

Major Changes to Pennsylvania's Contractor and Subcontract Payment Act

DECEMBER 3, 2018

Pennsylvania's amended Contractor and Subcontractor Payment Act ("CASPA"), 73 P.S. § 501 et seq., took effect October 10, 2018 and governs all contracts, subcontracts and purchase orders on private, nonresidential jobs entered into after that date. This is the first amendment to the Act that was originally passed in 1994.

The amended Act makes it clear that the majority of the new provisions cannot be contracted around or waived. Contract clauses in conflict with the statute will lose out to the strict mandates of the statute. Therefore, it is now absolutely essential that every owner, contractor, and subcontractor carefully review its form contracts to make sure that they are in compliance with the amended Act, specifically clauses dealing with time of payment, withholding, retainage, invoice errors, and the right to suspend performance during payment disputes. Contractors and subcontractors should additionally revise their form demand letters that are sent to collect overdue amounts to include the new and more aggressive provisions of CASPA.

Key Areas of Change:

- **Right to Suspend Work for Nonpayment**

Owner's payments are still due within 20 days of the end of the billing period (or 20 days from receipt of the invoice, whichever is later), but downstream contractors now have an additional remedy for nonpayment. Under 505(e) and 507(e) a downstream contractor can suspend performance without penalty for nonpayment after 70 days. Strict notice requirements apply however. Email or written notice to the payor must be provided when payment is unpaid more than 30 days from the close of the billing period. Upon the passing of 30 days from the first notice of nonpayment, contractor shall then issue a notice warning of its intent to suspend performance in 10 days if payment in full is not received. This second notice must be delivered via certified mail to both the payor and the owner. Suspension of work can continue until payment is received.

Impact: While parties can contract to shorten these time periods, any attempt to lengthen them will be unenforceable. Any and all contract terms prohibiting a subcontractor from suspending work for nonpayment will be unenforceable, an issue for upstreams entities in timely completing the project.

- **Withholding of Payment for Deficient Work**

Upstream contractors have the right to withhold payment for deficient work, subject to a few conditions. Strict notice requirements must be complied with.

If an owner makes the deficient work determination and withholds payment to the contractor, the owner must provide written notice within 14 days of its receipt of the invoice (extended from the former statutes 7 day notice requirement). Included in the notice must be a good faith reason for the deficiency determination and only funds necessary to cover the reasonable cost of correction may be withheld. Payments for all satisfactorily completed work must be remitted. If a second tier subcontractor's work is identified as deficient, the contractor must provide written notice to the second tier within 14 days of the contractor receiving said notice from the owner.

If a contractor makes the deficiency determination, it too must provide written notice including its good faith reasoning and may only withhold the reasonable cost to correct, however, contractors notice time period may be altered by contract.

Impact: Failure to provide notice waives all rights to withhold payment for deficient work. Should an upstream contractor or owner withhold payment without providing requisite notice, or withhold more than the reasonable estimate to cover a deficiency, the subcontractor may be entitled to interest on all wrongly withheld amounts.

- **Retainage**

Subcontractors can now have their retainage released prior to the project's completion by posting a maintenance bond equal to 120% of its retainage upon the substantial completion of its own scope.

Impact: This is a great benefit for subcontractors who provide services in the very early stages of the project, however, "substantial completion" is not defined in the statute so be sure that it is clearly defined in the applicable subcontract in order to trigger the right to post a bond.

- **Invoice Errors**

Payments can no longer be unreasonably delayed due to errors in the invoice. The 10 day time period is no longer binding, rather a subcontractor can alert the contractor of the error at anytime and full payment must be remitted on the due date.

Impact: Be mindful of this change as failure to timely pay invoice errors could result in interest accrual. Payment failures under CASPA remain subject to potential interest in the amount of 1% per month, penalties in the amount of 1% per month, and counsel fees.

The amendments to CASPA come just after Pennsylvania revamped its Mechanics' Lien Law in 2017. Contact the attorneys at Benesch today to make sure your contracts, forms, payment demand letters, and policies are in compliance with the new CASPA.

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