

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, SCHWEYER, KORTZ, NEILSON, DAVIS AND DAVIDSON, FEBRUARY 21, 2017

AS AMENDED ON SECOND CONSIDERATION, IN SENATE, MAY 21, 2018

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 application of act,
5 for owner's payment obligations, for owner's withholding of
6 payment for good faith claims, for contractor's and
7 subcontractor's payment obligations, for errors in
8 documentation, for retainage, for contractor's withholding of
9 payment for good faith claims and for penalty and attorney
10 fee.

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

13 Section 1. Sections 3 and 5 of the act of February 17, 1994
14 (P.L.73, No.7), known as the Contractor and Subcontractor
15 Payment Act, are amended by adding subsections to read:

16 Section 3. Application of act.

17 * * *

18 (c) Prohibition on waiver.--Unless specifically authorized
19 under this act, parties to a contract or other agreement may not
20 waive a provision of this act by contract or other agreement.

1 Section 5. Owner's payment obligations.

2 * * *

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

10 ~~(1) payment has not been made to the contractor in~~
11 ~~accordance with the schedule established under subsection~~
12 ~~(c);~~

13 ~~(2) at least 30 calendar days have passed since the end~~
14 ~~of the billing period for which payment has not been received~~
15 ~~according to the terms of the construction contract, the~~
16 ~~contractor shall provide written notice to the owner or the~~
17 ~~owner's authorized agent, via electronic mail or postal~~
18 ~~service, stating that payment has not been made; and~~

19 ~~(3) at least 30 calendar days have passed since the~~
20 ~~written notice in paragraph (2) has been sent, the contractor~~
21 ~~shall provide at least 10 calendar days' written notice, via~~
22 ~~certified mail, of the contractor's intent to suspend~~
23 ~~performance to the owner or the owner's authorized agent.~~

24 ~~(E) SUSPENSION OF PERFORMANCE.-- <--~~

25 ~~(1) IF PAYMENT IS NOT RECEIVED BY A CONTRACTOR IN~~
26 ~~ACCORDANCE WITH THIS SECTION, THE CONTRACTOR SHALL HAVE THE~~
27 ~~RIGHT TO SUSPEND PERFORMANCE OF ANY WORK, WITHOUT PENALTY,~~
28 ~~UNTIL PAYMENT IS RECEIVED ACCORDING TO THE TERMS OF THE~~
29 ~~CONSTRUCTION CONTRACT. ANY PROCEDURE IN A CONSTRUCTION~~
30 ~~CONTRACT THAT EXCEEDS THE PROCEDURE IN PARAGRAPH (2) SHALL BE~~

1 UNENFORCEABLE.

2 (2) SUSPENSION OF PERFORMANCE IN A CONSTRUCTION CONTRACT
3 MAY OCCUR IN ACCORDANCE WITH PARAGRAPH (1) OR IF:

4 (I) PAYMENT HAS NOT BEEN MADE TO THE CONTRACTOR IN
5 ACCORDANCE WITH THE SCHEDULE ESTABLISHED UNDER SUBSECTION
6 (C);

7 (II) AT LEAST 30 CALENDAR DAYS HAVE PASSED SINCE THE
8 END OF THE BILLING PERIOD FOR WHICH PAYMENT HAS NOT BEEN
9 RECEIVED ACCORDING TO THE TERMS OF THE CONSTRUCTION
10 CONTRACT, THE CONTRACTOR SHALL PROVIDE WRITTEN NOTICE TO
11 THE OWNER OR THE OWNER'S AUTHORIZED AGENT, VIA ELECTRONIC
12 MAIL OR POSTAL SERVICE, STATING THAT PAYMENT HAS NOT BEEN
13 MADE; AND

14 (III) AT LEAST 30 CALENDAR DAYS HAVE PASSED SINCE
15 THE WRITTEN NOTICE IN SUBPARAGRAPH (II) HAS BEEN SENT,
16 THE CONTRACTOR SHALL PROVIDE AT LEAST 10 CALENDAR DAYS'
17 WRITTEN NOTICE, VIA CERTIFIED MAIL, OF THE CONTRACTOR'S
18 INTENT TO SUSPEND PERFORMANCE TO THE OWNER OR THE OWNER'S
19 AUTHORIZED AGENT.

20 Section 2. Section 6 of the act is amended to read:

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 any item which appears on the invoice
27 and has been satisfactorily completed.

28 (b) Notice.--[If]

29 (1) Except as provided under section 9, if an owner
30 withholds payment from a contractor for a deficiency item,

1 [it] the amount withheld shall be reasonable and the owner
2 shall notify the contractor of the deficiency item by a
3 written explanation of its good faith reason within [seven]
4 14 calendar days of the date that the invoice is received.

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

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

13 Section 3. Section 7(a) and (c) of the act are amended and
14 the section is amended by adding a subsection to read:

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

17 (a) Entitlement to payment.--Performance by a subcontractor
18 in accordance with the provisions of the construction contract
19 shall entitle the subcontractor to payment from the party with
20 whom the subcontractor has contracted.

21 * * *

22 (c) Time for payment.--When a subcontractor has performed in
23 accordance with the provisions of the construction contract, a
24 contractor shall pay to the subcontractor, and each
25 subcontractor shall in turn pay to the subcontractor's
26 subcontractors, the full or proportional amount received for
27 each such subcontractor's work and materials, based on work
28 completed or service provided under the subcontract, 14 days
29 after receipt of each progress or final payment or 14 days after
30 receipt of the subcontractor's invoice, whichever is later.

1 Payment shall be made under this section unless it is being
2 withheld under section 11.

3 * * *

4 ~~(e) Suspension of performance. If payment is not received <--~~
5 ~~by a subcontractor in accordance with this section, the~~
6 ~~subcontractor shall have the right to suspend performance of any~~
7 ~~work, without penalty, until payment is received according to~~
8 ~~the terms of the construction contract. Any term in a~~
9 ~~construction contract contrary to this subsection shall be~~
10 ~~unenforceable. Suspension of performance may occur only if:~~

11 ~~(1) payment has not been made to the subcontractor in~~
12 ~~accordance with the schedule established under subsection~~
13 ~~(e);~~

14 ~~(2) at least 30 calendar days have passed since the end~~
15 ~~of the billing period for which payment has not been received~~
16 ~~according to the terms of the construction contract, the~~
17 ~~subcontractor shall provide written notice to the contractor~~
18 ~~or contractor's authorized agent, via electronic mail or~~
19 ~~postal service, stating that payment has not been made; and~~

20 ~~(3) at least 30 calendar days have passed since the~~
21 ~~written notice in paragraph (2) has been sent, the~~
22 ~~subcontractor shall provide at least 10 calendar days'~~
23 ~~written notice, via certified mail, of the subcontractor's~~
24 ~~intent to suspend performance to the owner or the owner's~~
25 ~~authorized agent.~~

26 (E) SUSPENSION OF PERFORMANCE.-- <--

27 (1) IF PAYMENT IS NOT RECEIVED BY A SUBCONTRACTOR IN
28 ACCORDANCE WITH THIS SECTION, THE SUBCONTRACTOR SHALL HAVE
29 THE RIGHT TO SUSPEND PERFORMANCE OF ANY WORK, WITHOUT
30 PENALTY, UNTIL PAYMENT IS RECEIVED ACCORDING TO THE TERMS OF

1 THE CONSTRUCTION CONTRACT. ANY PROCEDURE IN A CONSTRUCTION
2 CONTRACT THAT EXCEEDS THE PROCEDURE IN PARAGRAPH (2) SHALL BE
3 UNENFORCEABLE.

4 (2) SUSPENSION OF PERFORMANCE IN A CONSTRUCTION CONTRACT
5 MAY OCCUR IN ACCORDANCE WITH PARAGRAPH (1) OR IF:

6 (I) PAYMENT HAS NOT BEEN MADE TO THE SUBCONTRACTOR
7 IN ACCORDANCE WITH THE SCHEDULE ESTABLISHED UNDER
8 SUBSECTION (C);

9 (II) AT LEAST 30 CALENDAR DAYS HAVE PASSED SINCE THE
10 END OF THE BILLING PERIOD FOR WHICH PAYMENT HAS NOT BEEN
11 RECEIVED ACCORDING TO THE TERMS OF THE CONSTRUCTION
12 CONTRACT, THE SUBCONTRACTOR SHALL PROVIDE WRITTEN NOTICE
13 TO THE CONTRACTOR OR CONTRACTOR'S AUTHORIZED AGENT, VIA
14 ELECTRONIC MAIL OR POSTAL SERVICE, STATING THAT PAYMENT
15 HAS NOT BEEN MADE; AND

16 (III) AT LEAST 30 CALENDAR DAYS HAVE PASSED SINCE
17 THE WRITTEN NOTICE IN SUBPARAGRAPH (II) HAS BEEN SENT,
18 THE SUBCONTRACTOR SHALL PROVIDE AT LEAST 10 CALENDAR
19 DAYS' WRITTEN NOTICE, VIA CERTIFIED MAIL, OF THE
20 SUBCONTRACTOR'S INTENT TO SUSPEND PERFORMANCE TO THE
21 OWNER OR THE OWNER'S AUTHORIZED AGENT.

22 Section 4. Sections 8, 9, 11 and 12 of the act are amended
23 to read:

24 Section 8. Errors in documentation.

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

1 [(b) Payment of amount incurred.--The person receiving the
2 incorrect invoice shall pay the amount actually incurred on the
3 due date in accordance with the provisions of this act.]

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

8 Section 9. Retainage.

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

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

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

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

30 (d) Withholding acceptance or failure to pay retainage.--

1 Withholding of retainage for longer than 30 days after final
2 acceptance of the work shall be subject to the obligations
3 imposed upon the owner, contractor or subcontractor in section
4 6(b) or 11(b). If an owner, contractor or subcontractor
5 unreasonably withholds acceptance of work or fails to pay
6 retainage as required by this section, the owner, contractor or
7 subcontractor shall be subject to the payment of interest at the
8 rate established in section 5(d) on the balance due and owing on
9 the date acceptance was unreasonably withheld or the date the
10 retainage was due and owing, whichever is applicable. The owner,
11 contractor or subcontractor shall also be subject to the
12 provisions of section 12.

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

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

21 (b) Notice.--[If]

22 (1) Except as provided under section 9, if a contractor
23 or subcontractor withholds payment from a subcontractor for a
24 deficiency item, [it] the contractor or subcontractor
25 withholding payment must notify the subcontractor [or
26 supplier and the owner of the reason within] and the owner in
27 writing of the good faith reason for the withholding within
28 the time period specified in the construction contract or
29 [seven] 14 calendar days of the date after receipt of the
30 notice of the deficiency item.

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

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

10 Section 12. Penalty and attorney fee.

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

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

18 (2) An amount shall not be deemed to have been
19 wrongfully withheld [to the extent it] if all of the
20 following apply:

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

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

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

1 Section 5. This act shall take effect in 120 days.