

HOW TO PROTECT YOUR BUSINESS AND LEGAL INTERESTS

– FROM BID THROUGH COMPLETION AND BEYOND –

Speaker: Karen Palecek of Palecek & Palecek, PLLC



6263 N. Scottsdale Road, Ste 310
Scottsdale, AZ 85250
Phone: (602) 522-2454
E-mail: karen@paleceklaw.com
www.constructionlawyersaz.com



KAREN A. PALECEK is a co-managing member of Palecek & Palecek PLLC where she has more than 26 years of experience in the areas of construction law and litigation. Her clientele includes specialty trade contractors, suppliers, general contractors and owners.

Her practice and experience is focused on every aspect of the construction industry including but not limited to contract review and negotiation, mechanics liens, bond claims, arbitration, mediation, bench trials, jury trials, payment and performance issues, claim evaluations, litigation from complaint through to collection on judgments and appeals.

She also makes frequent appearances at the Office of Administrative Hearings for matters involving the Registrar of Contractors. Karen obtained her Juris Doctorate degree from Arizona State College of Law in December 1987 and was licensed to practice in the State of Arizona in 1988. She received her undergraduate degree in Political Science Cum Laude from the University of Dayton in 1983.

Reported cases include the following:

In re Mortgages Ltd, 482 B. R. 298 (Bankr. Ariz. 2012)

Fagerlie v. Markham Contracting Co. Inc. 227 Ariz. 367, 258 P. 3d 185 (Ariz. App. 2011)

Western Insulated Glass v. Mckay 174 Ariz. 597, 852 p.2d 412 (App. 1993)

Memorandum decision:

Markham Contracting Co., Inc. vs First American Title Insurance Company , 2013 WL3838690 (Ariz. App. Div 1)

Associations:

American Subcontractor's Association State Bar of Arizona Construction Law section

Features:

Karen was featured in Attorney at Law magazine "Women in Law Issue"



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I. BID PROPOSAL

II. CONTRACT

III. DURING PROJECT

IV. CLAIMS



Do your bid terms and conditions address important terms such as price, scope, claims, delays, scheduling issues, termination, indemnity, and attorneys' fees?

Clauses to include in your bid to protect you

- Sample Bid Form
 - Scope of Work
 - Inclusions
 - Exclusions
- Time for Performance (2)
- Consequential Damages
- Termination of Contract
- Indemnity, especially if you are a subcontractor

SAMPLE BID FORM

CONTRACTOR Address _____ Phone _____ Contractor Licenses _____ - \$ _____ Bid Limit _____	
PROPOSAL/CONTRACT	
Date of Proposal:	
Customer Name/Address ("Customer"):	
Project Name/Address ("Project"):	
Owner Name/Address ("Owner"):	
Architect Name/Address ("Architect"):	
Engineer's Name/Address ("Engineer"):	
Plans/Drawings Sheets ("Plans"):	
Specification Sections ("Specifications"):	
Attachments to Proposal/Contract: ("Attachments")	<u>Attachment "1":</u> Terms and Conditions; <u>Attachment "2":</u> Scope of Work; <u>Attachment "3":</u> Inclusions and Exclusions
Bid Amount:	
<p>FOR THE BID AMOUNT SET FORTH ABOVE, SUBCONTRACTOR ("Subcontractor") PROPOSES, subject to the terms and conditions of the Attachments hereto (which Attachments are hereby incorporated by reference and binding on the parties as though fully set forth herein), to furnish the labor, materials, equipment and/or services to the Project (the "Work"), identified on Attachment "2".</p>	
<p>PROPOSAL/CONTRACT SUBMITTED BY:</p> <p>Subcontractor _____</p> <p>Authorized Signature _____</p> <p><u>Note:</u> Unless otherwise extended in writing, this Proposal/Contract shall become void if not accepted within 30 days from the date herein.</p>	<p>ACCEPTANCE OF PROPOSAL/CONTRACT: The labor, materials, services and/or equipment to be provided for the above Bid Amount and the terms and conditions of the Attachments incorporated herein are satisfactory and are hereby accepted. You are hereby authorized to furnish the labor, materials, services and/or equipment specified herein.</p> <p>Customer signature _____</p> <p>Print Name and Title _____</p> <p>Date of Acceptance: _____</p>

SAMPLE BID FORM – Terms and Conditions 1 of 5

(Company Name)

(Address)

(Phone Number)

TERMS AND CONDITIONS OF BID
[ADDENDUM ____ TO SUBCONTRACT]

Contractor: _____

Project: _____

Subcontractor hereby provides its bid for the above-referenced Project. This bid is only valid for 30 days. If this bid is accepted the terms and conditions in this bid must be incorporated into any Subcontract Agreement offered by Contractor. By reviewing this bid, Contractor acknowledges and accepts the terms and conditions set forth herein. This bid is conditioned on the use of the American Institute of Architect's A401 - 1997 subcontract form, and on the exclusion of any requirement to name additional insureds or to waive subrogation for claims covered by workers' compensation or commercial general liability insurance.

[Subcontractor hereby accepts the terms of the attached Subcontract subject to the provisions as defined on the Subcontract Agreement as well as Contractor's Agreement with the terms set forth in this Addendum. This Addendum is attached hereto and incorporated herein by reference. If any of the terms of the Subcontract are inconsistent with the terms of this Addendum, then this Addendum shall be controlling and the parties shall be bound by the terms and conditions of this Addendum.]

1. PAYMENT.

Arizona's Prompt Pay Statute, A.R.S. Sect. 32-1129 et seq. applies to payment of this project as set forth in the statute. Subcontractor shall be paid monthly progress payments pursuant to the Prompt Payment Statute within 7 days after receipt of the payment by the general contractor for the value of work performed plus the amount of materials and equipment suitably stored on or off site or within 20 days following the month in which work was performed whichever occurs first. Final payment shall be due 30 days after the work described in the proposal is substantially completed. No provision of this agreement shall serve to void the subcontractors entitlement to payment for properly performed work or suitably stored material.

2. RETENTION.

The contractor will withhold no more retention from the subcontractor than is being withheld by the owner from the contractor with respect to the subcontractors work.

3. INTEREST AND EXPENSES.

All sums not paid when due shall bear an interest rate of 1 ½ % per month.

4. ATTORNEYS' FEES.

In the event of litigation or collection efforts by subcontractor, including any Registrar of Contractor's action, the prevailing party shall be reimbursed for its reasonable attorneys' fees, which shall include all costs that would normally be passed through to the client, specifically but not limited to research charges, travel costs, expert witness costs, copying costs, mailing costs, facsimile costs, hand-delivery costs, Federal Express or Express Mail costs, taxable costs and disbursements.

5. PROJECT FINANCING DISCLOSURES.

SAMPLE BID FORM – Terms and Conditions 2 of 5

Subcontractor shall be provided, upon written request, with the legal description of the property, the name, address and representative of the Owner, and evidence of adequate owner project financing. The Contractor shall promptly notify Subcontractor of material changes in the Owner's identity or financial arrangements. Subcontractor shall not be obligated to commence or continue subcontract work unless adequate assurance of payment is received.

6. WARRANTY AND REJECTION OF WORK.

Notwithstanding any higher standard stated elsewhere, Subcontractor's work shall be executed in substantial compliance with the subcontract documents in a good and workmanlike manner [as reflected in the following industry quality standard, if inserted: _____] and free of defect not inherent in the type of work. Contractor may reject subcontract work only for demonstrated non-compliance with the subcontract documents and only if the Architect/Engineer concurs that the subcontract work is unacceptable. The foregoing warranty for defective materials and workmanship shall be for a period of one year from the date of substantial completion of subcontractor's work unless otherwise specifically agreed in a writing signed by Subcontractor. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES WHETHER EXPRESS OR IMPLIED, AND ALL SUCH WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED, INCLUDING THE IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE AND MERCHANTABILITY.

7. SITE INSPECTION AND COMPLETENESS OF PLANS.

Subcontractor's obligations to examine documents, project site, and materials and work furnished by others is limited to the obligation to bring to the attention of the Contractor any defects or deficiencies that a person in the trade of the Subcontractor would discover by reasonable sight inspection. No testing beyond reasonable sight inspection shall be required. Subcontractor is entitled to rely on the accuracy and completeness of the plans and specifications provided to the Subcontractor.

8. DESIGN DELEGATION.

Any design services provided by the Subcontractor or its designer will be reviewed by the Architect/Engineer responsible for the overall project to assure that the design will be acceptable when integrated with the entire work. Contractor, Owner and Architect are entitled to rely on the accuracy and completeness of the designers hired by Subcontractor only if all design criteria are furnished to the Subcontractor by the Contractor, Owner and Architect.

9. SUBCONTRACTOR CLAIMS.

Subcontractor's entitlement to adjustments in the subcontract time or price for changes in the work shall not be contingent upon or limited to the amount that the Contractor receives from the Owner. Under no circumstances does the Subcontractor waive its right to payment for extra work performed by the Subcontractor pursuant to verbal or written instructions from the Contractor.

10. STOP WORK NOTICE.

If payment is not received by the subcontractor in accordance with the subcontract agreement, then the subcontractor has the right to cease performance until payment is made. If subcontractor is required to demobilize, then once payment is made, contractor is responsible for costs of demobilization and remobilization.

11. BACK CHARGES.

No back charge or claim of the contractor for services of the subcontractor shall be valid except by an agreement in writing, by the subcontractor before the work is executed, except in the case of the subcontractor's failure to meet any requirement of the subcontract agreement. In this event, the contractor shall notify the subcontractor of its default, in writing, and allow subcontractor reasonable time to correct any deficiency before incurring any costs

SAMPLE BID FORM – Terms and Conditions 3 of 5

chargeable to the subcontractor. If this is not done, all costs incurred will be borne by the contractor.

12. WORK AREAS.

Contractor shall secure all work areas as to be acceptable to subcontractor work under the subcontract. Subcontractor will not be called upon to start work until sufficient areas are ready to ensure continued work.

13. TIME FOR PERFORMANCE.

Subcontractor shall be given a reasonable time in which to make delivery of materials and/or commence and complete the performance of the contract. Subcontractor shall not be responsible for delays or default where occasioned by any causes beyond its control including but not limited to delays caused by the owner, general contractor, architect and/or engineers, delays in transportation, shortages of raw material, civil disorders, labor difficulties, vendor allocations, fires, floods, accidents, hazardous waste or controlled substances and acts of God. Subcontractor shall be entitled to equitable adjustment in the subcontract amount for additional costs due to unanticipated project delays or accelerations. Subcontractor shall not be obligated to provide any labor or materials outside the scope of work and subcontractor shall first agree in writing, to equitably adjust the subcontract amount to be paid subcontractor.

14. WORKMANSHIP.

All workmanship is guaranteed against defects for a period of 1 year from the date of substantial completion. The exclusive remedy shall be that subcontractor will replace or repair any part of its work which is found to be defective. Subcontractor shall not be responsible for special, incidental or consequential damages.

15. WORK HOURS.

Work called for herein is to be performed during subcontractors regular working hours. All work performed outside of such hours shall be charged at subcontractors overtime rates or amount agreed upon by the parties at the time the overtime was authorized.

16. NOTICE.

Any notice of written claim required by the contract documents to be submitted to the contractor on account charges, extras, delays, acceleration or otherwise shall be furnished within a time frame and in the manner to permit the contractor to satisfy the requirements of the contract documents and the contract with the owner, not within any shorter time period otherwise provided.

17. INSURANCE RESTRICTION.

Notwithstanding any provision to the contrary, Subcontractor shall maintain the types and limitations on insurance as shown on the attached certificate of insurance. Subcontractor is not required to include Contractor, Owner or any others as additional insured or named insured, nor to waive any claims or rights of subrogation against the Contractor, Owner, or any others for losses and claims covered or paid by Subcontract's workers compensation or general liability insurance. Acceptance of the Certificate of Insurance constitutes acceptance of the insurance of subcontractor, including any additional insured requirements.

18. INDEMNITY, HOLD HARMLESS RESTRICTION.

Any indemnification or hold harmless obligation of the subcontractor shall extend only to claims relating to bodily injury and property damage and then only to that part or proportion of any claim damage, loss or defect that results from the negligence or intentional act of the indemnitor or someone for whom it is responsible. Subcontractor shall not under any circumstance have a duty to defend. Nothing in this agreement shall require the subcontractor to

SAMPLE BID FORM – Terms and Conditions 4 of 5

indemnify any other party from any damages including expenses and attorneys' fees to persons or property for any amount exceeding the degree subcontractor directly caused such damages. Subcontractor shall not be responsible for fines or assessments made against contractor and subcontractor. Subcontractor retains all rights of subrogation. Subcontractor will not indemnify anybody for any actions except for subcontractor's own negligence and only in the proportional amount of their negligence.

19. OSHA.

Subcontractor will not be responsible for fines relating to contractors OSHA fines. Subcontractor is only responsible for any violations as a direct result of its work.

20. RIGHT TO RELY.

Subcontractor assumes no risk for unknown or unforeseen conditions not evident from the plans, drawings, specifications or other information provided to subcontractor.

21. ALL-RISK INSURANCE.

The Contractor shall, if the Owner does not, purchase and maintain all risk insurance upon the full value of the work performed and/or materials delivered to the jobsite which shall include the interest of the Subcontractor.

22. SUSPENSION OF WORK.

In the event of a suspension of work by the Owner, Contractor, or Subcontractor, Contractor's liability to the Subcontractor is for payment in full for all work performed to date of suspension and any additional costs incurred as a result of the suspension, including demobilization, plus reasonable overhead and profit.

23. TERMINATION OF SUBCONTRACT.

In the event of any termination by the Owner or Contractor which is not justified by a default of the Subcontractor, or termination by Subcontractor, Subcontractor shall be entitled to payment from the Contractor for all costs incurred by the Subcontractor for which the Subcontractor has not received payment, including, but not limited to, reasonable overhead, profit, expenses and damages, including attorneys' fees and interest, including profit on unperformed work.

24. LIEN AND BOND RIGHTS PRESERVED.

Notwithstanding any provision to the contrary, Subcontractor may take all steps reasonably necessary to preserve and enforce its lien and bond rights.

25. CONSEQUENTIAL DAMAGES.

Contractor shall make no demand for liquidated damages or actual damages for delays in excess of the amount assessed against the Contractor and paid by the Contractor for unexcused delays actually caused by Subcontractor. Subcontractor shall not be subject to any consequential damages other than any contractually provided liquidated damages. The Contractor expressly waives all consequential damages.

26. SAFETY BARRIERS.

Subcontractor shall not be liable for erecting Project safety barriers unless expressly and specifically agreed to be part of the Subcontractor's work. Each party to the Agreement shall be liable for any safety violation fines or penalties imposed upon it, regardless of the cause of the fine or penalty.

SAMPLE BID FORM – Terms and Conditions 5 of 5

27. WAIVERS.

Statutory Waivers, pursuant to A.R.S. § 33-1008, will be executed. However, subcontractor is only waiving those items set forth in the corresponding invoice and is preserving its rights to Prompt Payment interest and attorneys' fees. Subcontractor will not agree to execute an Unconditional Waiver and Release on Progress Payments or Unconditional Waiver and Release on Final Payment until the check has cleared the bank.

DATED: _____

(Company Name)

By: _____

Its: _____

What terms in the contract address delays, scheduling, termination, and indemnity?

Contract Clauses to Watch Out For



Time for Performance – Sample Clause #1

Clause that Protects Your Business Interests

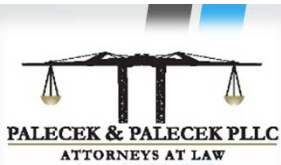
Contractor shall be given a reasonable time in which to make delivery of materials and/or commence and complete the performance of the contract. Contractor shall not be responsible for delays or default where occasioned by any causes beyond its control including but not limited to delays caused by the owner, architect and/or engineers, delays in transportation, shortages of raw material, civil disorders, labor difficulties, vendor allocations, fires, floods, accidents, hazardous waste or controlled substances and acts of God. Contractor shall be entitled to equitable adjustment in the contract amount for additional costs due to unanticipated project delays or accelerations. Contractor shall not be obligated to provide any labor or materials outside the scope of work unless Contractor shall first agree in writing, to equitably adjust the contract amount to be paid to Contractor.



Time for Performance – Sample Clause #2

Clause that Protects Your Business Interests

If Contractor's work is delayed, disrupted and/or accelerated as a result of events and/or occurrences outside Contractor's control that cause it to incur additional cost or expense in performing the Work (for, among other things, but not limited to: overtime, weekend, or shift work), Contractor shall be entitled to an adjustment in the time for performance equivalent to the time lost, as well as reimbursement for the additional costs or expenses incurred.



Termination of Contract – Sample Clause **Clause that Protects Your Business Interests**

In the event of any termination by the Customer or Contractor which is not justified by a material default of Contractor, Contractor shall be entitled to payment from the Customer for all costs incurred by Contractor for which Contractor has not received payment, including, but not limited to, reasonable overhead, profit, expenses and damages, including attorneys' fees and interest, and profit on unperformed work.

Indemnity

- **Clause that does NOT Protect Your Business Interests:**

"To the fullest extent permitted by law, Contractor agrees to indemnify and hold harmless, the Owner, the Architect, Engineer, and all of their parents, subsidiaries, affiliates, agents, officers and employees from and against all claims, damages, losses penalties, ..., including but not limited to attorneys' fees and court costs, arising out of or resulting from the performance of Contractor's work...regardless of whether it is caused in part by the acts, omissions or negligence of a party indemnified hereunder."

- **Clause that Protects Your Business Interests:**

The Contractor will not indemnify anyone for anyone else's negligence. Contractor agrees only to indemnify for this Contractor's negligence.

No Damage for Delay

- **Clause that does NOT Protect Your Business Interests:**

Extensions of Time: If for any reasons beyond its control Contractor shall be materially delayed at any time in the progress of Work under such circumstances as would entitle Contractor to an extension of time for completion of Work hereunder or other relief, provided that Contractor shall have filed with Contractor a written claim for such extension or relief that complies with the requisites for making a claim under the Contract and in sufficient time to permit a claim against the Owner for an extension or other relief under the Contract. In the event the Contractor's performance of this Contract is delayed or interfered with by acts or omissions of the Owner, or other agents of Owner, Contractor may request an extension of time for the performance of this Contract as provided above, but shall **NOT** be entitled to any increase in the Contract Price or to damages or additional compensation as a consequence of such delays or interference.

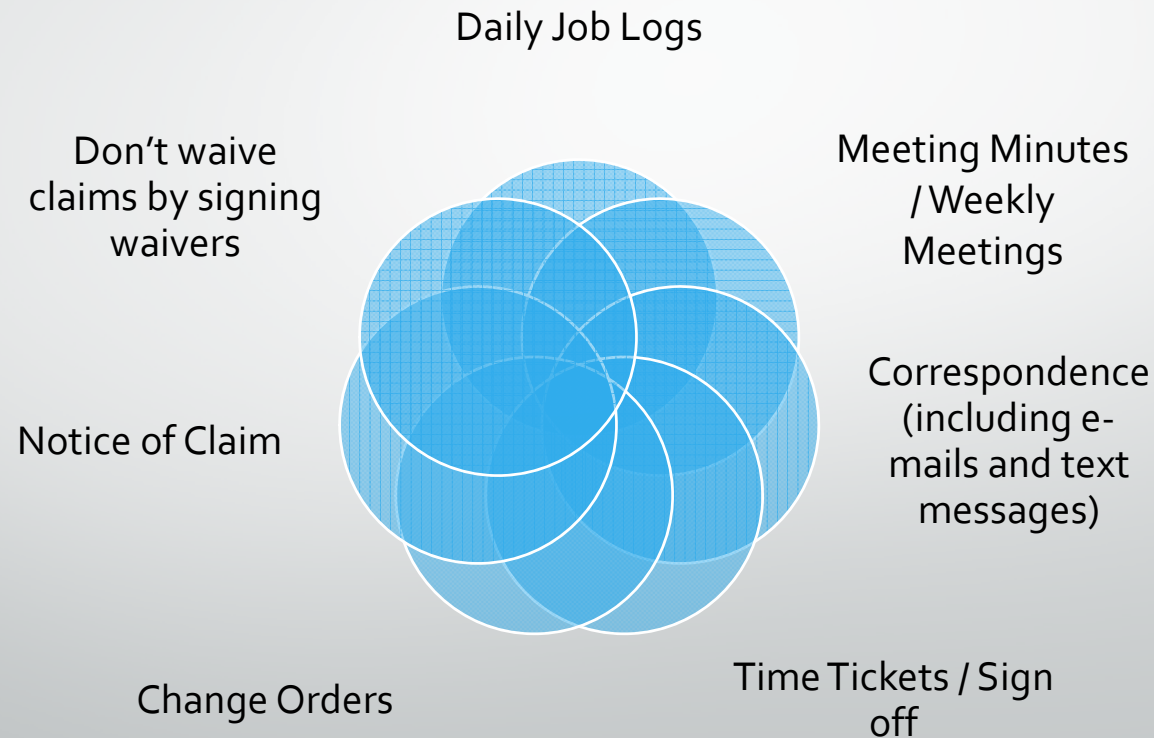
- **Clause that Protects Your Business Interests:**

Contractor is entitled to reasonable compensation associated with delays caused by Owner, Architect, Engineer, or other agents of Owner.



How can you help protect your firm during a project when you have scheduling issues and delays?

Things you can do during a project to help protect yourself during a project





Daily Job Logs



Daily Progress Report

Date: _____ Superintendent: _____
Project: _____ Project #: _____
Working Conditions: Above Average _____ Average _____ Bad _____
Temperature: High _____ Low _____ Weather _____
Employees: _____

TRADE	SUBCONTRACTOR	# OF TRADESMAN	PROGRESS

Deliveries Made By Whom For What Subcontractor

Visitors/Verbal Discussions/Inspections/Meetings/Delays

General Report

cc Project Manager
Office

Meeting Minutes / Weekly Meetings

Weekly Subcontractor's Meeting

PROJECT: THE PROJECT ON 123 STREET

Wednesday, March 19, 2014

I. ABC SUBCONTRACTOR:

- _____ will be completed by _____
- _____ will be up by end of today
- _____ is complete
- _____ comes in on Monday
- By end of next week, the plan is to have _____ complete; depends on City and issues with _____
- The overall goal is to be finished by the end of next week
- ABC Subcontractor will not be responsible for _____

II. DISCUSSIONS:

- ALL SUBS: _____
- Issue: John Doe is concerned with _____. John Doe II is concerned about _____. XYZ Contractor will talk with _____ regarding _____.
- DEF Subcontractor was concerned about the construction of _____. XYZ Contractor will schedule meeting to address the coordination of trades on the construction of the _____

III. SCHEDULE OF:

- Will _____ today in the _____ area.
- Finished with _____

IV. CONTRACTOR UPDATES:

- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____

V. GENERAL NOTES:

- All submittals have been turned in; waiting for approval
- 123 Framers Sub needs tub submittals
- 456 Truss drawings have been submitted to the City; City says the turnaround time is 4 days; XYZ Contractor should have drawings in hand by end of next week.
- Inspector has requested submittals on fire treated material and UL Assembly Ratings
- Subs to use the plans / elevations in the architectural drawings for cabinet layouts.
- WARNING: DO NOT TOUCH AS BUILT SETS OF DRAWINGS IN CONFERENCE ROOM

*NOTE: REQUIRE E-MAIL DISTRIBUTION AND OPPORTUNITY TO CORRECT

Correspondence (including e-mails and text messages)

- Make sure you document any breaches or delays in writing, even if it is just in e-mail or text messages*



23



STOP!

IN THE NAME OF CONTRACTOR

Suspending Work under Common Law

Tools to Collect Payment

- Common law requires a material breach
 - What is a material breach?
 - The breach goes to the essence of the contract-significant amount must be owed to be able to stop work

What is a Material Breach?

- Material Breach by Owner if they do not pay an entire Pay Application
- Material Breach by General Contractor, if it doesn't bill timely for sub's work



January 31, 2013

VIA CERTIFIED MAIL

Sly General Contractor, Inc.
242 South El Dorado Circle
Mesa, AZ 85202

VIA CERTIFIED MAIL

High End Apartments, LLC
12345 South 1st Avenue
Phoenix, AZ 85007

Re: Stop Work Order Pursuant to Material Breach

To Whom It May Concern:

This letter is a Stop Work Notice pursuant to the Material Breach of Contract for nonpayment. Informed Subcontractor, LLC ("Informed"), hereby gives notice that they are suspending performance of their construction contract with Sly General Contractor, Inc. ("Sly"), within **seven calendar days** from the date of this letter for failure of Sly to make timely payment of the amount due under the contract. This amount includes the authorized and billed change orders. Copies of the outstanding invoices and change orders are attached hereto for your reference.

As required by the contract, this notice is being provided to the Owner, High End Apartments, LLC, as Informed is unpaid the amount of \$500,000.00 from Sly, as billed on November 20, 2012, December 20, 2012, and January 20, 2013.

Demand is hereby made for payment to cure the breach plus interest and attorney's fees for a total due of \$_____ and it must be paid by _____.

Very truly yours,

DEWEY CHEATUM & HOWE, P.L.L.C.

Check contract
for time
periods

Claim Process

1. Know your contract deadlines and timeframes against Public Entities
 - Watch for 24-48 hour deadlines
 - Don't waive claims for delays on change orders and waivers
2. Stop Notice / Payment Bond / Mechanics Lien?
 - Stop Notice – Stops the flow of Money
 - Record Lien on Private Work
 - Payment Bond Claim – *Possible on Public or Private Projects*



Mechanics' and Materialmen's Liens

Governed by the Statutory Definitions



THE NAME IS BOND, PAYMENT BOND

Using Payment Bonds to get Paid

Little Miller Act v. Federal Miller Act

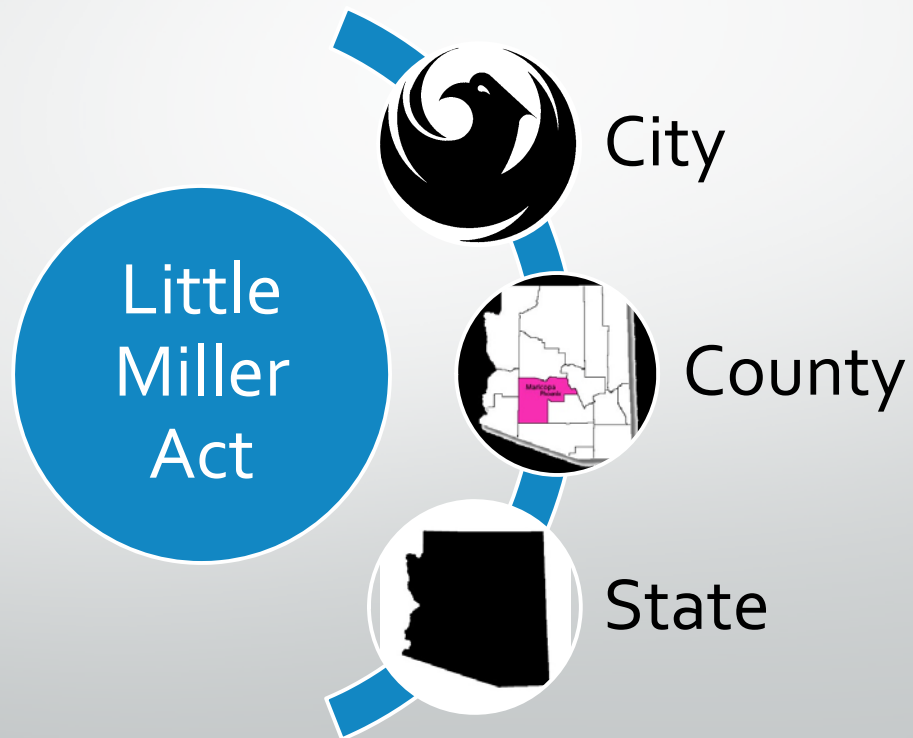
Federal
Miller
Act

40 U.S.C. §§ 3131-3134



Federal/US
Government

Little Miller Act v. Federal Miller Act





The Name is Bond, Payment Bond.

- Things to Remember for Little Miller Act claims:
 - ✓ THEY ARE EXTREMELY TIME SENSITIVE!
 - ✓ Make every effort to get a copy of the bond early and often!

The Name is Bond, Payment Bond.

- Federal Miller Bond claims
General Timeline
(EXTREMELY TIME SENSITIVE!)

Get a Copy of the Bond!!

This can take some time



90 Day Notice/Bond Claims

Deadline: Received **90 days** from last date of work



File Suit on Payment Bond

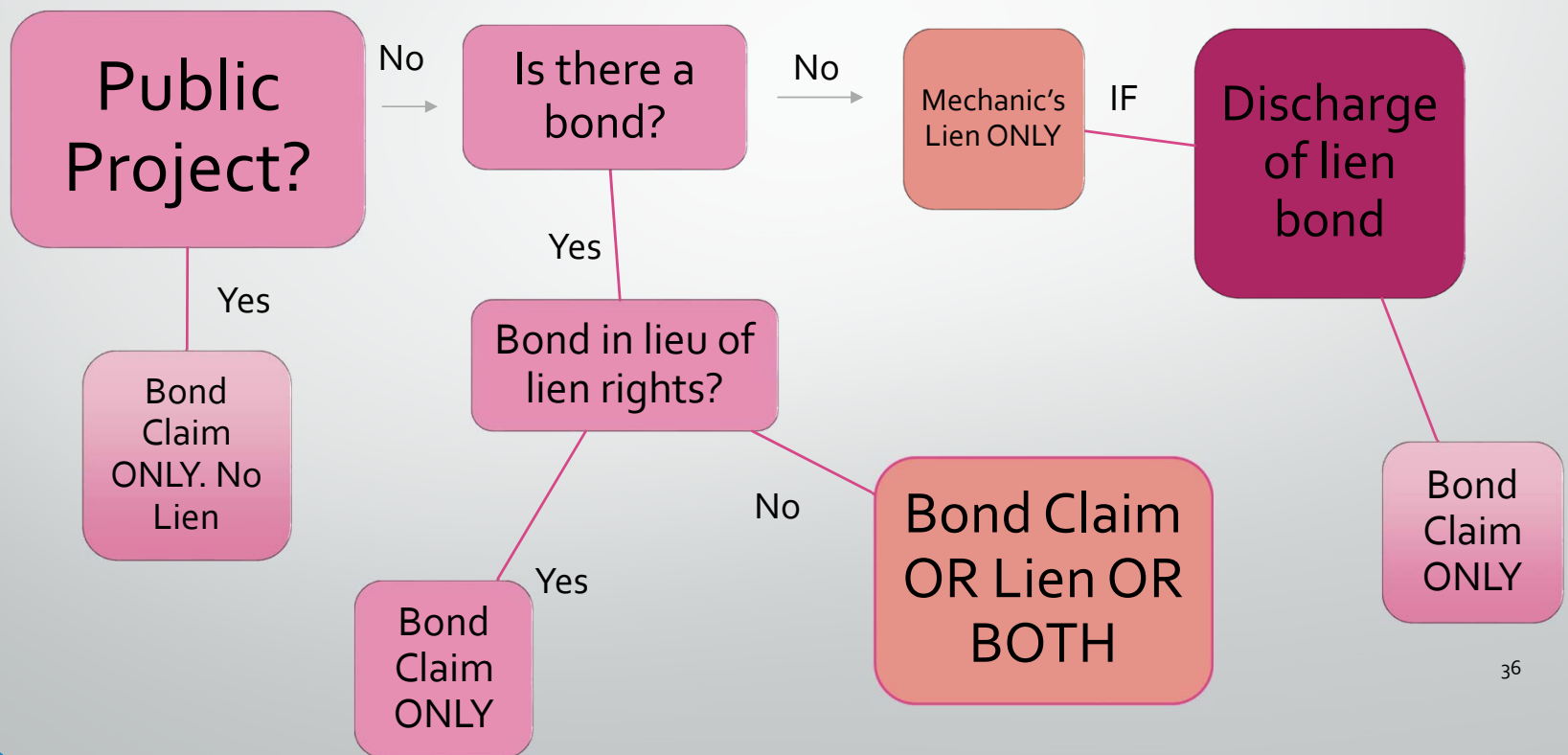
1 year from date last supplied labor and materials to jobsite



The Name is Bond, Payment Bond.

- Little Miller Bond claims
 - ** May have different timeline than Federal

The Kitchen Sink Approach: *Bond Claim, Mechanics' Lien, or Both?*





Disclaimer

Disclaimer is a way of not accepting responsibility in a situation where a party might have an expectation that might be different. For example, a lawyer disclaims providing legal advice with the forms that they provide at a seminar. For Builder's exchange or plan rooms or other form type document providers it is important to make sure there is no expectation. Also, you want to disclaim any liability for any losses that may occur if internet sites are not able to be reviewed or for the accuracy of the documents provided.

Possible wording for disclaimer:

ALL DOCUMENTS PROVIDED DO NOT CONSTITUTE ENDORSEMENT OF THE DOCUMENTS PROVIDED. ANY AND ALL LEGAL FORMS ARE DO NOT CONSTITUTE LEGAL ADVICE AND A LAWYER SHOULD BE CONTACTED PRIOR TO USE. NO GUARANTEES, REPRESENTATIONS OR WARRANTIES ARE BEING PROVIDED BY XYZ CORPORATION AS TO THE ACCURACY OR ADEQUACY OF THE INFORMATION PROVIDED.



Waiver

Distinction with Disclaimer Definition, Waiver is a voluntary relinquishment of a known right.

Check statute of state to determine whether statutory waiver forms are to be used on construction Projects.



To Waive, or Not to Waive... That is the Question

4 Types of Statutory Waivers

- **Conditional** Waiver and Release on **Progress** Payment
 - A.R.S. § 33-1008(D)(1)
- **Unconditional** Waiver and Release on **Progress** Payment
 - A.R.S. § 33-1008(D)(2)
- **Conditional** Waiver and Release on **Final** Payment
 - A.R.S. § 33-1008(D)(3)
- **Unconditional** Waiver and Release on **Final** Payment
 - A.R.S. § 33-1008(D)(4)



WAIVERS AND RELEASES ON PROGRESS PAYMENTS

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

(Pursuant to A.R.S. § 33-1008)

Project: _____

Job No.: _____

On receipt by the undersigned of a check from _____ in the sum of
(Maker of Check)
\$ _____ payable to _____
(Amount of Check) (Payee or Payees of Check)
and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any Mechanic's Lien, any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in the undersigned's position, the undersigned has on the job of

_____ located at _____
(Owner) (Job Description)

to the following extent. This release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to _____
(Person with whom the Undersigned Contracted)

through _____ only and does not cover any retention, pending modifications and
(Date)
changes or items furnished after that date. Before any recipient of this document relies on it, that person should verify evidence of payment to the undersigned.

The undersigned warrants that he either has already paid or will use the monies he receives from this progress payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above referenced project up to the date of this waiver.

DATED: _____
(Company Name)

By: _____
(Signature)

(Title)

UNCONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

(Pursuant to A.R.S. § 33-1008)

Project: _____

Job No.: _____

The undersigned has been paid and has received a progress payment in the sum of \$ _____ for labor, services, equipment or material furnished to the jobsite or to _____
(person with whom undersigned contracted)

on the job of _____ located at _____
(owner) (job description)

and does hereby release any mechanic's lien, any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in the undersigned's position that the undersigned has on the above referenced project to the following extent. This release covers a progress payment for all labor, services, equipment or materials furnished to _____, on the jobsite through _____ only
(person with whom undersigned contracted) (date)

and does not cover any retention, pending modifications and changes or items furnished after that date.

The undersigned warrants that he either has already paid or will use the monies he receives from this progress payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above referenced project up to the date of this waiver.

DATED: _____
(Company Name)

By: _____
(Signature)

(Title)

NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

WAIVERS AND RELEASES ON FINAL PAYMENT

CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

(Pursuant to A.R.S. § 33-1008)

Project: _____

Job No.: _____

On receipt by the undersigned of a check from _____ in the sum of
(maker of check)
\$ _____ payable to _____ and when the check has been properly
(amount) (payee or payees of check)
endorsed and has been paid by the bank on which it was drawn, this document becomes effective to release any mechanics' lien, any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in the undersigned's position, that the undersigned has on the job of _____ located at
(owner)
_____. This release covers a final payment for all labor,
(job description)
services, equipment, or materials furnished to the jobsite or to _____
(person with whom undersigned contracted)
except for disputed claims in the amount of \$ _____. Before any recipient of this document relies on it, the person should verify evidence of payment to the undersigned.

The undersigned warrants that he either has already paid or will use the monies he receives from this final payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above-referenced project up to the date of this waiver.

DATED: _____

(Company name)

By: _____
(Signature)

(Title)

UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

(Pursuant to A.R.S. § 33-1008)

Project: _____

Job No.: _____

The undersigned has been paid in full for all labor, services, equipment or material furnished to the jobsite or to _____
(person with whom undersigned contracted)
on the job of _____ located at _____
(owner) (job description)

and does hereby waive and release any right to mechanic's lien, any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in the undersigned's position, except for disputed claims for extra work in the amount of \$ _____.

The undersigned warrants that he either has already paid or will use the monies he receives from this final payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above referenced project.

DATE: _____

(Company Name)

By: _____
(Signature)

(Title)

NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

Summary

CHECKLIST FOR DOCUMENT PROTECTION FOR EACH PHASE OF CONSTRUCTION

PROPOSAL

- ☐ Is your proposal conditioned upon acceptable contract language?

CONTRACT

- ☐ Did your business negotiate contract terms to avoid "killer clauses" that threaten your business and cash flow?
- a. Avoid Pay if Paid Clauses
 - b. Set up a system if payment is not made within 60 days or sooner to send a Stop Work Notice. – If Subcontractor send a letter to Owner to see if payment has been made and have an early procedure in place to record mechanics liens, stop notices, and bond claims.
 - c. Don't agree to broad form indemnity clauses in violation of Arizona Law.
 - d. Agree only to written notice and opportunity to cure prior to back-charges
 - e. Always review schedule language with the requirement of a mutually agreed to schedule with no high liquidated damage clauses and actual / consequential damages and supplemental forces paragraphs
 - f. Review Default paragraphs and timing to cure
 - g. Avoid no damage for delay clauses limiting recovery to extensions of time
 - h. Avoid extra work clauses requiring any performance as directed by Owner / Contractor and payment does not have to be made until formal written change order is signed.

DURING PROJECT

- ☐ Have you preserved your mechanics lien and bond rights?
- a. Take and maintain a secured position by sending preliminary 20 day notices timely
- ☐ Dedicate someone to follow up on pay applications and fulfill requests
- ☐ Confirm statutory waivers are being signed properly
- a. Never sign an unconditional unless payment has been RECEIVED
 - b. Limit waiver to invoice only
 - c. Preserve interest
 - d. Preserve attorney's fees
 - e. Don't waive change orders or delay or acceleration claims
- ☐ Protect your Firm during a project when you have scheduling issues and delays
- a. Daily jobs logs
 - b. Meeting Minutes / Weekly Meetings
 - c. Correspondence
 - d. Time tickets
 - e. Change orders

CLAIMS PROCESS

- ☐ Be sure to check the Notice of Claim Paragraph in your Contract
- a. How soon do you give notice?
 - b. What options do you have for Claims/Collection of Payment?



Questions?

For full-sized handouts of the documents referenced in the PowerPoint please contact
Palecek & Palecek PLLC

Palecek & Palecek PLLC
6263 N. Scottsdale Road, Ste 310
Scottsdale, AZ 85250
Phone: (602) 522-2454
E-mail: karen@paleceklaw.com
www.constructionlawyersaz.com