

CHAPTER 2. OFFICES OF ADMINISTRATION AND THE BUDGET

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Subchapter A. SUBMISSION AND CONSIDERATION OF APPLICATIONS FOR AWARDS OF FEES AND EXPENSES

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Source

The provisions of this Subchapter A adopted May 18, 1984, effective May 19, 1984, 14 Pa.B. 1707, unless otherwise noted.

GENERAL PROVISIONS

§ 2.1. Purpose.

The act provides for the award of fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings initiated by Commonwealth agencies. An eligible party may receive an award, except as otherwise provided or prohibited by law, when it prevails over an agency, unless the agency's position in the proceeding was substantially justified or special circum-

stances make an award unjust. This subchapter describes how to apply for awards and the procedures for initiating payment. The guidelines and standard procedures contained in this subchapter are to apply unless specifically modified by an agency in accordance with § 2.9 (relating to agency rules).

Cross References

This section cited in 4 Pa. Code § 2.11 (relating to statements of policy).

§ 2.2. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

Act—Act of December 13, 1982 (P. L. 1127, No. 257) (71 P. S. §§ 2031—2035).

Adjudication—A final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include an order based upon a proceeding before a court or which involves the seizure or forfeiture of property, paroles, pardons or releases from mental institutions.

Agency—A government agency.

Applicant—The prevailing party seeking an award of fees and expenses.

Employe—An individual whom a party has the right to hire, the power to discharge and the right to direct work to be performed and the manner in which the work is to be performed.

Party—An individual, partnership, corporation, association, private organization or public organization except an agency, which appears in a proceeding before an agency that has a direct interest in the subject matter of the proceeding. The term does not include the following:

- (i) An individual whose net worth exceeded \$500,000 at the time the adversary adjudication was initiated and a sole owner of an unincorporated business, or a partnership, corporation, association or organization whose net worth exceeded \$2 million at the time the adversary adjudication was initiated.
- (ii) A sole owner of an unincorporated business, or a partnership, corporation, association or organization having more than 250 employes at the time the adversary adjudication was initiated.
- (iii) A party represented by counsel paid, directly or indirectly, in whole or in part, by an appropriation, grant, subsidy or loan made by the State, local or Federal government.

Cross References

This section cited in 4 Pa. Code § 2.11 (relating to statements of policy).

§ 2.3. Effective date and termination.

- (a) This subchapter is effective for proceedings begun on or after July 1, 1983.
- (b) This subchapter expires July 1, 1997.

Source

The provisions of this § 2.3 adopted May 18, 1984, effective May 19, 1984, 14 Pa.B. 1707; amended March 4, 1988, effective March 5, 1988, 18 Pa.B. 936. Immediately preceding text appears at serial page (89712).

Cross References

This section cited in 4 Pa. Code § 2.11 (relating to statements of policy).

§ 2.4. Applicability to Commonwealth agencies.

Every executive and independent Commonwealth agency, as defined in the act, the Auditor General, the State Treasurer and the Pennsylvania Public Utility Commission are subject to this subchapter.

Cross References

This section cited in 4 Pa. Code § 2.11 (relating to statements of policy).

§ 2.5. Awards of fees and expenses.

- (a) A Commonwealth agency that initiates an adversary adjudication will award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances make an award unjust. This subchapter shall not apply if otherwise provided or prohibited by law.
- (b) An attorney, agent or expert witness whose fee is in dispute may be required by the adjudicative officer to produce detailed contemporaneous records verifying the actual time spent on behalf of the prevailing party. The inability of an attorney, agent or expert witness to produce the records may be considered by the adjudicative officer as a basis for reducing the amount of fees and expenses sought for that attorney, agent or expert witness.

Cross References

This section cited in 4 Pa. Code § 2.11 (relating to statements of policy).

§ 2.6. Eligibility.

- (a) To be eligible for an award of fees and expenses under the act, an applicant shall be a party, as defined in the act; shall prevail over the Commonwealth

agency initiating the adversary adjudication; shall allege that the position of the Commonwealth agency was not substantially justified; and shall meet the conditions set forth in the act.

(b) The applicant shall provide the information required by this subchapter and by the Application for Award of Adjudicative Fees and Expenses.

(c) Each applicant shall provide a statement showing the net worth of the applicant. The statement may be in any form convenient to the applicant that provides full disclosure of assets and liabilities and is sufficient to determine eligibility under this subchapter. The net worth statement shall be made available only to the adjudicative officer and the Commonwealth agency except when an appeal is taken, in which case the net worth statement shall be included in the record of the proceeding in which an award is sought.

(d) For purposes of eligibility, the net worth and number of employes of an applicant will be determined as of the date the proceeding was initiated.

Notes of Decisions

The fact that a court reporter failed to appear at a hearing and appellant offered to pay for another court reporter were not sufficient reason, by itself, to award the appellant the costs and fees of bringing an expert witness from Alabama since appellant was not the prevailing party. *Willard Agri-Service, Inc., v. Department of Agriculture*, 554 A.2d 596 (Pa. Cmwlth. 1989).

Cross References

This section cited in 4 Pa. Code § 2.11 (relating to statements of policy).

§ 2.7. Application and other forms.

(a) Application forms will be available, insofar as possible, from adjudicative officers. The form will also be published in the *Pennsylvania Bulletin* as a notice. The application must be completed by the prevailing party and submitted to the adjudicative officer as prescribed in the act. The prevailing party, at the same time, shall send an additional copy of the application to the chief counsel of the Commonwealth agency that initiated the proceeding. The form shall be signed by the applicant attesting to his eligibility to submit an application.

(b) A statement of net worth must be attached to the application. The applicant may also include any other documents that the applicant wishes the adjudicative officer to consider in determining whether and in what amount an award should be made.

(c) Upon determination of an award the adjudicative officer must complete an Award of Adjudicative Fees and Expenses form and submit it to the agency's chief counsel. A copy of this form will be forwarded to the applicant as notification of the finding of the adjudicative officer.

(d) The Award of Adjudicative Fees and Expenses form must be signed by the applicant and returned to the chief counsel of the agency as notification of acceptance or nonacceptance of the award.

(e) Upon receipt of an Award of Adjudicative Fees and Expenses form signed by the applicant accepting an award, or upon completion of an appeal resulting in an award, the chief counsel shall sign and forward the acceptance form to the agency fiscal officer for submission to the agency comptroller for encumbrance and payment.

Cross References

This section cited in 4 Pa. Code § 2.11 (relating to statements of policy).

§ 2.8. Records.

A completed set of application and other forms, with attachments, shall be maintained by the chief counsel of the Commonwealth agency involved in the proceeding. The chief counsel shall provide a complete set to the agency fiscal officer when an award is to be paid.

Cross References

This section cited in 4 Pa. Code § 2.11 (relating to statements of policy).

§ 2.9. Agency rules.

(a) Section 4(b) of the act (71 P. S. § 2034(b)) requires that “after consultation with the Secretary of Budget and Administration, each agency shall by rule establish specific procedures for the submission and consideration of applications for an award of fees and other expenses for adjudicative proceedings before the agency, or may adopt the uniform procedures recommended by the Secretary.” Consultation with the Secretary of Budget and Administration will be as delegated by the Secretary of Administration and the Secretary of the Budget.

(b) To avoid the need for each agency to promulgate its own regulation to either adopt or modify the standard procedures in this subchapter, adoptions will be published as amendments to this section. Each agency is to notify the Secretary of Administration of its willingness to adopt the procedures in this subchapter.

(c) Under subsections (a) and (b), the following agencies have adopted the uniform procedures in this subchapter:

Aging, Department of
Agriculture, Department of (includes Harness and Horse Racing Commissions)
Arbitration Panels for Health Care
Banking, Department of
Commerce, Department of
Community Affairs, Department of
Corrections, Department of
Crime and Delinquency, Commission on
Education, Department of
Emergency Management Agency, Pennsylvania

General Services, Department of
 Health, Department of
 Health Facility Hearing Board, State
 Higher Education Assistance Agency
 Housing Finance Agency
 Insurance Department
 Labor and Industry, Department of
 Liquor Control Board
 Medical Professional Liability Catastrophe Loss Fund
 Military Affairs, Department of
 Municipal Retirement Board, Pennsylvania
 Pardons, Board of
 Public Welfare, Department of
 Revenue, Department of
 School Employes' Retirement System, Pennsylvania
 State, Department of
 State Employes' Retirement System
 State Police
 State System of Higher Education
 Transportation, Department of

Editor's Note: Subsection (c) appears under the Rules and Regulations heading as a document which the Legislative Reference Bureau finds to be general and permanent in nature and therefore a document to be codified. See 1 Pa. Code §§ 3.1 and 3.25 (relating to contents of *Pennsylvania Code* and rules and regulations).

Source

The provisions of this § 2.9 amended December 13, 1985, effective December 14, 1985, 15 Pa.B. 4426. Immediately preceding text appears at serial page (89714).

Cross References

This section cited in 4 Pa. Code § 2.1 (relating to purpose); and 4 Pa. Code § 2.11 (relating to statements of policy).

STATEMENTS OF POLICY

Source

The provisions of these §§ 2.11—2.20 adopted June 22, 1984, effective May 19, 1984, 14 Pa.B. 2129, unless otherwise noted.

§ 2.11. Statements of policy.

The act requires the Governor's Office of Budget and Administration to promulgate guidelines or uniform procedures for the submission and consideration of applications for awards of fees and other expenses. Those guidelines are contained in §§ 2.1—2.9 (relating to general provisions). The following additional

guidelines, as statement of policy of the Governor's Office, are provided for the use of Commonwealth agencies.

§ 2.12. Definitions.

The following words and terms, when used with this subchapter, have the following meanings, unless the context clearly indicates otherwise:

Adjudicative officer—The final deciding official of an agency, whether designated an administrative law judge, hearing officer, examiner, referee, or otherwise, who is presiding over a proceeding at the time of final disposition. The term may include more than one official, such as a hearing board.

Final disposition—A final adjudication on the merits of a case, withdrawal or termination of charges by the Commonwealth agency, or approval of a settlement of a case by the Commonwealth agency initiating the case.

Proceeding—An action initiated by a Commonwealth agency, up to and including final disposition.

§ 2.13. Submission of application.

An applicant must submit an application to the adjudicative officer within 30 calendar days after final disposition of the adversary adjudication. The additional copy required by the act is to be sent directly to the agency's chief counsel.

§ 2.14. Reopening of record.

The adjudicative officer may reopen the record following final disposition to require additional evidence relating to the amount of fees and expenses and whether or not they were reasonable and necessary. No further evidence may be presented at that time on the question of whether or not a position of the Commonwealth agency giving rise to the claim for fees and expenses was or was not substantially justified.

§ 2.15. Net worth and number of employees.

Both the net worth and the number of employees of an applicant and all of its affiliates shall be aggregated to determine eligibility. A party that directly or indirectly controls or owns a majority of the voting shares of another business, or controls, in any manner, the election of a majority of that business' board of directors, trustees, or other persons exercising similar functions, shall be considered an affiliate for purposes of this subchapter, unless the adjudicative officer determines that the treatment would be unjust and contrary to the purposes of the act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant, other than those described in this subsection, constitute special circumstances that would make an award unjust. A part-time employe who works more than 20 hours per week should be counted as one employe. A part-time employe who works 20 hours or less per week should be counted as one-half an employe.

Notes of Decisions*Affiliate*

Under this regulation, definition of "affiliate," only a business, and not an individual, may constitute an "affiliate" and the applicant for costs must exercise some control, either directly or indirectly, over the affiliated company. *McDonald Land & Mining Co. v. Department of Environmental Resources*, 1995 EHB 81.

§ 2.16. Sole owner of an unincorporated business.

(a) An individual who is the sole owner of an unincorporated business and who, at the time the adversary adjudication was initiated against him, had an individual net worth not exceeding \$500,000 but whose unincorporated business had a net worth not exceeding \$2 million or had more than 250 employees will be considered an individual rather than a sole owner of an unincorporated business only for those issues on the merits on which he prevails which primarily relate to his interests as an individual and which are severable from issues relating to his interests as sole owner of an unincorporated business.

(b) An individual who is the sole owner of an unincorporated business and who, at the time the adversary adjudication was initiated against him, had an individual net worth exceeding \$500,000 but whose unincorporated business had a net worth not exceeding \$2 million and had 250 or fewer employees will be considered a sole owner of an unincorporated business rather than an individual only for those issues on the merits on which he prevails which primarily relate to his interests as a sole owner of an unincorporated business and which are severable from all issues relating to his interests as an individual.

§ 2.17. Fees for expert witnesses.

If a rate of compensation for expert witnesses has not been established by an agency, the rate should not exceed Step H of Pay Range 53 of the Commonwealth's Standard Pay Schedule S-1.

§ 2.18. Fees for attorneys.

Justification for attorney fees in excess of \$75 per hour must be documented by the applicant's attorney and included as part of the application.

§ 2.19. Method of payment.

Awards shall be paid as they become due. If sufficient funds are not available during the close out of a fiscal year to pay all awards, remaining awards should be prorated accordingly and the unpaid balance paid from appropriations made to the agency in the next fiscal year.

§ 2.20. Reports.

When an award of fees or other expenses is made, the agency shall provide a report to the Secretary of Administration. The reports shall include a brief summary of the circumstances underlying the disposition of the case and the basis for the award, the amount of the award, and an identification of the remedial actions necessary to avoid future adversary adjudications being undertaken without substantial justification.

Subchapter B. INTEREST PENALTIES FOR LATE PAYMENTS

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Authority

The provisions of this Subchapter B issued under section 1507 of The Fiscal Code (72 P. S. § 1507), unless otherwise noted.

Source

The provisions of this Subchapter B adopted August 5, 1983, effective August 6, 1983, 13 Pa.B. 2390, unless otherwise noted.

§ 2.31. Purpose.

The act provides for the payment of interest penalties to qualified small business concerns when payments for property or services provided to Commonwealth agencies are not made by required payment dates. This subchapter prescribes eligibility requirements, payment dates, responsibilities of Commonwealth agencies, and method of payment.

§ 2.32. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

Act—The act of December 13, 1982 (P. L. 1155, No. 266) (72 P. S. § 1507).

Business concern—Any person (sole proprietorship, partnership, corporation) engaged in a trade or business and operating as a contractor with Commonwealth agencies and nonprofit entities operating as contractors with Commonwealth agencies.

Commonwealth agency—An executive or independent agency and the Auditor General, the Board of Claims, the State Treasurer, and the Public Utility Commission.

Executive agency—The Governor and the departments, boards, commissions, authorities, and other officers and agencies of the Commonwealth government; the term excludes a court or other officer or agency of the unified judicial system, the General Assembly and its officers and agencies, and an independent agency.

Independent agency—The Department of the Attorney General, the Fish Commission, the Game Commission, the Historical and Museum Commission, the State Civil Service Commission, the Turnpike Commission, the Milk Marketing Board, the Liquor Control Board, the Human Relations Commission, the Labor Relations Board, the Securities Commission, the State Tax Equalization Board, the Higher Education Assistance Agency, the Crime Commission and the State Ethics Commission.

Payment date—A payment shall be considered made on:

- (i) The date of the check;
- (ii) The date of scheduled electronic funds transfer; or
- (iii) The date of wire transfer.

Payment office or finance center—The location to which a Commonwealth agency directs an invoice to be submitted, as stipulated on the contract or purchase document.

Proper invoice—A billing from a vendor for property or services accepted by a Commonwealth agency that contains or is accompanied by such substantiating documentation and in such form and number as may be required by the Commonwealth agency.

Qualified small business concern—An independently owned and operated for-profit business concern employing 100 or fewer employees and not a subsidiary or affiliate of a corporation otherwise not qualified.

Receipt of invoice—The later of:

- (i) The date on which the agency's designated payment office or finance center actually receives a proper invoice; or
- (ii) The date on which the Commonwealth agency accepts the property or service concerned.

Required payment date—

- (i) The date on which payment is due under the terms of a contract;
- (ii) Thirty days after receipt of a proper invoice if a date on which payment is due is not specified in the contract; or
- (iii) The net payment date stated on the invoice if later than the dates established in accordance with subparagraphs (i) and (ii).

Source

The provisions of this § 2.32 amended September 13, 1985, effective September 14, 1985, 15 Pa.B. 3243. Immediately preceding text appears at serial pages (89718) to (89719).

Cross References

This section cited in 4 Pa. Code § 2.36 (relating to eligibility requirements).

§ 2.33. Effective date.

This subchapter applies to contracts entered into for the acquisition of property or services on or after June 11, 1983.

§ 2.34. Applicability to Commonwealth agencies.

Commonwealth agencies are subject to this subchapter.

§ 2.35. Policy governing payments of interest penalties.

(a) Each Commonwealth agency which acquires property or services from a qualified small business concern but which does not make payment for each such complete delivered item of property or service by the required payment date will pay an interest penalty to the qualified small business concern as prescribed in this subchapter.

(b) An interest penalty will be paid for the period beginning on the day after the required payment date and ending on the payment date, except that no interest penalty will be paid if the payment date is on or before the 15th day after the required payment date.

(c) Interest will be computed at the rate determined by the Secretary of Revenue as provided in sections 806 and 806.1 of The Fiscal Code (72 P. S. §§ 806 and 806.1).

(d) Interest will be paid by a separate payment within 30 days of the payment date. The amount of an interest penalty that remains unpaid at the end of each successive 30-day period will become the principal amount upon which subsequent interest penalties shall accrue.

For example:

- Day 1—receipt of a proper invoice
- Day 30—required payment date
- Day 45—end of grace period, no interest due
- Day 50—payment date; interest due from Day 31 through Day 50

Day 80—final due date for payment of interest penalty
Day 81—additional interest begins on interest payment due.

Cross References

This section cited in 4 Pa. Code § 2.37 (relating to responsibilities of Commonwealth agencies); and 4 Pa. Code § 2.38 (relating to exclusions).

§ 2.36. Eligibility requirements.

(a) A qualified small business concern, to be eligible under this subchapter, shall include the following on the face of every invoice presented to the Commonwealth:“(name of vendor) is a qualified small business concern as defined in 4 Pa. Code § 2.32.”

(b) Invoices, and any inquiries related thereto, of a qualified small business concern shall be directed to the payment office or finance center designated on the contract or purchasing document. If no payment office or finance center is designated, a proper invoice shall be submitted to the organization within the Commonwealth agency that accepts delivery of the property or service.

§ 2.37. Responsibilities of Commonwealth agencies.

(a) Commonwealth agencies will specify a payment office or finance center on every contract or purchasing document.

(b) Separate required payment dates will be specified by Commonwealth agencies for contracts under which property or services are to be provided in a series of partial executions or deliveries to the extent that such contracts provide for separate payments of such partial executions or deliveries.

(c) Prior to the date upon which payment without an interest penalty is due, the Commonwealth agency will notify a qualified small business concern of any defect in property or services or impropriety in an invoice that would prevent the running of the time periods specified in § 2.35 (relating to policy governing payments of interest penalties). The notification will include a statement that all differences must be resolved prior to acceptance by the Commonwealth. Upon written or telephonic notification to the qualified small business concern, the running of the time periods specified in § 2.35 will stop.

§ 2.38. Exclusions.

(a) This subchapter does not apply to public contracts subject to the act of November 26, 1978 (P. L. 1309, No. 317) (73 P. S. §§ 1621—1631), referred to as the Public Works Contract Regulation Law.

(b) Interest penalties will not accrue on invoices remaining unpaid because the Commonwealth is setting off obligations receivable from a qualified small business concern.

(c) Accrual of an interest penalty will cease automatically 6 months from the date of the original invoice unless the qualified small business concern has noti-

fied the payment office or finance center in writing that the invoice was not paid by the required payment date.

(d) Interest penalties will not be paid if the total accrued amount is less than \$1.00.

(e) This subchapter will not be construed to require interest penalties on a payment which is not made by the required payment date because of a dispute between a Commonwealth agency and a qualified small business concern over the amount of the payment or other allegations concerning compliance with a contract. Claims concerning any such dispute and any interest which may be payable with respect to the period while the dispute is being resolved may be filed with the Board of Claims, following the exhaustion of other appropriate administrative or contractual remedies, if the claim meets the jurisdictional requirements, other than those relating to amounts, of the Board of Claims. Interest penalties awarded by the Board, if any, will be computed as shown in § 2.35(b) (relating to policy governing payments of interest penalties).

§ 2.39. Method of payment.

(a) Commonwealth agencies will pay any interest penalties required by the act and this subchapter out of funds made available for the administration or operation of the program for which the penalty was incurred or from general administrative funds of the agency.

(b) Nothing in this subchapter will be construed to require payment of interest penalties from Federal funds if such payment is prohibited by Federal statute or regulation.

§ 2.40. Reports required of agencies.

Reports will be as required by the Secretary of the Budget through the Directives Management System.

APPENDIX A

*(Editor's Note: 1 Pa. Code § 3.13(b) (relating to contents of *Bulletin*) gives the Legislative Reference Bureau discretion to exclude from publication in the *Pennsylvania Bulletin* classes of documents which are voluminous and applicable only to Commonwealth property or contracts or agency organization, management or personnel. Section 3.13(c) requires the Bureau to publish and codify a summary table of documents filed under § 3.13(b).)*

- (1) Administrative Circular No. 92-8, Dated February 27, 1992. Central Management Information Center Computer Service Charges for Fiscal Year 1991-92.
- (2) Administrative Circular No. 92-22, Dated June 12, 1992. Workers' Compensation Rates.
- (3) Administrative Circular No. 92-25, Dated July 23, 1992. Appropriation, Authorization, and Expenditure of Federal Funds.
- (4) Administrative Circular No. 92-31, Dated August 14, 1992. 1993-94 Budget Instructions.
- (5) Administrative Circular No. 92-33, Dated August 18, 1992. Revised Revenue Estimates, 1992-93 Fiscal Year.
- (6) Administrative Circular No. 92-35, Dated September 3, 1992. Revenue Estimates, 1993-94 Fiscal Year.

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