

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 906 Session of 1993

INTRODUCED BY LESCOVITZ, LINTON, GODSHALL, CAWLEY, ROBERTS, DeLUCA, LAUGHLIN, MARKOSEK, TRELLO, COY, PISTELLA, FAIRCHILD, CESSAR, PRESTON, STISH, HASAY, BATTISTO, ROONEY, STAIRS, VAN HORNE, OLASZ, HANNA, BELFANTI, DALEY, E. Z. TAYLOR, BLAUM, CIVERA, KASUNIC AND FLICK, MARCH 24, 1993

AS REPORTED FROM COMMITTEE ON BUSINESS AND ECONOMIC DEVELOPMENT, HOUSE OF REPRESENTATIVES, AS AMENDED, SEPTEMBER 28 1993

AN ACT

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

TABLE OF CONTENTS

5 Section 1. Short title.

6 Section 2. Definitions.

7 Section 3. Application of act.

8 Section 4. Performance by contractor or subcontractor.

9 Section 5. Owner's payment obligations.

10 Section 6. Contractor's and subcontractor's payment
11 obligations. <—

12 Section 7. Errors in documentation.

13 Section 8. Retainage.

14 Section 9. Prepayment; advance payment.

15 Section 10. Withholding payment for good faith claim.

16 Section 11. Penalty and attorney fee.

1 ~~Section 12. Contracts involving Federal aid.~~

2 ~~Section 13. Applicable law.~~

3 ~~Section 14. Applicability.~~

4 ~~Section 15. Effective date.~~

5 SECTION 6. OWNER'S WITHHOLDING OF PAYMENT FOR GOOD FAITH

<—

6 CLAIMS.

7 SECTION 7. CONTRACTOR'S AND SUBCONTRACTOR'S PAYMENT

8 OBLIGATIONS.

9 SECTION 8. ERRORS IN DOCUMENTATION.

10 SECTION 9. RETAINAGE.

11 SECTION 10. PREPAYMENT; ADVANCE PAYMENT.

12 SECTION 11. CONTRACTOR'S WITHHOLDING OF PAYMENT FOR GOOD FAITH

13 CLAIMS.

14 SECTION 12. PENALTY AND ATTORNEY FEE.

15 SECTION 13. CONTRACTS INVOLVING FEDERAL AID.

16 SECTION 14. APPLICABLE LAW.

17 SECTION 15. APPLICABILITY.

18 SECTION 16. THIRD PARTY CLAIMS.

19 SECTION 17. EFFECTIVE DATE.

20 The General Assembly of the Commonwealth of Pennsylvania

21 hereby enacts as follows:

22 Section 1. Short title.

23 This act shall be known and may be cited as the Contractor

24 and Subcontractor Payment Act.

25 Section 2. Definitions.

26 The following words and phrases when used in this act shall

27 have the meanings given to them in this section unless the

28 context clearly indicates otherwise:

29 "Billing period." A payment cycle agreed to by the parties

30 or, in the absence of an agreement, the calendar month within

1 which work is performed.

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

5 "Contractor." A person ~~who contracts with~~ AUTHORIZED OR <—
6 ENGAGED BY an owner to improve real property.

7 "DEFICIENCY ITEM." WORK PERFORMED BUT WHICH THE OWNER, THE <—
8 CONTRACTOR OR THE INSPECTOR WILL NOT CERTIFY AS BEING COMPLETED
9 ACCORDING TO THE SPECIFICATIONS OF A CONSTRUCTION CONTRACT.

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

15 "Improve." To ~~build,~~ DESIGN, effect, alter, PROVIDE <—
16 PROFESSIONAL OR SKILLED SERVICES, repair or demolish any
17 improvement upon, connected with, or on or beneath the surface
18 of any real property, to excavate, clear, grade, fill or
19 landscape any real property, to construct driveways and private
20 roadways, to furnish materials, including trees and shrubbery
21 for any of these purposes, or to perform any labor upon
22 improvements. ~~The term includes design or other professional or <—~~
23 ~~skilled services furnished by architects, engineers, land~~
24 ~~surveyors and landscape architects licensed by the Commonwealth.~~

25 "Improvement."

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

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

29 (3) Landscaping, including the planting of trees and
30 shrubbery, and constructing driveways and private roadways on

1 real property.

2 "INSPECTOR." THE CONTRACTOR OR A PERSON AUTHORIZED OR <—
3 ENGAGED BY THE OWNER TO INSPECT THE WORK PERFORMED PURSUANT TO A
4 CONSTRUCTION CONTRACT TO DETERMINE WHETHER THE WORK COMPLETED IS
5 IN COMPLIANCE WITH THE CONSTRUCTION CONTRACT.

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

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

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

17 Section 3. Application of act.

18 (a) Number of residential units.--This act shall not apply
19 to improvements to real property which consists of six or fewer
20 residential units WHICH ARE CURRENTLY AND SIMULTANEOUSLY UNDER <—
21 CONSTRUCTION.

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

25 Section 4. Performance by contractor or subcontractor.

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

30 Section 5. Owner's payment obligations.

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

4 (b) Absence of payment term.--In THE ABSENCE OF A ←
5 CONSTRUCTION CONTRACT OR IN the event that the construction
6 contract does not contain a term governing the terms of payment,
7 the contractor shall be entitled to invoice the owner for
8 progress payments at the end of the billing period. The
9 contractor shall be entitled to submit a final invoice for
10 payment in full upon completion of the agreed-upon work.

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

15 (d) Interest.--Except as otherwise agreed by the parties, if
16 any progress or final payment to a contractor is not paid within
17 seven days of the due date established in subsection (c), the
18 owner shall pay the contractor, beginning on the eighth day,
19 interest at the rate of 1% per month or fraction of a month on
20 the balance that is at the time due and owing.

21 SECTION 6. OWNER'S WITHHOLDING OF PAYMENT FOR GOOD FAITH ←

22 CLAIMS.

23 (A) AUTHORITY TO WITHHOLD.--THE OWNER MAY WITHHOLD PAYMENT
24 FOR DEFICIENCY ITEMS ACCORDING TO THE TERMS OF THE CONSTRUCTION
25 CONTRACT. THE OWNER SHALL PAY THE CONTRACTOR ACCORDING TO THE
26 PROVISIONS OF THIS ACT FOR ALL OTHER ITEMS WHICH APPEAR ON THE
27 INVOICE AND HAVE BEEN SATISFACTORILY COMPLETED.

28 (B) NOTICE.--IF AN OWNER WITHHOLDS PAYMENT FROM A CONTRACTOR
29 FOR A DEFICIENCY ITEM, IT SHALL NOTIFY THE CONTRACTOR OF THE
30 DEFICIENCY ITEM WITHIN SEVEN CALENDAR DAYS OF THE DATE THAT THE

1 INVOICE IS RECEIVED.

2 Section 6 7. Contractor's and subcontractor's payment
3 obligations. ←

4 (a) Entitlement to payment.--Performance by a subcontractor
5 in accordance with the provisions of the contract shall entitle
6 the subcontractor to payment from the party with whom the
7 subcontractor has contracted.

8 (b) Disclosure of payment dates.--A contractor or
9 subcontractor shall disclose to a subcontractor, before a
10 subcontract is executed, the due date for receipt of payments
11 from the owner. Notwithstanding any other provision of this act,
12 if a contractor or subcontractor fails to accurately disclose
13 the due date to a subcontractor, the contractor or subcontractor
14 shall be obligated to pay the subcontractor as though the due
15 dates established in section 5(c) were met by the owner. THIS ←
16 SUBSECTION SHALL NOT APPLY TO A CHANGE IN DUE DATES BECAUSE OF
17 CONDITIONS OUTSIDE OF THE CONTRACTOR'S CONTROL, INCLUDING, BUT
18 NOT LIMITED TO, DESIGN CHANGES, CHANGE ORDERS OR DELAYS IN
19 CONSTRUCTION DUE TO WEATHER CONDITIONS.

20 (c) Time for payment.--When a subcontractor has performed in
21 accordance with the provisions of the contract, a contractor
22 shall pay to the subcontractor, and each subcontractor shall in
23 turn pay to the subcontractor's subcontractors, the full or
24 proportional amount received for each such subcontractor's work
25 and materials, based on work completed or service provided under
26 the subcontract, ~~seven~~ 14 days after receipt of each progress or ←
27 final payment or ~~seven~~ 14 days after receipt of the ←
28 subcontractor's invoice, whichever is ~~earlier~~. LATER. PAYMENT ←
29 SHALL BE MADE UNDER THIS SECTION UNLESS IT IS BEING WITHHELD
30 UNDER SECTION 11.

1 ~~(d) Conditions for payment. Payment by the owner to a~~ <—
2 ~~contractor is not a condition precedent for payment to a~~
3 ~~subcontractor, and payment by a contractor to a subcontractor is~~
4 ~~not a condition precedent for payment to any other~~
5 ~~subcontractor. An agreement that is contrary to this subsection~~
6 ~~shall be unenforceable.~~

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

13 Section 7 8. Errors in documentation. <—

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

19 ~~(b) Change in billing period. If an error on the invoice is~~ <—
20 ~~corrected by the person who sent the invoice, the date on which~~
21 ~~the corrected invoice is delivered shall be deemed the end of~~
22 ~~the billing period for the purposes of this act.~~

23 ~~(c) Waiver of defect. If notice of a defect is not given in~~
24 ~~accordance with subsection (a), the defect shall be deemed~~
25 ~~waived.~~

26 (B) PAYMENT OF AMOUNT INCURRED.--THE PERSON RECEIVING THE <—
27 INCORRECT INVOICE SHALL PAY THE AMOUNT ACTUALLY INCURRED ON THE
28 DUE DATE IN ACCORDANCE WITH THE PROVISIONS OF THIS ACT.

29 Section 8 9. Retainage. <—

30 (a) Time for payment.--If payments under a construction

1 contract are subject to retainage, any amounts which have been
2 retained during the performance of the contract and which are
3 due to be released to the contractor upon final completion shall
4 be paid within 30 days after final acceptance of the work.

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

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

15 (d) Withholding acceptance or failure to pay retainage.--If
16 an owner, contractor or subcontractor unreasonably withholds
17 acceptance of work or fails to pay retainage as required by this
18 section, the owner, contractor or subcontractor shall be subject
19 to the payment of interest at the rate established in section
20 5(d) on the balance due and owing on the date acceptance was
21 unreasonably withheld or the date the retainage was due and
22 owing, whichever is applicable. The owner, contractor or
23 subcontractor shall also be subject to the provisions of section
24 ~~11~~ 12. ←

25 Section 9 10. Prepayment; advance payment. ←

26 This act shall not be construed to prohibit an owner,
27 contractor or subcontractor from making advance payments or
28 progress payments, or from prepaying if an agreement or other
29 circumstances make such payment appropriate. All payments shall
30 be made when they are due and owing and if not so made shall

1 bear interest at the rate provided for in section 5(d) from the
2 date payment was due. The person who fails to make timely
3 payment shall also be subject to the provisions of section 11.

4 ~~Section 10. Withholding payment for good faith claim.~~ <—

5 ~~This act shall not prevent an owner, contractor or~~
6 ~~subcontractor from withholding payment in whole or in part under~~
7 ~~a construction contract in an amount equal to the value of any~~
8 ~~good faith claims against a contractor or subcontractor,~~
9 ~~including claims arising from unsatisfactory job progress,~~
10 ~~defective construction, disputed work or third party claims.~~

11 SECTION 11. CONTRACTOR'S WITHHOLDING OF PAYMENT FOR GOOD <—

12 FAITH CLAIMS.

13 (A) AUTHORITY TO WITHHOLD.--THE CONTRACTOR OR SUBCONTRACTOR
14 MAY WITHHOLD PAYMENT FROM ANY SUBCONTRACTOR RESPONSIBLE FOR A
15 DEFICIENCY ITEM. THE CONTRACTOR OR SUBCONTRACTOR SHALL PAY ANY
16 SUBCONTRACTOR ACCORDING TO THE PROVISIONS OF THIS ACT FOR ANY
17 ITEM WHICH APPEARS ON THE INVOICE AND HAS BEEN SATISFACTORILY
18 COMPLETED.

19 (B) NOTICE.--IF A CONTRACTOR OR SUBCONTRACTOR WITHHOLDS
20 PAYMENT FROM A SUBCONTRACTOR FOR A DEFICIENCY ITEM, IT MUST
21 NOTIFY THE SUBCONTRACTOR OR SUPPLIER AND THE OWNER OF THE REASON
22 WITHIN SEVEN CALENDAR DAYS OF THE DATE AFTER RECEIPT OF THE
23 NOTICE OF THE DEFICIENCY ITEM.

24 Section ~~11~~ 12. Penalty and attorney fee. <—

25 (a) Penalty for failure to comply with act.--If arbitration
26 or litigation is commenced to recover payment due under this act
27 and it is determined that an owner, contractor or subcontractor
28 has failed to comply with the payment terms of this act, the
29 arbitrator or court shall award, in addition to all other
30 damages due, a penalty equal to 1% per month of the amount that

1 was wrongfully withheld. An amount shall not be deemed to have
2 been wrongfully withheld to the extent it bears a reasonable
3 relation to the value of any claim held in good faith by the
4 owner, contractor or subcontractor against whom the contractor
5 or subcontractor is seeking to recover payment.

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

11 Section ~~12~~ 13. Contracts involving Federal aid. <—

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

16 Section ~~13~~ 14. Applicable law. <—

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

21 Section ~~14~~ 15. Applicability. <—

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

24 SECTION 16. THIRD PARTY CLAIMS. <—

25 ONCE A CONTRACTOR HAS MADE PAYMENT TO THE SUBCONTRACTOR
26 ACCORDING TO THE PAYMENT TERMS OF THE CONSTRUCTION CONTRACT OR
27 THE PROVISIONS OF THIS ACT, FUTURE CLAIMS FOR PAYMENT AGAINST
28 THE CONTRACTOR BY PARTIES OWED PAYMENT FROM THE SUBCONTRACTOR
29 WHICH HAS BEEN PAID SHALL BE BARRED.

30 Section ~~15~~ 17. Effective date. <—

1 This act shall take effect in 60 days.