

Legal Perspective



By Danny P. Cerrone Jr., Esq.

In 1994, Pennsylvania enacted the Contractor and Subcontractor Payment Act ("CASPA") in order to protect contractors, subcontractors and suppliers against the withholding of monies due and owed for no reason or for reasons based upon bad faith. Recently, Representative Mike Tobash (Republican-Dauphin County (Part) and Schuylkill (Part)) introduced House Bill 726 to the Pennsylvania House of Representatives to amend CASPA. The Bill could significantly impact both contracting and payment on private projects, to which CASPA applies as stated by the Pennsylvania Supreme Court, in *Clipper Pipe Service, Inc. v. The Ohio Casualty Insurance Company*, 105 A.3d 657 (Pa. 2015) (holding that CASPA did not apply in the context of public construction projects).

In his memorandum submitted to other House members to elicit support and co-sponsors for the Bill, Representative Tobash wrote that non-payment on a construction project "can be very problematic for a small construction-related business when payment is not received for work that has been satisfactorily completed." Representative Tobash further wrote, the Bill "is intended to strengthen the law and provide additional incentives to pay contractors and subcontractors on time, as agreed." The Bill was referred to the Commerce Committee, which has yet to act.

Below is a summary of the proposed changes to CASPA from Representative Tobash's Bill:

- If the Bill is enacted, the parties on a construction project would be prohibited from waiving CASPA or any provision of CASPA. Any contractual or other provision agreeing to such waiver would be deemed as void and unenforceable.
- CASPA provides that, unless otherwise agreed upon by the parties, interest shall accrue at a rate of 1% per month. The Bill proposes to raise the interest rate to 1.5% per month for owner payments owed to a contractor and contractor payments owed to subcontractors or suppliers.
- CASPA provides that, in addition to interest provided in the contract or under the provisions of CASPA, a penalty equal to 1% per month may be recovered for any monies that were wrongfully withheld. The Bill proposes to raise the penalty rate to 1.5% per month for owner payments owed to a contractor and contractor payments owed to subcontractors or suppliers.
- CASPA provides that payment may be withheld, if the owner provides notice of the deficiency item(s) to the contractor within seven days of the date that the invoice is received. The Bill would require that such notice must also contain "a written explanation of its good faith reason." The Bill provides that the owner's failure to provide the written explanation of the good faith reason to withhold payment constitutes a waiver of such basis and necessitates payment in full for the invoice.
- Similarly, CASPA provides that payment may be withheld, if the contractor provides notice of the deficiency item(s) to the subcontractor or supplier, and the owner, within seven days of the date that the invoice is received. The Bill would require that such notice must be in writing and provide the good faith reason. The Bill provides that the contractor's failure to provide the written notice of the good faith reason to withhold payment constitutes a waiver of such basis and necessitates payment in full for the invoice.
- CASPA provides that, if any monies are withheld as retainage, retainage shall be released within 30 days after final acceptance of the work. A contractor is required to pay subcontractors and suppliers within

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14 days of receipt of retainage from the owner. CASPA also provides that the failure to pay retainage, after work is accepted, shall permit a claimant to recover interest, penalty interest and attorneys' fees. The Bill proposes two changes to CASPA's retainage provisions. First, the Bill would permit a contractor or subcontractor, upon reaching substantial completion of its own work, to facilitate the release of retainage on its own contract before final completion of the project by posting a maintenance bond with an approved surety for 120% of the amount of retainage being withheld. This would permit a contractor or subcontractor to be paid its full contract price at the time of substantial completion, if the contractor or subcontractor provides a performance/maintenance bond from an approved surety. Second, the Bill provides that the withholding of

retainage for longer than 30 days, after final acceptance of the work, would require a written explanation of the good faith reason to withhold payment and, if such explanation is not provided, would waive any basis for withholding payment.

- CASPA provides that if an invoice is incorrect or incomplete, the person receiving the invoice shall give written notice of such defect within ten working days. The Bill reduces the notice period to seven working days.
- CASPA provides that an amount is not deemed to be wrongfully withheld to the extent that it bears a reasonable relation to the value of any claim held in good faith. In addition to the reasonable relation requirement, the Bill would require a written explanation of the good faith reason for withholding. Under the Bill, if both of these conditions are not met, the withholding of monies will be considered to be not in good faith or wrongfully withheld.

There are still a number of hurdles that the Bill has to overcome before it is enacted into law. We will keep you apprised of any future developments with the Bill.

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