

It Pays to Pay Attention to Payment Provisions in Construction Contracts



work, but must notify the contractor of its intent to do so either within the timeframe set forth in the contract or within 15 calendar days from receipt of the payment application. Under CASPA, the owner may withhold progress payments per the terms of the contract in the event of deficient work, but must provide notice to the contractor in writing within 14 calendar days of such deficiency; failure by the owner to do so waives the right to withhold payment by the owner.

Retainage

In contracts where CASPA controls, the parties remain free to contract retention amounts and step-downs; however, final release of retention must occur within 30 days from final acceptance and contractors can have retainage released by providing a bond valued at 120 percent the remaining project price. The PPA strictly limits the amount of retainage allowed during the course of construction: 10 percent until the project is 50 percent completed; then 5 percent until substantial completion. Substantial completion is a defined term under the PPA, and the governmental agency's design professional's approval is required. Once substantial completion is met, retainage is capped at 1.5 times the amount of work left on the project.

Penalties

Overdue progress payments under both the PPA and CASPA accrue statutory interest, and the PPA allows an additional 1-percent penalty interest if the withholding of payments is found to be in bad faith. Furthermore, the court can award attorneys' fees and costs to the substantially prevailing party (CASPA) or to the prevailing party if there was an element of bad faith (PPA).

Paying attention to these payment provisions during contract negotiation and project execution is essential. Failure to do so may have you paying much more than anticipated for your project in penalties, attorneys' fees, and interest. ■

For more information, please contact an attorney in the Construction or Real Estate Practice Groups at MacDonald Illig at 814/870-7600 or email info@mijb.com.



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Often overlooked in construction contracts are the legal provisions surrounding the "non-business" aspects of progress payments and retainage terms. Not surprisingly, disputes surrounding these two provisions frequently arise between the parties involved in construction projects.

Pennsylvania has two applicable statutes on payment in construction contracts: the Pennsylvania Prompt Pay Act ("PPA") (which applies to contracts with a governmental agency (with some exceptions) for public construction or improvements in excess of \$50,000) and the Contractor and Subcontractor Payment Act ("CASPA") (which applies to all contracts for commercial construction and residential construction for more than six units simultaneously). Both the PPA and CASPA establish default payment provisions, rules and penalties for non-compliance.

Progress Payments

Under both the PPA and CASPA, the parties retain the ability to freely contract for the desired progress payment schedules and values. If, and only if, a contract subject to the PPA does not contain any provisions surrounding progress payments, payment must be made by the governmental agency to the contractor within 45 calendar days from the date the governmental agency receives the application for payment from the contractor.

Similarly for contracts to which CASPA applies, if the contract is silent on progress payments, the owner must pay the contractor within 20 days from the later of: 1) the end of the billing period (the end of the calendar month in which the invoiced work was performed), or 2) after the delivery of the contractor's invoice. General contractors have similar obligations under both the PPA and CASPA to their sub-contractors, with shorter timeframes and additional requirements on disclosure of payment terms found in the prime contracts.

Withholding Payment for Deficient Work

Under the PPA, the governmental agency may withhold payments for deficient