

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 566 Session of 2017

INTRODUCED BY SANTORA, DRISCOLL, SOLOMON, THOMAS, McNEILL, PASHINSKI, DUNBAR, GALLOWAY, W. KELLER, A. HARRIS, D. COSTA, JOZWIAK, WHITE, ZIMMERMAN, PETRI, BRIGGS, SAINATO, PETRARCA AND SCHWEYER, FEBRUARY 21, 2017

AS REPORTED FROM COMMITTEE ON COMMERCE, HOUSE OF REPRESENTATIVES, AS AMENDED, JUNE 6, 2017

AN ACT

1 ~~Amending the act of February 17, 1994 (P.L.73, No.7), entitled <--~~
2 ~~"An act requiring timely payment to certain contractors and~~
3 ~~subcontractors; and providing remedies to contractors and~~
4 ~~subcontractors," further providing for owner's payment~~
5 ~~obligations and for contractors' and subcontractors' payment~~
6 ~~obligations.~~

7 AMENDING THE ACT OF FEBRUARY 17, 1994 (P.L.73, NO.7), ENTITLED <--
8 "AN ACT REQUIRING TIMELY PAYMENT TO CERTAIN CONTRACTORS AND
9 SUBCONTRACTORS; AND PROVIDING REMEDIES TO CONTRACTORS AND
10 SUBCONTRACTORS," FURTHER PROVIDING FOR APPLICATION OF ACT,
11 FOR OWNER'S PAYMENT OBLIGATIONS, FOR OWNER'S WITHHOLDING OF
12 PAYMENT FOR GOOD FAITH CLAIMS, FOR CONTRACTOR'S AND
13 SUBCONTRACTOR'S PAYMENT OBLIGATIONS, FOR ERRORS IN
14 DOCUMENTATION, FOR RETAINAGE, FOR CONTRACTOR'S WITHHOLDING OF
15 PAYMENT FOR GOOD FAITH CLAIMS AND FOR PENALTY AND ATTORNEY
16 FEE.

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

19 ~~Section 1. Section 5 of the act of February 17, 1994 <--~~
20 ~~(P.L.73, No.7), known as the Contractor and Subcontractor~~
21 ~~Payment Act, is amended by adding a subsection to read:~~
22 ~~Section 5. Owner's payment obligations.~~

23 * * *

1 ~~(e) Suspension of performance. If payment is not received~~
2 ~~by a contractor in accordance with this section, the contractor~~
3 ~~shall have the right to suspend performance of any work, without~~
4 ~~penalty, until payment is received in full. Any term in a~~
5 ~~construction contract contrary to this subsection shall be~~
6 ~~unenforceable. Suspension of performance may occur only if:~~

7 ~~(1) payment has not been made to the contractor in~~
8 ~~accordance with the schedule established under subsection~~
9 ~~(c);~~

10 ~~(2) the contractor has provided at least seven calendar~~
11 ~~days' written notice of the contractor's intent to suspend~~
12 ~~performance to the owner or the owner's authorized agent; and~~

13 ~~(3) at least 60 calendar days have passed since the end~~
14 ~~of the billing period for which payment has not been received~~
15 ~~in full.~~

16 Section 2. Section 7(a) and (c) of the act are amended and
17 the section is amended by adding a subsection to read:

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

20 (a) Entitlement to payment. Performance by a subcontractor
21 in accordance with the provisions of the construction contract
22 shall entitle the subcontractor to payment from the party with
23 whom the subcontractor has contracted.

24 * * *

25 (c) Time for payment. When a subcontractor has performed in
26 accordance with the provisions of the construction contract, a
27 contractor shall pay to the subcontractor, and each
28 subcontractor shall in turn pay to the subcontractor's
29 subcontractors, the full or proportional amount received for
30 each such subcontractor's work and materials, based on work

1 ~~completed or service provided under the subcontract, 14 days~~
2 ~~after receipt of each progress or final payment or 14 days after~~
3 ~~receipt of the subcontractor's invoice, whichever is later.~~
4 ~~Payment shall be made under this section unless it is being~~
5 ~~withheld under section 11.~~

6 * * *

7 ~~(c) Suspension of performance. If payment is not received~~
8 ~~by a subcontractor in accordance with this section, the~~
9 ~~subcontractor shall have the right to suspend performance of any~~
10 ~~work, without penalty, until payment is received in full. Any~~
11 ~~term in a construction contract contrary to this subsection~~
12 ~~shall be unenforceable. Suspension of performance may occur only~~
13 ~~if:~~

14 ~~(1) payment has not been made to the subcontractor in~~
15 ~~accordance with the schedule established under subsection~~
16 ~~(c);~~

17 ~~(2) the subcontractor has provided at least seven~~
18 ~~calendar days' written notice of the subcontractor's intent~~
19 ~~to suspend performance to the owner or the owner's authorized~~
20 ~~agent; and~~

21 ~~(3) at least 60 calendar days have passed since the end~~
22 ~~of the billing period for which payment has not been received~~
23 ~~in full.~~

24 ~~Section 3. This act shall take effect in 60 days.~~

25 SECTION 1. SECTIONS 3 AND 5 OF THE ACT OF FEBRUARY 17, 1994 <--
26 (P.L.73, NO.7), KNOWN AS THE CONTRACTOR AND SUBCONTRACTOR
27 PAYMENT ACT, ARE AMENDED BY ADDING SUBSECTIONS TO READ:

28 SECTION 3. APPLICATION OF ACT.

29 * * *

30 (C) PROHIBITION ON WAIVER.--UNLESS SPECIFICALLY AUTHORIZED

1 UNDER THIS ACT, PARTIES TO A CONTRACT OR OTHER AGREEMENT MAY NOT
2 WAIVE A PROVISION OF THIS ACT BY CONTRACT OR OTHER AGREEMENT.

3 SECTION 5. OWNER'S PAYMENT OBLIGATIONS.

4 * * *

5 (E) SUSPENSION OF PERFORMANCE.--IF PAYMENT IS NOT RECEIVED
6 BY A CONTRACTOR IN ACCORDANCE WITH THIS SECTION, THE CONTRACTOR
7 SHALL HAVE THE RIGHT TO SUSPEND PERFORMANCE OF ANY WORK, WITHOUT
8 PENALTY, UNTIL PAYMENT IS RECEIVED ACCORDING TO THE TERMS OF THE
9 CONSTRUCTION CONTRACT. ANY TERM IN A CONSTRUCTION CONTRACT
10 CONTRARY TO THIS SUBSECTION SHALL BE UNENFORCEABLE. SUSPENSION
11 OF PERFORMANCE MAY OCCUR ONLY IF:

12 (1) PAYMENT HAS NOT BEEN MADE TO THE CONTRACTOR IN
13 ACCORDANCE WITH THE SCHEDULE ESTABLISHED UNDER SUBSECTION
14 (C);

15 (2) AT LEAST 30 CALENDAR DAYS HAVE PASSED SINCE THE END
16 OF THE BILLING PERIOD FOR WHICH PAYMENT HAS NOT BEEN RECEIVED
17 ACCORDING TO THE TERMS OF THE CONSTRUCTION CONTRACT, THE
18 CONTRACTOR SHALL PROVIDE WRITTEN NOTICE TO THE OWNER OR THE
19 OWNER'S AUTHORIZED AGENT, VIA ELECTRONIC MAIL OR POSTAL
20 SERVICE, STATING THAT PAYMENT HAS NOT BEEN MADE; AND

21 (3) AT LEAST 30 CALENDAR DAYS HAVE PASSED SINCE THE
22 WRITTEN NOTICE IN PARAGRAPH (2) HAS BEEN SENT, THE CONTRACTOR
23 SHALL PROVIDE AT LEAST 10 CALENDAR DAYS' WRITTEN NOTICE, VIA
24 CERTIFIED MAIL, OF THE CONTRACTOR'S INTENT TO SUSPEND
25 PERFORMANCE TO THE OWNER OR THE OWNER'S AUTHORIZED AGENT.

26 SECTION 2. SECTION 6 OF THE ACT IS AMENDED TO READ:

27 SECTION 6. OWNER'S WITHHOLDING OF PAYMENT FOR GOOD FAITH
28 CLAIMS.

29 (A) AUTHORITY TO WITHHOLD.--THE OWNER MAY WITHHOLD PAYMENT
30 FOR DEFICIENCY ITEMS ACCORDING TO THE TERMS OF THE CONSTRUCTION

1 CONTRACT. THE OWNER SHALL PAY THE CONTRACTOR ACCORDING TO THE
2 PROVISIONS OF THIS ACT FOR ANY ITEM WHICH APPEARS ON THE INVOICE
3 AND HAS BEEN SATISFACTORILY COMPLETED.

4 (B) NOTICE.--[IF]

5 (1) EXCEPT AS PROVIDED UNDER SECTION 9, IF AN OWNER
6 WITHHOLDS PAYMENT FROM A CONTRACTOR FOR A DEFICIENCY ITEM,
7 [IT] THE AMOUNT WITHHELD SHALL BE REASONABLE AND THE OWNER
8 SHALL NOTIFY THE CONTRACTOR OF THE DEFICIENCY ITEM BY A
9 WRITTEN EXPLANATION OF ITS GOOD FAITH REASON WITHIN [SEVEN]
10 14 CALENDAR DAYS OF THE DATE THAT THE INVOICE IS RECEIVED.

11 (2) FAILURE TO COMPLY WITH PARAGRAPH (1) SHALL
12 CONSTITUTE A WAIVER OF THE BASIS TO WITHHOLD PAYMENT AND
13 NECESSITATE PAYMENT OF THE CONTRACTOR IN FULL FOR THE
14 INVOICE.

15 (3) IF AN OWNER WITHHOLDS PAYMENT FROM A CONTRACTOR FOR
16 A DEFICIENCY ITEM, THE OWNER SHALL REMIT PAYMENT TO THE
17 CONTRACTOR FOR EACH OTHER ITEM THAT HAS BEEN SATISFACTORILY
18 COMPLETED UNDER THE CONSTRUCTION CONTRACT.

19 SECTION 3. SECTION 7(A) AND (C) OF THE ACT ARE AMENDED AND
20 THE SECTION IS AMENDED BY ADDING A SUBSECTION TO READ:

21 SECTION 7. CONTRACTOR'S AND SUBCONTRACTOR'S PAYMENT
22 OBLIGATIONS.

23 (A) ENTITLEMENT TO PAYMENT.--PERFORMANCE BY A SUBCONTRACTOR
24 IN ACCORDANCE WITH THE PROVISIONS OF THE CONSTRUCTION CONTRACT
25 SHALL ENTITLE THE SUBCONTRACTOR TO PAYMENT FROM THE PARTY WITH
26 WHOM THE SUBCONTRACTOR HAS CONTRACTED.

27 * * *

28 (C) TIME FOR PAYMENT.--WHEN A SUBCONTRACTOR HAS PERFORMED IN
29 ACCORDANCE WITH THE PROVISIONS OF THE CONSTRUCTION CONTRACT, A
30 CONTRACTOR SHALL PAY TO THE SUBCONTRACTOR, AND EACH

1 SUBCONTRACTOR SHALL IN TURN PAY TO THE SUBCONTRACTOR'S
2 SUBCONTRACTORS, THE FULL OR PROPORTIONAL AMOUNT RECEIVED FOR
3 EACH SUCH SUBCONTRACTOR'S WORK AND MATERIALS, BASED ON WORK
4 COMPLETED OR SERVICE PROVIDED UNDER THE SUBCONTRACT, 14 DAYS
5 AFTER RECEIPT OF EACH PROGRESS OR FINAL PAYMENT OR 14 DAYS AFTER
6 RECEIPT OF THE SUBCONTRACTOR'S INVOICE, WHICHEVER IS LATER.
7 PAYMENT SHALL BE MADE UNDER THIS SECTION UNLESS IT IS BEING
8 WITHHELD UNDER SECTION 11.

9 * * *

10 (E) SUSPENSION OF PERFORMANCE.--IF PAYMENT IS NOT RECEIVED
11 BY A SUBCONTRACTOR IN ACCORDANCE WITH THIS SECTION, THE
12 SUBCONTRACTOR SHALL HAVE THE RIGHT TO SUSPEND PERFORMANCE OF ANY
13 WORK, WITHOUT PENALTY, UNTIL PAYMENT IS RECEIVED ACCORDING TO
14 THE TERMS OF THE CONSTRUCTION CONTRACT. ANY TERM IN A
15 CONSTRUCTION CONTRACT CONTRARY TO THIS SUBSECTION SHALL BE
16 UNENFORCEABLE. SUSPENSION OF PERFORMANCE MAY OCCUR ONLY IF:

17 (1) PAYMENT HAS NOT BEEN MADE TO THE SUBCONTRACTOR IN
18 ACCORDANCE WITH THE SCHEDULE ESTABLISHED UNDER SUBSECTION
19 (C);

20 (2) AT LEAST 30 CALENDAR DAYS HAVE PASSED SINCE THE END
21 OF THE BILLING PERIOD FOR WHICH PAYMENT HAS NOT BEEN RECEIVED
22 ACCORDING TO THE TERMS OF THE CONSTRUCTION CONTRACT, THE
23 SUBCONTRACTOR SHALL PROVIDE WRITTEN NOTICE TO THE CONTRACTOR
24 OR CONTRACTOR'S AUTHORIZED AGENT, VIA ELECTRONIC MAIL OR
25 POSTAL SERVICE, STATING THAT PAYMENT HAS NOT BEEN MADE; AND

26 (3) AT LEAST 30 CALENDAR DAYS HAVE PASSED SINCE THE
27 WRITTEN NOTICE IN PARAGRAPH (2) HAS BEEN SENT, THE
28 SUBCONTRACTOR SHALL PROVIDE AT LEAST 10 CALENDAR DAYS'
29 WRITTEN NOTICE, VIA CERTIFIED MAIL, OF THE SUBCONTRACTOR'S
30 INTENT TO SUSPEND PERFORMANCE TO THE OWNER OR THE OWNER'S

1 AUTHORIZED AGENT.

2 SECTION 4. SECTIONS 8, 9, 11 AND 12 OF THE ACT ARE AMENDED
3 TO READ:

4 SECTION 8. ERRORS IN DOCUMENTATION.

5 (A) NOTICE OF [DEFECT] ERRORS IN INVOICE.--IF AN INVOICE IS
6 FILLED OUT INCORRECTLY OR INCOMPLETELY OR IF THERE IS ANY OTHER
7 DEFECT OR IMPROPRIETY IN AN INVOICE, THE PERSON WHO RECEIVES THE
8 INCORRECT INVOICE SHALL GIVE WRITTEN NOTICE TO THE PERSON WHO
9 SENT THE INCORRECT INVOICE WITHIN TEN WORKING DAYS OF RECEIPT OF
10 THE INVOICE.

11 [(B) PAYMENT OF AMOUNT INCURRED.--THE PERSON RECEIVING THE
12 INCORRECT INVOICE SHALL PAY THE AMOUNT ACTUALLY INCURRED ON THE
13 DUE DATE IN ACCORDANCE WITH THE PROVISIONS OF THIS ACT.]

14 (C) PAYMENT FOR INVOICE WITH ERROR.--ONCE WRITTEN NOTICE HAS
15 BEEN RECEIVED BY THE PERSON WHO SENT THE INCORRECT INVOICE, THE
16 PERSON RECEIVING THE INVOICE SHALL PAY THE CORRECT AMOUNT OF THE
17 INVOICE ON THE DUE DATE IN ACCORDANCE WITH THIS ACT.

18 SECTION 9. RETAINAGE.

19 (A) TIME FOR PAYMENT.--IF PAYMENTS UNDER A CONSTRUCTION
20 CONTRACT ARE SUBJECT TO RETAINAGE, ANY AMOUNTS WHICH HAVE BEEN
21 RETAINED DURING THE PERFORMANCE OF THE CONTRACT AND WHICH ARE
22 DUE TO BE RELEASED TO THE CONTRACTOR UPON FINAL COMPLETION SHALL
23 BE PAID WITHIN 30 DAYS AFTER FINAL ACCEPTANCE OF THE WORK.

24 (A.1) POSTING OF SECURITY IN LIEU OF RETAINAGE.--UPON
25 REACHING SUBSTANTIAL COMPLETION OF ITS OWN SCOPE OF WORK, A
26 CONTRACTOR OR SUBCONTRACTOR MAY FACILITATE THE RELEASE OF
27 RETAINAGE ON ITS CONTRACT BEFORE FINAL COMPLETION OF THE PROJECT
28 BY POSTING A MAINTENANCE BOND WITH APPROVED SURETY FOR 120% OF
29 THE AMOUNT OF RETAINAGE BEING HELD.

30 (B) AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR.--IF AN

1 OWNER IS NOT WITHHOLDING RETAINAGE, A CONTRACTOR MAY WITHHOLD
2 RETAINAGE FROM A SUBCONTRACTOR IN ACCORDANCE WITH THEIR
3 AGREEMENT. THE RETAINAGE SHALL BE PAID WITHIN 30 DAYS AFTER
4 FINAL ACCEPTANCE OF THE WORK.

5 (C) PAYMENT OF RETAINAGE TO SUBCONTRACTORS.--A CONTRACTOR
6 SHALL PAY TO THE CONTRACTOR'S SUBCONTRACTORS, AND EACH
7 SUBCONTRACTOR SHALL IN TURN PAY TO THE SUBCONTRACTOR'S
8 SUBCONTRACTORS, WITHIN 14 DAYS AFTER RECEIPT OF THE RETAINAGE,
9 THE FULL AMOUNT DUE EACH SUBCONTRACTOR.

10 (D) WITHHOLDING ACCEPTANCE OR FAILURE TO PAY RETAINAGE.--
11 WITHHOLDING OF RETAINAGE FOR LONGER THAN 30 DAYS AFTER FINAL
12 ACCEPTANCE OF THE WORK SHALL BE SUBJECT TO THE OBLIGATIONS
13 IMPOSED UPON THE OWNER, CONTRACTOR OR SUBCONTRACTOR IN SECTION
14 6(B) OR 11(B). IF AN OWNER, CONTRACTOR OR SUBCONTRACTOR
15 UNREASONABLY WITHHOLDS ACCEPTANCE OF WORK OR FAILS TO PAY
16 RETAINAGE AS REQUIRED BY THIS SECTION, THE OWNER, CONTRACTOR OR
17 SUBCONTRACTOR SHALL BE SUBJECT TO THE PAYMENT OF INTEREST AT THE
18 RATE ESTABLISHED IN SECTION 5(D) ON THE BALANCE DUE AND OWING ON
19 THE DATE ACCEPTANCE WAS UNREASONABLY WITHHELD OR THE DATE THE
20 RETAINAGE WAS DUE AND OWING, WHICHEVER IS APPLICABLE. THE OWNER,
21 CONTRACTOR OR SUBCONTRACTOR SHALL ALSO BE SUBJECT TO THE
22 PROVISIONS OF SECTION 12.

23 SECTION 11. CONTRACTOR'S AND SUBCONTRACTOR'S WITHHOLDING OF
24 PAYMENT FOR GOOD FAITH CLAIMS.

25 (A) AUTHORITY TO WITHHOLD.--THE CONTRACTOR OR SUBCONTRACTOR
26 MAY WITHHOLD PAYMENT FROM ANY SUBCONTRACTOR RESPONSIBLE FOR A
27 DEFICIENCY ITEM. THE CONTRACTOR OR SUBCONTRACTOR SHALL PAY ANY
28 SUBCONTRACTOR ACCORDING TO THE PROVISIONS OF THIS ACT FOR ANY
29 ITEM WHICH APPEARS ON THE INVOICE AND HAS BEEN SATISFACTORILY
30 COMPLETED.

1 (B) NOTICE.--[IF]

2 (1) EXCEPT AS PROVIDED UNDER SECTION 9, IF A CONTRACTOR
3 OR SUBCONTRACTOR WITHHOLDS PAYMENT FROM A SUBCONTRACTOR FOR A
4 DEFICIENCY ITEM, [IT] THE CONTRACTOR OR SUBCONTRACTOR
5 WITHHOLDING PAYMENT MUST NOTIFY THE SUBCONTRACTOR [OR
6 SUPPLIER AND THE OWNER OF THE REASON WITHIN] AND THE OWNER IN
7 WRITING OF THE GOOD FAITH REASON FOR THE WITHHOLDING WITHIN
8 THE TIME PERIOD SPECIFIED IN THE CONSTRUCTION CONTRACT OR
9 [SEVEN] 14 CALENDAR DAYS OF THE DATE AFTER RECEIPT OF THE
10 NOTICE OF THE DEFICIENCY ITEM.

11 (2) FAILURE TO COMPLY WITH PARAGRAPH (1) SHALL
12 CONSTITUTE A WAIVER OF THE BASIS TO WITHHOLD PAYMENT AND
13 NECESSITATE PAYMENT OF THE SUBCONTRACTOR IN FULL FOR THE
14 INVOICE.

15 (C) AMOUNT OF WITHHOLDING.--IF A CONTRACTOR OR SUBCONTRACTOR
16 WITHHOLDS PAYMENT FROM A SUBCONTRACTOR FOR A DEFICIENCY ITEM,
17 THE CONTRACTOR OR SUBCONTRACTOR WITHHOLDING PAYMENT SHALL REMIT
18 PAYMENT TO THE SUBCONTRACTOR FOR EACH OTHER ITEM THAT HAS BEEN
19 SATISFACTORILY COMPLETED UNDER THE CONSTRUCTION CONTRACT.

20 SECTION 12. PENALTY AND ATTORNEY FEE.

21 (A) PENALTY FOR FAILURE TO COMPLY WITH ACT.--

22 (1) IF ARBITRATION OR LITIGATION IS COMMENCED TO RECOVER
23 PAYMENT DUE UNDER THIS ACT AND IT IS DETERMINED THAT AN
24 OWNER, CONTRACTOR OR SUBCONTRACTOR HAS FAILED TO COMPLY WITH
25 THE PAYMENT TERMS OF THIS ACT, THE ARBITRATOR OR COURT SHALL
26 AWARD, IN ADDITION TO ALL OTHER DAMAGES DUE, A PENALTY EQUAL
27 TO 1% PER MONTH OF THE AMOUNT THAT WAS WRONGFULLY WITHHELD.

28 (2) AN AMOUNT SHALL NOT BE DEEMED TO HAVE BEEN
29 WRONGFULLY WITHHELD [TO THE EXTENT IT] IF ALL OF THE
30 FOLLOWING APPLY:

1 (I) THE AMOUNT BEARS A REASONABLE RELATION TO THE
2 VALUE OF ANY CLAIM HELD IN GOOD FAITH BY THE OWNER,
3 CONTRACTOR OR SUBCONTRACTOR AGAINST WHOM THE CONTRACTOR
4 OR SUBCONTRACTOR IS SEEKING TO RECOVER PAYMENT.

5 (II) THE CLAIM HOLDER COMPLIES WITH SECTION 6 OR 11.

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 5. THIS ACT SHALL TAKE EFFECT IN 120 DAYS.