

Are Cross-Contractual Offset Provisions Enforceable?

Construction subcontracts sometimes include a provision that allows the general contractor to withhold amounts due to its subcontractor on one project if that subcontractor is in breach of its obligations to the general contractor on another project. Are such provisions enforceable in Pennsylvania? There is not much law on this subject. Significantly, one court has recently indicated that the answer is yes. *See A.B.&S. Masonry Corp v. Hartford Fire Insurance Co.* (E.D. Pa. 2018).

In *A.B.&S. Masonry*, the general contractor hired a subcontractor on two separate public works construction projects. Both subcontracts included a stay provision whereby the subcontractor agreed to stay all claims for payment if the general contractor was in dispute resolution proceedings with the project owner. Both subcontracts also contained a “cross-contractual offset” provision, whereby the subcontractor agreed that the contractor could withhold payment on one project if the subcontractor owed the contractor for any debt or liability on another project.

The general contractor invoked the offset provision and did not pay its subcontractor for its work on one project because of issues with the subcontractor’s work on another, unrelated job. When the surety on the first job was sued by the subcontractor due to the general contractor’s refusal to pay, it invoked the cross-contractual offset provision to seek a stay of the subcontractor’s claims against it for payment. The surety argued that a stay was appropriate because the amounts due to the subcontractor on the project at issue could be properly offset by a liability owed by the subcontractor on the second project, which was being litigated. The proper amount of the offset would depend on the outcome of the contractor’s dispute resolution proceedings with the owner on the second project, thereby requiring a stay of the subcontractor’s claim for payment on the project at issue.

The U.S. District Court for the Eastern District of Pennsylvania agreed with the surety, finding that the court’s power to stay a matter before it “is appropriately exercised where parallel litigation will likely determine a significant amount of what is at stake in the present dispute, as when a general contractor is in dispute resolution proceedings against the owner of a project. . . . The existence of the Cross-Contractual Offset Provision warrants a stay in this matter.”

The order granting the stay in *A.B.&S. Masonry* may have important implications regarding the use of cross-contractual offset provisions in subcontracts, especially in light of the dearth of case law regarding the enforceability of these provisions. Contractors may now wish to consider including such cross-contractual offset

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provisions in their subcontracts, particularly where they work with the same subcontractors on multiple projects. Subcontractors should beware that such provisions may now be enforceable and should consider such provisions in proposed subcontracts.



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