

CONTRACTOR AND SUBCONTRACTOR PAYMENT ACT

Act of Feb. 17, 1994, P.L. 73, No. 7

Cl. 68

AN ACT

Requiring timely payment to certain contractors and subcontractors; and providing remedies to contractors and subcontractors.

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The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the Contractor and Subcontractor Payment Act.

Section 2. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Billing period." A payment cycle agreed to by the parties or, in the absence of an agreement, the calendar month within which work is performed.

"Construction contract." An agreement, whether written or oral, to perform work on any real property located within this Commonwealth.

"Contractor." A person authorized or engaged by an owner to improve real property.

"Deficiency item." Work performed but which the owner, the contractor or the inspector will not certify as being completed according to the specifications of a construction contract.

"Delivery." Transmittal to an addressee, including, but not limited to, delivery by first class or registered mail, hand delivery or transmission by facsimile machine. Mail, properly addressed, shall be deemed delivered three days from the day it was sent.

"Improve." To design, effect, alter, provide professional or skilled services, repair or demolish any improvement upon, connected with or on or beneath the surface of any real property, to excavate, clear, grade, fill or landscape any real property, to construct driveways and private roadways, to

furnish materials, including trees and shrubbery for any of these purposes, or to perform any labor upon improvements.

"Improvement."

(1) All or any part of a building or structure.

(2) The erection, alteration, demolition, excavation, clearing, grading or filling of real property.

(3) Landscaping, including the planting of trees and shrubbery, and constructing driveways and private roadways on real property.

"Inspector." The contractor or a person authorized or engaged by the owner to inspect the work performed pursuant to a construction contract to determine whether the work completed is in compliance with the construction contract.

"Owner." A person who has an interest in the real property that is improved and who ordered the improvement to be made. The term includes successors in interest of the owner and agents of the owner acting with their authority.

"Person." A corporation, partnership, business trust, other association, estate, trust foundation or a natural individual.

"Real property." Real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon.

"Subcontractor." A person who has contracted to furnish labor or materials to or has performed labor for a contractor or another subcontractor in connection with a contract to improve real property.

Section 3. Application of act.

(a) Number of residential units.--This act shall not apply to improvements to real property which consists of six or fewer residential units which are under construction simultaneously.

(b) Owner's exclusion.--This act shall not apply to contracts for the purchase of materials by a person performing work on his or her own real property.

(c) Prohibition on waiver.--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. ((c) added June 12, 2018, P.L.131, No.27)

Section 4. Performance by contractor or subcontractor.

Performance by a contractor or a subcontractor in accordance with the provisions of a contract shall entitle the contractor or subcontractor to payment from the party with whom the contractor or subcontractor has contracted.

Section 5. Owner's payment obligations.

(a) Construction contract.--The owner shall pay the contractor strictly in accordance with terms of the construction contract.

(b) Absence of payment term.--In the absence of a construction contract or in the event that the construction contract does not contain a term governing the terms of payment, the contractor shall be entitled to invoice the owner for progress payments at the end of the billing period. The contractor shall be entitled to submit a final invoice for payment in full upon completion of the agreed-upon work.

(c) Time for payment.--Except as otherwise agreed by the parties, payment of interim and final invoices shall be due from the owner 20 days after the end of a billing period or 20 days after delivery of the invoice, whichever is later.

(d) Interest.--Except as otherwise agreed by the parties, if any progress or final payment to a contractor is not paid within seven days of the due date established in subsection (c), the owner shall pay the contractor, beginning on the eighth

day, interest at the rate of 1% per month or fraction of a month on the balance that is at the time due and owing.

(e) Suspension of performance.--

(1) If payment is not received by a contractor in accordance with this section, the contractor shall have the right to suspend performance of any work, without penalty, until payment is received according to the terms of the construction contract. Any procedure in a construction contract that exceeds the procedure in paragraph (2) shall be unenforceable.

(2) Suspension of performance in a construction contract may occur in accordance with paragraph (1) or if:

(i) payment has not been made to the contractor in accordance with the schedule established under subsection (c);

(ii) 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. The contractor shall provide written notice to the owner or the owner's authorized agent, via electronic mail or postal service, stating that payment has not been made; and

(iii) at least 30 calendar days have passed since the written notice in subparagraph (ii) has been sent. The contractor shall provide at least 10 calendar days' written notice, via certified mail, of the contractor's intent to suspend performance to the owner or the owner's authorized agent.

((e) added June 12, 2018, P.L.131, No.27)

Section 6. Owner's withholding of payment for good faith claims.

(a) Authority to withhold.--The owner may withhold payment for deficiency items according to the terms of the construction contract. The owner shall pay the contractor according to the provisions of this act for any item which appears on the invoice and has been satisfactorily completed.

(b) Notice.--

(1) Except as provided under section 9, if an owner withholds payment from a contractor for a deficiency item, the amount withheld shall be reasonable and the owner shall notify the contractor of the deficiency item by a written explanation of its good faith reason within 14 calendar days of the date that the invoice is received.

(2) Failure to comply with paragraph (1) shall constitute a waiver of the basis to withhold payment and necessitate payment of the contractor in full for the invoice.

(3) If an owner withholds payment from a contractor for a deficiency item, the owner shall remit payment to the contractor for each other item that has been satisfactorily completed under the construction contract.

(6 amended June 12, 2018, P.L.131, No.27)

Section 7. Contractor's and subcontractor's payment obligations.

(a) Entitlement to payment.--Performance by a subcontractor in accordance with the provisions of the construction contract shall entitle the subcontractor to payment from the party with whom the subcontractor has contracted. ((a) amended June 12, 2018, P.L.131, No.27)

(b) Disclosure of payment dates.--A contractor or subcontractor shall disclose to a subcontractor, before a subcontract is executed, the due date for receipt of payments

from the owner. Notwithstanding any other provision of this act, if a contractor or subcontractor fails to accurately disclose the due date to a subcontractor, the contractor or subcontractor shall be obligated to pay the subcontractor as though the due dates established in section 5(c) were met by the owner. This subsection shall not apply to a change in due dates because of conditions outside of the contractor's control, including, but not limited to, design changes, change orders or delays in construction due to weather conditions.

(c) Time for payment.--When a subcontractor has performed in accordance with the provisions of the construction contract, a contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to the subcontractor's subcontractors, the full or proportional amount received for each such subcontractor's work and materials, based on work completed or service provided under the subcontract, 14 days after receipt of each progress or final payment or 14 days after receipt of the subcontractor's invoice, whichever is later. Payment shall be made under this section unless it is being withheld under section 11. ((c) amended June 12, 2018, P.L.131, No.27)

(d) Interest.--If any progress or final payment to a subcontractor is delayed beyond the date established in subsection (b) or (c), the contractor or subcontractor shall pay the subcontractor interest, beginning on the next day, at the rate provided for in section 5(d) on the balance that is at the time due and owing.

(e) Suspension of performance.--

(1) If payment is not received by a subcontractor in accordance with this section, the subcontractor shall have the right to suspend performance of any work, without penalty, until payment is received according to the terms of the construction contract. Any procedure in a construction contract that exceeds the procedure in paragraph (2) shall be unenforceable.

(2) Suspension of performance in a construction contract may occur in accordance with paragraph (1) or if:

(i) payment has not been made to the subcontractor in accordance with the schedule established under subsection (c);

(ii) 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. The subcontractor shall provide written notice to the contractor or contractor's authorized agent, via electronic mail or postal service, stating that payment has not been made; and

(iii) at least 30 calendar days have passed since the written notice in subparagraph (ii) has been sent. The subcontractor shall provide at least 10 calendar days' written notice, via certified mail, of the subcontractor's intent to suspend performance to the owner or the owner's authorized agent.

((e) added June 12, 2018, P.L.131, No.27)

Section 8. Errors in documentation.

(a) Notice of errors in invoice.--If an invoice is filled out incorrectly or incompletely or if there is any other defect or impropriety in an invoice, the person who receives the incorrect invoice shall give written notice to the person who sent the incorrect invoice within ten working days of receipt of the invoice.

(b) Payment of amount incurred.--(Deleted by amendment).

(c) Payment for invoice with error.--Once written notice has been received by the person who sent the incorrect invoice, the person receiving the invoice shall pay the correct amount of the invoice on the due date in accordance with this act.

(8 amended June 12, 2018, P.L.131, No.27)

Section 9. Retainage.

(a) Time for payment.--If payments under a construction contract are subject to retainage, any amounts which have been retained during the performance of the contract and which are due to be released to the contractor upon final completion shall be paid within 30 days after final acceptance of the work.

(a.1) Posting of security in lieu of retainage.--Upon reaching substantial completion of its own scope of work, a contractor or subcontractor may facilitate the release of retainage on its contract before final completion of the project by posting a maintenance bond with approved surety for 120% of the amount of retainage being held.

(b) Agreement between contractor and subcontractor.--If an owner is not withholding retainage, a contractor may withhold retainage from a subcontractor in accordance with their agreement. The retainage shall be paid within 30 days after final acceptance of the work.

(c) Payment of retainage to subcontractors.--A contractor shall pay to the contractor's subcontractors, and each subcontractor shall in turn pay to the subcontractor's subcontractors, within 14 days after receipt of the retainage, the full amount due each subcontractor.

(d) Withholding acceptance or failure to pay retainage.--Withholding of retainage for longer than 30 days after final acceptance of the work shall be subject to the obligations imposed upon the owner, contractor or subcontractor in section 6(b) or 11(b). If an owner, contractor or subcontractor unreasonably withholds acceptance of work or fails to pay retainage as required by this section, the owner, contractor or subcontractor shall be subject to the payment of interest at the rate established in section 5(d) on the balance due and owing on the date acceptance was unreasonably withheld or the date the retainage was due and owing, whichever is applicable. The owner, contractor or subcontractor shall also be subject to the provisions of section 12.

(9 amended June 12, 2018, P.L.131, No.27)

Section 10. Prepayment; advance payment.

This act shall not be construed to prohibit an owner, contractor or subcontractor from making advance payments or progress payments or from prepaying if an agreement or other circumstances make such payment appropriate. All payments shall be made when they are due and owing and if not so made shall bear interest at the rate provided for in section 5(d) from the date payment was due. The person who fails to make timely payment shall also be subject to the provisions of section 11.

Section 11. Contractor's and subcontractor's withholding of payment for good faith claims.

(a) Authority to withhold.--The contractor or subcontractor may withhold payment from any subcontractor responsible for a deficiency item. The contractor or subcontractor shall pay any subcontractor according to the provisions of this act for any item which appears on the invoice and has been satisfactorily completed.

(b) Notice.--

(1) Except as provided under section 9, if a contractor or subcontractor withholds payment from a subcontractor for a deficiency item, the contractor or subcontractor

withholding payment must notify the subcontractor and the owner in writing of the good faith reason for the withholding within the time period specified in the construction contract or 14 calendar days of the date after receipt of the notice of the deficiency item.

(2) Failure to comply with paragraph (1) shall constitute a waiver of the basis to withhold payment and necessitate payment of the subcontractor in full for the invoice.

(c) Amount of withholding.--If a contractor or subcontractor withholds payment from a subcontractor for a deficiency item, the contractor or subcontractor withholding payment shall remit payment to the subcontractor for each other item that has been satisfactorily completed under the construction contract.

(11 amended June 12, 2018, P.L.131, No.27)

Section 12. Penalty and attorney fee.

(a) Penalty for failure to comply with act.--

(1) If arbitration or litigation is commenced to recover payment due under this act and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this act, the arbitrator or court shall award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was wrongfully withheld.

(2) An amount shall not be deemed to have been wrongfully withheld if all of the following apply:

(i) The amount bears a reasonable relation to the value of any claim held in good faith by the owner, contractor or subcontractor against whom the contractor or subcontractor is seeking to recover payment.

(ii) The claim holder complies with section 6 or 11.

(b) Award of attorney fee and expenses.--Notwithstanding any agreement to the contrary, the substantially prevailing party in any proceeding to recover any payment under this act shall be awarded a reasonable attorney fee in an amount to be determined by the court or arbitrator, together with expenses.

(12 amended June 12, 2018, P.L.131, No.27)

Section 13. Contracts involving Federal aid.

If any provision of this act conflicts with a Federal statute or regulation or with conditions attached to the receipt of Federal aid, this act shall not operate to prevent receipt of Federal aid.

Section 14. Applicable law.

Making a contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state shall be unenforceable.

Section 15. Applicability.

This act shall apply to construction contracts executed on or after the effective date of this act.

Section 16. Third party claims.

Once a contractor has made payment to the subcontractor according to the payment terms of the construction contract or the provisions of this act, future claims for payment against the contractor by parties owed payment from the subcontractor which has been paid shall be barred.

Section 17. Effective date.

This act shall take effect in 60 days.