

Cause of Action in a Public Construction Project

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Since the enactment of the Commonwealth Procurement Code's Prompt Pay Act, practitioners have wrestled with the question of whether the Prompt Pay Act or the Contractor and Subcontractor Payment Act (CASPA) applies to public construction projects. Recently, the Pennsylvania Supreme Court, in *Clipper Pipe Service v. Ohio Casualty Insurance*, 105 A.3d 657 (Pa. 2015), answered the question.

The *Clipper Pipe* matter arose from a 2010 agreement between the U.S. Department of the Navy and Contracting Systems Inc. II. CSI was retained as a general contractor on the Navy's construction project in Lehigh Valley and retained Clipper Pipe Service Inc. as a subcontractor to perform mechanical, heating, ventilation and air-conditioning work. After a dispute arose over payment, Clipper filed suit, in the U.S. District Court for the Eastern District of Pennsylvania, against CSI and its surety, the Ohio Casualty Insurance Co., for breach of contract and also under CASPA.

CSI and Ohio Casualty filed a motion for summary judgment arguing that CASPA did not apply to public construction projects. The district court denied the summary judgment motion, holding that a government entity may be an "owner" as defined in CASPA and, therefore, CASPA applied.

Clipper prevailed at a jury trial, and was awarded interest, penalty interest and attorney fees under CASPA. CSI and Ohio Casualty appealed the decision to the U.S. Court of Appeals for the Third Circuit. The Supreme Court accepted certification from the Third Circuit to determine whether CASPA applied in the context of a public construction project.

On appeal, CSI and Ohio Casualty argued that, under the principles of statutory construction, the Navy is not an owner and, thus, not subject to CASPA. CSI and Ohio Casualty also argued that it would be untenable for both CASPA and the Prompt Pay Act to apply simultaneously to a construction project because of the significant differences in the laws, including the timing of required notices, the rate of interest on delay payments and the burden of proof associated with penalty interest and attorney fees. Finally, CSI and Ohio Casualty argued that the application of CASPA to a federal construction project would contravene the principle of federal supremacy.

Clipper argued that the identity of the owner is not fundamental to the application of CASPA because the dispute was between a contractor and its subcontractor. If the identity was relevant, Clipper argued that the federal government is an owner for the purposes of CASPA. Clipper also argued that the salient policy behind CASPA was protecting contractors and subcontractors from nonpayment and encouraging fair dealing in construction contracts. Finally, Clipper cited to the federal Prompt Pay Act as alleviating any pre-emption concerns.

After considering the arguments, the Supreme Court held that CASPA does not apply in the context of public construction projects. The court found that, even though not directly involved in the lawsuit, the Navy was not an owner as the term is defined under CASPA and, as such, CASPA does not apply to the dispute between a contractor and subcontractor on a public construction project. Without an owner for the purposes of CASPA, the court reasoned that there can be no contractor. The court held that, while the salient policy of CASPA was important to consider, the legislature did not design CASPA to apply independently to subcontracts in scenarios where the contract resides outside of CASPA's boundaries. Accordingly, the court concluded that CASPA does not apply to a construction project where the owner is a government entity.

The Supreme Court's decision was similar to a recent decision from the Commonwealth Court. Two months prior to *Clipper Pipe*, the Commonwealth Court, in *East Coast Paving & Sealcoating v. North Allegheny*

School District, 111 A.3d 220 (Pa. Cmwlth. 2015), held that the Prompt Pay Act, and not CASPA, governed construction contracts between a government agency and a contractor.

In *East Coast Paving*, East Coast Paving & Sealcoating Inc. was a successful bidder on a paving project at two schools in the North Allegheny School District. East Coast's bid contained a proposal to perform soft-spot repair work at a price of \$135 per cubic yard. The district rejected East Coast's offer to perform the soft-spot repair work as unnecessary. Shortly after the project commenced, the district directed East Coast to perform soft-spot repair work. East Coast submitted a change order request, which the district accepted. East Coast later submitted another change order request based upon the original bid price of \$135 per cubic yard. The district rejected the second change order request, and reasoned that the first change order request covered the entire scope of the work. East Coast filed suit against the district for breach of contract and also under CASPA.

At trial, East Coast moved to amend its complaint to add a claim under the Prompt Pay Act. The trial court denied the motion to amend, presumably due to the district's argument that a claim under the Prompt Pay Act was barred by the statute of limitations.

East Coast prevailed at trial and was awarded its outstanding balance, as well as interest and attorney fees, under CASPA. The district appealed the award and argued, among other things, that CASPA did not apply to public construction projects.

The Commonwealth Court held that CASPA does not apply in the context of public construction projects. The Commonwealth Court found that both CASPA and the Prompt Pay Act could not apply to a construction project because of the differences in the laws and that every contractor would choose CASPA's lower threshold for imposition of penalty interest and attorney fees. Accordingly, the Commonwealth Court held that the Prompt Pay Act applies to public construction projects.

The Commonwealth Court also held that the trial court's denial of the motion to amend was improper. The Commonwealth Court held that the residual six-year statute of limitations, as set forth in 42 Pa.C.S. Section 5527(b), applies to claims under CASPA and the Prompt Pay Act. The Commonwealth Court remanded the matter to the trial court for a determination if the district withheld payment in bad faith and, therefore, would be subject to the penalty and attorney fees provisions of the Prompt Pay Act.

With the decisions in *Clipper Pipe* and *East Coast Paving*, it is important for practitioners to be mindful of pleading the correct cause of action on a public construction project in order to ensure that your client may potentially be awarded damages provided in the Prompt Pay Act.

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