



February 6, 2018

Hon. James R. Santora
432 Irvis Office Building
P.O. Box 202163
Harrisburg, PA 17120-2163

**RE: HB 566 – Amendments to the Contractor and
Subcontractor Payment Act**

Dear Representative Santora:

My name is Loni Warholic and I serve as the Executive Director of the American Subcontractors Association of Central Pennsylvania (ASACP) which is located in Harrisburg, Pennsylvania. ASACP has been in existence for over 45 years, and is the local chapter of the national American Subcontractors Association which is located in Alexandria, Virginia. ASACP's territory covers over 31 counties in Central Pennsylvania and the Lehigh Valley regions. Given its geographic size, ASACP has access to and indirectly affects literally thousands of subcontractors in those counties, as well as in the entire state. Furthermore, ASACP has general contractors, law firms, accounting firms, insurance companies and various other entities as associate members or partners (past and present). While ASACP focuses on the subcontracting industry, it touches businesses and industries throughout Pennsylvania in numerous different fields. It is not limited to the subcontracting industry.

On behalf of ASACP, we write to oppose and offer an alternative to a particular section of HB 566, and to express our support with other provisions of House Bill 566. HB 566 contains proposed amendments to the Contractor and Subcontractor Payment Act (CASPA). As you may know, CASPA was originally passed in 1994 to help regulate payments between owners and general contractors, and general contractors and subcontractors. In addition to payment terms, CASPA permits a party to recover interest, penalties and attorneys' fees under certain conditions if a party violates the payment requirements.

P.O. Box 60902 | Harrisburg, PA 17106 | 717-232-2222
contactus@asacentralpa.com | www.asacentralpa.com | 

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Our principal concern with HB 566 is with the proposed amendments to sections 5(E) and 7(E) of CASPA which gives contractors and subcontractors the right to suspend performance due to non-payment after a series of notices and lengthy waiting periods. It is our understanding that several other trade organizations are opposed to HB 566 for the same reason.

As it is now, most industry-wide subcontracts and the caselaw which has developed over the years give a contractor or a subcontractor the right to suspend performance due to non-payment. HB 566 takes away the freedom to contract suspension of work clauses and provides for a series of notices and lengthy waiting periods for both contractors and subcontractors to follow prior to suspending work.

As we understand it, here is how the suspension of work provision works for both contractors and subcontractors under HB 566:

1. If a contractor has not received a payment from an owner 30 days after the end of the “billing period,” a contractor may send a notice to the owner informing the owner of non-payment. A “billing period” is often defined in the contract and is not limited to any particular time period. As you can see, a contractor must keep working for 30 days after payment is due before it can even send a notice of non-payment. The owner clearly knows whether it paid the contractor, so it is not clear why the first 30-day notice is even needed.

2. If, after 30 days from the contractor’s first notice (i.e., 60 days from when payment was originally due), the contractor has still not received payment, the contractor must send a second notice of non-payment to the owner. Again, the owner knows whether it made payment, so the purpose of the notice is not clear.

3. If, after 10 days from the date of the second notice (i.e., 70 days from when payment was due) the contractor is still not paid, the contractor may suspend performance. There is no mention of an owner being responsible for any additional costs due to the suspension of work.

A subcontractor must follow the same procedure prior to suspending performance due to non-payment from the contractor (i.e., send two notices and wait 70 days).

As you can see, both a contractor and a subcontractor have to wait a minimum of 70 days from the end of the “billing period” to suspend performance. Keep in mind, the 70 days is after the payment was already due because the 70 days does not commence until after the end of the billing period which is when the parties agreed the

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payment was actually due. During that 70 day period, the contractor and subcontractor must continue working and incurring cost.

This would be devastating for both contractors and subcontractors because they would have to continue to incur and pay costs (labor, materials, equipment rental, etc.) despite the fact that they are not receiving payment. Given the length of time and the amount of costs that would accrue over that period, a contractor and subcontractor would be forced to expose themselves to significant expense which they may never recover.

Furthermore, for a lot of subcontractors, having to continue working for 70 days after payment is actually due means that a lot of subcontractors will complete their work because they do not need 70 days to complete their entire subcontract work. Therefore, payment terms will become irrelevant because a subcontractor will simply have to keep working, and, in a lot of cases, actually complete its contract work despite a lack of payment.

By way of comparison, under the American Institute of Architects (AIA) model contract agreement between an owner and a contractor, if an owner fails to pay a contractor 7 days after a payment is due, a contractor may send a notice to the owner, and, if the owner still does not make payment after an additional 7 days, the contractor may suspend performance (one notice and a total of 14 days). The provision in AIA's subcontract is the same meaning a subcontractor may suspend performance after 14 days of nonpayment (and the required notice).

The AIA documents have been in existence for over a century, are well-known and used throughout the construction industry, and were drafted with input from all sectors (owners, architects, contractors, subcontractors and suppliers). HB 566 essentially negates AIA's approach, requires two notices, and expands the period from 14 days to 70 days (at a minimum).

Given the unreasonable amount of time involved prior to having the ability to suspend performance, ASACP opposes HB's 566 current proposal for suspending work (i.e., a 70-day wait). This risks putting subcontractors out of business because they will not be able to wait the 70 period (in addition to whatever the billing period is to suspend work).

Therefore, ASACP supports removing the proposed amendments to subsections 5(E) and 7(E) from HB 566, or, as an alternative, amending both sections to include a much more reasonable process and time-frame for suspension. Following the model used in the AIA contracts, a party should be able to suspend performance if, after 7 days from when payment was due, the party sends a notice threatening suspension unless it

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is paid within the next 7 days. The following is sample language that could be substituted for 5(E) and 7(E):

5(E) Suspension of Performance. Unless otherwise agreed between the parties, 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. Suspension under this section may occur if:

(1) Payment has not been made to the contractor in accordance with the schedule established under subsection (C);

(2) At least seven 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 and the contractor sends a notice to the owner or the owner's representative stating that payment has not been made; and

(3) Seven days have passed since the contractor sent the notice required by paragraph (2).

(4) A contractor shall be entitled to payment for any additional costs it incurred due to the suspension of work.

* * *

7(E) Suspension of Performance. Unless otherwise agreed between the parties, 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. Suspension under this section may occur if:

(1) Payment has not been made to the subcontractor in accordance with the schedule established under subsection (C);

(2) At least seven 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 and the subcontractor sends a notice to the contractor or subcontractor or their representatives stating that payment has not been made; and

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(3) Seven days have passed since the subcontractor sent the notice required by paragraph (2).

(4) A subcontractor shall be entitled to payment for any additional costs it incurred due to the suspension of work.

Under the proposals listed above, the parties would be free to contract whatever suspension terms they deem appropriate, but, if their contract was silent as to the right of suspension of work, a contractor or subcontractor would only have to wait 14 days to suspend performance for non-payment.

With respect to the following provisions contained in HB 566, ASACP supports them:

1. Section 3(C) prohibits the waiver of CASPA rights;
2. Amendments to sections 6 and 11 dealing with withholding for deficiency items; and
3. Amendments to section 8 (errors in invoicing), section 9 (retainage) and 12 (penalties and attorneys fees).

(Sections refer to the sections of CASPA that HB 566 amends.)

On behalf of ASACP, thank you for considering the needs of the contracting and subcontracting industry. If we can provide any further information to you on HB 566, CASPA, or any other construction related topic, please do not hesitate to contact ASACP's office.

Very truly yours,

Loni Warholic
Executive Director

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