

TESTIMONY OF: Jeffrey P. Scarpello
National Electrical Contractors Association, Penn-Del-Jersey Chapter

CASPA Public Hearing
The House Commerce Committee
Wednesday, March 1, 2017 (10:00 A.M.)

Good Morning, Chairman Ellis, Minority Chairman Thomas, and Members of the Committee. Thank you for the opportunity to testify before you this morning regarding the February 17, 1994 Contractor and Subcontractor Payment Act (CASPA) as it relates to subcontractors in the construction industry. Today, I would specifically like to speak to the need for effective prompt payment provisions to be included in any changes to CASPA and I strongly support House Bill 566, which Representatives Santora and Driscoll recently introduced to help ensure prompt payment to contractors and subcontractors.

I am the Executive Director of the Penn-Del-Jersey Chapter of the National Electrical Contractors Association (NECA), which represents the management interests of approximately 150 companies in the eastern half of Pennsylvania and the entire state of Delaware. In this role, I witness the impact that our poorly crafted prompt pay law has on subcontractors within Pennsylvania's construction industry. From week-to-week, NECA's members, who have performed satisfactory work, provided materials and equipment, and paid their laborers, struggle to find creative ways to collect the compensation that is owed to them. These delays in payment can last for months or more, and sometimes require legal action to release payment, if it is released at all. It is important to note, that subcontractors cannot simply prevent these situations by avoiding "bad actors" in the construction industry, as some have suggested. Extremely delayed payment has become the norm in construction, even when working on government projects. All of this is an unnecessary burden to subcontractors, who across the board, are seemingly being positioned as a way to finance construction projects.

In the last legislative session, Representatives Santora and Driscoll took action by introducing HB 2354, which would have amended CASPA by requiring timely payments to contractors and subcontractors. Specifically, it included "suspension of performance" language, which stated that, "if a payment is not received by a contractor in accordance with the owner's payment obligations then the contractor may suspend performance of the work, without penalty, until payment is received. Any term in a construction contract that is contrary to this subsection shall be unenforceable as a matter of public policy."

I am pleased that they reintroduced this legislation, now House Bill 566, in advance of this hearing. I believe that this is an entirely reasonable provision that is already commonplace in neighboring states, and no state has a "60-day" time period as does this legislation. I would be disappointed if, yet again, this committee and the PA General Assembly do not vote in favor of this common sense legislation.

In the remainder of my testimony, I would like to explain how this prompt pay legislation would benefit the construction community and urge you to include this provision in any changes to CASPA.

HB 566's suspension of performance language applies to both prime contractors (commonly called general contractors or G's) and subcontractors. The provisions would be added to Section 5 of CASPA, which outlines the payment obligations of owners to prime contractors, and to Section 7, which addresses the payment obligations of prime contractors to subcontractors. Sections 5 and 7 mirror each other. Section 5 allows prime contractors to stop work if unpaid by the owner, while Section 7 allows subcontractors to stop work if unpaid by the prime contractor.

During construction projects in Pennsylvania, subcontractors generally must wait at least two (2) months before receiving payment for their labor and materials. This payment schedule must be considered when weighing the proposed suspension of performance provisions. Payment due dates are nearly always dictated by the particular job's construction contract, and its terms are predictable. For example, under templates publicized by the American Institute of Architects, which are commonly used, each payment application submitted by a contractor encompasses a one-month (or 30 day) calendar period. The owner must remit payment to the prime contractor within generally twenty (20) days after the end of each billing period. The deadline to pay the subcontractor is usually an additional fourteen (14) days after the contractor has received payment from the owner.

Stop work provisions are not triggered until months after the satisfactory performance of the work. Furthermore, the owner or prime contractor would have sufficient time to prevent work stoppage. The prime contractor would not be permitted to stop work until the following contingencies have occurred: the prime contractor has performed in accordance with the construction contract and billed for the work, which is the typical monthly billing (30 days); the prime contractor has waited another twenty (20) days after the end of the billing period until payment becomes due from the owner; and after the payment deadline has passed, the prime contractor may send the written notice, which itself triggers an additional (7 day) waiting period. In sum, the prime contractor must have put in place work for at least fifty-seven (57) days before the stop work protection could be triggered.

Subcontractors, for their part, must wait even longer because their payments do not become due until usually two (2) weeks after payment has been provided by the owner to the prime contractor. That means subcontractors would be obligated to perform work without payment for at least seventy-one (71) days before stop work could become an option: the thirty (30) day billing period, plus twenty (20) days before payment becomes due to the prime contractor, plus fourteen (14) more days before payment must be provided to the subcontractor, plus the seven (7) day notice of intent to stop work.

As a final protection to the payer, this legislation stipulates that before work may be stopped, at least sixty (60) calendar days have passed since the end of the billing period, in case of the unlikely event that the payment schedule does not already account for two months.

Subcontractors shoulder nearly all the credit burden on construction projects, and the proposed stop work relief is a reasonable option of “last resort.” The modest proposed changes would help contractors and subcontractors who regularly extend significant credit. The stop work provisions constitute a last resort option meant to keep contractors from being forced to choose between burning their remaining resources without any promise of payment OR breaking their contracts and risking damages as well as the loss of entitlement to future payment for work already performed.

The stop work protections would not override the ability to withhold payment for a good faith reasons in which the work is in dispute. Additionally, in the construction industry, contractors and subcontractors have an incentive to continue to perform work and maintain positive relationships. The notion that subcontractors would somehow take advantage of the seven (7) day notice period to force the hand of an owner or prime contractor is untrue. Stop work protection is only available for a contractor who has performed in accordance with the contract documents and is entitled to payment.

Contractors and subcontractors bear significant financial risk on construction projects, so it is not surprising that a number of states, including two (2) that share a border with Pennsylvania, have adopted stop work protections already. These include states as New Jersey, New York, Texas, Illinois, Oklahoma, Arizona, California, and Kansas.

Stopping work helps small business and saves costs at all tiers on a construction project. The proposed seven (7) day written notice requirement prior to suspension of work has precedent in the above-mentioned states, but a longer waiting period would create an undue burden. In the previous legislative session, longer written notice periods and additional “grace periods” were discussed, but no justifiable reasons for such delays were offered. I believe that this is because there are no practical reasons to delay payment longer than at least 57 and 71 days have passed after work has been satisfactorily completed.

A longer waiting period would make stop work an impractical remedy because subcontractors who truly need the protection to maintain financial sustainability would not be unable to continue working on projects for several months without being paid. A written notice period would lead to bankruptcies, increased costs for replacement contractors, and delays on projects that already face challenges.

In conclusion, this “suspension of performance” language will enhance CASPA for the betterment of Pennsylvania’s construction industry. I look forward to the continued dialogue on this important legislative issue. Please call upon me to be a resource to you and your staff.

Thank you, Mr. Chairman and Members of the Committee, for the opportunity to testify on this very important issue affecting Pennsylvania’s construction industry.

MIKE TURZAI
Majority Leader

Room 110 Main Capitol Building
PO Box 202028
Harrisburg, PA 17120-2028
Phone: (717) 772-9943



House of Representatives
Commonwealth of Pennsylvania
Harrisburg

125 Hillvue Lane
First Floor
Pittsburgh, PA 15237
Phone: (412) 369-2230

October 28, 2014

Michael Schurr
Director of Education
The Finishing Trades Institute
2190 Hornig Road
Philadelphia, PA 19116

Dear Mike:

Thank you for inviting me out to tour the institute. That was certainly an interesting and informative experience for me. I really enjoyed the virtual welding machine, and having a chance to see all the other technology and gadgets around the facility! It is such an amazing place, and one deserving of the pride and dedication shown by the staff and students.

Thank you also for giving me a chance to meet with the trade industry leaders. You provided me with some truly valuable insights into the challenges facing tradesmen and business owners. I appreciated hearing about the prompt pay legislation; we will be giving it significant consideration as we head into the next session.

It was wonderful meeting you, and I hope to see you again soon.

Very truly yours,

A handwritten signature in cursive script that reads "Mike Turzai".

Mike Turzai
Majority Leader
Member, 28th Legislative District
Pennsylvania House of Representatives