

Construction Schedules, Change Orders, Delay Damages and Relevant Contractual Issues

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ATTORNEYS

Incorporation of Other Documents

- Contract Documents. The “**Contract Documents**” include that certain Owner-Contractor Agreement dated _____, 20__ between Owner and Contractor (the “Prime Contract”), as well as the following:
 - Why is this important?
 - Arbitration provision
 - Limited Damages (Waiver of Consequential Damages?)
 - Payment terms
 - Liquidated Damages
 - Jurisdiction
 - Early Completion Bonuses

Flow Down Provision

To the extent that the provisions of Prime Contract apply to the Work of the Trade Contractor, the Trade Contractor shall assume toward the Contractor all obligations and responsibilities that the Contractor, under the Prime Contract, assumes toward the Owner. The Contractor shall have the benefit of all rights, remedies and redress against the Trade Contractor that the Owner, under Prime Contract, has against the Contractor.

Change Orders

- 1. Change Orders.** Trade Contractor will make changes to the Work (“Change Orders”) as ordered by Contractor. Payment (or credits) for Change Orders will be documented by Contractor’s Change Orders and signed by Contractor prior to start of any Change Order work. All Change Orders are to be priced at origination and will constitute a complete settlement of all matters related to the change. **NO CHANGE ORDERS CAN BE COMPLETED OR APPROVED WITH A VERBAL REQUEST.** ANY CHANGE ORDER DONE WITHOUT COMPLIANCE WITH THIS PARAGRAPH 3.7 WILL NOT BE PAID. Change Orders will be billed on the A.I.A. Document G702 Application and Certification for Payment with the Change Order number referenced on Trade Contractor’s A.I.A. documents G702 and Continuation Sheet. All Change Orders will become part of the Contract Documents.



NOT THE
LAW

Change Orders

Payment. Contractor's acceptance of the A.I.A. Document G702 Application and Certification for Payment and obligation to make Progress Payments to Trade Contractor is subject to the condition that Contractor is actually paid by the Construction Lender or Owner

Change Orders – Suggested Edit

- **3.8 Payment.** Contractor's acceptance of the A.I.A. Document G702 Application and Certification for Payment and obligation to make Progress Payments to Trade Contractor is subject to the condition that Contractor is actually paid by the Construction Lender or Owner except for Change Orders ordered by Contractor which Contractor will be obligated to pay regardless of payment by Construction Lender or Owner.

Disputed Claims – Construction Change Directives

Release/Non-Waiver. A Progress Payment releases Contractor from all wage claims of Trade Contractor and its employees, except those attributable to Retentions. Payment of a Progress Payment is only fulfillment of a contractual obligation, and it should not be deemed to be Contractor's or Owner's acceptance of delivery of any supplies or materials or acceptance or waiver of defective or incomplete work

**WATCH OUT FOR CONDITIONAL LIEN WAIVERS
SIGNED MONTHLY – ARE YOU SCREWING YOURSELF?**

Conditional Waiver and Release on Progressive Payment

(Pursuant to A.R.S. 33-1008)

Job Name:
Job Site:
Job Owner:
Amount of Payment:

On receipt by the undersigned of a check from [Maker of Check] in the sum of \$ payable to 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 that the undersigned has on the job of [Owner] located at [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 undersigned contracted], through [Date] only and does not cover any retention, pending modifications and 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.

Date: _____

By: _____

Its: _____

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Conditional Lien Waiver

- **The Fix** – Partial Waiver
- United Metro Materials Inc. v. Pena Blanca Properties LLC.

Change Orders and Pay if Paid

To the extent approved by CONTRACTOR, the progress payments less the retainage shall be payable to SUBCONTRACTOR within seven days after payment is received by CONTRACTOR from Owner unless otherwise provided in the Subcontract Work Authorization. Notwithstanding any other provisions of the Subcontract Documents, SUBCONTRACTOR agrees that payment by Owner to CONTRACTOR for Work performed by SUBCONTRACTOR will be condition precedent to any payment obligation of CONTRACTOR to SUBCONTRACTOR hereunder. SUBCONTRACTOR expressly agrees that it will not be entitled to receive any payments or retention for Subcontract Work performed in the event that CONTRACTOR is not paid by Owner for that work. SUBCONTRACTOR specifically assumes the risk associated with any failure or refusal of Owner to pay CONTRACTOR.

Change Orders and Pay if Paid

SUBCONTRACTOR expressly agrees that it waives any and all rights to make payment demand on CONTRACTOR directly or on CONTRACTOR'S bond for any payment due unless CONTRACTOR has received payment from Owner for the amount due to SUBCONTRACTOR but which has not been paid as required herein.

Production Schedule

- Work will be performed within the time periods specified in the Production Schedule. Work will be commenced by the anticipated start date in the Production Schedule. **The Production Schedule may be adjusted from time to time at Contractor's discretion.**
- Adjustments to Trade Contractor's Work, even if occasioned by previously unknown conditions, discrepancies in the work of other trades, or latent ambiguities in the Contract Documents, will require the Contractor's prior written authorization. **All decisions made by the Architect, if one is named above, or the Contractor, if an Architect is not named above, on such matters (including appropriate adjustments to the Work and Contract Price) are binding on Trade Contractor.**

Production Schedule

- Trade Contractor will promptly increase its work force, accelerate its performance, work overtime, and work Saturdays, Sundays, and holidays, all without additional compensation or increase to the Contract Price, if necessary to meet the Production Schedule.
- **Construction Acceleration or Delays.** The Production Schedule may be accelerated or postponed at any time by a verbal or written instruction from Contractor and then only by the number of days so specified by Contractor

Suggested Edits

- The Production Schedule may be accelerated or postponed at any time by a written instruction from Contractor and then only by the number of days so specified by Contractor. **Costs associated with any acceleration or postponement will be paid by Contractor in accordance with a Change Order.**

Schedule Issues

- Should General or any other contractor on the building be delayed in the progress of its/their work, thus delaying the work of Subcontractor, General shall not be liable to Contractor for any damages nor for extra compensation, and the obligations of Contractor shall not be released or affected.
- Suggested EDIT:

Schedule Issues

- Contractor shall not be entitled to bring a claim for damages for such delay, but shall as its sole and exclusive remedy be entitled to an additional change order increasing the time period for completion and the Contract Price to be paid to the Contractor in an amount equal to any increase in the cost of labor or materials incurred directly by the Contractor plus a reasonable charge for overhead and profit in the total amount of 15%. Contractor shall provide General with reasonable evidence of such increased costs to substantiate any request for such a change order.

Schedule Issues - Damages

- An extension of the time for completion of the Work shall be the sole remedy of the Contractor whether or not such delays are foreseeable
- In no event shall the Contractor be entitled to any compensation or recovery of any damages in connection with any delays, including without limitation consequential damages, lost opportunity costs, impact damages

Schedule Issues - Damages

- **Delays.** If performance of the Subcontract Work is delayed or interfered with for any reason beyond SUBCONTRACTOR's control, and without SUBCONTRACTOR's fault or negligence, SUBCONTRACTOR may request an extension of time but shall not be entitled to any increase in the Subcontract Price or to damages or additional compensation as a consequence of such delays or interference, except to the extent that the General Contract entitles CONTRACTOR to compensation for such delays and then only to the extent of any amount that CONTRACTOR may, on behalf of SUBCONTRACTOR, recover from Owner or other responsible party for such delays. SUBCONTRACTOR agrees that an extension of time will be permitted for a delay only to the extent that such delay (a) is not caused, or could not have been reasonably anticipated by SUBCONTRACTOR, (b) could not be limited or avoided by SUBCONTRACTOR's timely notice to CONTRACTOR of the delay, and (c) adversely affects the critical path construction sequence.

Initial Dispute Resolution

- Adjustments to Trade Contractor's Work, even if occasioned by previously unknown conditions, discrepancies in the work of other trades, or latent ambiguities in the Contract Documents, will require the Contractor's prior written authorization. **All decisions made by the Architect, if one is named above, or the Contractor, if an Architect is not named above, on such matters (including appropriate adjustments to the Work and Contract Price) are binding on Trade Contractor.**

Damage Limitation

- **Limited Recourse.** The sole recourse available to Trade Contractor under the Contract Documents for a breach or default by the Contractor or, if applicable, the Owner will be limited solely to the Contractor's interest in the Job or, if applicable, to Owner's interest in the construction project and will not extend to any other assets of Owner or Contractor. The previous sentence will not be construed to limit the ability of Trade Contractor to enforce any statutory lien rights or stop notice rights available to Trade Contractor.

Watch out for the Unenforceable Contract Provision

Federal Preemption – whose law is going to apply?

Also, don't ever expect a judge to agree with you.



Waiver of Lien Rights

- (a) Notwithstanding the foregoing, to the fullest extent permitted under applicable law, Contractor for itself and its subcontractors, laborers and material suppliers and all others directly or indirectly acting for, through or under the Contractor does hereby expressly waive, release and relinquish all rights to file and obtain any mechanic's lien or claim against the Owner, WHC, the Project which is the subject matter of this Contract or all or any portion of the real estate which is the subject matter of any such lien; and Contractor further agrees that this waiver of the right to file and obtain a mechanic's lien and claim shall be an independent covenant and shall apply as well to work, labor and services performed and materials, equipment, and other items furnished under any change order or supplemental Contract for extra or additional work in connection with the completion of the Work covered and described by this Contract or any subsequently issued change orders or any other changes or alterations adding to or deducting from the Work made pursuant to the provisions of this Contract

Waiver of Lien Rights

- *Contractor does hereby expressly waive, release and relinquish all rights to file and obtain any mechanic's lien or claim against the Owner, WHC, the Project which is the subject matter of this Contract*

Retention – KNOW THE LAW

- **Retentions.** For each Progress Payment hereunder, the Contractor will hold a 10% Retention (“Retentions”). To ensure complete performance by the Trade Contractor, Contractor will hold funds from the last Progress Payment (or last few Progress Payments if the last Progress Payment is insufficient) until the date which is (30) days after the last to occur of these events:
 - KEYS – what does the prime contract provide?
 - AZ Prompt Pay Law only allows the owner to retain funds. GC must pay subs everything the owner pays the GC.

Potentially Unenforceable Provision

- Subcontractor will not interfere with Contractor's relationship with Owner or any other contractors or subcontractors. Subcontractor will not deal directly with either Owner or its architects, engineers, consultants or other agents without prior authorization in each instance from Contractor.
 - What about Prelien Notices, Stop Notices, Payment Inquiries

Potentially Unenforceable Provision

- 10.5 In the event of any actual or potential claim or condition that may, in Contractor's reasonable opinion, result in losses, damages, judgments or expenses, including attorneys' fees and litigation expenses (collectively, "Losses and Expenses") for which Contractor is entitled to reimbursement or indemnity under the Subcontract Documents or which Contractor may incur by reason of Subcontractor's breach of this Agreement and/or resulting from due to tax levy, garnishment or other similar process received by Contractor from Subcontractor's creditors, Contractor may withhold, setoff or recoup from any payment due or thereafter to become due to Subcontractor **under this or any other agreement, an amount sufficient in Contractor's opinion to cover all such actual and anticipated Losses and Expenses**. No interest shall be paid to Subcontractor on any amounts so withheld, setoff or recouped. If the actual Losses and Expenses incurred by Contractor exceed the balance due to Subcontractor, Subcontractor shall pay the difference to Contractor forthwith. This Section 10.5 governs over any other provision of this Agreement.

Potentially Unenforceable Provision

- **Release of Retention and Final Payment.** Retention shall be released and final payment shall be made to SUBCONTRACTOR within five days after final completion and acceptance of the Project by CONTRACTOR and Owner, provided that: (a) SUBCONTRACTOR shall have completed its work to the full satisfaction of CONTRACTOR, Architect and Owner; (b) CONTRACTOR has received final payment from Owner; (c) **all subcontractors and materialmen have been fully paid and are waiving their lien rights and/or bond claims on the Project; and** (d) SUBCONTRACTOR has furnished all as-built drawings, warranties and other required closeout documents. CONTRACTOR's obligation to make final payment is subject, at all times, to SUBCONTRACTOR furnishing proof satisfactory to CONTRACTOR that all labor, materials and other obligations incurred by SUBCONTRACTOR in connection with performance of the Subcontract Work have been paid in full or otherwise resolved.

Insurance and Bonds

- Can GC or owner require you to obtain a payment or performance bond?
- Can GC require you to obtain higher limits of insurance without compensation?

Notice

- What is the deal with FedEx, hand-delivery or US Mail?
- Allow for notice via email.

