

30-Day Warning: Major Changes to Pennsylvania's Contractor and Subcontractor Payment Act

We are 30 days away from the effective date of significant amendments to Pennsylvania's Contractor and Subcontractor Payment Act (CASPA or the act)¹ that will profoundly impact rights relating to the timing of payments for work on construction projects. The amended act will apply to construction contracts entered into on or after October 10, 2018.²

Generally, CASPA governs downstream payments on private construction projects in Pennsylvania. The amended act will provide downstream entities — like contractors, subcontractors or suppliers — with more robust protections to better ensure prompt payment for completed work. There are five significant additions, each discussed below along with potential contract and project considerations in light of the changes. Like any new statute, application of the amended act will continue to be refined as courts interpret the new additions. For your reference, the full text of the amended act as compared to the current statute can be found [here](#).

Upstream Entities Waive a Legitimate Basis to Withhold by Failing to Provide Timely Written Notice. Sections 506(b), 511(b).

Currently, CASPA permits upstream entities — typically a project owner or prime contractor — to withhold payments in good faith for deficiency items, but only if they timely notify the downstream entities of the deficiency items. But, the current act provides no meaningful recourse for failure to provide this notice. The amended act makes four key changes to strengthen protections for downstream entities against over-withholding and, most importantly, even against good-faith withholding without timely notice. These significant changes in favor of downstream entities apply to withholding of progress payments and also to withholding of retainage.³

1. The amended act clarifies that the amount an owner withholds must be “reasonable.”⁴ This is consistent with the explicit requirement to remit payment for any non-deficient items satisfactorily completed.⁵ In other words, an entire invoice cannot be withheld for a single deficiency item; rather, all undisputed amounts must be paid.
2. The amended act clarifies that an upstream entity's notice of deficiency must include a written explanation of its good-faith reason to withhold.⁶
3. The amended act extends the time to provide the required written notice from seven to 14 days.⁷
4. The amended act imposes strict consequences on upstream entities that fail to provide the required written notice within 14 days, as failure to do so results in waiver of the basis — and thus the right — to withhold.⁸ The upstream entity must then pay the invoice in full, which means that instead of withholding money to incentivize repair work, punch list work, etc., the downstream entity is entitled to receive payment even though it may still be contractually obligated to perform such work. If an upstream entity decides to withhold payment without providing proper notice, the amount withheld — even if for a legitimate reason — will now be subject to the applicable CASPA penalties. On the other hand, compliance with the withholding requirements now explicitly cannot be subject to CASPA's penalty interest for



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wrongful withholding.⁹

Contract and Project Considerations

Upstream entities should carefully examine contractual withholding provisions to determine if they are enforceable because CASPA's provisions cannot be waived by agreement (see below). Downstream entities should be prepared to submit a claim in writing 15 days after any unpaid invoice to confirm that any basis for withholding has been waived and to continue to develop documents to support payment claims under CASPA.

Downstream Entities Can Suspend Work Until Payment Is Received. Sections 505(e), 507(e).

The current statute outlines three areas of potential exposure for an upstream entity that fails to make proper payments: (1) interest, (2) penalty interest, and (3) attorneys' fees.¹⁰ The amended act also adds a very significant fourth area of potential exposure by creating a framework for downstream entities to stop work if they are not timely paid. Like the current statute, the amended act permits the parties to agree to contractual payment terms and timing for payment. But, the amended act now explicitly permits downstream entities to suspend performance if they are not being paid according to the contract, notwithstanding agreed contract terms to the contrary.¹¹ This provides downstream entities with a new leverage point to force upstream entities to negotiate payments to avoid a work stoppage.

Although there are nuances to consider with the interpretation and application of the amended act, the bottom line is that a downstream entity may now suspend performance as soon as 70 days following the end of the billing period¹² for which payment of undisputed amounts or untimely disputed amounts has not been received. To do so, the downstream entity must: (1) provide written notice of non-payment at least 30 days after the end of the billing period; and (2) provide written notice of intent to suspend performance at least 30 days after written notice of the non-payment and at least 10 days before it suspends performance.¹³ There are slight differences between the procedures for a contractor and subcontractor to suspend work, but the concept is the same.

Once a downstream entity suspends performance, it may continue the suspension until payment is received. It should be noted that the statute is unclear whether the payment amount required to restart the work includes the applicable statutory interest of 1 percent per month.

Contract and Project Considerations

Upstream entities should be prepared to properly and timely — within 14 days of receipt of an invoice — document withholdings of properly disputed payments to avoid the possibility of work suspensions. Downstream entities may consider providing form notices at 30 days and 60 days after non-payment to maximize leverage and also should create the necessary documentation to support payment claims if needed.

Payment Due Date Is Not Affected by Invoice Errors. Section 508.

The current statute requires that the recipient of an incorrect or incomplete invoice provide written notice of the error to the person who sent the invoice within 10 working days. The amended act clarifies that even after proper notice of alleged errors is provided, the correct amount of the invoice remains due on the same date as if the original invoice was correct.¹⁴ Thus, a contractor is not penalized for submitting an invoice with errors.

Contract and Project Considerations

Upstream entities should review contract provisions that adjust the payment date based on resubmitted invoices, as the amended act may render such provisions unenforceable. On the other hand, downstream entities may relax negotiations regarding incorrect invoicing and, instead, rely on the protections of the amended act.

Downstream Entities Can Post a Bond for All Retainage upon Substantial Completion. Section 509(a.1).

The amended act permits contractors and subcontractors to facilitate the release of retainage upon substantial completion by posting a maintenance bond with an approved surety for 120 percent of the amount of retainage being held.¹⁵ Whether a downstream entity decides to exercise this right depends on that entity's particular circumstances and the particular project at issue, as there may be a number of variables and business considerations, such as the need for cash flow versus the potential to recover statutory interest.

Contract and Project Considerations

Both upstream and downstream entities should contractually define "substantial completion," since it is the event that triggers the right to post the maintenance bond under the amended act.

Waiving CASPA Provisions Is Now Explicitly Prohibited. Section 503(c).

Unless specifically authorized by CASPA, no CASPA provision can be waived.¹⁶ The most notable impact is that the amended act will prohibit construction agreements that require downstream entities to continue performing when payments are improperly withheld, an important new feature for upstream entities seeking timely completion of their projects.

Contract and Project Considerations

Upstream entities should re-evaluate their typical contract provisions related to payment dates, withholding, retainage, and the downstream entity's obligation to continue work during payment disputes, as many of these provisions may be unenforceable under the amended act. On the other hand, downstream entities no longer need to negotiate such provisions that will be unenforceable under the amended act.

The purpose of this alert is to provide notice to all participants in Pennsylvania private construction projects of the very significant statutory changes relating to payment disputes on these projects. Please contact us if you would like to discuss the amended act and its effects in more depth, or to have us review your contract documents in light of the new statute.

¹ 73 P.S. § 501 *et seq.*

² *See id.* § 515.

³ *See id.* § 509(d) (as amended).

⁴ *See id.* § 506(b)(1) (as amended).

⁵ *See id.* §§ 506(b)(3), 511(c) (as amended).

⁶ *See id.* §§ 506(b)(1), 511(b)(1) (as amended).

⁷ *See id.*

⁸ *See id.* §§ 506(b)(2), 511(b)(2) (as amended).

⁹ *See id.* § 512(a)(2) (as amended).

¹⁰ *See id.* §§ 505(d), 507(d), 512.

¹¹ *See id.* §§ 505(e), 507(e) (as amended).

¹² "Billing period" is defined as "[a] payment cycle agreed to by the parties or, in the absence of an agreement, the calendar month within which work is performed."

Id. § 502.

¹³ *See* 73 P.S. §§ 505(e)(2), 507(e)(2) (as amended).

¹⁴ *See id.* § 508(c) (as amended).

¹⁵ *See id.* § 509(a.1) (as amended).

¹⁶ *See id.* § 503(c) (as amended).

