day on which payment is to be received. For purposes</u>	450
14	<u>of this act, presentation of a receipt indicating that the</u>	451
15	<u>report, claim, statement or other document or payment was filed</u>	
16	<u>by registered or certified mail on or before the due date shall</u>	452
17	<u>be prima facie evidence of timely filing of such report, claim,</u>	453
18	<u>statement or other document or payment.</u>	454
19	<u>Section 25. Effective date.</u>	456
20	<u>This act shall take effect in 60 days.</u>	459

# COMMONWEALTH PROCUREMENT CODE PROPOSED LEGISLATION

For more information, please call Brenda Reigle, Executive Director at PUCA at 717.234.8055 or [ed@puca.org](mailto:ed@puca.org).

## WHAT IS THE COMMONWEALTH PROCUREMENT CODE?

The state codified various procurement legislation like the "Prompt Pay Act" into the new Commonwealth Procurement Code (Act 57 of 1998). The change lumped construction projects, professional services and purchasing together into one law. While this action simplified the law, no changes were made to the former "Prompt Pay Act" to update the law with technical corrections; or make the law conform to aspects of the Federal Acquisition Regulations (FARs); or AIA documents; or updates to correct certain omissions and deficiencies in the Code based on the experience of contractors and government agencies in operating under the Code.

## WHY MAKE THESE CHANGES?

It is predicted to save money for government agencies such as municipal authorities, water and sewer authorities, boroughs, townships and cities and school districts in contracting by lowering bids and because it is fairer, to encourage more competitive bidding for contracts, especially those for local transportation and sewage and water treatment. Pennsylvania contract documents need to be competitive compared to surrounding states' procurement laws to attract bidders to stay and work in Pennsylvania. The Pennsylvania utility construction industry pays prevailing wages to over 5,500 employees. This Proposed Bill is similar, with a few further corrections, to Senate Bill 770 of 2003, which was proposed but not enacted due to time constraints in the session and House Bill No. 652 of Session 2005, which was referred to the Committee on State Government but not enacted. This Proposed Bill makes corrections to the Commonwealth Procurement Code (the "Code"), and conforms it to aspects of the Federal Acquisition Regulations (FARs), AIA documents and updates it to correct certain omissions and deficiencies in the Code based on the experience of contractors and government agencies in operating under the Code. The significant change from those bills is to make the provisions of the bill applicable to local government units only, while the provisions of the present Commonwealth Procurement Code remain applicable to state agencies such as the DGS. It is predicted to save money for local government agencies or units such as municipal authorities, water and sewer authorities, boroughs, townships and cities and school districts in contracting by lowering bids because it is fairer, and to encourage more competitive bidding for contracts, especially those for local transportation and sewage and water treatment.

## WHAT ARE THE 15 PROPOSED CHANGES?

1. Provides for an extension of contract time or milestones in cases where a contractor is prevented from completing parts of the work or reaching milestones due to delays beyond the contractor's control; these include, but are not limited to, acts or neglect by the government agency, engineers or architects and utility owners or other contractors; fires, floods, strikes, unforeseen material shortages, epidemics, abnormal weather

conditions or acts of God. Such extensions to the contract would be only for the length of such delay beyond the contractor's control.

2. Provides for the handling of concealed or unknown conditions encountered in a contract, such as subsurface or otherwise concealed physical conditions which are either: (1) materially different from those indicated in the construction contract or (2) unknown physical conditions of an unusual nature on a construction site. The provision allows the contractor to present claims for such hidden or unforeseen conditions. This suggested change mirrors provisions of and updates the Procurement Code to conform to the concealed or unknown site conditions provisions in the Federal Acquisition Regulations (FARs) and the American Institute of Architects (AIA) documents. It also adds a provision to allow relief and in order to deal with unforeseen environmental hazards and dangerous conditions.

3. Provides that the retainage for local government unit jobs will not exceed 6% of the amount due until 50% of the contract is completed, which is the same provision for the contracts let under the Code by the Pennsylvania Department of General Services (DGS).

4. Provides that applications for payment representing refund of one-half of the retainage upon completion of 50% shall not be unreasonably withheld by the local government unit. This updated provision also provides that if there are specific causes for greater retainage withholding, the reason or reasons must be specified by the engineer or architect and may be challenged on the basis of reasonableness in the arbitration procedure.

5. Provides that construction financing plans which include interim financing provisions are prepared and approved by the local government unit prior to the bidding for a construction contract.

6. Provides for monthly progress payments and that if monthly progress payments from the local government unit to the contractor, which include payments for change orders or claims against the local government unit which are agreed to or later found to be proper, are not made by the payment due date under the contract, interest provided for in the Code for late or non-payment of a payment application shall be paid at rates already specified in the Code. Also eliminates the delay before such interest payments begin to run, in an incentive for prompt handling on the progress payment paperwork.

7. Provides that if the local government unit has improperly withheld payment to the contractor for reasons such as their timely failure to: make a final inspection as provided for in the Code, or to issue a certificate of completion when warranted under the Code, or to list in detail each uncompleted item in a punchlist and to list reasonable cost of completion of such items as presently required under the Code or if the unit or agency commits certain other violations of the Code as it exists now, then the penalty provided for presently in the Procurement Code shall be awarded, as shall reasonable attorneys fees in an amount to be determined by the Board of Claims, court or arbitrator, together with expenses. This removes the requirement of a local government unit or agency acting in "bad faith" and, as such, makes the provisions of the Code parallel those in the Act which governs private work, the Pennsylvania Contractor and Subcontractor Payment Act. (73 P.S. §501 et seq.)

8. Provides a technical correction by providing that a local government unit which awards contracts which are not covered under the Procurement Code because of exceptions to the Code must notify the bidders to such contract that the Procurement Code does not apply.

9. Provides for value engineering suggestion programs wherein successful contractors can suggest cost and efficiency changes to the local government unit and share in the savings if the suggestions are adopted.

10. Provides, in addition to 7 above, that if the architect or engineer employed by the local government agency fails to comply with the present provisions in the Code to issue substantial completion certificates, or fails to provide a punchlist with reasonable costs of completion values in accord with the present Code or does not comply with final payment and substantial completion provisions in the Code, then it will be presumed that there are no uncompleted items and final payment, including release of retainage will be made to the contractor within 45 days of the final payment application. This is to attempt to remedy repeated, open and notorious violations of the Code on the part of independent architects and engineers employed by government agencies. They have repeatedly and deliberately failed to comply with the present provisions of the Code on the concerned issues and, in effect, frequently ignore the contractor's rights under the Code. This, in turn, affects the bidding procedure as it becomes uncertain as to when final payment and release of retainage under the Act will be made to the contractors.

11. Provides that, in order to protect the rights of both the contractor and the local government agency in the instances described in 7 and 10 above, in cases where the claim made by the contractor under the above section is disputed by the government agency, the matter may be resolved by the use of expedited arbitration procedure of the Construction Industry Rules of the American Arbitration Association.

12. Provides a clarification or technical correction that amounts withheld for completion of minor items (punchlist items) shall be paid upon the completion of each such item in the certificate of substantial completion issued by the architect or engineer.

13. Provides a technical correction making it clear that that the present Procurement Code language providing that disputes over the payment of retainages and final payment shall be arbitrated under the Rules of the American Arbitration Association, or under alternative rules for arbitration if the parties agree upon such alternative, or under the Pennsylvania statutes pertaining to arbitration as presently provided in the Code. This change clarifies that the choice of which procedure to follow shall be by choice of the claimant. The present applicable section of the Procurement Code utilizes the word shall, but is unclear as to the means of arbitration. This is predicted to save hundreds of thousands of dollars on expensive litigation in court, and the money may be used on the project instead.

14. Provides that either party to a claim or dispute arising under the construction contract or performance of the contract may submit the dispute to mediation. The new provision also adds that unless the parties agree otherwise, mediation shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association and the request for mediation may be made concurrently with the filing of a Demand for Arbitration. The arbitration would then be stayed for a period of thirty (30) days to allow mediation in an attempt to resolve the dispute in the least expensive and most expeditious manner.

15. Provides in SUBCHAPTER F that construction contracts provide that the architect or engineer will be the representative and agent of the local government agency. It further provides that they shall be impartial and carry out their duties in a professional and competent manner, and indemnification and waiver clauses shall vary or lessen their duties and responsibilities. This provision is predicted to help save millions of dollars and countless disputes generated by faulty plans and specifications, and the disputes, delays and litigation which arise on local governmental agency construction projects. This proposed provision was added by sponsoring Senators to proposed Senate Bill 770 of 2003, P.N. 899.

## **POSSIBLE SUPPORTERS OF THE AMENDMENT**

**Contractors that do public bid contracts  
Local Government entities interested in saving their ratepayers money**

## **EXAMPLES OF CONTRACTORS AND GOVERNMENT AGENCIES NOT-OPERATING UNDER THE CODE**

**Project: Rural Valley Borough, Armstrong Co.** – Holding redundant retainages for items already secured through performance bonds – acts as a penalty and makes a responsible contractor a unwarranted creditor

**Project: Midway Sewerage Authority Construction of Sanitary Sewers** - Holding redundant retainages for items already secured through performance bonds – acts as a penalty and makes a responsible contractor a unwarranted creditor

**Project: South Strabane Township Sanitary Authority Lakeview Drive/East Beau Street Sanitary Sewers**  
Triple retainage – 1) The standard retention allowed by the “Commonwealth Procurement Code” 2) Withholding payment for testing 3) withholding payment for restoration

**Redundant Retainage has a trickle down effect to the contractor and the suppliers – if the contractor doesn’t get paid on a timely basis then the supplier also becomes and unwarranted creditor**

**Contractors and Suppliers simply want to be paid in a timely fashion for work performed so they can pay their workers, their suppliers, and their taxes.**

## **WHAT IS THE PENNSYLVANIA UTILITY CONTRACTORS ASSOCIATION’S (PUCA) POSITION ON THE COMMONWEALTH PROCUREMENT CODE AMENDMENT**

The Pennsylvania Utility Contractors Association (PUCA), representing nearly 300 members and over 5,500 employees of both union and non-union companies, believes in the importance of free enterprise throughout the construction industry and **supports these needed changes for a competitive bidding market in Pennsylvania.**

PART II  
GENERAL PROCUREMENT PROVISIONS

Chapter

- 31. General Provisions
- 33. Prevention of Environmental Pollution
- 35. (Reserved)
- 37. Contract Clauses and Preference Provisions
- 39. Construction Contracts Over \$50,000
- 41. Purchase of Surplus Federal Property
- 43. Public Facilities Concessions
- 45. Antid-Rigging
- 47. Contracts for Public Works for Local Government Units

CHAPTER 31  
GENERAL PROVISIONS

Sec.

3101. Application of part. 3102. Definitions.

§ 3101. Application of part.

This part applies to government agencies. In the case of Commonwealth agencies, this part shall be read in pari materia with Part I (relating to Commonwealth Procurement Code).

§ 3102. Definitions.

Subject to additional definitions contained in subsequent provisions of this part which are applicable to *specific provisions of this part*, the following words and phrases when used in this part shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Commonwealth agency." A Commonwealth agency as defined in section 103 (relating to definitions).

"Government agency." Any Commonwealth agency, any transportation authority or agency created by statute or any political subdivision or municipal or other local authority, or agency of any political subdivision or local authority, except where such government agency is subject to the provisions of Chapter 47 the provisions of that chapter relating to local government units shall be applicable instead of the provisions of Chapter 39.

CHAPTER 47  
CONTRACTS FOR PUBLIC WORKS FOR LOCAL GOVERNMENT UNITS

Subchapter

- A. Preliminary Provisions
- B. General Provisions
- C. Retainage
- D. Prompt Payment Schedules
- E. Substantial/Final Payment
- F. Role of Architect or Engineer

SUBCHAPTER A  
PRELIMINARY PROVISIONS

Sec.

4701. Application and purpose of chapter. 4702. Definitions.

§ 4701. Application and purpose of chapter.

(a) Application.-Except as otherwise specifically provided in this chapter, this chapter applies to contracts

entered into by a local government unit through competitive sealed bidding.

(b) Purpose of chapter.-The purpose of this chapter is to establish a uniform and mandatory system governing public contracts to the extent of the requirements set forth in this chapter and shall be construed to effectuate such purpose. The provisions of this chapter shall in no way affect the provisions of the act of August 15, 1961 (P.L.987, No.442), known as the Pennsylvania Prevailing Wage Act, nor the regulations promulgated under that act, nor shall any requirements of this chapter affect any provisions of a contract to be awarded pursuant to any Federal law or regulations containing specific provisions which are different from the public contract requirements of this chapter.

#### § 4702. Definitions.

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

"Contract." A contract exceeding \$50,000 for construction as defined in section 103 (relating to definitions), but relating only to contracts of local government units.

"Contractor." A person who enters into a contract with a local government unit .

"Deficiency item." Work performed but which the design professional, the contractor or the inspector will not certify as being completed according to the contract.

"Design professional." Persons performing professional services as defined in section 901 (relating to definitions).

"Inspector." The person authorized or engaged by the local government unit to inspect the work performed and materials furnished pursuant to a contract to determine whether the work completed is in compliance with the contract.

"Local government unit." Any county, city, borough, incorporated town, township, school district, vocational school district, county institution district, home rule municipality, local authority or any joint or cooperative body of local government units or any instrumentality, authority or corporation thereof which has authority to enter into a contract.

"State-aided institution." Any institution which receives State funds directly or indirectly for construction as defined in section 103 (relating to definitions).

"Subcontractor." A person who has contracted to furnish labor or materials to or has performed labor for a contractor or another subcontractor in connection with a contract.

"Substantial completion." Construction that is sufficiently completed in accordance with the contract and certified by the architect or engineer of the local government unit , as modified by change orders agreed to by the parties, so that the project can be used, occupied or operated for its intended use. In no event shall a project be certified as substantially complete until at least 90% of the work on the project is completed.

## SUBCHAPTER B GENERAL PROVISIONS

### Sec.

4711. Time for awarding contract. 4712. Time for executing contract. 4713. Release of successful bidder.

4714. Claims for concealed or unknown conditions.

#### § 4711. Time for awarding contract.

(a) General rule.-In the case of a contract to be entered into by a local government unit through competitive sealed bidding, the contract shall be awarded to the lowest responsible and responsive bidder within 60 days of the bid opening, or all bids shall be rejected except as otherwise provided in this section.

(b) Delay.-If the award is delayed by the required approval of another government agency, the sale of bonds or the award of a grant, the contract shall be awarded to the lowest responsible and responsive bidder within 120 days of the bid opening, or all bids shall be rejected.

(c) Extensions.-Extensions of the date for the award may be made by the mutual written consent of the local government unit and the lowest responsible and responsive bidder.

(d) List of bidders.-All local government units shall be required to provide a list of the bidders and their bid amount on each contract within ten working days of the bid opening to interested parties for a fee to be determined by the local government unit to cover the cost of developing such list.

(e) Delays beyond contractor's control.--If a contractor is prevented from completing any part of the work within the mandated times or milestones of the construction contract or construction schedule due to delay beyond the control of the contractor, the contract times or milestones will be extended in an amount equal to the time lost due to the delay if a request for extension is made in writing. Delays beyond the control of the contractor shall include, but not be limited to, acts or neglect by the local government unit and the engineer or architect, acts or neglect of utility owners or other contractors performing other work on separate contracts, fires, floods, strikes, unforeseen material shortages, epidemics, abnormal weather conditions or acts of God.

§ 4712. Time for executing contract.

In the case of a contract entered into by a local government unit through competitive sealed bidding, the contract shall be executed by the local government unit within 60 days of the date that the contract is awarded.

§ 4713. Release of successful bidder.

Failure of the local government unit to comply with the requirements' of sections 4711 (relating to time for awarding contract) and 4712 (relating to time for executing contract) shall, unless the successful bidder waives' the noncompliance by written notice to the local government unit, release the successful bidder from any liability in respect to its bid or contract and entitle all bidders to the immediate return of any bonds or security deposits posted in connection with the bid or contract.

§ 4714. Claims for concealed or unknown conditions.

(a) General rule.--If conditions are encountered at the site which are:

(1) subsurface or otherwise concealed environmental or physical conditions which differ materially from those disclosed and indicated in the construction contract or construction drawings or plans accompanying the contract; or

(2) unknown physical or environmental conditions of an unusual nature which are undisclosed or differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the construction contract and construction drawings and plans accompanying the contract.

Notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after the first observance of the conditions. The architect or engineer will promptly investigate the conditions and, if they differ materially and cause an increase or decrease



in the contractor's cost of or time required for performance of any part of the work, shall recommend an equitable adjustment in the contract sum, contract time, or both.

(b) Nonserious conditions.--If the architect or engineer determines that the conditions at the site are not materially different from those indicated in the construction contract or construction drawings or plans accompanying the contract and that no change in the terms of the contract is justified, the architect or engineer shall so notify the owner and contractor in writing, stating the reasons.

(c) Objections.--Claims by either party in opposition to a determination under subsection (a) or (b) must be made within 21 days after the architect or engineer has given notice of the decision.

(d) Materially different conditions.--If the conditions encountered are materially different, the contract sum and contract time shall be equitably adjusted, but if the owner and contractor cannot agree on an adjustment in the contract sum or contract time, the adjustment shall be subject to arbitration under section 4742 (relating to arbitration).

## SUBCHAPTER C RETAINAGE

Sec.

4721. Retainage.

4722. Payment of retainage to subcontractors and material suppliers.

§ 4721. Retainage.

(a) Contract provision.--A contract may include a provision for the retainage of a portion of the amount due the contractor to insure the proper performance of the contract except that the sum withheld by the local government unit from the contractor shall not exceed 6% of the amount due the contractor until 50% of the contract is completed. When the contract is 50% completed, one-half of the amount retained by the local government unit shall be returned to the contractor, and the contractor shall release to subcontractors and suppliers any corresponding amount of such retainage withheld from them by the contractor.

However, the architect or engineer must approve the application for payment, which approval shall not be unreasonably withheld. The contractor must be making satisfactory progress, and there must be no specific cause for greater withholding. If the engineer or architect determines that there is a specific cause for greater withholding, the reason or reasons must be specified in written detail to the contractor. The decision can be challenged by the contractor on the basis of reasonableness in the arbitration procedure provided for in section 4742 (relating to arbitration).

The sum withheld by the local government unit from the contractor after the contract is 50% completed shall not exceed 3 % of the value of completed work based on monthly progress payment requests. In the event a dispute arises between the local government unit and any prime contractor, which dispute is based upon increased costs claimed by one prime contractor occasioned by delays or other actions of another prime contractor, additional retainage in the sum of one and one-half times the amount of any possible liability may be withheld as a final resolution is agreed to by all parties directly or indirectly involved

or the justification and reasonableness for the additional withholding is decided by arbitration under section 4742, unless the contractor causing the additional claim furnishes a bond satisfactory to the local government unit to indemnify the agency against the claim. All money retained by the local government unit may be withheld from the contractor until substantial completion of the contract.

§ 4722. Payment of retainage to subcontractors and material suppliers.

In the absence of sufficient reason, within 14 days of the receipt of payment, by the contractor, the contractor shall pay all subcontractors and material suppliers with which it has contracted their earned share of the payment the, contractor received.

#### SUBCHAPTER D PROMPT PAYMENT SCHEDULES

Sec.

4731. Performance by contractor or subcontractor.

4732. Local government unit 's progress payment obligations.

4733. Contractors', subcontractors' and material suppliers' payment obligations.

4734. Withholding of payment for good faith claims.

4735. Penalty and attorney fees.

4736. Contracts involving Federal aid.

4737. Certain provisions unenforceable.

4738. Applicability.

4739. Claims by innocent parties.

§ 4731. Performance by contractor or subcontractor.

(a) Entitlement of contractor to payment: Performance by a contractor in accordance with the provisions of a contract shall entitle the contractor to payment by the local government unit .

(b) Entitlement of subcontractor to payment Performance by a subcontractor in accordance with the provisions of a contract shall entitle the subcontractor to payment from the contractor with whom the subcontractor has contracted.

(c) **Value engineering** - Each local government unit shall establish and encourage construction cost-effective value engineering procedures and processes by the contractor.

(1) "Value engineering" defined - As used in this chapter, the term "value engineering" means an analysis by a contractor who is the low bidder and is awarded the construction contract of the functions of a program, project, system, product, item of equipment, building, facility, service, or supply which is part of a local government agency construction project directed at improving performance, reliability, quality, safety, and life cycle costs of such particular construction project.

(2) Goal of Contractor Value Engineering (VE) – The goal of such value engineering is to allow but not require a contractor who has been awarded a competitively bid construction contract to identify the function of a product or service, establish a worth for that function, generate alternatives through the use of creative thinking, and provide the needed functions to accomplish the original purpose of the project, reliably, and at a lower project cost or lower life-cycle cost, without sacrificing safety, necessary quality, and environmental attributes of the project.

(3) Recommendations - The Value Engineering program should include procedures to approve or reject recommendations and ensure the prompt review of contractor VE recommendations by the local government unit. Reviews should be performed promptly to minimize delays to the project.

(4) Incentives - The program should include a VE or cost reduction incentive clause in a project's standard specifications or project a special provision that allows construction contractors to submit change proposals and share the resulting cost savings with the local government unit. Such provisions shall provide that a contractor on a particular project shall be reimbursed fifty (50%) percent of the total negotiated deduct price for Contractor-provided value items that are determined to be acceptable by the Owner and/or Engineer. The total value of the proposed deduct shall be determined by the unit prices bid by the Contractor or by a detailed cost breakdown furnished by the Contractor and

reviewed and approved by the Engineer and/or local government unit Owner.

§ 4732. Local government unit 's progress payment obligations.

(a) Payments in accordance with contract - The local government unit shall pay the contractor or design professional strictly in accordance with the contract and with the provisions of (b) and (c) of this Section.

(b) Application for progress payments.- The contractor or design professional shall be entitled to make application for payment from the local government unit for monthly progress payments, and the local government unit shall make payment less the applicable retainage amount as authorized in section 4721 (relating to retainage) to the contractor or design professional within 30 calendar days of the date the application for payment is received.

(c) Interest on progress payments not timely made. If any progress payment, which shall include payment for change orders or claims against the local government unit which are either agreed to or later found to be proper and warranting payment, less the applicable retainage amount authorized under section 4721, is not made to a contractor or design professional by the due date established in the contract or in subsection (b), the local government unit shall pay to the contractor or design professional, in addition to the amount due, interest on the amount due, and the interest shall be computed at the rate determined by the Secretary of Revenue for interest payments on overdue taxes or the refund of taxes as provided in sections 806 and 806.1 of the act of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code.

(d) **Financing Plan for Project and Interim Financing** – Before awarding any contracts for public works under this Chapter, each local government unit shall have in place and have properly adopted a reasonable plan with accompanying documentation for financing such public work so that the successful bidder awarded the contract to construct such public work shall be paid in accordance with the local government's progress and final payment obligations as they become due and payable under this Chapter. Such reasonable plan shall include provisions for interim financing or borrowing until additional or further planned revenues can be obtained from a state or federal funding source or from other revenue producing measures. Such public work financing plan, including the provisions for the interim financing, shall be made available to interested bidders for review at least fifteen days before competitive bids are due for the particular public work. Documentation must accompany such plan and such documentation must be from the source of the borrowing or from the solicitor/bond counsel. The following are acceptable means of interim financing for such public works:

(1) Bank notes, letters of credit, lines of credit. The financing may be with a financial institution or between accounts within the municipality/authority.

(2) Revenue anticipation notes, bond anticipation notes, bonds or other public debt borrowing. The preliminary official statement or other such document accompanied with a statement of interest is acceptable.

(3) Use of borrower/applicants funds. Existing or on hand or on deposit funds may be used for interim funding. The depository of funds must be identified and the manner the source was developed (general revenues, tax collections).

§ 4733. Contractors', subcontractors' and material suppliers' payment obligations.

(a) Performance by subcontractor or material supplier entitles subcontractor or material supplier to payment.- Performance by a subcontractor or material supplier in accordance with the provisions of the contract shall entitle the subcontractor or material supplier to payment from the party with whom the subcontractor or material supplier has contracted. For purposes of this section, the contract between the contractor, subcontractor or material supplier is presumed to incorporate the terms of the contract between the contractor and the government agency.

(b) Disclosure of progress payment due dates.-A contractor or subcontractor shall disclose to a subcontractor, before a subcontract is executed, the due date for receipt of progress payments from the government agency. Notwithstanding any other provisions of this subchapter, if a contractor or a subcontractor fails to accurately disclose the due date to a subcontractor, the contractor or subcontractor shall be obligated to pay the subcontractor as though the due dates established in subsection (c) were met by the government agency. This subsection shall not apply to a change in due dates because of conditions outside of the contractor's control, including, but not limited to, design changes, change orders or delays in construction due to weather conditions.

(c) Payment - When a subcontractor or material supplier has performed in accordance with the provisions of the

contract, a contractor shall pay to the subcontractor or material supplier, and each subcontractor shall in turn pay to its subcontractors or material supplier, the full or proportional amount received for each such subcontractor's or material supplier's work and material, based on work completed or services provided under the subcontract, 14 days after receipt of a progress payment. Payment shall be made under this section unless it is being withheld under section 4734 (relating to withholding of payment for good faith claims).

(d) Interest due when progress payment not timely.-If any progress payment is not made to a subcontractor or material supplier as provided for in subsection (c), the contractor shall pay to the subcontractor or material supplier, in addition to the amount due, interest as computed in section 4732(c) (relating to government agency's progress payment obligations).

(e) When interest payment not required -In the event that the contract does not contain a grace period and if a subcontractor or material supplier is not paid by the payment date required by subsection (c), no interest penalty payment required under this section shall be paid if payment is made on or before the 15th calendar day after the payment date required under this subchapter.

#### § 4734. Withholding of payment for good faith claims.

(a) When local government unit may withhold payment.-The local government unit may withhold payment for deficiency items according to terms of the contract. The local government unit shall pay the contractor according to the provisions of this subchapter for all other items which appear on the application for payment and have been satisfactorily completed. The contractor may withhold payment from any subcontractor responsible for a deficiency item. The contractor shall pay any subcontractor according to the provisions of this subchapter for any item which appears on the application for payment and has been satisfactorily completed.

(b) Notification when payment withheld for deficiency item.-If a local government unit withholds payment from a contractor for a deficiency item, it shall notify the contractor of the deficiency item within the time period specified in the contract or 15 calendar days of the date that the application for payment is received. If a contractor withholds payment from a subcontractor for a deficiency item, it must notify the subcontractor or supplier and the local government unit of the reason within 15 calendar days of the date after receipt of the notice of the deficiency item from the local government unit.

#### § 4735. Penalty and attorney fees.

(a) Penalty.-If arbitration or a claim with a court of competent jurisdiction is commenced to recover payment due under this subchapter and it is determined that the local government unit, contractor or subcontractor has failed to comply with the payment terms of this subchapter or has improperly withheld payment to the contractor for reasons including those set forth in subsection (b), the arbitrator or the court shall award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld.

(b) Attorney fees.-Notwithstanding any agreement to the contrary, the prevailing party in any proceeding to recover any payment under this subchapter shall be awarded a reasonable attorney fee in an amount to be determined, by the court or arbitrator, together with expenses, if it is determined that the local government unit, contractor or subcontractor withheld payment improperly. Failure on the part of the architect or engineer to do any of the following in a timely manner shall constitute withholding payment improperly by the local government unit:

- (1) make a final inspection;
- (2) issue a certificate of completion when warranted under section 4741 (relating to substantial/final payment under contract);
- (3) list in detail each uncompleted item and a reasonable cost of completion as required under section 4741;
- (4) make timely recommendations or approval of payment of amounts due to the contractor, including payment for meritorious or approved change orders;
- (5) make recommendations or approval full payment to the contractor of retainage due.

#### § 4736. Contracts involving Federal aid.

If any provision of this chapter conflicts with a Federal statute or regulation or with conditions attached to the receipt of Federal aid, this chapter shall not operate to prevent receipt of the Federal aid in accordance with any Federal statute or regulation.

#### § 4737. Certain provisions unenforceable.

A provision in the contract making it subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occurs in another state shall be unenforceable.

§ 4738. Applicability.

(a) Not applicable in certain situations.- Nothing in this subchapter shall be construed to require payment of interest penalties by the Federal State Government if the local government unit is liable for the interest.

(b) Not applicable to following entities.-This chapter shall not apply to any of the following provided that all bidders to contracts entered into are informed of the status of the local government unit and are advised that this chapter does not apply to all contracts bid and awarded by the local government unit:

(1) A municipality determined to be distressed under the act of July 10, 1987 (P.L.246, No.47), known as the Municipalities Financial Recovery Act.

(2) A school district which has been determined to be a distressed school district under section 691 of the act of March 10, 1949 (P.L.30, No.14), known as the Public School Code of 1949.

(3) A city of the first class that has entered into an intergovernmental cooperation agreement under the act of June 5, 1991(P.L.9, No.6), known as the Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class, for so long as any deficit-reducing bonds issued by the authority pursuant to section 301(b)(1) of that act are outstanding and payable.

(4) A corporate entity or school district as defined in the Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class.

(5) A transportation authority organized or operating under 74 Pa. C. S. Ch. 17 (relating to metropolitan transportation authorities).

§ 4739. Claims by innocent parties.

(a) No obligation to third parties.-The local government unit shall have no obligation to any third parties for any claim.

(b) Barred claims.-Once a contractor has made payment to the subcontractor according to the provisions of this subchapter, future claims for payment against the contractor or the contractor's surety by parties owed payment from the subcontractor which has been paid shall be barred.

SUBCHAPTER E  
SUBSTANTIAL/FINAL PAYMENT

Sec.

4741. Substantial/final payment under contract.

4742. Arbitration.

4743. Mediation.

§ 4741. Substantial/final payment under contract.

(a) Contract containing provision for retainage.-

(1) A contract containing a provision for retainage as provided in section 4721 (relating to retainage) shall contain a provision requiring the architect or engineer to make final inspection within 30 days of receipt of the request of the contractor for final inspection and application for final payment.

(2) If the work is substantially completed, the architect or engineer shall issue a certificate of completion and a final certificate for payment, and the local government unit shall make payment in full within 30 days except as provided in section 4721, less only one and one-half times the amount required to complete any then-remaining uncompleted minor items, which amount shall be certified by the architect or engineer and, upon receipt by the local government unit of any guarantee bonds which may be required, in accordance with the contract, to insure proper workmanship for a designated period of time.

(3) If the architect or engineer unreasonably withholds a determination of substantial completion or the issuance of a certificate of completion and a final certificate for payment, such action shall constitute failure to comply with the payment terms under section 4735(a) (relating to penalty and attorney fees) and withholding payment improperly under section 4735(b) on the part of the local government unit .

(4) The certificate given by the architect or engineer shall list in detail each uncompleted item and a reasonable cost of completion. If the architect or engineer fails to provide a list in detail, together with the reasonable cost of completion, within 30 days after receipt of the request of the contractor for final inspection and application for final payment and substantial completion has been attained, it will be presumed that there are no uncompleted items and final payment, including release of retainage, shall be made to the contractor within 30 days of the final payment application.

(5) If a claim is filed by a contractor under this section and it is disputed by the local government unit, the contractor may request that it be decided by the use of the expedited arbitration procedure of the Construction Industry Rules of the American Arbitration Association.

(6) Final payment of any amount withheld for the completion of minor items shall be paid upon completion of each such item in the certificate of the engineer or architect.

(b) Interest.-The final payment due the contractor from the local government unit after substantial completion of the contract shall bear interest at a rate of 6% per annum for all contracts without provisions for retainage and at a rate of 10% per annum for all contracts with provisions for retainage, the interest to begin after the date that such payment becomes due and payable to the contractor. However, where the local government unit has issued bonds to finance the project, interest shall be payable to the contractor at the rate of interest of the bond issue or at the rate of 10% per annum, whichever is less, but in no event shall the interest payable to the contractor be at a rate of interest less than the legal rate of interest.

#### § 4742. Arbitration.

If a dispute should arise between the contractor and the local government unit over the payment of retainages and final payment or under or arising from the terms or performance of the construction contract, which dispute is not submitted to or resolved by mediation, then the dispute shall be arbitrated under the applicable terms of the contract. If the contract contains no provision for arbitration, the dispute shall be arbitrated under the rules of the American Arbitration Association or under alternative rules for arbitration agreed upon by the parties after the invocation of arbitration or in accordance with 42 Pa.C.S. Ch. 73 (relating to arbitration) at the choice of the claimant. In any event, either party shall have the right of appeal from any decision and award as provided by law.

#### § 4743. Mediation.

(a) General rule.--A claim arising under the terms of the construction contract or the performance of the contract shall, after initial decision by the architect or engineer, be subject to mediation at the request of either party.

##### (b) Procedure.—

(1) The parties shall endeavor to resolve their claims by mediation which shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect unless the parties agree after the invocation of mediation upon alternative rules or forum for mediation. A request for mediation shall be filed in writing with the other party to the contract and if its rules and forum are being utilized with the American Arbitration Association.

(2) The request may be made concurrently with the filing of a demand for arbitration, in which case mediation shall proceed in advance of arbitration or legal or equitable proceedings which shall be stayed pending mediation for a period of 30 days from the date of filing unless stayed for a longer period by agreement of the parties.

(3) The parties shall share the mediator's fee and any filing fees equally

(4) The mediation shall be held in the area where the project is located unless another location is mutually agreed upon.

(5) Agreements reached in mediation shall be enforceable as settlement agreements in a court having jurisdiction.

SUBCHAPTER F  
ROLE OF ARCHITECT OR ENGINEER

Sec.

4751. General rules.

§ 4751. General rules.

(a) Local government unit's representative and agent.-- Construction contracts awarded by a local government unit shall provide that the architect or engineer will be the local government unit's representative and agent during the construction period.

(b) Contract provisions.--Construction contracts shall also provide that the architect and engineer are bound to the provisions of the contract in carrying out their duties and responsibilities in a professional and competent manner, and no indemnification or waiver clause in a construction contract shall vary or lessen their duties and responsibilities.

(c) Impartiality.--While functioning as architect or engineer under any construction contract awarded by a government agency, the architect or engineer must not show partiality in interpretations and decisions of provisions of the contract, but must serve in an impartial manner.

This act shall take effect in 60 days.

CONSTRUCTION CONTRACT STANDARDS FLOW CHART

