

REAL ESTATE

ALERT

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OCTOBER 10 IS THE DATE: BE PREPARED FOR CHANGES TO PA CONTRACTOR AND SUBCONTRACTOR PAYMENT ACT

By Alexandra Zeiger

The Pennsylvania General Assembly recently revised and Governor Tom Wolf signed into law important changes to the [Contractor and Subcontractor Payment Act](#) (CASPA), which affect construction contracts executed on or after on October 10, 2018. Affording greater protections to contractors and subcontractors to secure payment, the changes may significantly alter payment schedules in construction contracts. Before negotiating a construction contract in Pennsylvania, familiarity with CASPA amendments and an understanding of their significance are essential.

A notable revision is that rights under CASPA are no longer waivable by contract; consequently construction contracts may require modification to standard clauses. In addition, five major amendments to CASPA include: (1) explicitly enumerating suspension of performance as a remedy for non-payment; (2) requiring written notice for withholding payment for deficiency items; (3) requiring notice and payment of the correct amount for defective invoices; (4) allowing release of retainage if a contract posts a maintenance bond; and (5) complying with notice requirements to avoid penalties.

Contractors and Subcontractors Can Suspend Performance for Non-Payment with Proper Notice

CASPA allows contractors and subcontractors to collect monthly interest for non-payment beginning on the eighth day after the due date. The new revisions to the Act explicitly provide contractors with another avenue to secure

payment – suspension of performance. The amendments permit contractors to suspend performance if the following three requirements are met: (1) the owner did not pay the bill 20 days after delivery date of the invoice or 20 days after the end of the billing period (whichever is later); (2) the bill remained unpaid for at least 30 calendar days after the end of the billing period and the contractor sent written notice (via e-mail or postal service) to the owner notifying the owner of non-payment; and (3) at least 30 calendar days have passed since the first written notice was sent pursuant to #2 above and the contractor provided at least 10 calendar days additional notice to the owner (via certified mail) of the contractor's intent to suspend performance. In sum, the contractor is required to give two written notices after non-payment and can suspend performance in as few as 70 calendar days, should the contractor follow all the requirements of the statute.

Additionally, the amendment contains a similar provision for subcontractors except (1) the first requirement only demands 14 days from the invoice delivery date or billing date, and (2) the first notice is provided to the contractor and the second notice is provided to the owner.

Owners, Contractors and Subcontractors are Permitted to Withhold a Reasonable Amount for Deficiency Items, if They Provide Written Notice with a Good Faith Explanation within 14 Calendar Days of Receiving an Invoice, and Failure to Provide Notice Results in Waiver

Under the CASPA amendments, owners are permitted to withhold a reasonable amount for a

deficiency item, so long as the owner notifies the contractor in writing of the owner's good faith reason for withholding payment for the deficiency item within 14 calendar days of receipt of the invoice. The owner must pay the invoice for all items that have been satisfactorily completed on the due date stated in the invoice. In other words, the owner must pay the balance minus the deficiency item about which the owner notified the contractor. Failure to comply with the written notice requirement within 14 calendar days results in waiver of the right to dispute charges in the invoice. The revisions to the Act include a provision with the same notice and time requirements for contractors and subcontractors.

Also, strict adherence to the notice requirements is critical to protect an owner or contractor's interest should litigation commence. If a court or arbitrator determines that the payment provisions of CASPA were violated, the amendments instruct a court or arbitrator to award a 1% monthly interest penalty on the amount of the wrongfully withheld funds. Funds are not wrongfully withheld if the value withheld was in reasonable relation to the claim and the party withholding funds complied with the notice requirements. Thus, adherence to the notice requirement can be determinative in a court's decision to grant an interest penalty award.

Owners should now be prepared to promptly review invoices upon receipt, provide written notice to contractors of any deficiency items present in the invoice within 14 calendar days, and promptly remit payment of the invoice minus the deficiency item to reduce the risk of suspension of performance and monthly interest penalties.

The Party Receiving an Invoice Must Notify the Sender of Any Defects within 10 Working Days and Must Pay the Correct Amount on the Due Date

CASPA requires the party receiving an invoice to notify the sender in writing of any defects within 10 working days. After the sender of the invoice receives notice of the defect, the party receiving the invoice must remit payment of the correct amount by the due date listed on the invoice.

Contractors Can Post a Maintenance Bond for Release of Retainage and Withholding Retainage is Subject to Notice Requirements

The amendments contain a new provision permitting contractors, upon substantial completion of performance, to facilitate the release of retainage provided the contractor posts a maintenance bond with surety for 120% of the retainage value. In other words, contractors can take advantage of releasing retainage before completion of the project if the contractor puts up a bond in compliance with the statute.

Additionally, the amendments provide that owners must remit payment of retainage within 30 days from date of final acceptance. If the owner does not remit payment within 30 days from the date of final acceptance, the owner must comply with the notice requirement used for deficiency items, as described above.

Owners, Contractors and Subcontractors Must Strictly Adhere to CASPA's New Revisions to Ensure Rights are Not Waived

To guarantee all rights under CASPA are protected, all parties to construction contracts must pay close attention to the terms of the contract and the revisions to CASPA. For instance, under the CASPA amendments, an owner can easily waive its right to a good faith dispute of a deficiency item by not complying with the statute's 14-day notice requirement. Likewise, contractors and subcontractors can relinquish their right to suspend performance without penalty by failing to comply with the notice requirements as proscribed by the statute.

To take advantage of the new robust rights under CASPA, all parties to construction contracts should document all of their efforts to strictly adhere to the statute and in particular be cognizant of all time and notice requirements. Standard contracts may now require modification to comply with the new CASPA provisions, especially to eliminate CASPA waivers no longer allowed. ♦

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