



A KCA Construction Industry Article of Interest:

Pennsylvania Waves Goodbye to CASPA Waiver

By Tom Williams, Esquire

When in 1994, the Pennsylvania legislature initially passed prompt payment protection for contractors and subcontractors by enacting the Contractor and Subcontractor Payment Act, commonly referred to as CASPA, construction contractors, particularly those acting in subcontractor roles, presumed that this legislative pronouncement preserved forever their rights to receive prompt payment for their work. Unfortunately, in the years that followed many subcontractors, in reviewing their subcontract documents, were surprised to find provisions whereby their rights to seek remedies under CASPA were extinguished. Threatened by the potential complete annihilation of their rights under CASPA at the whim of a contracting partner, many contracting groups lobbied for a reaffirmation of their prompt payment rights whereby any attempt to nullify CASPA rights in a contract would be made unlawful and unenforceable.

With the passage of House Bill 566, signed by Governor Wolf on June 12, 2018, the Pennsylvania legislature has amended CASPA, reaffirming the prompt payment rights and remedies of contractors and subcontractors. In the amendment to CASPA, the legislature has provided the following prohibition against such waivers: “Unless specifically authorized under this Act, parties to a contract or other agreement may not waive a provision of this Act by contract or other agreement.”

Suspension of Work Due to Non-Payment

Although the prohibition against waiver was the primary impetus for the amendment of CASPA, there are additional amendments included in House Bill 566. A very significant

change to CASPA is that it will now include the right for contractors and subcontractors to suspend their work in the event of nonpayment. If a contractor or subcontractor does not receive payment in accordance with the terms of the construction contract, they now have a specific statutory right to suspend their work. However, in order to properly exercise the right to suspend work, contractors and subcontractors must follow a specific schedule of written notices established under the amendment. As for contractors (those having direct contracts with the project owner), the pre-suspension notice requirement provides that, if at least 30 calendar days have passed since the end of the billing period for which payment has not been received according to the terms of the construction contract, a contractor must provide written notice to the owner by way of electronic mail or postal service that payment has not been made. If payment has still not been received 30 days after this initial written notice, the contractor must provide an additional written notice by certified mail at least 10 calendar days prior to work suspension advising the owner that it intends to suspend performance.

Similarly, subcontractors have the same right to suspend their work due to nonpayment. Subcontractors have to follow the same schedule of notices before suspending their work due to nonpayment by a contractor. The initial 30 day written notice must be sent by the subcontractor to the contractor by electronic mail or postal service. A subcontractor's final prerequisite written notice of intent to suspend its work must be sent to the owner or the owner's authorized agent 10 calendar days prior to the work suspension. It is this 10 day notice which may provide the project owner with the very first inkling that there is a payment issue that may put the completion of its project in jeopardy, or worse yet, lead to a mechanic's lien on the project/property.

It is important to note that this new statutory notice timeline prerequisite to work stoppage for non-payment can be shortened (but not lengthened) by agreement of the parties. For example, contractors and subcontractors are free to negotiate pre-work stoppage terms similar to those which already exist in industry recognized form contracts like those found in the AIA and ConsensusDocs documents.

Good-Faith Withholding of Payment for Deficiency Items

Under the amendment to CASPA, owners, contractors and subcontractors have the right to withhold payment from their contracting partners for deficiency items, but only if certain requirements are met. First, the amount to be withheld must be reasonable. In addition, the party seeking to withhold payment for a purported deficiency item must send a written notice to the party who submitted the invoice which includes the deficiency item. With respect to the owner's withholding of payment for a deficiency item, the written notice must be sent to the contractor within 14 days of receipt of the contractor's invoice containing a deficiency item.

With respect to a contractor or subcontractor who wishes to withhold payment for a purported deficiency item, the written notice must be sent to the party who submitted the invoice and the project owner stating the good-faith reason for withholding within 14 calendar days of the date after receipt of notice of the deficiency item. The failure of a party

to comply with the notice requirements constitutes a waiver under CASPA of the basis to withhold payment and the party in receipt of the invoice must then pay the invoice in full. In addition, CASPA makes it clear that, in the event an owner, contractor or subcontractor wishes to withhold payment for an alleged deficiency item, the owner, contractor or subcontractor must still make payment for each other item that has been satisfactorily completed.

Posting a Bond for Release of Retainage

CASPA, as amended, now provides contractors and subcontractors with an opportunity to receive the release of their retainage prior to final completion of a project. Instead of waiting for the entire project to be completed before receiving retainage, contractors and subcontractors may now avail themselves of a procedure whereby they would post a maintenance bond with an approved surety for 120% of the amount of retainage being held in order to receive the release of the retainage.

Effective Date

These amendments will become effective 120 days from the date HB566 was signed by Governor Wolf, which happened on June 12, 2018.

Because these amendments to CASPA are soon to impact all commercial Pennsylvania contractors and subcontractors, and because they include many moving parts, Tom and Reager & Adler will be providing seminar opportunities for construction professionals to get up to speed on these important changes. Look for the announcements of these upcoming seminar opportunities.

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