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## Penalties and Fees Under the Procurement Code Are Discretionary

by Patrick R. Kingsley

In the case of Scott Enterprises, Inc. v. City of Allentown, 2016 WL 3908965 (Pa. 2016), the Pennsylvania Supreme Court considered whether an award of statutory penalties and attorneys' fees under the prompt payment provisions of the Commonwealth's Procurement Code is mandatory upon a finding of bad faith. In a reversal of prior precedent, the Court held that such an award was not mandatory but merely permissive.

The case involved construction of a new public road that was found to be contaminated with arsenic. After suspending work, the municipal owner determined that construction could resume if extra precautions were taken, but the contract did not include terms to address such contaminated soil. The contractor declined to proceed with the contract and sued the municipal owner to recover its losses on the project. At trial, the jury found the municipal owner breached its contract and withheld payments in bad faith. Despite that finding, the trial court declined to award penalties and attorneys' fees contemplated by the Procurement Code.

On appeal, the Commonwealth Court reversed, finding that the award of penalty interest and attorneys' fees was mandatory. As the Commonwealth Court explained, the purpose of the Procurement Code was to "level the playing field" between government agencies and contractors. The Court went on to explain that it would be a "meaningless exercise with no consequences" for a contractor to establish that a government agency was guilty of bad faith, without the agency also being required to compensate the aggrieved contractor for such damages.

The Pennsylvania Supreme Court reversed the decision of the Commonwealth Court and affirmed that the trial court had discretion to decline to award penalty interest and attorneys' fees. According to the Supreme Court, the statute's plain language is unambiguous and merely permissive in nature. The statute provides that "the Court may award" interest penalties and that attorneys' fees "may be awarded." In contrast, the Contractor and Subcontractor Payment Act (CASPA) — which governs private contracts — does not use permissive language but instead uses the phrase "shall award." As the Supreme Court noted:

The General Assembly's use of the word "shall" in provisions in CASPA which are otherwise functionally equivalent to the terms of the Procurement Code suggests a deliberate intention that awards of penalties and attorney fees under the Procurement Code are within the discretion of the tribunal.

The Pennsylvania Supreme Court cautioned that a tribunal cannot arbitrarily decline to issue penalty interest and attorneys' fees, and that the trial court's determination was subject to review for abuse of discretion. Nevertheless, the Court expressly declined to identify any standard or specific factors that a court should use in determining whether the award of penalty interest and attorneys' fees was appropriate. ■



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