

CHAPTER 4.2

ARIZONA'S PROMPT PAYMENT LAWS

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CHAPTER 4.2

ARIZONA'S PROMPT PAYMENT LAWS

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§ 4.2.1 Introduction

Slow payment is one of the more vexing problems facing the construction industry. In an attempt to address construction payment issues, Arizona has enacted prompt payment laws. Arizona's first prompt payment laws were passed in 1989.¹ They established prompt payment rules at all tiers on public projects and prompt payment at all levels except between owners and contractors on private projects. After the 1989 prompt payment laws were implemented, some owners and general contractors narrowly construed certain provisions in the statute to avoid paying on time. As a result, the prompt payment laws were amended for the first time in 1991 to clarify certain statutory language and to close loopholes.²

The payment rights on private construction projects in Arizona changed drastically in 2000 with the enactment of sweeping amendments to the prompt payment laws.³ For the first time, owners on private projects were subjected to prompt payment requirements. The 2000 amendments also gave unpaid contractors and subcontractors on private projects the statutory right to stop work for non-payment, and made a number of other significant changes strengthening payment rights.

The importance of the 2000 amendments to Arizona's prompt payment laws did not go unnoticed. *Engineering News-Record* ("ENR"), a national weekly magazine covering construction issues, described the legislation as "significant for all contractors." *ENR* explained that requiring prompt payment from private owners to general contractors "goes a long way to eliminate general contractors' concerns about having to pay subs before they themselves are paid. And it eliminates subs' complaints about generals 'owning the float' by holding on to owner payments." *ENR* concluded: "We believe that

¹ 1989 Ariz. Sess. Laws, Ch. 301.

² 1991 Ariz. Sess. Laws, Ch. 164.

³ 2000 Ariz. Sess. Laws, Ch. 233.

the rest of the industry would benefit from following Arizona's lead, not just on prompt payment, but in how the industry can unite to resolve difficult issues."⁴

After the 2000 amendments, the consensus among construction industry professionals was that Arizona's prompt payment scheme was generally working. But in 2007, the Arizona Court of Appeals issued a decision in *Stonecreek Building Company, Inc. v. Shure*⁵ that misconstrued and incorrectly applied the language in the private sector prompt payment laws. *Stonecreek* failed to recognize one of the fundamental principles of the prompt payment laws: that owners retained their traditional contractual and common law rights to withhold payment from general contractors provided notice required under the prompt payment laws was given. In rendering its decision, the *Stonecreek* court failed to follow the intent of the drafters of the prompt payment legislation and of the Arizona Legislature.

After *Stonecreek* was decided, there were discussions among construction industry groups to seek "legislative clarification" to correct the *Stonecreek* court's erroneous application of the prompt payment laws. Bills were introduced in the Arizona Legislature in 2009 but there was disagreement among the stakeholders as to what was a fair trade for the *Stonecreek* correction.

In summer 2009, the Arizona Builders Alliance, one of Arizona's leading construction trade associations, approached various owners and subcontractor organizations previously involved in adopting the 2000 legislation to see if industry representatives could reach an acceptable compromise. The 2010 amendments to the private sector prompt payment laws were the result of those efforts.⁶

Simply stated, in exchange for amended language that clarifies the original intent and makes it clear that *Stonecreek* was wrongly decided, the owners agreed in the 2010 amendments to several modifications to the prompt payment laws to deal with problems that were simply missed or not addressed when the law was originally enacted.

This chapter summarizes Arizona's current private and public sector prompt payment laws.

⁴ ENGINEERING NEWS-RECORD, "Arizona Paves the Way for Contractor Prompt Pay," April 24, 2000 at 92.

⁵ 216 Ariz. 36, 162 P.3d 675 (Ct. App. 2007).

⁶ 2010 Ariz. Sess. Laws, Ch. 337. The 2010 amendments were amended by the Legislature several times before they were finally adopted. In the final amendment to the bill, a subsection was deleted and the amendment expressly provided "reletter to conform." But while the paragraphs themselves were renumbered, the references to the subsections in the text of the bill itself were not. As a result, all references to subsections E to W of § 32-1129.01 in the 2010 Session Laws were wrong. These errors were corrected in the 2011 Legislative Session the subsections are now correctly numbered. 2011 Ariz. Sess. Laws, Ch. 62.

§ 4.2.2 Private Sector Prompt Payment Laws

§ 4.2.2.1 Applicability

Arizona's private sector prompt payment laws have broad applicability. They apply to work performed by a contractor or subcontractor on a "construction contract."⁷ The term "construction contract" is defined to include any "written or oral agreement" relating to the "construction, alteration, repair, maintenance, moving or demolition of any building, structure or improvement or relating to the excavation of or other development or improvement to land."⁸ It is difficult to imagine any construction contract that does not fall under this broad definition.

The application of the private sector prompt payment laws is not limited based on the type or size of construction contract. The laws apply to every private construction contract, from the smallest home remodeling projects to multi-billion dollar industrial projects. But Arizona's private-sector prompt payment laws do not apply to owner-architect agreements or other professional services contracts. In *RSP Architects, Ltd. v. Five Star Development Resort Communities, LLC*,⁹ the Arizona Court of Appeals held that Arizona's prompt pay laws did not apply to an architectural services agreement. Although the court noted that the definition of "construction contract" in A.R.S. § 32-1129(A) was quite broad, "[c]ommon sense, however, tells us there must be some bounds to the breadth of the statute."¹⁰

§ 4.2.2.2 Wrongly-Decided *Stonecreek* Case Has Been "Legislatively Clarified" by the 2010 Amendments

*Stonecreek Building Company, Inc. v. Shure*¹¹ was the first Arizona published decision discussing the prompt payment laws. But the *Stonecreek* court misapplied a key provision in the statute and, as a result, drastically tilted the playing field against private owners.

The facts in *Stonecreek* are as follows. The contractor and the owner entered into a contract for the construction of a custom residence. During construction, the owner complained of defective workmanship, particularly with the masonry. Because the contractor assured the owner that payment would not be made to the masonry

⁷ See A.R.S. § 32-1129.01(A).

⁸ A.R.S. § 32-1129(A)(1).

⁹ 232 Ariz. 436, 306 P.3d 93 (App. 2013).

¹⁰ *Id.* at 438 ¶ 8, 306 P.3d at 95. Moreover, a federal court in a memorandum order held that the definition of "construction contract" in Arizona's prompt payment statute is not broad enough to cover architect-engineer professional services contracts. See *Landform Eng'g Co. v. Am. Prop. Dev., Inc.*, No. Civ. 07-1195 (D. Minn. June 28, 2007).

¹¹ 216 Ariz. 36, 162 P.3d 675 (Ct. App. 2007).

subcontractor until the masonry was corrected to the owner's satisfaction, the owner continued to make timely progress payments.¹²

In April 2004, the owner's lawyer sent a letter to contractor expressing dissatisfaction with the masonry and HVAC work. Two days later, the owner received a pay application from contractor in the amount of \$122,447. The pay application included billings for a variety of work, including the HVAC system. The architect approved the pay application.¹³

The owner withheld payment of \$100,000 based on the alleged deficiencies in the masonry work and the HVAC. In response, the contractor suspended performance and the owner then terminated the contract on the ground that the contractor had failed to remedy deficiencies in the construction.¹⁴

The contractor alleged that the owner had violated the prompt payment laws on two separate grounds: (1) by withholding payment for work that was not listed in the current pay application; and (2) by not filing a timely written objection to that pay application.¹⁵

The trial court held that the April 2004 letter (sent before the pay application was submitted) satisfied the statutory requirement of a timely, written objection. But the trial court found that the owner could withhold payment only to the extent that it disapproved work included in the current pay application.¹⁶ The Arizona Court of Appeals agreed and affirmed the trial court's decision on the following grounds.

The prompt payment laws provide that an owner shall make progress payments to a contractor "on the basis of a duly certified and approved billing or estimate of the work performed and the materials supplied during the preceding thirty day billing cycle." The owners in *Stonecreek* argued that they were entitled to withhold payments for earlier work, work other than that billed for in the current pay application. The *Stonecreek* court focused on the word "items" in the first sentence of § 32-1129.01(D): "[t]he first sentence of subsection D provides that a billing is deemed approved unless the owner issues a written statement 'detailing those items in the billing' that are not approved."¹⁷ The court concluded that this language "expressly limits the approval or disapproval to the work covered in a particular billing,"¹⁸ i.e. the current billing.

The *Stonecreek* court's reading of the prompt payment statute ignored the second sentence in subsection D that set forth the grounds for disapproving a payment, many of

¹² *Id.* at 37 ¶ 2, 162 P.3d at 676.

¹³ *Id.* at 37 ¶ 3, 162 P.3d at 676.

¹⁴ *Id.*

¹⁵ *Id.* at 37 ¶ 5, 162 P.3d at 676.

¹⁶ *Id.* at 38 ¶ 6, 162 P.3d at 677.

¹⁷ *Id.* at 39 ¶ 11, 162 P.3d at 678.

¹⁸ *Id.*

which may not be attributable to a particular billing item, i.e., “unsatisfactory job progress,” “failure to comply with other material provisions of the construction contract,” “third party claims,” and “construction cannot be completed for the unpaid balance.” This language was included to make clear that an owner retained its contractual and common law rights to withhold payments from a non-performing general contractor.

But the court ruled that if an owner discovers defects in work after having paid for that work, the owner’s only option is to continuing making payment for current pay applications and subsequently sue the contractor for breach of contract. To protect itself as to the other grounds listed in subsection D, the *Stonecreek* court held that the owner would have a right to disapprove payment for general line items in pay application such as “site supervision,” “project manager,” or “profit and overhead.”¹⁹ Finally, the Court explained that the contract “contains provisions for a reasonable retainer before final payment which affords protection to the owner.”²⁰

The Court concluded:

Accordingly, we find that the primary purpose of the [Prompt Pay] Act is to require an owner to identify and disapprove those items that need to be corrected early in the process so that contractors, subcontractors, and suppliers receive prompt payment for their work. In keeping with that purpose, the trial court correctly held that withholding funds for allegedly defective work not covered in the invoice violated the Act.²¹

The *Stonecreek* decision was wrongfully decided for a myriad of reasons. First, the decision misstated the “primary purpose” of the prompt payment laws. Contrary to the holding in *Stonecreek*, the intent of the law is not to speed up the time for owners “to identify and disapprove” of defective work. In fact, there is nothing in the prompt payment laws to suggest that owners are obligated to discover “work that needs to be corrected” any earlier in the payment process than before the law’s passage. Rather, the statute simply requires owners to issue timely written objections to pay applications and to pay promptly any undisputed amounts to the contractor. The owner’s right to withhold payment for problems in the contractor’s work is unaffected under the law, provided the owner issues a timely written objection.

Second, the *Stonecreek* court apparently did not understand the monthly billing process on construction projects. As is typical for construction projects, the contractor in *Stonecreek* issued monthly pay applications to the owner that covered work completed during the preceding month. The monthly progress billings were merely estimates of the quantity of work performed in the prior month and payment for work included in those billings did not constitute acceptance by the owner of either the quantity or quality of

¹⁹ *Id.* at 40, ¶ 19, 162 P.3d at 679.

²⁰ *Id.*

²¹ *Id.* at 40, ¶ 20, 162 P.3d at 679.

such work. But *Stonecreek* held that an owner could not withhold payment for allegedly defective work not covered in the current monthly billing. The effect of the court's interpretation is to require an owner to continue making progress payments after the owner becomes aware of defective work if that work was previously approved and, more importantly, to require an owner to approve and accept work on a monthly basis. Surprisingly, the *Stonecreek* court was not persuaded by a provision in the general contract that progress payments do not constitute acceptance of work that is not in accordance with contract requirements.²²

Third, the *Stonecreek* court failed to even mention that the Legislature had included a provision in the prompt payment laws that addressed situations where an owner might withhold payment from a general contractor for reasons unrelated to a particular subcontractor's work. A.R.S. § 32-1129.04(D) gives a subcontractor the right to suspend or terminate its subcontract with the general contractor if the owner declines to approve and certify the general contractor's billing or estimate for that subcontractor's work if the owner's reasons for failing to approve and certify are not the fault of or directly related to the subcontractor's work. In other words, that section applies when the owner refuses to approve and certify a billing for a performing subcontractor's work because another subcontractor's work is unacceptable. This provision supports the conclusion that the Legislature intended to allow owners to withhold payment for work covered in earlier pay applications.

After *Stonecreek* was decided, the industry groups that negotiated the prompt payment reforms in 2000 agreed that it had not been their intent to eliminate an owner's right to object to payments or to require an owner to approve and accept work on a monthly basis. Moreover, the owner representatives made it quite clear when the 2010 amendments were being discussed at the Arizona Legislature that they would never have agreed to private sector prompt payment in 2000 if they had known how the *Stonecreek* court would misapply what the drafters thought was the clear language of the statute. One of the prime objectives of the 2010 amendments was to make it absolutely clear that *Stonecreek* was wrongfully decided.²³

The *Stonecreek* fix in the 2010 amendments was a simple one. The *Stonecreek* court incorrectly construed the word "items" in the first sentence of A.R.S. § 32-1129.01(D). To eliminate any misunderstanding, the word "items" was changed to "reasons" to clarify that an owner has the right to withhold certification and approval of a later pay application for work included in earlier pay applications.²⁴

The 2010 amendments sought to clarify the language in Arizona's prompt payment laws. It is well settled that subsequent legislation that clarifies the statutory scheme is

²² 216 Ariz. at 41, ¶1 8, 162 P.3d at 680.

²³ See Testimony of Betty Hum, Hearing on S.B. 1375 before the Arizona House Committee on Commerce, April 7, 2010, 49th Leg., 2nd Reg. Sess. (2010).

²⁴ 2010 Ariz. Sess. Laws, Ch. 337, § 2.

strongly indicative of the Legislature's original intent.²⁵ Therefore, after the 2010 amendments, there is a strong argument that *Stonecreek* is no longer good law; the decision was effectively overruled legislatively by the clarification in those amendments.

§ 4.2.2.3 Effective Date of 2010 Amendments

The 2010 amendments had a staggered effective date; they applied to any construction contract where the initial distribution or dissemination of plans, including bid plans and construction plans, or specifications, or contract documents by an owner to a contractor or subcontractor occurred on or after January 1, 2011.²⁶ In other words, if an owner released any plans or specifications for a project or if any contract documents were circulated before the end of 2010, the provisions in the 2010 amendments do not apply to that project.

But regardless of when the plans, specifications or contract documents are initially distributed, the 2010 amendments applied to any construction contract between an owner and contractor entered into on or after January 1, 2012.²⁷ This was intended to establish a bright line test: all general construction contracts signed starting in 2012 (and any subcontracts for work covered under those general contracts) were subject to the 2010 amendments.

One exception to this effective date relates to the *Stonecreek* clarification discussed in the prior section. Since the intent of the 2010 amendments was to clarify the Legislature's original intent and to highlight that the *Stonecreek* court misinterpreted the law, there is a strong argument that the *Stonecreek* clarification applied immediately and retroactively.

§ 4.2.2.4 Presumptive Statutory Billing and Payment Cycles

The private sector prompt payment scheme is based on a monthly standard industry payment cycle. The law establishes "standard" or presumptive statutory billing and payment cycles for all private construction projects in Arizona as follows:

1. On all construction projects lasting 60 days or longer, an owner is required to make progress payments.²⁸
2. Progress payments shall be made on the basis of a duly certified and approved billing or estimate of the work performed and the material supplied during the preceding 30-day billing cycle.²⁹

²⁵ *Cicoria v. Cole*, 222 Ariz. 428, 432, 215 P.3d 402, 406 (Ct. App. 2009); *Bd. of Regents v. Pub. Safety Ret. Fund Mgmt. Admin.*, 160 Ariz. 150, 157, 771 P.2d 880, 887 (Ct. App. 1989).

²⁶ 2010 Ariz. Sess. Laws, Ch. 337, § 6.

²⁷ *Id.*

²⁸ A.R.S. § 32-1129.01(A).

²⁹ *Id.*

3. If any work is performed during the preceding billing cycle, the contractor is required to timely submit a billing or estimate to the owner covering the work performed during that billing cycle.³⁰
4. A billing or estimate shall be deemed approved and certified 14 days after the owner receives the billing or estimate unless before that time the owner or the owner's agent prepares and issues a written statement stating in reasonable detail the owner's reasons for not certifying or approving all or a portion of the billing or estimate.³¹
5. The owner is required to make progress payments to the contractor within seven days after the date the billing or estimate is certified and approved.³²
6. The owner is required to release retention to the contractor within seven days after the billing or estimate is certified and approved.³³
7. The owner is required to make final payment to the contractor within seven days after the billing or estimate for final payment is certified and approved.³⁴

§ 4.2.2.5 Owner's Right to Opt-Out of Presumptive Billing and Payment Cycles

These presumptive billing and payment cycles generally apply on all private construction projects in Arizona unless the owner takes affirmative steps to "opt out" of the standard statutory billing or payment cycles.³⁵ A private sector owner cannot contractually change or modify the prompt payment requirements unless the owner: (a) has the express statutory right to "opt out" of the private sector prompt payment requirements; and (b) follows the opt-out statutory requirements. The prompt payment laws clearly provide: "A construction contract shall not alter the rights of any contractor, subcontractor or material supplier to receive prompt and timely payments as provided under this article."³⁶

³⁰ *Id.* This requirement was added by the 2010.

³¹ A.R.S. § 32-1129.01(A) and (D). The 2010 amendments substituted "reasons" for "items" in this provision to address the *Stonecreek* issue.

³² A.R.S. § 32-1129.01(A). But if the owner and contractor are a single entity, then that entity is required to pay its subcontractors and suppliers within 14 days after the billing or estimate is certified or approved. A.R.S. § 32-1129.01(I).

³³ A.R.S. §§ 32-1129.01(A) and (I). This provision was added in the 2010 amendments.

³⁴ A.R.S. §§ 32-1129.01(A) and (L).

³⁵ Under the 2010 amendments, there are limitations on the applicability of the prompt payment laws on owner-occupied residential dwellings. *See* A.R.S. § 32-1129.07 and § 4.2.2.16 below.

³⁶ A.R.S. § 32-1129.01(P). The 2010 amendments changed this provision to this new text, which is now in effect. One of the least conspicuous changes in the 2010 amendments was the deletion of the word "progress" in § 32-1129.01(J) of the existing law (now renumbered as

The specific opt-out provisions are discussed below.

(1) Altering the Billing Cycle

A construction contract may provide for a billing cycle other than a 30-day billing cycle only if (a) the construction contract specifically identifies in a “clear and conspicuous manner” such other billing cycle; and (b) each page of the plans, including bid plans and construction plans, includes in clear and conspicuous type either one of the following legends (or substantially similar language):

NOTICE OF ALTERNATE BILLING CYCLE

This contract allows the owner to require submission of billings or estimates in billing cycles other than thirty days. Billings or estimates for the contract shall be submitted as follows:

NOTICE OF ALTERNATE BILLING CYCLE

This contract allows the owner to require submission of billings or estimates in billing cycles other than thirty days. A written description of such other billing cycle applicable to the project is available from the owner or the owner's designated agent at (telephone number or address, or both), and the owner or its designated agent shall provide this written description upon request.³⁷

(2) Extending Time for Payment

The standard time period for an owner to make progress payments, final payment or to release retention is “within seven days after the date the billing or estimate is certified and approved.” An owner may extend this 7-day time period only if: (a) the construction contract specifically provides in a clear and conspicuous manner “for a later payment defined by a specified number of days after certification and approval;” and (b) each page of the plans, including bid plans and construction plans, includes in clear and conspicuous type the following legend or substantially similar language:

NOTICE OF EXTENDED PAYMENT PROVISION

This contract allows the owner to make payment within ____ days after certification and approval of billings and estimates for progress payments, within ____ days after certification and approval of billings

subsection P). This change is significant because lawyers for some owners argued that a construction contract could alter any of the prompt pay protections that did not directly relate to progress payments, including interest rates, timing for final payment, and the owner's obligation to object timely to pay applications.

³⁷ A.R.S. § 32-1129.01(B).

and estimates for release of retention and within ____ days after certification and approval of billings and estimates for final payment.³⁸

(3) Changing Time for Certification and Approval

The presumptive time period for an owner to certify and approve a billing or estimate for progress payments, release of retention or final payment is 14 days after the owner receives the billing or estimate. An owner may change the time period to certify and approve a billing or estimate only if: (a) the construction contract specifically provides in a clear and conspicuous manner “for an extended time period within which a billing or estimate shall be certified or approved defined by a specified number of days after the owner has received the billing or estimate;” and (b) each page of the plans, including bid plans and construction plans, includes in clear and conspicuous type the following legend or substantially similar language:

NOTICE OF EXTENDED CERTIFICATION AND APPROVAL PERIOD PROVISION

This contract allows the owner to certify and approve billings and estimates for progress payments within ____ days after the billings and estimates are received from the contractor, for release of retention within ____ days after the billings and estimates are received from the contractor and for final payment within ____ days after the billings and estimates are received from the contractor.³⁹

(4) Establishing Different Timing and Conditions for Release of Retention and Final Payment

The owner may establish different timing and conditions as to when the contractor may submit a billing or estimate for release of retention or for final payment and for when such payments shall be due.⁴⁰ An owner may establish such different time periods or conditions only if: (a) the construction contract in a clear and conspicuous manner establishes different timing for when the contractor may submit a billing or estimate for release of retention or for final payment, and when such payments shall be due; (b) the modified requirements are set forth in the plans, including the bid plans and construction plans, on a the specific page or sheet number of the plans as expressly designated in the following statutorily mandated legend; and (c) each page of the plans, including bid plans and construction plans, includes in clear and conspicuous type the legend or substantially similar language set forth in A.R.S. § 32-1129.01(W)⁴¹ as follows:

³⁸ A.R.S. § 32-1129.01(C). This provision was amended in 2010 to add these references to retention and final payments.

³⁹ A.R.S. § 32-1129.01(F). This language was amended in 2010 to include references to retention and final payments.

⁴⁰ A.R.S. § 32-1129.01(V). The 2010 amendments added this language.

⁴¹ *Id.*

NOTICE OF ALTERNATE ARRANGEMENTS FOR
RELEASE OF RETENTION AND FINAL PAYMENT

This contract allows the owner to make alternate arrangements for the occurrence of substantial completion, the release of retention and making of final payment. Such alternate arrangements are disclosed on sheet no. _____ of these plans.⁴²

This provision only relates to release of retention and final payment.

(5) Changing Certain Statutory Definitions

An owner may also change the statutory definitions of “retention,” “substantial completion,” and “final completion.”⁴³ An owner may define retention, substantial completion and final completion to have meanings different than those stated in A.R.S. § 32-1129 only if: (a) the construction contract in a clear and conspicuous manner defines those terms; (b) the different definitions for these terms are set forth in the plans, including the bid plans and construction plans, on a the specific page or sheet number of the plans as expressly designated in the following statutorily mandated legend; and (c) each page of the plans, including bid plans and construction plans, includes in clear and conspicuous type the legend or substantially similar language set forth A.R.S. § 32-1129.01(W):

NOTICE OF ALTERNATE ARRANGEMENTS FOR
RELEASE OF RETENTION AND FINAL PAYMENT

This contract allows the owner to make alternate arrangements for the occurrence of substantial completion, the release of retention and making of final payment. Such alternate arrangements are disclosed on sheet no. _____ of these plans.⁴⁴

But the legend in this subsection does not expressly address changing the definitions of substantial completion, retention or final payment. Rather, due to sloppy drafting of the 2010 amendments, the legend included expressly pertains only to the right to include different timing and conditions for the billing of final payment or retention. It probably makes sense for an owner that wants to change the definitions of retention, substantial completion or final completion to modify the legend as follows:

NOTICE OF ALTERNATE ARRANGEMENTS FOR
RELEASE OF RETENTION AND FINAL PAYMENT/
DIFFERENT DEFINITIONS

This contract allows the owner to make alternate arrangements for the occurrence of substantial completion, the release of retention and making of final payment AND/OR CHANGE THE DEFINITIONS OF RETENTION, SUBSTANTIAL COMPLETION OR FINAL PAYMENT. SUCH ALTERNATE

⁴² A.R.S. § 32-1129.01(W). The 2010 amendments added this language.

⁴³ A.R.S. § 32-1129.01(U). The 2010 amendments added this language.

⁴⁴ A.R.S. § 32-1129.01(W). The 2010 amendments added this language.

ARRANGEMENTS AND/OR DIFFERENT DEFINITIONS are disclosed on sheet no. _____ of these plans.

These minor changes should satisfy the requirement that the notice include language “substantially similar” to the statutory legend⁴⁵ and eliminate any later argument from the contractor or subcontractor that it did not know that the owner intended to change the definitions.

(6) Post-Contract Changes to Payment Terms.

After the “effective date of a construction contract,” the owner and contractor may change the number of days after certification and approval for making payment and the time period within which a billing or estimate must be certified and approved.⁴⁶ The change will only have effect if agreed to in writing by the contractor or any subcontractors; “[a]ny contractor or subcontractor that does not provide written consent to the change will continue to be paid as previously agreed.”⁴⁷ But the prompt payment laws do not provide that the parties may change or extend the other statutory protections after the contract’s effective date.

§ 4.2.2.6 Progress Payments from Owner to General Contractor

The prompt payment laws provide that progress payments shall be made on the basis of a duly certified and approved billing or estimate of the work performed and the material supplied during the preceding 30-day billing cycle.⁴⁸ Payment to the contractor “shall not be required unless the contractor provides the owner with a billing or estimate in accordance with the terms of the construction contract between the parties.”⁴⁹

A billing or estimate is deemed approved and certified 14 days after the owner receives the billing or estimate unless before that time the owner or the owner’s agent

⁴⁵ A.R.S. § 32-1129.01(U). The 2010 amendments added this language.

⁴⁶ A.R.S. § 32-1129.01(G).

⁴⁷ *Id.*

⁴⁸ A.R.S. § 32-1129.01(A).

⁴⁹ A.R.S. § 32-1129.01(O). It is unsettled whether an owner has an affirmative obligation to respond if a contractor submits a billing or estimate that is not in the form prescribed in the contract. In a memorandum decision, the Arizona Court of Appeals held that an owner had the obligation under the prompt pay laws to object to a contractor’s billing to the extent that the owner believed the billing was defective and the billing was deemed “certified and approved” as a result of the owner’s failure to object. *Marana 670 Holdings, LLC v. Spirit Underground, LLC*, 2 CA-CV 2011-0136, 2 CA-CV 2012-0026 (Ariz. Ct. App. Oct. 1, 2012) (unpublished) (Ariz. Ct. App. 2012) (unpublished memorandum decision). In a 2015 memorandum decision, the Arizona Court of Appeals further explained that if an owner believed a pay application did not comply with the contract, it was required to object in writing to that pay application within 14 days; “[i]f an owner can simply not pay a contractor because the invoices do not comply with the terms of the construction contract, the fourteen day time limit in A.R.S. § 32-1129(D) becomes ineffective.” *Masaryk v. Mendelson Constr., LLC*, 1 CA-CV 13-0085 (Ariz. Ct. App. Mar. 31, 2015) (unpublished memorandum decision).

for not certifying or approving all or a portion of the billing or estimate.⁵⁰ The owner is required to make progress payments to the contractor within seven days after the date the billing or estimate is certified and approved.⁵¹

The owner is deemed to have received the billing or estimate when it is submitted to any person designated by the owner for the receipt of these submissions or for review or approval of the billing or estimate.⁵² An owner may decline to approve and certify a billing or estimate or a portion of a billing or estimate for any of the following reasons:

1. Unsatisfactory job progress.
2. Defective construction work or materials not remedied.
3. Disputed work or materials.
4. Failure to comply with other material provisions of the contract.
5. Third party claims filed or reasonable evidence that a claim will be filed.
6. Failure of the contractor or a subcontractor to make timely payments for labor, equipment and materials.
7. Damage to the owner.
8. Reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum.⁵³

This list is modeled after the grounds for withholding certification set forth in § 9.5.1 of the AIA A201-1997 General Conditions. The owner may also withhold from a progress payment “a reasonable amount for retention.”⁵⁴

If the owner does not issue a written objection within 14 days, then the owner must make payment to the contractor for the full amount of the billing or estimate within 7 days (unless the payment cycle has been extended pursuant to the statute.) On the other hand, if the owner issues a timely written objection, the owner is only entitled to withhold from a progress payment “an amount that is sufficient to pay the direct costs and expenses the owner reasonably expects to incur” to protect the owner from loss for which the contractor is responsible and that results from any reasons set forth in the written statement.⁵⁵ For example, if a contract required a contractor to submit statutory

⁵⁰ A.R.S. § 32-1129.01(A) and (D). The 2010 amendments substituted “reasons” for “items” in this provision to address the *Stonecreek* issue.

⁵¹ A.R.S. § 32-1129.01(A).

⁵² A.R.S. § 32-1129.01(D).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ A.R.S. § 32-1129.01(E). The 2010 Amendments changed this language to this new text, which is now the text in effect.

lien waivers from its subcontractors and suppliers as a condition of payment, an owner could withhold certification of a contractor's pay application if a contractor failed to provide a lien waiver from a particular subcontractor or supplier. But an owner could only withhold an amount sufficient to protect the owner for that particular reason.

The prompt payment laws were never intended to restrict an owner's contractual or common law rights to withhold payment from a non-performing general contractor or to require an owner to pay for defective or non-conforming work. This intent is evidenced by the use of the withholding grounds from the widely used AIA General Conditions and, additionally, by the inclusion of the broad "catch-all" reason—the contractor failed to comply with other material provisions of the contract—as the basis for withholding certification.⁵⁶ Rather, the primary goals of this section of the prompt payment laws are to require that an owner provide prompt notice of its intention not to pay the general contractor and only withhold a reasonable amount to protect it from the anticipated costs and expenses resulting from the stated reason.

Therefore, if a general contractor submits a billing to an owner and the owner fails to object within 14 days, the billing is deemed certified and approved and the owner is required to make progress payments to the contractor within seven days thereafter. If the owner fails to make the payment, the contractor is entitled to interest at the prompt payment rate of 1.5% per month or fraction of the month or at a higher agreed-upon contractual rate on the unpaid balance until paid.⁵⁷

§ 4.2.2.7 Owner's Release of Retention to General Contractor

The 2010 amendments included significant changes relating to the release of retention. "Retention" is defined as "a portion of a progress payment otherwise due from the owner to the contractor that is withheld pursuant to the terms and conditions of a construction contract to ensure proper performance of the construction contract."⁵⁸

The law includes a timeline for billing, approval and payment of retention similar to the provisions for progress payments. Here is the specific statutory scheme for release of retention. First, the contractor is required to submit a billing for release of retention "on substantial completion of the work."⁵⁹ Second, the billing or estimate for release of retention is deemed certified and approved within 14 days after the owner receives the billing or estimate unless before that time the owner or owner's agent issues a written statement stating in reasonable detail the owner's reasons for not certifying or approving all or a portion of the billing or estimate. (The owner is deemed to have received the billing or estimate when it is submitted to "any person designated by the owner for

⁵⁶ A.R.S. § 32-1129.01(D). The 2010 Amendments changed this language to this new text, which is now the text in effect.

⁵⁷ A.R.S. § 32-1129.01(Q).

⁵⁸ A.R.S. § 32-1129(A)(5). The 2010 amendments added the definition.

⁵⁹ A.R.S. § 32-1129.01(H). The 2010 amendments added this provision.

receipt or for certification and approval of the billing or estimate.”)⁶⁰ Third, within 14 days after receipt, the owner may decline to certify and approve the billing or a portion thereof for the contractor’s failure to complete a *material* requirement of the construction contract or to complete portions of the work or for any reason permitted for otherwise withholding approval.⁶¹ However, the owner is only entitled to withhold from retention to be released an amount not to exceed 150% of the direct costs and expenses the owner reasonably expects to incur to protect the owner from loss for which the contractor is responsible and that results from the contractor’s failure to complete the construction contract or for any reasons set forth in the written objection.⁶² Fourth, the owner shall release retention to the contractor “within seven days after the date the billing or estimate for release of retention is certified and approved.”⁶³

If the owner has declined to certify and approve all or a portion of a retention billing, “the contractor may submit a supplemental billing or estimate for all or a portion of the withheld amounts of retention” when “any reason as stated in the owner’s written statement has been removed.”⁶⁴ But a contractor may only submit one billing or estimate during each billing cycle unless otherwise agreed in writing.⁶⁵

“Substantial completion” is the trigger for release of retention.⁶⁶ Substantial completion is defined as the earliest of the following events:

1. *Traditional Definition.* When the work is sufficiently complete in accordance with the terms and conditions of the construction contract so that the owner can occupy AND use the work for its intended purpose.⁶⁷
2. *When Owner Opts Not to Use Otherwise Completed Work.* When the work is sufficiently complete in accordance with the terms and conditions of the construction contract so that the owner can occupy AND use the work for its intended purpose but the owner is unable to or does not occupy OR use the work for its intended purpose through no fault of the contractor.⁶⁸

⁶⁰ *Id.*

⁶¹ The inclusion of the word “material” highlights that a contractor is entitled to the release of retention if “immaterial” requirements of the contract are not yet completed.

⁶² *Id.*

⁶³ A.R.S. §§ 32-1129.01(A) and (I).

⁶⁴ A.R.S. § 32-1129.01(I). The 2010 amendments added this provision.

⁶⁵ *Id.*

⁶⁶ A.R.S. § 32-1129.01(H). The 2010 amendments added this provision.

⁶⁷ A.R.S. § 32-1129(A)(7)(a). The 2010 amendments added this definition.

⁶⁸ A.R.S. § 32-1129(A)(7)(b). The 2010 amendments added the definition.

3. *Bright Line or Objective Test.* The date the governmental body that issued the building permit for the project “issues a written acceptance allowing the owner to occupy and use the work under the construction contract.”⁶⁹

If a construction contract states a separate price for a portion of the work, a contractor is entitled to submit a billing or estimate for release of retention when the contractor substantially completes all work under that portion of the work.⁷⁰ For example, if a contractor is working on a multi-building project and the construction contract includes a separate price for each building, the contractor is entitled to submit a billing for release of retention upon substantial completion of each building.

§ 4.2.2.8 Final Payment from Owner to Contractor

Before the 2010 amendments, the prompt payment laws fell short in the area of final payments. The only requirement was that the owner shall make final payment within seven days after “a contractor completes and an owner approves and certifies all work under a construction contract.”⁷¹

The 2010 amendments include a more detailed approach for final payment. The provisions are similar to the billing, approval and payment provisions for progress payments in the prompt payment laws. The timeline for final payment under the 2010 amendments is as follows. First, on final completion of the work, a contractor shall submit a billing or estimate for final payment.⁷² Final completion is defined as the earliest of the following: (a) when the work has been completed in accordance with the terms and conditions of the construction contract, that is, actual completion; or (b) the date the final inspection and final written acceptance by the governmental body that issues the building permit for the project, that is, the Final Certificate of Occupancy typically.⁷³ Second, the billing or estimate shall be deemed certified and approved 14 days after the owner receives the billing or estimate unless before that time the owner or the owner’s agent issues a written statement stating in reasonable detail the reasons that the billing or estimate has not been certified and approved.⁷⁴ Third, during that 14-day period, the owner may decline to certify and approve the final payment billing or a portion thereof for the contractor’s failure to complete a requirement of the construction contract or to complete portions of the work or for any of the permitted reasons under the statute for

⁶⁹ A.R.S. § 32-1129(A)(7)(c). The 2010 amendments added the definition.

⁷⁰ A.R.S. § 32-1129.01(J). The 2010 amendments added this provision.

⁷¹ Before the 2010 amendments were adopted, this language appeared in A.R.S. § 32-1129(H). As discussed in this section, the 2010 amendments included a more detailed approach to final payment.

⁷² A.R.S. § 32-1129.01(K).

⁷³ A.R.S. § 32-1129(A)(3). The 2010 amendments added this definition.

⁷⁴ A.R.S. § 32-1129.01(K). The 2010 amendments added this provision.

withholding approval.⁷⁵ However, the owner is only entitled to withhold from final payment an amount not to exceed 150% of the direct costs and expenses the owner reasonably expects to incur to protect the owner from loss for which the contractor is responsible and that results from any reason set forth in the written objection.⁷⁶ Fourth, an owner shall make final payment within seven days after the billing or estimate for final payment is certified and approved.⁷⁷

When the contractor completes work that was the owner's basis for withholding approval for final payment, "the contractor may submit a supplemental billing or estimate for all or a portion of the withheld amounts of retention." But a contractor may only submit one billing or estimate during each billing cycle unless otherwise agreed in writing.⁷⁸

If a construction contract states a separate price for a portion of the work, a contractor is entitled to submit a billing or estimate for final payment when the contractor completes all work under that portion of the work.⁷⁹

The prompt payment law includes one exception to the final payment requirements. If a project requires a federal agency's final certification or approval, the owner is required to make payment in full to the contractor within seven days after the federal agency issues its final certification or approval.⁸⁰

§ 4.2.2.9 Payments from General Contractor to Subcontractor

Arizona law requires the general contractor to pay its subcontractors and suppliers within seven days after receipt of each progress payment, retention release or final payment "the full amount received for such subcontractor's work and materials supplied based on work completed or materials supplied under the subcontract."⁸¹ Thus, the Arizona Legislature effectively adopted a statutory "pay-when-paid" scheme relating to the timing of payment—a subcontractor is entitled to receive payment within seven days after the general contractor receives payment from the owner for the subcontractor's work. The same rule applies to subcontractors: they are required to pay their sub-

⁷⁵ To receive full final payment, a general contractor is required to complete all of the requirements of the construction contract. Therefore, unlike the provision dealing with release of retention in A.R.S. § 32-1129.01(H), the word "material" was intentionally omitted.

⁷⁶ *Id.*

⁷⁷ A.R.S. §§ 32-1129.01(A) and (L). The 2010 amendments added these provisions.

⁷⁸ A.R.S. § 32-1129.01(L). The 2010 amendments added this provision.

⁷⁹ A.R.S. § 32-1129.01(N). The 2010 amendments changed this provision to this new text, which is now the text in effect.

⁸⁰ A.R.S. § 32-1129.01(M). The 2010 amendments changed this provision to this new text, which is now the text in effect.

⁸¹ A.R.S. § 32-1129.02(B).

subcontractors and suppliers within seven days of receipt of each progress payment, retention release or final payment.⁸²

A general contractor or subcontractor may decline to approve and certify a billing or estimate or a portion of a billing or estimate for any of the following reasons:

1. Unsatisfactory job progress.
2. Defective construction work or materials not remedied.
3. Disputed work or materials.
4. Failure to comply with other material provisions of the contract.
5. Third party claims filed or reasonable evidence that a claim will be filed.
6. Failure of the subcontractor to make timely payments for labor, equipment and materials.
7. Damage to the contractor or another subcontractor or material supplier.
8. Reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum.⁸³

If a general contractor does not agree with a subcontractor's billing in a particular month, the general contractor should not bill the owner for the subcontractor's work. By doing so, the general contractor is certifying and approving that subcontractor's work and the general contractor must pay the subcontractor for that work within seven days of receiving payment from the owner. Moreover, a general contractor should not impose additional conditions on the subcontractor after the pay application certifying a subcontractor's work is submitted to the owner for payment. Once a general contractor requests payment for a subcontractor, the general contractor is required to pay that subcontractor within seven days of receipt of payment from the owner for the subcontractor's work—no strings attached.

An interesting problem arises if a general contractor discovers after receiving payment for a subcontractor's work that the work is defective or that there are other grounds for withholding certification or approval. The prompt payment laws do not address this situation. Under a strict reading of the prompt payment laws, the subcontractor should be paid. But the general contractor will obviously not want to pay the subcontractor because the previously certified work has now proven to be defective. The prudent course for the general contractor is to return the money received for the subcontractor's work to the owner thereby effectively "decertifying" the earlier pay application.

Although subcontractor payment rights are triggered under the prompt payment laws by the general contractor's submission of a monthly pay application, the prompt

⁸² *Id.*

⁸³ A.R.S. § 32-1129.02(C).

payment laws before the 2010 amendments did not mandate that the general contractor submit monthly pay applications to the owner. Therefore, unless the subcontract itself included a requirement that the general contractor submit a bill for the subcontractor's work on a monthly basis, the subcontractor had no remedy. The 2010 amendments corrected this oversight. A.R.S. § 32-1129.01(A) provides: "If any work is performed during the preceding billing cycle, a contractor shall timely submit a billing or estimate to the owner covering the work performed during that billing cycle."

The right to payment is conditioned on the subcontractor or material supplier having "performed in accordance with the provisions of a construction contract."⁸⁴ The prompt payment laws also impose additional express affirmative obligations on subcontractors and suppliers to trigger the prompt payment protections:

1. A subcontractor or supplier is required to provide a billing or invoice for the work performed or materials supplied in accordance with the terms of the construction contract between the parties.⁸⁵
2. A subcontractor or supplier is required to provide a statutory conditional waiver and release in accordance with A.R.S. § 33-1008 and the contractor may require that the conditional waiver be notarized.⁸⁶ This notarization requirement for lien waivers does not appear in the lien waiver statute itself.

If a subcontractor or supplier fails to satisfy these requirements, the contractor has the right to not include amounts due for that particular subcontractor's work performed in its monthly billing to the owner. Again, these same requirements apply to payments between a subcontractor and its sub-subcontractors and suppliers.

The prompt payment laws further provide that the amount of retention that a general contractor can withhold from subcontractors "shall not exceed the actual amount of retention retained by the owner pertaining to the subcontractor's work."⁸⁷

§ 4.2.2.10 General Contractor's Obligation to Pay Subcontractors for *Stonecreek* Holdbacks

The *Stonecreek* decision⁸⁸ held that an owner was not entitled to withhold payment from a general contractor for defective work if the owner had previously approved the billing line item for that defective work. *Stonecreek* incorrectly held that the prompt payment laws "expressly limit[] the approval or disapproval to the work covered in a particular billing."⁸⁹

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ A.R.S. § 32-1129.02(B).

⁸⁷ A.R.S. § 32-1129.02(C)(9) and (D). This language was added by the 2010 amendments.

⁸⁸ 216 Ariz. 36, 162 P.3d 675 (Ct. App. 2007).

⁸⁹ *Id.* at 39 ¶ 11, 162 P.3d at 678.

Whether rightly or wrongly decided, *Stonecreek* presented an interesting issue: which party should ultimately bear the risk for defective work? Under the prompt payment statute as enacted in 2000, both the general contractor and subcontractors bore the risk. The subcontractor was at risk because of the pay-when-paid requirement of prompt payment. But the risk was shifted at least in part to the general contractor because a performing subcontractor had the right to stop work. Under the prompt payment laws, a subcontractor had an express right to suspend or terminate performance under those circumstances. Scenario Four in A.R.S. § 32-1129.04(D) provides that a subcontractor may suspend or terminate “if the owner declines to certify or approve portions of a contractors’ billing or estimate . . . for that subcontractor’s work but the reasons for that failure by the owner to approve or certify are not the fault of or directly related to the subcontractor’s work.” Under the *Stonecreek* decision, the risk was shifted entirely to the owner for previously approved and paid for defective work.

But since the decision to stop work is rarely exercised, subcontractors were reluctant to give up the increased protection they gained under *Stonecreek*. Contractors and subcontractors worked out the following compromise that was included in the 2010 amendments: if the owner withholds payment for “defective work or materials not remedied” and if the contractor as a result does not receive sufficient funds to pay subcontractors and suppliers whose work was not the basis of the owner’s withholding for defective work or materials not remedied, the contractor shall pay such performing subcontractors and materials suppliers within 21 days after payment would otherwise have been made by the owner.⁹⁰ The additional time for general contractors to make payments to performing subcontractors was part of the compromise. General contractors wanted this extended time for several reasons: first, to correct the defective work and secure release of payment from the owner, if possible; second, to arrange for funding to pay the performing subcontractors and material suppliers; and third, to demand that the non-performing subcontractor return the previous payments for the defective work.

A simple example illustrates this provision. In month one, a contractor bills the owner for concrete work. The work appears to be okay and the owner pays for it. In month six while the project is still going on, the owner discovered serious cracks in the concrete. That same month, the contractor bills the owner on Day One for the electrical subcontractor’s work completed in the past 30 days (no concrete work was performed that month). The owner provides a timely objection on Day 14 and withholds approval of that month’s pay application to cover the reasonable costs to correct the cracked concrete. As a result, the general contractor does not receive payment from the owner on Day 21 and the general contractor fails to pay the electrical subcontractor for its work on Day 28.

The electrical subcontractor has the option on Day 28 to provide notice under A.R.S. § 32-1129.04(D) that it will suspend or terminate the subcontract within seven

⁹⁰ A.R.S. § 32-1129.02(G).

days if the general contractor fails to pay the subcontractor. If the subcontractor is not paid during that time period, it has the right to suspend or terminate performance on Day 35. In addition, under A.R.S. § 32-1129.02(G), the general contractor is obligated to pay the electrical subcontractor no later than Day 42, that is, 21 days after the owner would otherwise have made payment.

Thus, the 2010 amendments shifted the risk for previously approved and paid for defective work back to the general contractor and subcontractor by clarifying that the *Stonecreek* court misinterpreted the statute. But the 2010 amendments went further in making it clear that the general contractor should ultimately bear this risk by requiring it to pay the performing subcontractor. But this affirmative obligation for a general contractor to pay subcontractors even if the general contractor has not received payment from the owner is limited to situations when the owner withholds payment for “defective work or materials not remedied.” If the owner fails to pay the general contractor for any other reason, this provision does not apply.

§ 4.2.2.11 Obligation to Advise Lower Tier Parties of Billing Disagreements

Before the 2010 amendments, a general contractor had no statutory obligation to advise a subcontractor that the general contractor disagreed with the subcontractor’s billing request. For example, if a general contractor believed a subcontractor’s billing was overstated or inaccurate, the general contractor could decide not to pass through a subcontractor’s billing to the owner without advising the subcontractor.

The 2010 amendments changed this requirement. If a general contractor chooses to withhold the application or certification for all or a portion of a subcontractor’s or material supplier’s billing, the general contractor is now obligated to provide a written statement “within fourteen days” to the applicable subcontractor or material supplier stating in reasonable detail the contractor’s reasons for withholding the application of the subcontractor’s or material supplier’s billing.⁹¹ Although the section does not specify the trigger for the 14-day notice requirement, the date that makes the most sense is when the general contractor submits its billing to the owner.

This requirement also applies if a subcontractor exercises the choice to not bill for one of its subsubcontractor’s or material supplier’s work.⁹²

§ 4.2.2.12 Obligation to Advise Lower Tier Parties of Owner’s Failure to Certify or Approve

The prompt payment law before the 2010 amendments did not require a general contractor to advise a subcontractor that the owner had declined to certify or approve a general contractor’s billing or estimate.

The law now expressly provides that if the owner issues a written objection to general contractor’s billing and if the amounts to be paid from the billing from the

⁹¹ A.R.S. § 32-1129.02(E). The 2010 amendments added this provision.

⁹² *Id.*

general contractor to a subcontractor or material supplier are affected by the owner's objection, the general contractor shall send a copy of that written objection within seven days after receipt to any affected subcontractors or material suppliers.⁹³ This provision also requires subcontractors to pass through the written objection to any affected subcontractors or material suppliers.⁹⁴

§ 4.2.2.13 Subcontractor's Continuing Request for Payment Information

Upon the written request of a subcontractor, the owner is required to notify the subcontractor within five days after issuing progress payments, releasing retention or making final payment to the contractor. But before the 2010 amendments, a subcontractor's request for this information was not a continuing one. In other words, a subcontractor was required to make a written request every month to get updated payment information. This provision was changed under the 2010 amendments. The statute now provides: "A subcontractor's request pursuant to this subsection shall remain in effect for the duration of the subcontractor's work on the project."⁹⁵

§ 4.2.2.14 Effect of Prompt Payment Laws on Pay-If-Paid Clauses

One unsettled issue is whether Arizona's prompt payment laws have any effect on the enforceability of contingent payment or "pay-if-paid" clauses⁹⁶ in subcontracts. When the prompt payment laws were initially enacted in 1989, the Arizona Legislature included the following language:

Notwithstanding the other provisions of this article, performance by a contractor, subcontractor or material supplier in accordance with the provisions of a construction contract entitles the contractor, subcontractor or material supplier to payment from the party with whom the contractor, subcontractor or material supplier contracts.⁹⁷

Subcontractors seeking to avoid the effect of pay-if-paid clauses have argued that this provision represents a broad policy pronouncement against such clauses, that is, a subcontractor that performs in accordance with the subcontract is entitled to payment

⁹³ A.R.S. § 32-1129.02(F). The 2010 amendments added this provision.

⁹⁴ *Id.*

⁹⁵ A.R.S. § 32-1129.01(R). The 2010 amendments added this provision.

⁹⁶ In *L. Harvey Concrete, Inc. v. Argo Const. & Supply Co.*, 189 Ariz. 178, 939 P.2d 811 (Ct. App. 1997), the Arizona Court of Appeals used the "pay-when-paid" moniker for contingent payment provisions. Although the *L. Harvey* court is not alone in failing to draw any distinction between pay-if-paid and paid-when-paid clauses, the construction industry generally recognizes that there is an important difference between these payment clauses: a "pay-when-paid" clause simply provides for "the timing of payments" while a "pay-if-paid" clause constitutes a condition precedent to the subcontractor's entitlement to payment.

⁹⁷ This language originally appeared in A.R.S. § 32-1129(A). The provision was renumbered as § 32-1129.02(A) in the 2000 amendments.

from the general contractor “notwithstanding the other provisions” of the prompt payment statute. There are two “other provisions” in the article that affect a subcontractor’s entitlement to payment from the general contractor: first, the general contractor is required to pay its subcontractors within seven days of receipt of payment from the owner; and second, that the parties may agree in writing to a different length of time for payment.

Subcontractors argue that notwithstanding these two other provisions—the statutory pay-when-paid provision and the parties’ right to agree to a different length of time for payment—performance by a subcontractor in accordance with the provisions of a construction contract entitles the subcontractor to payment from the party with whom the subcontractor contracts. Subcontractors conclude that A.R.S. § 32-1129.02(A) is a bold public policy statement that subcontractors are entitled to payment regardless of whether the owner pays the general contractor or whether the parties agree to different payment terms in their contract: in other words, under the 1989 prompt payment laws, pay-if-paid or contingent payment clauses violate Arizona law.

In response, general contractors point out that the Arizona Legislature in A.R.S. § 32-1129.05 provided that certain clauses sometimes found in construction contracts (for example, limiting a party’s right to suspend performance for non-payment) are deemed against public policy in Arizona and that if the Legislature considered pay-if-paid clauses to be contrary to public policy, it would have clearly so stated in that statute. General contractors further argue that the most recent Arizona case upholding the enforceability of pay-if-paid clauses, *L. Harvey Concrete, Inc. v. Argo Const. & Supply Co.*,⁹⁸ was decided eight years after the “notwithstanding the other provisions” language was first adopted by the Arizona Legislature. Thus, the Arizona Court of Appeals had an opportunity to invalidate pay-if-paid clauses under the prompt payment law in 1997 but did not do so.⁹⁹

This issue remains open: there are no reported Arizona decisions that discuss whether the prompt payment laws impact “pay-if-paid” clauses.

§ 4.2.2.15 Sanctions for Prompt Payment Violations

The recovery of interest was the only statutory sanction for non-payment under Arizona’s prompt payment laws as originally enacted. But it became apparent that an interest penalty failed to serve as a sufficient deterrent to prevent parties from wrongfully

⁹⁸ 189 Ariz. 178, 939 P.2d 811 (Ct. App. 1997).

⁹⁹ Subcontractors counter this argument on the following grounds. First, there is nothing in the published *L. Harvey* decision suggesting that the subcontractor challenged the pay-if-paid provision on statutory or public policy grounds or that the prompt payment statutes were even raised for consideration. Moreover, based on a review of the briefs filed in the *L. Harvey* appeal, none of these issues was raised or argued by either side. Therefore, subcontractors argue that the holding in *L. Harvey* should be limited to the issues presented in that case and any subsequent court is free to consider the additional statutory and public policy reasons for invalidating pay-if-paid clauses.

withholding payment. To give the prompt payment laws “sharper teeth,” the 2000 amendments added a number of additional sanctions to the private sector prompt payment laws.

(1) Interest and Attorneys’ Fees.

A contractor is entitled to recover interest at a rate of 1½ per cent per month or fraction of a month on the unpaid balance “or at a higher rate” as agreed to by the parties if the owner or owner’s representative fails to make timely payment of progress payments, retention or final payment as required under the prompt payment laws.¹⁰⁰

If a progress payment, final payment or release of retention to a subcontractor or material supplier is delayed by more than seven days after receipt of that payment by the contractor or subcontractor, the unpaid subcontractor or material supplier is entitled to receive interest “beginning on the eighth day” at the rate of 1½ per cent per month or fraction of a month on the unpaid balance “or at a higher rate” as agreed to by the parties.¹⁰¹

The prompt payment law also provides that in any action or arbitration brought to collect payments or interest under A.R.S. § 32-1129.01, the successful party shall be awarded costs and attorney fees in a reasonable amount.¹⁰² This provision is broader than A.R.S. § 12-341.01 in three respects: first, unlike 12-341.01, the statute provides reasonable fees “shall be awarded,” thereby eliminating the judge’s absolute discretion; second, attorneys’ fees are now recoverable in arbitrations to collect payments even if the construction contract does not so provide; and finally, an action need not be “contested” for fees to be awarded. The identical provision applies to any action or arbitration brought by a subcontractor or material supplier to collect payment or interests under A.R.S. § 32-1129.02.¹⁰³

(2) Right to Suspend Performance or Terminate the Contract.

Contractors and subcontractors have the right to suspend performance or terminate the contract for untimely payment or non-payment. In effect, these provisions codified the common law right to terminate a contract for the material breach of non-payment with two additional twists—express notice requirements and the right after suspending performance to recover “any costs incurred for mobilization resulting from the shutdown or start-up” before recommencing work.

The prompt payment laws include four specific non-payment scenarios and impose different notice requirements depending on the circumstances:

¹⁰⁰ A.R.S. § 32-1129.01(Q).

¹⁰¹ A.R.S. § 32-1129.02(H).

¹⁰² A.R.S. § 32-1129.01(S).

¹⁰³ A.R.S. § 32-1129.02(J).

1. A contractor may suspend performance under a contract or terminate a contract if the owner fails to make timely payment to a contractor of the amount certified and approved. Under these circumstances, the contractor must give written notice to the owner at least seven calendar days before the intended suspension or termination unless the owner-contractor contract includes a shorter time period.¹⁰⁴
2. A subcontractor may suspend performance under a contract or terminate a contract if the owner fails to make timely payment of amounts certified and approved for the subcontractor's work and the contractor fails to pay the subcontractor for the certified and approved work. In this case, the subcontractor must give written notice to the contractor and the owner at least three calendar days before the intended suspension or termination unless the subcontract includes a shorter time period.¹⁰⁵
3. A subcontractor may suspend performance under a contract or terminate a contract if the owner makes timely payment of amounts certified and approved for the subcontractor's work to the contractor but the contractor fails to pay the subcontractor for the certified and approved work. In this case, the subcontractor must give written notice to the contractor and the owner at least seven calendar days before the intended suspension or termination unless the subcontract includes a shorter time period.¹⁰⁶
4. A subcontractor may suspend performance of a contract or terminate a contract if the owner declines to approve and certify the contractor's billing or estimate for that subcontractor's work but the reasons for that failure by the owner to approve and certify are not the fault of or directly related to the subcontractor's work. In this scenario, the subcontractor must give written notice at least seven calendar days before the intended suspension or termination unless the subcontract includes a shorter time period.¹⁰⁷

The law provides that the following general rules apply in each of these suspension or termination scenarios. First, a contractor or subcontractor shall not be deemed in breach for suspending or terminating a construction contract.¹⁰⁸ Second, the time periods for contractors and subcontractors to suspend or terminate shall not be extended in the construction contract.¹⁰⁹ Third, the successful party in any litigation or arbitration brought to enforce suspension and termination rights under A.R.S. § 32-1129.04 shall be

¹⁰⁴ A.R.S. § 32-1129.04(A).

¹⁰⁵ A.R.S. § 32-1129.04(B).

¹⁰⁶ A.R.S. § 32-1129.04(C).

¹⁰⁷ A.R.S. § 32-1129.04(D).

¹⁰⁸ A.R.S. § 32-1129.04(A) to (D).

¹⁰⁹ *Id.*

awarded reasonable costs and attorneys' fees.¹¹⁰ Fourth, written notice required under this section may be: (a) delivered in person or (b) delivered at or sent by "any means that provides written, third party verification of delivery" to the other party's last known business address.¹¹¹

The prompt payment law further provides that a contractor or subcontractor that has suspended work is "not required to furnish further labor, materials or services until the contractor or subcontractor is paid the amount that was certified and approved, together with any costs incurred for mobilization resulting from the shutdown or start-up of a project." In other words, the suspending contractor or subcontractor is entitled to payment of demobilization and remobilization costs as a condition precedent to returning to the project.¹¹²

(3) Grounds for Registrar Discipline.

The prompt payment laws expressly provide that the Arizona Registrar of Contractors may take disciplinary action against a licensed general contractor or subcontractor for prompt payment violations, including suspension or revocation of a license.¹¹³ The specific statutory grounds for disciplinary action in the prompt payment statute are (1) any diversion of payment received for work performed under a construction contract or (2) the failure to "reasonably account for the application or use of such payments."¹¹⁴

In addition to these specific statutory grounds in the prompt payment statute itself, a contractor or subcontractor's failure to pay for work performed under a construction contract may also constitute a violation of one of Registrar's standard grounds for discipline: the failure of a licensee to pay monies in excess of \$750 for materials or services "when the licensee has received sufficient monies as payment for the particular construction work."¹¹⁵

An unpaid subcontractor or supplier typically files a formal complaint with Registrar of Contractors to initiate disciplinary action although the Registrar has the authority to initiate action on its own motion.¹¹⁶ A complainant has two different statutory bases to seek disciplinary action from the Registrar for non-payment—under the prompt pay law grounds in A.R.S. § 32-1129.02(B) or under the more generic "failure to pay" ground in A.R.S. § 32-1154(A)(11). Although the grounds in the prompt pay law are broader

¹¹⁰ A.R.S. § 32-1129.04(F).

¹¹¹ A.R.S. § 32-1129.04(G).

¹¹² A.R.S. § 32-1129.04(E).

¹¹³ A.R.S. § 32-1129.02(B).

¹¹⁴ *Id.*

¹¹⁵ A.R.S. § 32-1154(A)(11).

¹¹⁶ A.R.S. § 32-1154(B).

because they cover both non-payment and the failure to reasonably account for the application or use of any payment, most non-payment complaints rely only on the more general violation in § 32-1154(A)(11).

The reason is that the prompt pay law imposes an additional requirement on a complainant seeking relief for specific prompt pay violations. Any licensed contractor, licensed subcontractor or material supplier who files a complaint under § 32-1129.02 is required to post a surety bond or cash deposit for \$500 or one-half of the amount due, whichever is less, with the Registrar “to secure the payment of claims under this section.”¹¹⁷ If the Registrar later determines that the complaint was “without merit and frivolous,” the complainant forfeits the bond or cash deposit with half of the bond amount paid to the respondent and the other half paid to the Registrar for deposit into the state general fund.¹¹⁸ In other words, to file a ROC complaint based on the specific grounds in the prompt pay law, an unpaid subcontractor or supplier must provide a bond or cash deposit of up to \$500 and risk losing the bond or deposit if the claim is deemed without merit or frivolous. Most complainants opt to avoid this additional step (and eliminate the risk) when filing a complaint with the Registrar by simply alleging non-payment under § 32-1154(A)(11).

The prompt payment law also provides that a subcontractor or material supplier may notify the Registrar of Contractors and the owner in writing of any payment less than the amount or percentage approved for that subcontractor or material supplier’s particular work.¹¹⁹

§ 4.2.2.16 Limitations on the Prompt Payment Law for “Owner-Occupied” Residential Construction Projects

Before the 2010 amendments, the private sector prompt payment laws applied to all private construction projects in Arizona, including contracts between homeowners and contractors for residential and home-remodeling projects. Many homeowners were unaware of the requirements of the prompt payment law. As a result, in payment disputes involving residential projects, homeowners with legitimate grievances often failed to issue written objections to billings or estimates as required under A.R.S. § 32-1129.01(A). The *Stonecreek* case involved this scenario.¹²⁰

¹¹⁷ A.R.S. § 32-1129.02(I).

¹¹⁸ *Id.*

¹¹⁹ A.R.S. § 32-1129.02(A). This provision as originally enacted in 1989 required a subcontractor or supplier to notify the Registrar and owner of any prompt payment violation. But “shall notify” was changed to “may notify” in the 2000 amendments.

¹²⁰ 216 Ariz. 36, 162 P.3d 675 (Ct. App. 2007). Interestingly, the homeowner in *Stonecreek* did not send an objection after receiving the billing or estimate as required under A.R.S. § 32-1129.01(A). Rather, the homeowner’s lawyer sent a letter to the contractor expressing dissatisfaction with certain work two days before the owner received billing or estimate at issue. The trial court in *Stonecreek* held the letter satisfied the statutory requirement of a timely, written

To alert unsuspecting homeowners of their obligations under the prompt pay law, the 2010 amendments imposed the following disclosure requirement on contractors:¹²¹ the prompt payment requirements between owners and contractors under A.R.S. § 32-1129.01 do not apply to construction projects involving owner-occupied dwellings¹²² unless certain statutory-mandated language “appears in clear and conspicuous type on the front page of each billing or estimate” from the contractor to the owner. The statute requires that each billing or estimate include the following legend or substantially similar language:¹²³

Notice to Owner of Applicability of Arizona Prompt Pay Act

(Notice required by Arizona Revised Statutes Section 32-1129.07)

Attention: Your obligations to pay your contractor are subject to the Arizona prompt pay act. That act is set forth in section 32-1129, Arizona Revised Statutes, and sections 32-1129.01 through 32-1129.07, Arizona Revised Statutes. The full text of the statutes are available at your local public law library or the internet. Under that act, you have the right to withhold all or a portion of a payment to a contractor for a variety of reasons, including defective construction work that has not been corrected. However, in order to do so, you must issue a written statement setting forth in reasonable detail your reasons for withholding payments within fourteen (14) days after the date you receive a billing or estimate. If you fail to issue the written statement within that period, the billing or estimate will be deemed approved. Once the billing or estimate is deemed approved, you must pay the billing or estimate within seven (7) days. Generally, you are limited by the act to withholding only an amount that is sufficient to pay the direct costs and expenses you reasonably expect to incur to protect you from loss for which the contractor is responsible. You are encouraged to read the act in full to know your obligations and rights.

The limitation in A.R.S. § 32-1129.07 relates only to the requirements in A.R.S. § 32-1129.01, the section of the prompt payment laws that deal with owner-contractor contracts. Therefore, the payment rights of subcontractors and material suppliers under A.R.S. § 32-1129.02 are not subject to this limitation.

objection and it appears that the trial court’s decision on this issue was not appealed. 216 Ariz. at 38 ¶ 6, 162 P.3d at 677.

¹²¹ A.R.S. § 32-1129.07(A). The 2010 amendments added this provision.

¹²² A.R.S. § 32-1129.07(B) provides that the definitions for “dwelling” and “owner-occupant” in Arizona’s lien statute, A.R.S. § 33-1002, apply to this limitation.

¹²³ A.R.S. § 32-1129.07(A). The 2010 amendments added this provision.

§ 4.2.2.17 Contract Provisions Void and Against Public Policy

A.R.S. § 32-1129.05(A) lists several provisions in construction contracts that are against Arizona's public policy and are void and unenforceable. The section applies to any "provision, covenant, clause or understanding in, collateral to or affecting a construction contract." The term "construction contract" is broadly defined in A.R.S. § 32-1129(A)(2) to include any "written or oral agreement relating to the construction, alteration, repair, maintenance, moving or demolition of any building, structure or improvement or relating to the excavation of or other development or improvement of land." This definition is probably not broad enough to cover architect-engineer professional services contracts.¹²⁴

A.R.S. § 32-1129.05(A)(1) states that any provision that makes the contract "subject to the laws of another state" is void and against Arizona's public policy. This prohibition against choice of law provisions in construction contracts is intended to prevent the parties from circumventing Arizona's prompt payment protections and requirements by making the contract subject to the laws of another state. Prompt payment laws in other states include similar provisions¹²⁵ and they are generally enforced.¹²⁶ But one federal court opted not to enforce a similar statute.¹²⁷

A.R.S. § 32-1129.05(A)(1) further provides that the following contract clause is void and against public policy: a provision that requires any litigation to be conducted in another state. In other words, a forum selection clause in the construction contract requiring the matter to be adjudicated outside of Arizona is void and against public policy. These provisions are also generally enforced.¹²⁸

Before the 2010 amendments, this section further stated that a provision requiring "arbitration or other dispute resolution proceeding" to be conducted in another state

¹²⁴ *RSP Architects, Ltd. v. Five Star Dev. Resort Communities, LLC*, 232 Ariz. 436, 306 P.3d 93 (Ct. App. 2013).

¹²⁵ States with similar provisions include Indiana, Ohio, Wisconsin, Virginia, California, New York, Florida and North Carolina. *See* Ind. Code 32-28-3-17; Ohio Rev. Code § 4113.62(D)(2); Wis. Stat. § 779.135; Va. Code § 8.01-262.1; Calif. Proc. Code § 410.42; N.Y. Gen. Bus. Law 35-E § 757; Fla. Stat. § 47.025; N.C. Gen. Stat. § 22B-3.

¹²⁶ *Price & Price Mechanical of N.C., Inc. v. The Miken Corp.*, 661 S.E.2d 775 (N.C. Ct. App. 2008) (choice of law and forum selection clauses in construction contract providing law of another state applied were void under similar North Carolina statute); *MPACT Const. Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901 (Ind. 2004).

¹²⁷ *Oldcastle Precast, Inc. v. Sunesis Constr. Co.*, No. 5:07-81-JMH, 2007 WL 1655380 (E.D. Ky. June 6, 2007) (Federal District Court ignored an almost identical Ohio statute and enforced Kentucky choice-of-law provision even though the project was located in Ohio).

¹²⁸ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S. Ct. 1907, 1913 (1972) ("[S]uch clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances.").

was void and unenforceable. But courts interpreting similar provisions have refused to enforce them because they are preempted by the Federal Arbitration Act (“FAA”).¹²⁹ As a general principle, the FAA presumptively preempts state laws that attempt to “rewrite the parties’ agreements and compel arbitration of their dispute in a forum which is not one of those enumerated in an arbitration agreement’s forum-selection clause.”¹³⁰

As a result, the Arizona Legislature amended the dispute resolution forum selection clause in 2010 in an attempt to comply with the requirements of the FAA. A.R.S. § 32-1129.05(B) now provides: “Any mediation, arbitration or other dispute resolution proceeding arising from a construction contract for work performed in this state shall be conducted in this state.” But it is uncertain whether the change will be effective in avoiding FAA preemption.

Finally, A.R.S. § 32-1129.05(A)(2) provides that a contractual clause that prohibits a party from suspending performance or terminating the contract if prompt payments are not made is void and against public policy.

The provisions in A.R.S. § 32-1129.05 have been discussed in two federal district court decisions. In *Millenium 3 Technologies v. ARINC, Inc.*,¹³¹ a subcontractor sought a declaratory judgment that the choice of law and choice of forum provisions in its subcontract agreement were void and against public policy in Arizona. The project was performed in Arizona but the subcontract provided that “the place of arbitration shall be Washington, D.C.” and the dispute shall be governed by Maryland law. The subcontractor argued that the subcontract provisions were void and that any arbitration between the parties should take place in Arizona and be governed by Arizona law. In response, the general contractor argued that A.R.S. § 32-1129.05 did not void these clauses because the Federal Arbitration Act preempted the application of such law and that the authority to determine the applicable law and the forum for arbitration was vested with the arbitrator. The district court held that the determination regarding the location of the arbitration and the law to be applied should be made by the arbitrator rather than the courts. The court explained: “Where the parties concede that a dispute is subject to arbitration and do not challenge the applicability of the [arbitration] provision itself, challenges to a forum selection or choice of law clause do not present issues of arbitrability that are within the jurisdiction of the court.”

¹²⁹ *OPE Int’l L.P. v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447-48 (5th Cir. 2001) (Louisiana statute that conditioned enforceability of arbitration agreements in construction contracts on selection of Louisiana forum preempted by FAA); *M.C. Constr. Corp. v. Gray Co.*, 17 F. Supp. 2d 541, 547-48 (W.D. Va. 1998) (determining that state statute invalidating arbitration agreements designating out-of-state forums in construction contracts preempted by FAA).

¹³⁰ See generally *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 892 (9th Cir. 2001) (state law prohibiting out-of-state venue for franchise contract preempted by Federal Arbitration Act).

¹³¹ No. CV 08-1257 (D. Ariz. Oct. 29, 2008).

In *Landform Engineering Co. v. American Property Development, Inc.*,¹³² the Federal District Court in Minnesota considered whether a forum selection clause in an agreement between an owner and a engineering firm for preliminary engineering and other professional services on a project in Gilbert, Arizona was void under A.R.S. § 32-1129.05. The clause provided that any litigation shall be conducted in state or federal court in Minnesota and that Minnesota law applied. The Federal District Court held that A.R.S. § 32-1129.05 does not apply to void the foreign selection clause because it refers only to construction contracts and that it did not apply to architect-engineer professional service contract between the owner and engineer in that case.

§ 4.2.3 Public Sector Prompt Payment Laws

§ 4.2.3.1 Applicability

Arizona's public sector prompt payment laws apply to all Arizona public works projects. Prompt payment requirements for public construction projects appear in a myriad of laws and regulations. The public sector prompt payment laws have not been significantly changed since they were originally enacted in 1989. The 2000 and 2010 amendments to the prompt payment laws did not extend to public projects with one limited exception.¹³³ In 2015, the public sector prompt pay laws were amended to add protections for design professionals.¹³⁴

Thus, many of the protections for contractors and subcontractors, including the right to suspend or terminate performance, do not apply on public works projects.

Here is a chart of the applicable public sector prompt payment statutes and regulations:

PUBLIC OWNER	SOURCE
State of Arizona	A.R.S. §§ 41-2576 and -2577
City, County and Improvement Districts	A.R.S. § 34-221 (design-bid-build contracts); A.R.S. § 34-609 (contracts for construction-manager-at-risk, design-build and job-order-contracting construction services)
Arizona Department of Transportation	A.R.S. § 28-411 (agreements with consultants and contractors); A.R.S. § 28-6924 (agreements with contractors for highway construction projects)

¹³² No. Civ. 07-1195 (D. Minn. June 28, 2007).

¹³³ The only provision in the 2000 amendments that was added to public sector prompt payment laws was that forum selection and choice of law provisions are against public policy if they required the law of another state to apply. 2000 Ariz. Sess. Laws, Ch. 233, §§ 1, 2, 8 and 9.

¹³⁴ 2015 Arizona Session Laws Chapter 282 (House Bill 2336). The 2015 amendments, entitled "The Arizona Design Professional Prompt Pay Act, are discussed in § 4.3.2.5 below.

School Districts	A.A.C. R7-2-1105 (effective as of 4/28/2014) adopted pursuant to A.R.S. § 15-213(A)(1) (“The state board shall submit to the auditor general proposed rules consistent with the procurement practices prescribed in title 41, chapter 23 . . . modifying as necessary other provisions that the state board determines are not appropriate for school districts”)
University	Arizona Board of Regents (“ABOR”) Policy Manual, § 3-804(H), and University Procurement Code, § 3-804(H) adopted pursuant to A.R.S. § 41-2501(E) (“The Arizona board of regents . . . shall adopt rules prescribing procurement policies and procedures” and the rules “must be substantially equivalent to the policies and procedures described in this chapter”)

The public sector prompt payment laws and regulations for the various types of state projects are almost identical except for some specific differences discussed below.

§ 4.2.3.2 Progress Payments from Public Owner to General Contractor

Arizona’s prompt payment laws mandate monthly billing cycles and progress payments under most circumstances. Public owners under Title 34 are required to make monthly progress payments on all construction contracts of 90 days or more and may “by mutual agreement” make progress payments on contracts of less than 90 days.¹³⁵ The regulations applicable to school and university construction provide for monthly billing cycles on all projects; there is no exception for projects less than 90 days.¹³⁶ The applicable Arizona Department of Transportation law and the State Procurement Code require progress payments but do not specify that the payments must be made on a monthly basis. On ADOT projects, progress payments may be made based on pay estimates for work performed during an undefined “preceding period of time.”¹³⁷ Under the State Procurement Code, progress payments may be made based on pay estimates for work performed “during a preceding period of time as set by rule.”¹³⁸

The procedure for making periodic progress payments is spelled out in the prompt payment statutes. A general contractor is entitled to receive progress payments based on a duly certified and approved estimate of the work performed during the preceding

¹³⁵ A.R.S. § 34-221(C)(2); A.R.S. § 34-609(B)(2).

¹³⁶ ABOR Policy Manual § 3-804(H)(1); A.A.C. R7-2-1105(A).

¹³⁷ A.R.S. § 26-6924(A).

¹³⁸ A.R.S. § 41-2577(A).

month or other period of time.¹³⁹ A public owner is required to pay the general contractor on or before 14 days after the estimate is “certified and approved.”¹⁴⁰

A pay estimate is deemed certified and approved for payment after seven days from the date submitted unless, within that seven-day time period, the public owner or its agent issues a written finding specifically setting forth those items “in detail” in the pay estimate that are not approved for payment. In other words, if the public owner disagrees with the amount of any estimate, it must provide a detailed objection in writing within seven days. The owner may only withhold an amount from the progress payment sufficient to pay the expenses the owner reasonably expects to incur in correcting the deficiencies set forth in the written objection. The seven-day time period to object starts to run when the estimate is submitted to any person designated by the public owner for the submission, review or approval of the estimate.¹⁴¹

Public owners on most Arizona projects¹⁴² are required to retain ten percent of each estimate until “final completion and acceptance of all material, equipment and work covered by the contract” to insure the proper performance of the contract.¹⁴³ However, after the contract is 50 percent completed, the general contractor may request that the public owner pay one-half of the amount retained and the owner is required to honor that request provided the general contractor is making satisfactory progress on the contract and there is no specific cause or claim requiring that a greater amount be retained. In addition, after completion of 50 percent of the contract work, the public owner may retain no more than five per cent of the amount of any subsequent progress payment, provided that the general contractor is making satisfactory progress on the project. If the public owner determines at any time after the project is 50 per cent completed that satisfactory progress is not being made, the public owner is required to reinstate retention at 10 per cent for all subsequent progress payments.¹⁴⁴

At the end of a project, a public owner may not withhold retention for more than 60 days after final completion and acceptance of the project unless it provides the general contractor with a specific written finding stating the reasons justifying the delay in payment. After 60 days, the public owner may not withhold more money than the

¹³⁹ A.R.S. §§ 28-6924(A), 34-221(C)(2), 34-609(B)(3), 41-2577(A); ABOR Policy Manual § 3-804(H)(1); A.A.C. R7-2-1105(A).

¹⁴⁰ *Id.*

¹⁴¹ A.R.S. §§ 28-6924(A)(1), 34-221(C)(2), 34-609(B)(2), 41-2577(A); ABOR Policy Manual § 3-804(H)(1); A.A.C. R7-2-1105(A).

¹⁴² The ADOT statutes do not include provisions regarding the withholding of retention.

¹⁴³ A.R.S. §§ 34-221(C)(2), 34-609(B)(2), 41-2576(A); ABOR Policy Manual § 3-804(G); A.A.C. R7-2-1104(A).

¹⁴⁴ A.R.S. §§ 34-221(C)(3), 34-609(B)(3), 41-2576(B); ABOR Policy Manual § 3-804(G); A.A.C. R7-2-1104(A).

amount necessary to pay the expenses it reasonably expects to incur to address the issues set forth in the specific written finding.¹⁴⁵

If the public owner's payment to the general contractor is delayed more than 14 days after the estimate is "certified and approved," interest accrues on the amount due at the rate of one percent per month or fraction of a month on the unpaid balance.¹⁴⁶

The public sector prompt payment law expressly provides that a construction contract may not "materially alter" the rights of any contractor to "receive prompt and timely payment" as provided for in the public prompt payment law.¹⁴⁷ But the term "materially alter" is not defined and there are no reported decisions interpreting this provision.

§ 4.2.3.3 Progress Payments from General Contractor to Subcontractor on Public Projects

On most public projects, Arizona law requires the general contractor to pay its subcontractors and suppliers within seven days after receipt of each progress payment the respective amount allowed the contractor on account of the work performed by subordinate subcontractors, to the extent of each such subcontractor's interest in that progress payment.¹⁴⁸ The same rule applies to subcontractors: they are required to pay their sub-subcontractors and suppliers within seven days of receipt of each progress payment.¹⁴⁹

However, the State Board of Education has no specific regulations relating to payments from the general contractor to subcontractors or from subcontractors to their subcontractors or suppliers. Instead, the only Board of Education regulation dealing with subcontractors' payment rights states: "No contract for construction may materially alter the rights of any contractor, subcontractor or material supplier to receive prompt and timely payment as provided under this Section."¹⁵⁰ But this limitation may have no effect since that section does not have any provisions relating to the prompt and timely payments of subcontractors or suppliers.

¹⁴⁵ A.R.S. §§ 34-221(C)(5), 34-609(B)(5), 41-2576(C); ABOR Policy Manual § 3-804(G); A.A.C. R7-2-1104(F).

¹⁴⁶ A.R.S. §§ 28-6924(A)(4), 34-221(J), 34-609(I), 41-2577(E); ABOR Policy Manual § 3-804(H)(5); A.A.C. R7-2-1105(D).

¹⁴⁷ A.R.S. §§ 28-6924(B), 34-221(D), 34-609(C), 41-2577(A); ABOR Policy Manual § 3-804(H)(1); A.A.C. R7-2-1105(A).

¹⁴⁸ A.R.S. §§ 28-6924(B), 34-221(G), 34-609(F), 41-2577(B); ABOR Policy Manual § 3-804(H)(2).

¹⁴⁹ *Id.*

¹⁵⁰ A.A.C. R7-2-1105(A).

Under the public sector prompt payment law, contractors and subcontractors may agree in writing to a different time period for progress payments with the following proviso: such other terms cannot “materially alter” the rights of any contractor, subcontractor or supplier to receive prompt and timely payment as provided for in the public sector prompt payment law. Thus, the general contractor and subcontractor probably could agree to extend the time for payment from seven to ten days because that would not constitute a material alteration. But whether the parties could extend the time period for payment to 30 days is not as clear.¹⁵¹

A general contractor may refuse to certify for payment a subcontractor or supplier's work due to unsatisfactory job progress, unremedied defective construction work or materials, disputed work, failure to comply with material contract terms, third-party claims, failure to make timely payments, damage to the contractor or another subcontractor or reasonable evidence that the subcontractor cannot complete its work for the unpaid balance of the subcontract. However, if a general contractor intends to not pay a subcontractor based on any of these grounds, its pay estimate to the owner should not include any of the disputed amounts for that subcontractor's work. On the other hand, if the general contractor in its pay estimate to the owner certifies and approves a particular subcontractor's work, the general contractor must pay the subcontractor for that work upon receipt of payment from the owner.¹⁵²

A general contractor can withhold a “reasonable amount for retention” but the retention amount cannot exceed the actual percentage retained by the owner for the subcontractor's work.¹⁵³

If a general contractor fails to pay a subcontractor or supplier within the applicable time period, interest accrues on the amount due at the rate of one percent per month or a fraction of a month beginning on the eighth day, unless the parties have otherwise agreed in writing to different payment terms.¹⁵⁴

Moreover, the failure of a general contractor to pay a subcontractor upon receipt of payment from the owner for that subcontractor's work in accordance with the prompt payment laws or the failure of the general contractor to reasonably account for the application or use of such payments constitutes grounds for disciplinary action by the Arizona Registrar of Contractors.¹⁵⁵ The public sector prompt payment law also imposes an affirmative obligation on subcontractors and material suppliers to provide written notice to the Registrar of Contractors and the public owner if the general contractor pays “less than the amount or percentage approved for the class or item of work” as set forth

¹⁵¹ A.R.S. §§ 28-6924(B), 34-221(G), 34-609(F), 41-2577(B); ABOR Policy Manual § 3-804(H)(2).

¹⁵² A.R.S. §§ 28-6924(C), 34-221(I), 34-609(H), 41-2577(B); ABOR Policy Manual § 3-804(H)(4).

¹⁵³ *Id.*

¹⁵⁴ A.R.S. §§ 28-6924(A)(5), 34-221(K), 34-609(J), 41-2577(F); ABOR Policy Manual § 3-804(H)(6).

¹⁵⁵ A.R.S. §§ 28-6924(A)(2), 34-221(G), 34-609(F), 41-2577(B); ABOR Policy Manual § 3-804(H)(2).

in the prompt payment laws.¹⁵⁶ The law expressly provides that a subcontractor or material supplier “shall notify the registrar of contractors and the purchasing agent.”¹⁵⁷ But there are no sanctions in the law if a subcontractor or supplier fails to give such notice.

A subcontractor may submit a written notice to the owner requesting that the owner notify the subcontractor in writing within five days after payment of each progress payment made by the owner to the general contractor. This allows the subcontractor to monitor whether the general contractor is making timely payments to the subcontractor under the prompt payment laws.¹⁵⁸

The subcontractor’s request is a continuing one and remains in effect for the duration of the subcontractor’s work on the project.¹⁵⁹ However, there is no sanction in the prompt payment law if the owner fails to comply with the subcontractor’s request.¹⁶⁰

§ 4.2.3.4 Contract Provisions Against Public Policy

The public sector prompt payment laws provide that the following contract language is void and against public policy: a provision that makes the contract subject to the laws of another state or requires any litigation, arbitration or other ADR proceeding “arising from the contract” to be conducted in another state. Therefore, the prompt payment law provides that a forum selection clause requiring the matter to be adjudicated outside of Arizona and a choice of law clause providing that the law of another state governs the contract are both void and against public policy.¹⁶¹ The forum selection clause for arbitration may be preempted by the Federal Arbitration Act.¹⁶²

¹⁵⁶ A.R.S. §§ 28-6924(A)(2), 34-221(G), 34-609(F), 41-2577(B); ABOR Policy Manual § 3-804(H)(2).

¹⁵⁷ The private sector prompt payment laws originally included the same mandatory notice requirement but “shall” was changed to “may” in the 2000 amendments. A.R.S. § 32-1129.02(B). The requirement in the public sector prompt payment laws was not similarly changed.

¹⁵⁸ A.R.S. §§ 28-6924(A)(3), 34-221(H), 34-609(G), 41-2577(C); ABOR Policy Manual § 3-804(H)(3); A.A.C. R7-2-1105(C).

¹⁵⁹ *Id.*

¹⁶⁰ The ADOT statute goes further and expressly provides that the prompt pay statute “creates no cause of action in favor of a subcontractor or material supplier against this state, the department or any state employee or agent.” A.R.S. § 28-6924(D).

¹⁶¹ A.R.S. §§ 15-213(A)(2)(g), 28-6926, 34-227, 41-2583.

¹⁶² See discussion in § 4.2.2.17 above.

§ 4.2.3.5 2015 Amendments: Arizona Design Professional Prompt Pay Act

The Arizona Legislature amended certain sections of the public sector prompt pay law in 2015.¹⁶³ The 2015 amendments are entitled “The Arizona Design Professional Prompt Pay Act.”¹⁶⁴ The bill as originally introduced sought to expand the prompt payment law to design professional agreements on both public and private projects. But due to strong opposition from the trade association representing Arizona’s homebuilders, the sections in the original draft legislation dealing with private construction projects were deleted and the scope of the final bill as enacted is much narrower.

First, the 2015 amendments apply only to public construction projects. Therefore, the decision in *RSP Architects, Ltd. v. Five Star Development Resort Communities, LLC*,¹⁶⁵ that held Arizona’s private sector prompt payment laws do not apply to owner-architect agreements or other professional services contracts was not affected by the amendments and is still good law.

Second, as discussed in more detail below, because the 2015 legislation amended only particular sections of the public sector prompt pay laws, prompt pay protections were not extended to design professional agreements on all public works projects in Arizona. In addition, some of the language in the 2015 amendments is unclear and it is difficult to determine how broadly courts will ultimately interpret the amendments.

The 2015 amendments changed provisions in the ADOT statutes, Title 34 and the State Procurement Code. The changes to each of those statutes is discussed below.

(1) Changes to the ADOT Prompt Pay Statute

The 2015 amendments made changes to A.R.S. § 28-411. That section deals with prompt payment for ADOT agreements with “a consultant or contractor” other than “any agreement between the department and a contractor for highway construction projects” covered under A.R.S. § 28-6924. The term “consultant” is not defined anywhere in the ADOT statutes.

The prompt pay provisions in A.R.S. § 28-411 were amended to allow ADOT to provide its written objection to an application for a progress payment by “electronic means” in addition to first class mail.¹⁶⁶ Although the term “electronic means” is not defined in this section, the term likely encompasses emails. This is the first instance in any prompt pay law in Arizona where notice can be expressly provided electronically.

¹⁶³ 2015 Arizona Session Laws Chapter 282 (House Bill 2336). Governor Ducey signed the 2015 Amendments on April 13, 2015.

¹⁶⁴ *Id.* at Section 8 entitled Short Title: “This act shall be known and may be cited as “The Arizona Design Professional Prompt Pay Act.”

¹⁶⁵ 232 Ariz. 436, 306 P.3d 93 (App. 2013). The Arizona Court of Appeals decision in *RSP Architects* is discussed in § 4.2.2.1 above.

¹⁶⁶ A.R.S. § 28-411(B).

But as noted, the provision is limited to ADOT contracts with “consultants and contractors” other than contracts with contractors for highway construction projects.

The 2015 amendments also added a provision that ADOT shall pay “the agreed or reasonable value of all labor, materials, work or services furnished, installed or performed by a design professional pursuant to a limited notice to proceed” from ADOT’s authorized agent “before the execution of a contract or contract modification” applicable to that work.¹⁶⁷ The amended language specifically references work performed by a “design professional” and that term is defined.¹⁶⁸ This amendment recognizes that ADOT in some instances directs design professionals to perform work without strictly following formal contracting requirements. The new section also includes language that the cost or pricing formula used in the contract is to be considered “the fair and reasonable cost” for such services unless otherwise agree. The amendment further allows the design professional to be paid even if the contract or contract modification is not finalized consistent with ADOT’s cost guidelines.¹⁶⁹

(2) Amendments to State Procurement Code Title 41

The 2015 amendments also amended the Arizona Procurement Code in Title 41. A.R.S. § 41-2577 sets forth the procedure for making periodic progress payments on projects covered by the Procurement Code—the owner is required to make payment within 14 days after a pay estimate is “certified and approved.”¹⁷⁰ That section applies to all of the different procurement delivery methods provided for in Title 41, including contracts for competitively bid projects, job-order-contracting construction services, construction-manager-at-risk construction services, and design-build projects.

Contracts Between Public Owners and Design Professionals Under Title 41.

The 2015 amendments added references to “design professional service contract[s]” in § 41-2577 as follows (added language in CAPS):

- A pay estimate is deemed certified and approved for payment after seven days from the date submitted unless, within that seven-day time period, the public owner or its agent issues a written finding specifically setting forth those items “in detail” in the pay estimate that are not approved for payment under either a

¹⁶⁷ A.R.S. § 28-411(G).

¹⁶⁸ “Design professional” is defined as an individual or firm registered under “Title 32 . . . to practice architecture, engineering, geology, landscape architecture or land surveying.” A.R.S. § 28-411(G). The use of the specific term “design professional” in the new subsection (G) raises a question whether the term “consultant” used in other subsections of A.R.S. § 28-411 is intended to reference design professional services contracts. The intent of the statute would be clearer if the term “design professional” had also been added to the other subsections.

¹⁶⁹ *Id.*

¹⁷⁰ A.R.S. § 41-2577(A).

construction contract or a DESIGN PROFESSIONAL SERVICES CONTRACT.¹⁷¹

- If either the construction contract or the DESIGN PROFESSIONAL SERVICES CONTRACT includes separately priced divisions, payment may be made in full on completion and acceptance of the separate division.¹⁷²
- No contract for construction or DESIGN PROFESSIONAL SERVICES may materially alter the rights of any contractor, subcontractor, DESIGN PROFESSIONAL or material supplier to receive “prompt and timely payment as provided under this section.”¹⁷³

Therefore, a design professional in direct contract with the public owner on a project covered under Title 41 is now generally afforded the protections of the public sector prompt pay law.

But the term “design professional” was not added to the first sentence of § 41-2577 requiring the State to make progress payments to the contractor on the basis of duly certified and approved pay estimates “during a preceding period of time as set by rule.” This omission may have been intentional because design professionals—unlike contractors—do not always submit bills on a monthly basis.

Moreover, whether a design professional is entitled to statutory interest for late payments from the public owner is unclear under the 2015 Amendments because the phrase “design professional” was not added in the section providing that “[i]f any payment to a contractor is delayed after the date due, interest shall be paid at the rate of one percent per month or fraction of a month on such unpaid balance as may be due.”¹⁷⁴ A design professional arguably may still be entitled to recover interest from the public owner on late payments at the statutory rate based on the broad definition of “contractor” used in the Procurement Code: “Contractor’ means any person who has a contract with a state governmental unit.”¹⁷⁵ But since the Procurement Code’s definition of contract¹⁷⁶ does not expressly include “design services,” which is another defined term,¹⁷⁷ this is an open issue.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ A.R.S. § 41-2577(J).

¹⁷⁵ A.R.S. § 41-2503(9).

¹⁷⁶ “Contract’ means all types of state agreements, regardless of what they may be called, for the procurement of materials, services, construction, construction services or the disposal of materials.” A.R.S. § 41-2503(7).

¹⁷⁷ “Design services’ means architectural services, engineer services or landscape architect services.” A.R.S. § 41-2503(16).

Contracts Between Contractors and Design Professionals Under Title 41. The 2015 amendments to the State Procurement Code also extended the obligation of a contractor to pay its subcontractors or suppliers within seven days of receipt of each progress payment to include design professionals. Here is the specific language (added language in CAPS): “The contractor shall pay to the contractor’s subcontractors, DESIGN PROFESSIONALS or material suppliers . . . within seven days of receipt of each progress payment, unless otherwise agreed in writing by the parties, the respective amounts allowed the . . . DESIGN PROFESSIONAL on account of the work performed by the . . . DESIGN PROFESSIONAL . . .”¹⁷⁸ This prompt pay protection also extends to subcontractors who enter into agreements with design professionals.¹⁷⁹ However, the same limitations on the parties’ ability to “otherwise agree” that generally apply to public sector prompt pay also apply to contracts between contractors and design professionals—the different payment terms may not “materially alter” the rights of the design professional “to receive prompt and timely payment as provided for under [§ 41-2577].”¹⁸⁰

Other Amendments to Title 41. A.R.S. § 41-2577 was also amended to add “design professionals” to the following provisions:

- A.R.S. § 41-2577(C) now provides that a design professional may request in writing that the purchasing agency notify the design professional in writing within five days from payment of each progress payment to the contractor. The obligation of the purchaser agency to provide such notification is a continuing one.
- Under A.R.S. § 41-2577(D), a contractor or subcontractor, at the time of application and certification of a pay estimate to the owner or contractor, may refuse to apply for or certify all or a portion of a design professional’s work for payment for any of the reasons stated in the statute.
- A.R.S. § 41-2577 (F) was amended to provide that design professionals are entitled to interest from the contractor or subcontractor at a rate of one percent per month “on any periodic or final payment . . . delayed by more than seven days after receipt of the periodic or final payment by the contractor or subcontractor . . .”

Moreover, “design professional service contracts” were added to the language in A.R.S. § 41-2583 stating that any construction contract provision that makes a contract subject to the laws of another state or requires any litigation, arbitration or other dispute resolution arising from the contract to be conducted in another state is against public policy and “is void and unenforceable.”

¹⁷⁸ A.R.S. § 41-2477(B).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

Finally, the subsection that previously expressly provided that the section did not apply to “a construction services contract for design services” was changed to state affirmatively that “this section applies only to amounts payable in a construction contract for construction and in a contract for design services . . .”¹⁸¹

(3) Amendments to Title 34

The 2015 amendments also changed the prompt pay provisions relating to cities and towns under Title 34. But the changes to prompt pay under Title 34 are not as broad as the changes to the State Procurement Code. Although the Title 34 amendments mirror the Procurement Code amendments by extending prompt pay protections to contracts between contractors and design professionals (and subcontractors and design professionals), the changes to Title 34 only cover competitively bid design-bid-build projects; the prompt pay section in Title 34 covering design-build and construction-manager-at-risk contracts was not amended. Second, it is unclear whether the Title 34 amendments apply to any contracts between owners and design professionals.

Contracts Between Contractors and Design Professionals Under Title 34. The Title 34 amendments extend the obligation of a contractor to pay its subcontractors or suppliers within seven days of receipt of each progress payment to design professionals on traditional design-bid-build projects covered by A.R.S. § 34-221. Here is the specific language: “The contractor shall pay to the contractor’s subcontractors, design professionals or material suppliers . . . within seven days of receipt of each progress payment.”¹⁸² This prompt pay protection also extends to subcontractors who enter into agreements with design professionals.¹⁸³ However, under the Title 34 amendments, the same limitations that apply to public sector prompt pay generally also apply to contracts between contractors and design professionals—the parties can “otherwise agree[] in writing” to different payment terms provided those terms do not “materially alter” the rights of the design professional “to receive prompt and timely payment as provided for under [§ 34-221].”¹⁸⁴

A.R.S. § 34-221 was also amended to add “design professionals” to the following provisions:

- A.R.S. § 34-221(H) now allows design professionals to notify that the purchasing agency in writing requesting that it be notified in writing within five days from payment of each progress payment to the contractor. There is a continuing obligation on the purchaser agency to provide such notification.

¹⁸¹ A.R.S. § 41-2577(F).

¹⁸² A.R.S. § 34-221(G).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

- A.R.S. § 34-221(I) was amended to allow a contractor or subcontractor not to apply for or certify for payment work performed by a design professional for any of the reasons stated in the statute.
- A.R.S. § 34-221(K) was amended to provide that design professionals are entitled to interest at a rate of one percent per month “on any periodic or final payment . . . delayed by more than seven days after receipt of the periodic or final payment by the contractor or subcontractor . . .”

Interestingly, the changes in Title 34 were only added to A.R.S. § 34-221, the prompt pay provision that covers contracts procured under the traditional competitively bid design-bid-build model. A.R.S. § 34-609 dealing with contracts for construction-manager-at-risk, design-build or job-order contracting was not amended. This is a major distinction between the 2015 amendments to Title 34 and Title 41. In fact, A.R.S. § 34-609(K), which remained unchanged, expressly provides:

Notwithstanding anything to the contrary in this section, this section applies only to amounts payable in construction services contracts for construction and does not apply to amounts payable in a construction services contract for design services, preconstruction services, finance services, maintenance services, operations services and other related services.

Therefore, the prompt pay protections under the 2015 amendments do not cover contracts between contractors and design professionals on Arizona public projects for design-build contracts or CMAR contracts covered by title 34 with one exception: “design professional service contracts” were added to the language in A.R.S. § 34-227 stating that any construction contract provision that makes a contract subject to the laws of another state or requires any litigation, arbitration or other dispute resolution arising from the contract to be conducted in another state is against public policy and “is void and unenforceable.” Since § 34-227 appears to apply to all contracts under Title 34, that change also encompasses construction-manager-at-risk, design-build or job-order contracts.

Payments from Owners to Design Professionals Under Title 34. Whether the 2015 amendments extend prompt pay protections to any contracts between owners and design professionals for design-bid-build projects governed by Title 34 is unclear.

A.R.S. § 34-221(D) was amended as follows (added language in CAPS): “No contract for construction OR DESIGN PROFESSIONAL SERVICES may materially alter the rights of any contractor, subcontractor, DESIGN PROFESSIONAL or material supplier to receive prompt and timely payment required to be included in the contract under subsection C of this section.” Subsection C sets forth the standard prompt pay procedure for public projects: the owner shall make monthly progress payments to the contractor based on duly certified and approved estimates with 14 days after the estimate is “certified and approved” and “an estimate of the work submitted shall be deemed approved and certified for payment after seven days from the date of submission” unless before that time the owner or owner’s agent issues a written objection. The added

language to subsection D suggests that this procedure for prompt and timely payment in subsection C cannot be materially altered for design professional services contracts.

However, the “do not materially alter” language in subsection D expressly applies only to prompt pay provisions “to be included in the contract under subsection C of this section.” The problem is that it does not appear that design professional services contracts are contracts covered by subsection C. Subsection C sets forth “[t]he terms of contracts entered into pursuant to subsection A of this section.” But subsection A does not deal with design professional services contracts. Rather, subsection A covers contracts issued to “the lowest responsible bidder whose proposal is satisfactory”—in other words, it covers construction contracts issued to the lowest responsible and responsive bidder in a competitively bid situation. (Contracts for professional services under title 34 are generally covered by A.R.S. § 34-103.)

After following this circuitous path, it is hard to predict whether a court will conclude that the Legislature intended to extend prompt pay protections to owner-design professional contracts under A.R.S. § 34-221.

As discussed above, the amendments to the State Procurement Code extended the prompt pay protections to contracts between public owners and design professionals for projects covered under Title 41 by adding the phrase “design professional service contract” in the statutory section dealing with owner-design professional contracts. While there is no apparent reason why the Legislature would treat owner-design professional contracts differently under Title 34 and Title 41, the failure of the 2015 amendments to add the term “design professional” to A.R.S. § 34-221(C) creates ambiguity. Simply stated, if the intent of the 2015 amendments was to extend the prompt pay protections under Title 34 to contracts between owners and design professionals, why did the language in § 34-221(C) not mirror the language in § 41-2577(A)?

