

# AN ANALYSIS OF ARIZONA PROMPT PAYMENT STATUTES

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## I. ARIZONA'S PROMPT PAYMENT STATUTES<sup>1</sup>

In Arizona, there are a number of different Prompt Payment statutes governing both public and private projects. A common misconception in the construction industry and even among legal practitioners is that ARS §32-1129.01 to §32-1129.06 apply to all Arizona projects—regardless of whether the project is new or remodeled residential, commercial, or work for the State or other public agency. The typical Prompt Payment statute referred to in most legal articles relates only to private projects, which make up only a small fraction of all construction projects in Arizona. This has been especially true for the past 5 years (2007 – 2011), when private lending has been difficult—if not impossible—to obtain for new development.

An analysis of the Prompt Payment statutes applicable to work performed for the various state agencies, cities, towns, school districts, counties, and for the State University system have been uniformly ignored by most legal authors. What follows is a summary of each of the various statutes and codes applicable to the majority of construction projects in Arizona—both private and public. (The scope of this article is not intended to address the Prompt Payment statutes and regulations for work performed for the federal government<sup>2</sup>, or work performed on tribal lands.<sup>3</sup>)

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<sup>2</sup> The scope of this Article does not include work for the federal government or its various agencies, e.g. the Department of Defense, Department of Education, Department of Homeland Security, Department of Interior, and the General Services Administration. The general Prompt Payment act is found at 31 USC §3905. The specific payment requirements and procedures are generally modified by Agency regulation. *See* 31 USC §3905(b).

<sup>3</sup> There are 20 separate Native American Tribal Reservations with lands within Arizona. Work performed on Native Lands will be governed by the specific contract agreement and the particular Tribe's Constitution. As a general rule, Arizona courts have no jurisdiction over Native Americans contracting on tribal lands due to the doctrine of sovereign immunity. While a

The Arizona Procurement Code covers most state agencies. However, the Arizona Department of Transportation (ADOT) and the Arizona University System, governed by the Arizona Board of Regents (ABOR), each have specific statutory or code provisions relating to Prompt Payment.

School districts are covered by Arizona State Board of Education School District Procurement Rules. Counties, cities, and certain special districts are governed by ARS §34-221. Only private construction projects are governed by ARS §32-1129.01 and 32-1129.02.

What follows is a brief summary of the various statutory and regulatory provisions relating to Prompt Payment laws. A review of the relevant provisions has been prepared for quick reference, and the full text of the applicable statutes has been included, in order to allow the legal practitioner a quick reference guide for use in their practice and when advising clients.

#### **A. The “General Rule”**

As a general rule, the numerous Prompt Payment statutes and codes that follow provide procedures and deadlines to ensure timely and prompt payment to general contractors, their subcontractors and suppliers alike. With few exceptions, each statute or code provides for:

- 1) The timing of submission of periodic pay application, or invoices for payment (generally every 30 days or for work performed in the prior month);
- 2) The date by which the Owner must review, approve, or reject the application for payment (7 or 14 days);
- 3) The requirement for specific written reasons to justify any rejection of a pay application, whether in whole or part (7 or 14 days);

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tribe may not waive immunity from suit, it may contractually agree to binding arbitration and that Arizona law is controlling.

- 4) A provision that the Owner or Contractor's failure to timely object (in writing) results in the pay application or invoice being "deemed approved" or "certified";
- 5) The requirement that payments be made on approved or certified pay applications or invoices within a specified period of time (7 or 14 days);
- 6) The requirement that the General Contractor and each Subcontractor make timely payment to lower tier Subcontractors or Suppliers for work performed or materials supplied on certified pay applications or invoices (7 days);
- 7) A penalty or mandatory interest for late payment (between 10 and 18%)

The Prompt Payment laws provide for mandatory actions and payment to be completed within a relatively short time frame after submission of a proper invoice for payment. Each statute or rule provides for the submission of an invoice or application for payment, the certification of such application (whether it be through affirmative action, or through inaction), a deadline for payment from the public or private owner to the General Contractor (14 days), and then subsequent payment deadlines for each lower tier Subcontractor or Supplier (7 days). Depending on the statute or rule, interest on late payment will accrue at either 10.0% per annum, 1.0%, or 1.5% per month. Only ARS §32-1129.01 and 1129.02 provide the mandatory award of attorneys fees in the event of a breach of the Prompt Payment law.

## **B. Objections Must be In Writing and Specific**

Once a “proper”<sup>4</sup> invoice or application for payment has been submitted<sup>5</sup>, the project Owner or General Contractor must either act affirmatively by approving the application for payment, or otherwise by identifying, in writing, very specific reasons for the rejection of the application or invoice. Even in those instances, there is an affirmative duty on the Owner or Contractor to approve so much of the application for payment as is appropriate. Typical justifications for rejecting (in whole or part) invoice, billing or applications for payment include:

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 construction 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, Contractor, or another Subcontractor.
8. Reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum.
9. The Owner has withheld retention from the Contractor, in which case the amount of the retention withholding by the Contractor shall not exceed the actual amount of the retention retained by the Owner pertaining to the subcontractor's work. See ARS §32-1129.02

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<sup>4</sup> This author is of the opinion that the statutory requirements for either approving or rejecting the pay application or invoice do not begin until the Contractor or Subcontractor has submitted an application which contains ALL of the contractual requirements and attachments. See e.g. AIA Document A101-2007 Agreement Between Owner and Contractor, Section 5.1; AIA Document A20-2007 General Conditions of the Contract for Construction, Section 9.3.1

<sup>5</sup> See, e.g. ARS §32-1129.01(O).

Regarding the billing or invoice for release of retention, the Owner may withhold or refuse to release retention due to failure of the Contractor to complete a material requirement of the construction contract, to complete portions of the work, or for any reason identified above.

The Owner may also withhold from retention or final payment an amount equal to 150% (private projects only) or 100% (public projects) 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 results from the Contractor's failure to complete portions of the work at the time of substantial completion, or for any reasons set forth in writing,

## II. SUMMARY OF STATUTORY AND CODE PROVISIONS

### A. Private Projects – ARS §32-1129.01 to ARS §32-1129.05

Billing Cycle:	30 Days <sup>6</sup>
Deadline for Approval / Certification	14 Days <sup>7</sup>
Time for Payment by Owner to General	7 Days thereafter
Deadline for Payment by General to Subs / Supplier	7 Days thereafter
Deadline for Payment by Subs to Subs / Supplier	7 Days thereafter
Right to Suspend Performance for Late Payment	Yes <sup>8</sup>
Subcontractor / Supplier Right to Notice of Payment	Within 5 Days <sup>9</sup>
Withholding for Defects / Damages Permitted	Yes <sup>10</sup>
Retention Rate	Not Specified <sup>11</sup>

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<sup>6</sup> ARS §32-1129.01(A) Applies only to jobs lasting more than 60 days. Alternative billing cycle may be permitted assuming the Owner follows the specific procedures on the contract and all contract documents as provided in (B) and (C).

<sup>7</sup> ARS §32-1129.01(D) Billing or estimate is “deemed certified and approved” unless written objection is made prior to 14 day period.

<sup>8</sup> ARS §32-1129.04(A) – Contractors. Contractor must give 7 days written notice to Owner prior to suspension or termination. ARS §32-1129.04(B) – (D) – Subcontractors. In the case of non payment by the Owner, the Subcontractor must give written notice to the Owner and Contractor 3 or 7 days before suspension or termination, depending on the circumstances surrounding non-payment.

<sup>9</sup> ARS §32-1129.01(R).

<sup>10</sup> ARS §32-1129.01(E).

<sup>11</sup> While the percentage of retention is not specified by statute, presumably the industry standard of 10.0% would be applicable unless a higher rate of retention is specified in the contract.

Final Payment; Release of Retention; Withholding for Defective / Deficient Work;	7 Days after Certified Billing; <sup>12</sup> 150% of Reasonable Cost
Interest Rate for Late Payment	1.5% / Month <sup>13</sup>
Attorneys Fees Recoverable	Yes <sup>14</sup>

## B. Interpreting Case Authority

1. Stonecreek Building Co., Inc. v. Shure, 216 Ariz. 36, 162 P.3d 675 (CA1, 2007)<sup>15</sup>

As noted in Section I, the statutory scheme known as the Prompt Pay Act establishes guidelines to ensure timely payments from an Owner to a Contractor when work has been approved. Interpretation of the Prompt Pay Act is a question of law that the court will review de novo. In Stonecreek, the court held:

If an owner can simply wait until a later billing statement to disapprove and withhold payment for work already completed and deemed approved, the fourteen-day time limit in ARS §32-1129/01(D) and the seven-day time periods become ineffective.

Accordingly, we find that the primary purpose of the 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

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<sup>12</sup> ARS §32-1129.01(H)

<sup>13</sup> ARS §32-1129.01(Q)

<sup>14</sup> ARS §32-1129.01(S)

<sup>15</sup> While Stonecreek has been quoted here for sake of completeness, this case and its rulings have been strongly criticized by legal commentators and authors. The 2010 Amendments to ARS §32-1129.01 have the result of legislatively overturning this decision to correct many of that court's holdings.

held that withholding funds for allegedly defective work not covered in the invoice violated the Act.

2. Slaton Bros. SW, LLC v. Bozrah Builders, Inc. (WL 1434683 (CA1, 2011).(Not Reported)

In Slaton Bros, the Court was presented with the question of whether the Contractor was entitled to statutory prejudgment interest at 18.0% per annum on the entire amount shown on invoices which were not timely disputed and not timely paid, when the Owner itself was claiming damages and offsets for work not performed, defective work, and the cost of completion of the project after termination.

We hold that prejudgment interest calculated according to the Prompt Pay Act must be calculated on amounts certified as due and owing pursuant to [A.R.S. § 32-1129.01\(A\)](#), minus any amounts a fact finder determines are in excess of what is actually due to the contractor.

Bozrah argues that the trial court erred when it disallowed recovery of any completion costs for the Project. The trial court reasoned that Bozrah was not permitted to recover cost to complete the project because it had not made timely payments under the Prompt Pay Act. Slaton argues that Bozrah's failure to pay the invoices was "a material breach of contract" and therefore, Slaton had no further obligation "to complete any remaining work." We disagree.

Accordingly, the trial court erred when it ruled as a matter of law that Bozrah could not recover completion costs on the Project.

**C. Counties, Cities, Special Districts – ARS §34-221<sup>16</sup>**

Billing Cycle:	30 Days <sup>17</sup>
Deadline for Approval / Certification	7 Days <sup>18</sup>
Time for Payment by Owner to General	14 Days thereafter <sup>19</sup>
Deadline for Payment by General to Subs / Supplier	7 Days thereafter <sup>20</sup>
Deadline for Payment by Subs to Subs / Supplier	7 Days thereafter
Right to Suspend Performance for Late Payment	Not Specified
Subcontractor / Supplier Right to Notice of Payment	Within 5 Days <sup>21</sup>
Withholding for Defects / Damages Permitted	Yes <sup>22</sup>
Retention Rate	10.0% <sup>23</sup> / 5.0%
Final Payment; Release of Retention; Withholding for	60 Days after Final

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<sup>16</sup> Unlike the Private Prompt Pay statutes, there are no published decisions in Arizona which have specifically interpreted this statute as regards the certification procedures or deadlines for payment.

<sup>17</sup> ARS §34-221(C)(2). For contracts more than 90 days in duration.

<sup>18</sup> ARS §34-221(C)(2). Requires a “duly certified and approved estimate.”

<sup>19</sup> ARS §34-221(B)(2).

<sup>20</sup> ARS §34-221(G). Unless otherwise agreed in writing between the parties, however contract may not “materially” alter the rights of the Subcontractor or Supplier to receive timely payment.

<sup>21</sup> ARS §34-221(H). Only one written request is necessary. Request remains in effect for the duration of the Subcontractor’s work on the project.

<sup>22</sup> ARS §ARS §34-221(C)(2). Specific written findings, setting forth in detail those items that are not approved.

<sup>23</sup> ARS §34-221(C)(2). ARS §34-221(C)(3) Retention to be reduced to 5% when project is 50% complete.

Defective / Deficient Work;	Completion; <sup>24</sup>
Interest Rate for Late Payment	1.0% / Month <sup>25</sup>
Attorneys Fees Recoverable	Not addressed

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<sup>24</sup> ARS §34-221(C)(5). State is under no obligation to pay over withheld funds until all laborers and materialmen have been paid. Butler v. Pacific Nat. Ins. Co., 375 F2d 518 CA9 (Ariz), 1967. Before initiating an action for damages against a public entity, the Contractor must submit a statutorily compliant notice of claim pursuant to ARS §12-821.01. See Deer Valley Unified Sch Dist #97 v. Houser, 24 Ariz 293 (2007). This would include a specific demand and calculation of any prompt pay act interest which may be due on late payments.

<sup>25</sup> ARS §34-221(J) – Owner to General; ARS §34-221(K) – General to Subcontractor or Supplier

**D. Arizona Department of Transportation – ARS §28-6924<sup>26</sup>**

Applicable to highway construction projects awarded pursuant to ARS §28-6923, §28-7365 and §28-7366.

Billing Cycle:	Preceding Month <sup>27</sup>
Deadline for Approval / Certification	7 Days <sup>28</sup>
Time for Payment by Owner to General	14 Days thereafter <sup>29</sup>
Deadline for Payment by General to Subs / Supplier	7 Days thereafter <sup>30</sup>
Deadline for Payment by Subs to Subs / Supplier	7 Days thereafter
Right to Suspend Performance for Late Payment	Not Specified <sup>31</sup>
Subcontractor / Supplier Right to Notice of Payment	Within 5 Days <sup>32</sup>
Withholding for Defects / Damages Permitted	Yes <sup>33</sup>

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<sup>26</sup> There are no published decisions in Arizona interpreting this statute, the certification procedures or the mandatory obligations to make timely payment.

<sup>27</sup> ADOT Standard Specifications ARS §109.06.

<sup>28</sup> ARS §28-6924(A)(1). Requires a “duly certified and approved estimate.”

<sup>29</sup> ARS §28-6924(A)(1).

<sup>30</sup> ARS §28-6924(A)(2). ARS §28-6924(B) Contract between Contractor and Subcontractor or material Supplier may not “materially” alter the rights of the Subcontractor or Supplier to receive timely payment.

<sup>31</sup> ARS §28-6924(D). No private right of action permitted in favor of Subcontractor or supplier for failure to promptly pay for Subcontractor or Suppliers work.

<sup>32</sup> ARS §28-6924(A)(3). Only one written request is necessary. Request remains in effect for the duration of the Subcontractor’s work on the project.

<sup>33</sup> ARS §28-6924(A)(1). Specific written findings, setting forth in detail those items that are not approved. *See also*, ARS §28-6924(C).

Retention Rate	5.0% <sup>34</sup>
Final Payment; Release of Retention; Withholding for Defective / Deficient Work;	60 Days after Final Completion and Acceptance; <sup>35</sup>
Interest Rate for Late Payment	1.0% per month <sup>36</sup>
Attorneys Fees Recoverable	Not addressed <sup>37</sup>

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<sup>34</sup> ADOT Standard Specifications ARS §109.06. 5.0% retention until final acceptance however ADOT typically will reduce the retention percentage further once the project is 50% complete and then periodically thereafter depending on successful performance of the work.

<sup>35</sup> ADOT Standard Specifications ARS §109.09.

<sup>36</sup> ARS §28-6924(A)(4) – Owner to Contractor. ARS §28-6924(A)(5) – Contractor to Subcontractor or Supplier.).

<sup>37</sup> See ADOT Standard Specification ARS §105.22 which provides for mandatory arbitration of claims and disputes and further provides that each party shall bear their own attorneys fees and costs of arbitration.

**E. State Agencies - Arizona State Procurement Code – ARS §41-2577<sup>38</sup>**

Billing Cycle:	Preceding Month <sup>39</sup>
Deadline for Approval / Certification	7 Days <sup>40</sup>
Time for Payment by Owner to General	14 Days thereafter <sup>41</sup>
Deadline for Payment by General to Subs / Supplier	7 Days thereafter <sup>42</sup>
Deadline for Payment by Subs to Subs / Supplier	7 Days thereafter
Right to Suspend Performance for Late Payment	Not Specified
Subcontractor / Supplier Right to Notice of Payment	Within 5 Days <sup>43</sup>
Withholding for Defects / Damages Permitted	Yes <sup>44</sup>
Retention Rate	10.0% <sup>45</sup> / 5.0%
Final Payment; Release of Retention; Withholding for Defective / Deficient Work;	60 Days after Final

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<sup>38</sup> There are no published decisions in Arizona interpreting this statute, the certification procedures or the mandatory obligations to make timely payment.

<sup>39</sup> ARS §41-2577(A).

<sup>40</sup> ARS §41-2577(A). Requires a “duly certified and approved estimate.”

<sup>41</sup> ARS §41-2577(A). No contract may “materially” alter the rights of the Contractor, Subcontractor or Supplier to receive timely payment.

<sup>42</sup> ARS §41-2577(B). Unless otherwise agreed to in writing, however contract may not “materially” alter the rights of the Subcontractor or Supplier to receive timely payment.

<sup>43</sup> ARS §41-2577(C.). Only one written request is necessary. Request remains in effect for the duration of the Subcontractor’s work on the project.

<sup>44</sup> ARS §41-2577(A). Specific written findings, setting forth in detail those items that are not approved. *See also*, ARS §41-2577(D).

<sup>45</sup> ARS §41-2576(A). Retention to be reduced to 5% when project is 50% complete. ARS §41-2576(B).

	Completion; <sup>46</sup>
Interest Rate for Late Payment	1.0% / Month <sup>47</sup>
Attorneys Fees Recoverable	Not addressed

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<sup>46</sup> ARS §41-2576(C).

<sup>47</sup> ARS §41-2577(E) - Owner to General; ARS §41-2577(F) - General to Subcontractor or Supplier.

**F. Arizona State University System –Board of Regents Policy Manual §3-804(G & H).<sup>48</sup>**

Billing Cycle:	Monthly Basis <sup>49</sup>
Deadline for Approval / Certification	7 Days <sup>50</sup>
Time for Payment by Owner to General	14 Days thereafter <sup>51</sup>
Deadline for Payment by General to Subs / Supplier	7 Days thereafter <sup>52</sup>
Deadline for Payment by Subs to Subs / Supplier	7 Days thereafter
Right to Suspend Performance for Late Payment	Not Specified
Subcontractor / Supplier Right to Notice of Payment	Within 5 Days <sup>53</sup>
Withholding for Defects / Damages Permitted	Yes <sup>54</sup>
Retention Rate	10.0% <sup>55</sup> / 5.0%

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<sup>48</sup> There are no published decisions in Arizona interpreting this policy manual, the certification procedures or the mandatory obligations to make timely payment.

<sup>49</sup> ABOR Policy Manual §3-804(H)(1).

<sup>50</sup> ABOR Policy Manual §3-804(H)(1).

<sup>51</sup> Compare the first sentence of §3-804(H)(1) which provides that payments are to be made within 30 days after receipt of a certified and approved pay application.

<sup>52</sup> ABOR Policy Manual §3-804(H)(2). Unless otherwise agreed in writing between the parties, however contract may not “materially” alter the rights of the Subcontractor or Supplier to receive timely payment.

<sup>53</sup> ABOR Policy Manual §3-804(H)(3). Only one written request is necessary. Request remains in effect for the duration of the Subcontractor’s work on the project.

<sup>54</sup> ABOR Policy Manual §3-804(H)(1), §3-804(H)(4). Specific written findings, setting forth in detail those items that are not approved and certified.

<sup>55</sup> ABOR Policy Manual §3-804(G)(1). Retention to be reduced to 5% when project is 50% complete. 10% Rate may be reinstated at any time if satisfactory progress is not being made.

Final Payment; Release of Retention; Withholding for Defective / Deficient Work;	60 Days after Final Completion; <sup>56</sup>
Interest Rate for Late Payment	1.0% / Month <sup>57</sup>
Attorneys Fees Recoverable	Not addressed

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<sup>56</sup> ABOR §3-804(G)(1);

<sup>57</sup> ABOR Policy Manual §3-804(H)(5) – Owner to General; ABOR Policy Manual §3-804(H)(6) – General to Subcontractor or Supplier.

**G. School District Procurement Code – Arizona Administrative Code R7-2-1114, R7-2-1115<sup>58</sup>**

Billing Cycle:	Preceding Month <sup>59</sup>
Deadline for Approval / Certification	7 Days <sup>60</sup>
Time for Payment by Owner to General	14 Days thereafter <sup>61</sup>
Deadline for Payment by General to Subs / Supplier	Not Specified <sup>62</sup>
Deadline for Payment by Subs to Subs / Supplier	Not Specified <sup>63</sup>
Right to Suspend Performance for Late Payment	Not Specified
Subcontractor / Supplier Right to Notice of Payment	Within 5 Days <sup>64</sup>
Withholding for Defects / Damages Permitted	Yes <sup>65</sup>

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<sup>58</sup> There are no published decisions in Arizona interpreting this code, the certification procedures or the mandatory obligations to make timely payment.

<sup>59</sup> AAC R7-2-1115(A).

<sup>60</sup> AAC R7-2-1115(A). Requires a “duly certified and approved estimate.”

<sup>61</sup> Compare the second sentence of AAC R7-2-1115(A) which provides that payments are to be made within 30 days after receipt of a certified and approved pay application.

<sup>62</sup> The deadline for payment from the General Contractor to Subcontractors and Suppliers is not specified by Rule. Presumably the 7 day period specified by ARS §32-1129.02(B) would be applicable since there is nothing in the statute that excepts it from application to School Districts. Note that AAC R7-2-1115(A) specified that no contract may not “materially” alter the rights of the Subcontractor or Supplier to receive timely payment. Further, AAC R7-2-1115(A) conditions the General Contractor’s right to receive payment from the School District upon his strict adherence to ARS §41-2577(B), which itself provides for payment within 7 days.

<sup>63</sup> See footnote immediately above. The same analysis should apply.

<sup>64</sup> AAC R7-2-1115(B).

<sup>65</sup> AAC R7-2-1115(A). Specific written findings, setting forth in detail those items that are not approved and certified.

Retention Rate	10.0% <sup>66</sup> / 5.0%
Final Payment; Release of Retention; Withholding for Defective / Deficient Work;	60 Days after Final Completion; <sup>67</sup>
Interest Rate for Late Payment	1.0% / Month <sup>68</sup>
Attorneys Fees Recoverable	Not addressed

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<sup>66</sup> AAC R7-2-1114(A) Retention to be reduced to 5% when project is 50% complete. 10% Rate may be reinstated at any time if satisfactory progress is not being made.

<sup>67</sup> AAC R7-2-1114(D).

<sup>68</sup> AAC R7-2-1115(C) – Owner to General. No provision regarding the rate if interest due from General to Subcontractor or Supplier is specified. Presumably the rate of interest would be 10.0% as provided by ARS §44-1201(A) (interest on any loan, indebtedness, or other obligation shall be at the rate of 10% per annum unless a different rate of interest is contracted for in writing).

### III. STATUTORY AND CODE PROVISIONS (FULL TEXT)

#### A. Private Projects – ARS §32-1129.01 to ARS §32-1129.05

##### 1. 32-1129.01. Progress payments by Owner; conditions; interest

A. By mutual agreement with a contractor, an owner may make progress payments on construction contracts of less than sixty days. An owner shall make progress payments to a contractor on all other construction contracts. Progress payments shall be made 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, or such other billing cycle as stated in the construction contract. If billings or estimates are to be submitted in other than thirty day billing cycles, the construction contract and each page of the plans, including bid plans and construction plans, shall specifically identify such other billing cycle in a clear and conspicuous manner as prescribed in subsection B of this section. 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. Except as provided in subsection C of this section, the owner shall make progress payments to the contractor within seven days after the date the billing or estimate is certified and approved pursuant to subsection D of this section. Except as provided in subsection C of this section, an 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 pursuant to subsection H of this section. Except as provided in subsection C of this section, an owner shall make final payment to the contractor within seven days after the billing or estimate for final payment is certified and approved pursuant to subsection K of this section.

B. A construction contract may provide for a billing cycle other than a thirty day billing cycle if the construction contract specifically sets forth such other billing cycle and either of the following applies:

1. The following legend or substantially similar language setting forth the other billing cycle appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

Notice of Alternate Billing Cycle

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

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2. The following legend or substantially similar language setting forth the other billing cycle appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

#### Notice of Alternate Billing Cycle

This contract allows the owner to require the 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 on request.

C. An owner may make progress payments, release of retention and final payment later than seven days after the date the billing or estimate is certified and approved if both:

1. The construction contract in a clear and conspicuous manner specifically provides for a later payment defined by a specified number of days after certification and approval.

2. The following legend or substantially similar language setting forth the specified number of days appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

#### 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 and estimates for release of retention and within \_\_\_ days after certification and approval of billings and estimates for final payment.

D. Except as provided in subsection F of this section, a billing or estimate for a progress payment shall be deemed certified and approved fourteen 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. The owner is deemed to have received the billing or estimate when the billing or estimate is submitted to any person designated by the owner for receipt or for certification and approval of the billing or estimate. The owner may withhold from a progress payment a reasonable amount for retention. An owner may decline to certify and approve a billing or estimate or 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 construction 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.
- E. An owner may withhold from a progress payment only 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 writing pursuant to subsection D of this section.
- F. An owner may extend the period within which the billing or estimate for progress payments, release of retention and final payment is certified and approved if both:
1. The construction contract in a clear and conspicuous manner specifically provides for an extended time period within which a billing or estimate shall be certified and approved defined by a specified number of days after the owner has received the billing or estimate.
  2. The following legend or substantially similar language, setting forth the specified number of days, appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

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.

G. After the effective date of a construction contract, an owner and contractor may change the number of specified days after certification and approval for the owner to make payment to the contractor or within which a billing or estimate must be certified and approved. Any contractor or subcontractor that does not provide written consent to the change will continue to be paid as previously agreed.

H. On substantial completion of the work, a contractor shall submit a billing or estimate for release of retention. Except as provided in subsection F of this section, the billing or estimate for release of retention shall be deemed certified and approved within fourteen 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 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 the billing or estimate is submitted to any person designated by the owner for receipt or for certification and approval of the billing or estimate. The owner may:

1. Decline to certify and approve a billing or estimate for release of retention or a portion of a billing or estimate for release of retention for failure of the contractor to complete a material requirement of the construction contract or to complete portions of the work or for any reason permitted under subsection D of this section.

2. Withhold from retention to be released only an amount not to exceed one hundred fifty per cent 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 portions of the work at the time of substantial completion or for any reasons set forth in writing pursuant to this subsection.

I. Except as provided in subsections C and H of this section, the owner shall pay the retention to the contractor within seven days after the date the billing or estimate for release of retention is certified and approved. If the owner has declined to certify or approve a billing or estimate for release of retention or a portion of a billing or estimate for release of retention pursuant to subsection H of this section, when any reason as stated in the owner's written statement has been removed, the contractor may submit a supplemental billing or estimate for all or a portion of the withheld amounts of retention pursuant to subsection H of this section. Unless otherwise agreed, the contractor may submit only one billing or estimate during each billing cycle.

J. When a contractor substantially completes all work under a portion of a construction contract for which the contract states a separate price, the contractor shall submit a billing or estimate for release of retention on that portion of the construction contract pursuant to subsection H of this section.

K. On final completion of the work, a contractor shall submit a billing or estimate for final payment. Except as provided in subsection F of this section, a billing or estimate for final payment shall be deemed certified and approved fourteen days after the owner receives the billing or estimate, unless before that time the owner or owner's agent prepares and issues a written statement stating in reasonable detail the reasons the billing or estimate has not been certified or approved. The owner is deemed to have received the billing or estimate for final payment when the billing or estimate is submitted to any person designated by the owner for receipt of or for certification and approval of the billing or estimate. The owner may:

1. Decline to certify and approve a billing or estimate for final payment or a portion of a billing or estimate for final payment for failure of the contractor to complete a

requirement of the construction contract or to complete portions of the work or for any reason permitted under subsection D of this section.

2. Withhold from final payment only an amount not to exceed one hundred fifty per cent 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 reasons set forth in writing pursuant to this subsection.

L. Except as provided in subsection C of this section, the owner shall make final payment to the contractor within seven days after the date the billing or estimate for final payment is certified and approved. If the owner has declined to certify or approve a billing or estimate for final payment or a portion of a billing or estimate for final payment pursuant to subsection K of this section, when any reason as stated in the owner's written statement has been removed, the contractor may submit a billing or estimate for all or a portion of the withheld amounts of final payment pursuant to subsection K of this section. Unless otherwise agreed, the contractor may submit only one billing or estimate during each billing cycle.

M. Except as provided in subsection C of this section, on projects that require a federal agency's final certification or approval, the owner shall make payment in full on the construction contract within seven days after the federal agency's final certification or approval.

N. When a contractor completes all work under a portion of a construction contract for which the contract states a separate price, the contractor may timely submit a billing or estimate for final payment on that portion of the construction contract pursuant to subsection K of this section.

O. Payment shall not be required pursuant to this section unless the contractor provides the owner with a billing or estimate in accordance with the terms of the construction contract between the parties.

P. 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.

Q. If an owner or a third party designated by an owner as the person responsible for making progress payments, releasing retention or making final payment on a construction contract does not make a timely payment on amounts due pursuant to this section, the owner shall pay the contractor interest at the rate of one and one-half per cent a month or fraction of a month on the unpaid balance, or at a higher rate as the parties to the construction contract agree.

R. On the written request of a subcontractor, the owner shall notify the subcontractor within five days after the issuance of a progress payment to the contractor. On the written request of a subcontractor, the owner shall notify the subcontractor within five days after the owner releases retention or makes the final payment to the contractor on the construction contract. A subcontractor's request pursuant to this subsection shall remain in effect for the duration of the subcontractor's work on the project.

S. In any action or arbitration brought to collect payments or interest pursuant to this section, the successful party shall be awarded costs and attorney fees in a reasonable amount.

T. If the owner and contractor are a single entity, that entity shall pay its subcontractors or material suppliers within fourteen days after the billing or estimate is certified and approved unless the deadlines for certification and approval or for payment have been modified pursuant to subsection C or F of this section.

U. Notwithstanding anything to the contrary in this section, an owner may define "retention", "substantial completion" and "final completion" to have meanings different than those stated in section 32-1129, if:

1. The construction contract in a clear and conspicuous manner defines the terms.

2. The legend set forth in subsection W of this section or substantially similar language appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans.

3. The different meanings of "retention", "substantial completion" and "final completion" are set forth in the plans, including on bid plans and construction plans, and the legend required by paragraph 2 of this subsection designates the sheet number of the plans on which the different meanings of the terms can be found.

V. Notwithstanding anything to the contrary in this section, an owner may establish different timing and conditions for 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, if:

1. 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, or both, and for when such payments shall be due.

2. The legend set forth in subsection W of this section or substantially similar language appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans.

3. The different timing and conditions for 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 are set forth in the plans, including on bid plans and construction plans, and the legend required by paragraph 2 of this subsection designates the sheet number of the plans on which the different timing and conditions can be found.

W. The legend for making one or more of the modifications set forth in subsections U and V of this section shall be as follows:

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.

2. 32-1129.02. Performance and payment by contractor, subcontractor or material supplier; conditions; interest

A. 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.

B. If a subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the contractor shall pay to its subcontractors or material suppliers and each subcontractor shall pay to its subcontractors or material suppliers, within seven days of receipt by the contractor or subcontractor 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. Payment shall not be required pursuant to this subsection unless the subcontractor or material supplier provides to the contractor or subcontractor a billing or invoice for the work performed or material supplied in accordance with the terms of the construction contract between the parties. Each subcontractor or material supplier shall provide a waiver of any mechanic's or materialman's lien conditioned on payment for the work completed or material supplied. The contractor or subcontractor may require that such conditional waivers of lien be notarized. Any diversion by the contractor or subcontractor of payments received for work performed pursuant to a contract, or failure to reasonably account for the application or use of such payments, constitutes grounds for disciplinary action by the registrar of contractors. Violations of this section shall be grounds for suspension or revocation of a license or other disciplinary action by the registrar pursuant to section 32-1154, subsections B, C and D. The 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 the class or item of work as set forth in this section.

C. Nothing in this section prevents the contractor or subcontractor, at the time of application or certification to the owner or contractor, from withholding such application or certification to the owner or contractor for payment to the subcontractor or material supplier 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 construction 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 a contractor or another subcontractor or material supplier.

8. Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

9. The owner has withheld retention from the contractor, in which case the amount of the retention withholding by the contractor shall not exceed the actual amount of the retention retained by the owner pertaining to the subcontractor's work.

D. A contractor or subcontractor shall not withhold retention from a subcontractor in an amount greater than the actual amount of the retention retained by the owner pertaining to the work of the subcontractor.

E. If the contractor or subcontractor chooses to withhold the application or certification for all or a portion of a subcontractor's or material supplier's billing or estimates as permitted by subsection C of this section, the contractor or subcontractor must prepare and issue a written statement within fourteen days to the applicable subcontractors or material suppliers stating in reasonable detail the contractor's or subcontractor's reasons for withholding the application or certification from the owner or contractor.

F. If the owner issues a written statement pursuant to section 32-1129.01, subsection D, H or K stating that the owner declines to certify or approve all or a portion of the contractor's billing or estimate and if the amounts to be paid from that billing or estimate by the contractor to any subcontractors or material suppliers are affected by the owner's decision not to certify or approve, the contractor shall send a copy of that written statement within seven days after receipt to any affected subcontractors or material suppliers. If the contractor sends a copy of the owner's written statement to a subcontractor and if the amounts to be paid from that billing or estimate by a subcontractor to any of its subcontractors or material suppliers are affected by the owner's decision not to certify or approve, then the subcontractor shall send a copy of that written statement within seven days after receipt to any of its affected subcontractors or material suppliers.

G. If the owner issues a written statement pursuant to section 32-1129.01, subsection D, H or K stating that the owner declines to certify or approve a billing or estimate or a portion of a billing or estimate for defective construction work or materials not remedied and if the contractor as a result does not receive sufficient payment from the owner to pay subcontractors and material suppliers for work included in the contractor's billing or estimate, the contractor shall nevertheless pay any subcontractor or material supplier whose work was not the basis of the owner's withholding for defective construction work or materials not remedied within twenty-one days after payment would otherwise have been made by the owner under section 32-1129.01, subsection A. This subsection does not limit a subcontractor's rights to suspend performance under a construction contract or terminate a construction contract under section 32-1129.04, subsection D.

H. If a progress or final payment or release of retention to a subcontractor or material supplier is delayed by more than seven days after receipt of progress or final payment or release of retention by the contractor or subcontractor pursuant to this section, the contractor or subcontractor shall pay its subcontractor or material supplier interest, except for periods of time during which payment is withheld pursuant to subsection C of this section, beginning on the eighth day, at the rate of one and one-half per cent per month or a fraction of a month on the unpaid balance or at such higher rate as the parties agree.

I. Any licensed contractor, licensed subcontractor or material supplier who files a complaint with the registrar of contractors under this section shall be required to post a surety bond or cash deposit of five hundred dollars or one-half of the amount due, whichever is less, with the registrar to secure the payment of claims under this section. If the complaint is determined by the registrar to be without merit and frivolous, the registrar shall order the person who filed the complaint to pay one-half of the amount of the required surety bond or cash deposit to the respondent and one-half to the registrar for deposit into the state general fund. If no claim may be made under this section against the surety bond or cash deposit, the surety bond or cash deposit shall be returned to the complainant. The surety bond or cash deposit shall be in the name of the licensee or material supplier who files the complaint and shall be subject to claims by the registrar of contractors and the respondent licensee as provided in this section. The surety bond or cash deposit shall be conditioned on and provide for payment on the presentation of a certified copy of the order of the registrar and a certification by the complainant of nonpayment within thirty days after the order becomes final. The surety bond shall be executed by the complainant as principal with a corporation duly authorized to transact surety business in this state. Evidence of the surety bond shall be submitted to the registrar in a form acceptable to the registrar. The cash deposit shall be deposited, pursuant to sections 35-146 and 35-147, by the registrar in the contractors prompt pay complaint fund and shall be held for the payment of claims.

J. In any action or arbitration brought to collect payments or interest pursuant to this section, the successful party shall be awarded costs and attorney fees in a reasonable amount.

**B. Counties, Cities, Special Districts – ARS §34-221**

1. 34-221. Contract with successful bidder; payments to contractor; security; recovery of damages by contractor for delay; progress payments

A. The agent shall enter into a contract with the lowest responsible bidder whose proposal is satisfactory, except that in determining the lowest responsible bidder under this section, the board of supervisors may consider, for no more than five projects, the time of completion proposed by the bidder, the value over time of completed services and facilities and the value over time of interrupted services if the board determines that this procedure will serve the public interest by providing a substantial fiscal benefit or that the use of the traditional awarding of contracts is not practicable for meeting desired construction standards or delivery schedules and if the formula for considering the time of completion is specifically stated in the bidding information.

B. In determining the lowest responsible bidder for a horizontal construction project using the design-bid-build project delivery method, an agent may consider the time of completion proposed by the bidder if the agent determines that this procedure will serve the public interest by providing a substantial fiscal benefit or that the use of the traditional awarding of contracts is not practicable for meeting desired construction standards or delivery schedules and if the formula for considering the time of completion is specifically stated in the bidding information.

C. The terms of a contract entered into pursuant to subsection A shall include the following items:

1. A surety company bond or bonds as required under this article.

2. The owner by mutual agreement may make progress payments on contracts of less than ninety days and shall make monthly progress payments on all other contracts as provided for in this paragraph. Payment to the contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month under such contract may include payment for material and equipment, but to insure the proper performance of such contract, the owner shall retain ten per cent of the amount of each estimate until final completion and acceptance of all material, equipment and work covered by the contract. 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 prepares and issues a specific written finding setting forth those items in detail in the estimate of the work that are not approved for payment under the contract. The owner may withhold an amount from the progress payment sufficient to pay the expenses the owner reasonably expects to incur in correcting the deficiency set forth in the written finding. The progress payments shall be paid on or before fourteen days after the estimate of the work is certified and approved. The estimate of the work shall be deemed received by the owner on submission to any person designated by the owner for the submission, review or approval of the estimate of the work.

3. When the contract is fifty per cent completed, one-half of the amount retained including any securities substituted under paragraph 5 shall be paid to the contractor upon the contractor's request provided the contractor is making satisfactory progress on the contract and there is no specific cause or claim requiring a greater amount to be retained. After the contract is fifty per cent completed, no more than five per cent of the amount of any subsequent progress payments made under the contract may be retained providing the contractor is making satisfactory progress on the project, except that if at any time the owner determines satisfactory progress is not being made ten per cent retention shall be reinstated for all progress payments made under the contract subsequent to the determination.

4. Upon completion and acceptance of each separate building, public work or other division of the contract on which the price is stated separately in the contract, except as qualified in paragraph 5, payment may be made in full, including retained percentages thereon, less authorized deductions. In preparing estimates, the material and equipment delivered on the site to be incorporated in the job shall be taken into consideration in determining the estimated value by the architect or engineer.

5. Ten per cent of all estimates shall be retained by the agent as a guarantee for complete performance of the contract, to be paid to the contractor within sixty days after completion or filing notice of completion of the contract. Retention of payments by a purchasing agency longer than sixty days after final completion and acceptance requires a specific written finding by the purchasing agency of the reasons justifying the delay in payment. No purchasing agency may retain any monies after sixty days which are in excess of the amount necessary to pay the expenses the purchasing agency reasonably expects to incur in order to pay or discharge the expenses determined by the purchasing agency in the finding justifying the retention of monies. In lieu of the retention provided in this section, the agent, at the option of the contractor, shall accept as a substitute an assignment of time certificates of deposit of banks licensed by this state, securities of or guaranteed by the United States of America, securities of this state, securities of counties, municipalities and school districts within this state or shares of savings and loan associations authorized to transact business in this state, in an amount equal to ten per cent of all estimates which shall be retained by the agent as a guarantee for complete performance of the contract. In the event the agent accepts substitute security as described in this paragraph for the ten per cent retention, the contractor shall be entitled to receive all interest or income earned by such security as it accrues and all such security in lieu of retention shall be returned to the contractor by the agent within sixty days after final completion and acceptance of all material, equipment and work covered by the contract if the contractor has furnished the agent satisfactory receipts for all labor and material billed and waivers of liens from any and all persons holding claims against the work. In no event shall the agent accept a time certificate of deposit of a bank or shares of a savings and loan association in lieu of the retention specified unless accompanied by a signed and acknowledged waiver of the bank or savings and loan association of any right or power to setoff against either the agent or the contractor in relationship to the certificates or shares assigned.

6. In any instance where the agent has accepted substitute security as provided in paragraph 5, any subcontractor undertaking to perform any part of such public work shall be entitled to provide substitute security to the contractor upon terms and conditions

similar to those described in paragraph 5, and such security shall be in lieu of any retention under the subcontract.

D. No contract for construction may materially alter the rights of any contractor, subcontractor or material supplier to receive prompt and timely payment required to be included in the contract under subsection C.

E. The contract shall be signed by the agent and the contractor.

F. A contract for the procurement of construction shall include a provision which provides for negotiations between the agent and the contractor for the recovery of damages related to expenses incurred by the contractor for a delay for which the agent is responsible, which is unreasonable under the circumstances and which was not within the contemplation of the parties to the contract. This section shall not be construed to void any provision in the contract which requires notice of delays, provides for arbitration or other procedure for settlement or provides for liquidated damages.

G. The contractor shall pay to the contractor's subcontractors or material suppliers and each subcontractor shall pay to the subcontractor's subcontractor or material supplier, within seven days of receipt of each progress payment, unless otherwise agreed in writing by the parties, the respective amounts allowed the contractor or subcontractor on account of the work performed by subordinate subcontractors, to the extent of each such subcontractor's interest therein, except that 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. Such payments to subcontractors or material suppliers shall be based on payments received pursuant to this section. Any diversion by the contractor or subcontractor of payments received for work performed on a contract, or failure to reasonably account for the application or use of such payments, constitutes grounds for disciplinary action by the registrar of contractors. The subcontractor or material supplier shall notify the registrar of contractors and the purchasing agency in writing of any payment less than the amount or percentage approved for the class or item of work as set forth in this section.

H. A subcontractor may notify the purchasing agency in writing requesting that the subcontractor be notified by the purchasing agency in writing within five days from payment of each progress payment made to the contractor. The subcontractor's request remains in effect for the duration of the subcontractor's work on the project.

I. Nothing in this chapter prevents the contractor or subcontractor, at the time of application and certification to the owner or contractor, from withholding such application and certification to the owner or contractor for payment to the subcontractor or material supplier for unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, third party claims filed or reasonable evidence that a claim will be filed, failure of a subcontractor to make timely payments for labor, equipment and materials, damage to the contractor or another subcontractor, reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention that does not exceed the actual percentage retained by the owner.

J. If any payment to a contractor is delayed after the date due interest shall be paid at the rate of one per cent per month or fraction of a month on such unpaid balance as may be due.

K. If any periodic or final payment to a subcontractor is delayed by more than seven days after receipt of the periodic or final payment by the contractor or subcontractor, the contractor or subcontractor shall pay a subordinate subcontractor or material supplier interest, beginning on the eighth day, at the rate of one per cent per month or a fraction of a month on such unpaid balance as may be due.

## C. Arizona Department of Transportation – ARS §28-6924

### 1. 28-6924. Progress payments

A. The following apply to the department's highway construction projects awarded pursuant to section 28-6923, 28-7365 or 28-7366:

1. Progress payments may be made by the department to the contractor on the basis of a duly certified and approved estimate of the work performed during a preceding period of time. The progress payments shall be paid on or before fourteen days after the estimate of the work is certified and approved. The estimate of the work shall be deemed received by the department on submission to the person designated by the department for the submission, review or approval of the estimate of the work. An estimate of the work submitted under this section shall be deemed approved and certified after seven days from the date of submission unless before that time the department prepares and issues a specific written finding detailing those items in the estimate of the work that are not approved and certified under the contract. The department may withhold an amount from the progress payment sufficient to pay the expenses the department reasonably expects to incur in correcting the deficiency set forth in the written finding. On completion and acceptance of separate divisions of the contract on which the price is stated separately in the contract, payment may be made in full including retained percentages, less deductions, unless a substitute security has been provided.

2. The contractor shall pay to the contractor's subcontractors or material suppliers and each subcontractor shall pay to the subcontractor's subcontractors 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 contractor or subcontractor on account of the work performed by the contractor's or subcontractor's subcontractors or material suppliers, to the extent of each subcontractor's or material supplier's interest in the amount. These payments to subcontractors or material suppliers shall be based on payments received pursuant to this section. Any diversion by the contractor or subcontractor of payment received for work performed on a contract or failure to reasonably account for the application or use of the payments constitutes grounds for disciplinary action by the registrar of contractors. A subcontractor or material supplier shall notify the registrar of contractors and the department in writing of any payment less than the amount of percentage approved for the class or item of work as set forth in this section.

3. A subcontractor may notify the department in writing requesting that the subcontractor be notified by the department in writing within five days after payment of each progress payment made to the contractor. The subcontractor's request under this paragraph remains in effect for the duration of the subcontractor's work on the project.

4. If any payment to a contractor is delayed after the date due, interest shall be paid at the rate of one per cent per month or a fraction of the month on the unpaid balance.

5. If any periodic or final payment to a subcontractor or material supplier is delayed by more than seven days after receipt of the periodic or final payment by the contractor or

subcontractor, the contractor or subcontractor shall pay the subcontractor or material supplier interest, beginning on the eighth day, at the rate of one per cent per month or a fraction of a month on the unpaid balance.

B. A contract for construction shall not materially alter the rights of any contractor, subcontractor or material supplier to receive prompt and timely payment as provided under this section.

C. Nothing in this section prevents a contractor or subcontractor, at the time of application and certification to the department or contractor, from withholding the application and certification to the department or contractor for payment to the subcontractor or material supplier for unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, third party claims filed or reasonable evidence that a claim will be filed, failure of a subcontractor to make timely payments for labor, equipment and materials, damage to the contractor or another subcontractor, reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract amount or a reasonable amount for retention that does not exceed the annual percentage retained by the department.

D. This section creates no duty of the department to a subcontractor or material supplier other than the duty to notify pursuant to subsection A, paragraph 3 of this section and creates no cause of action in favor of a subcontractor or material supplier against this state, the department or any state employee or agent.

**D. Arizona State Procurement Code – ARS §41-2577**

1. 41-2577. **Progress payments**

A. Progress payments may be made by this state to the contractor on the basis of a duly certified and approved estimate of the work performed during a preceding period of time as set by rule, except that a percentage of all estimates shall be retained as provided in section 41-2576. The progress payments shall be paid on or before fourteen days after the estimate of the work is certified and approved. The estimate of the work shall be deemed received by the owner on submission to any person designated by the owner for the submission, review or approval of the estimate of the work. An estimate of the work submitted under this section shall be deemed approved and certified after seven days from the date of submission unless before that time the owner or owner's agent prepares and issues a specific written finding detailing those items in the estimate of the work that are not approved and certified under the contract. The owner may withhold an amount from the progress payment sufficient to pay the expenses the owner reasonably expects to incur in correcting the deficiency set forth in the written finding. On completion and acceptance of separate divisions of the contract on which the price is stated separately in the contract, payment may be made in full including retained percentages, less deductions, unless a substitute security has been provided pursuant to section 41-2576. 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.

B. The contractor shall pay to the contractor's subcontractors or material suppliers and each subcontractor shall pay to the subcontractor's subcontractor or material supplier, within seven days of receipt of each progress payment, unless otherwise agreed in writing by the parties, the respective amounts allowed the contractor or subcontractor on account of the work performed by the contractor's or subcontractor's subcontractors, to the extent of each such subcontractor's interest therein, except that 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. These payments to subcontractors or material suppliers shall be based on payments received pursuant to this section. Any diversion by the contractor or subcontractor of payments received for work performed on a contract, or failure to reasonably account for the application or use of such payments, constitutes grounds for disciplinary action by the registrar of contractors. The subcontractor or material supplier shall notify the registrar of contractors and the purchasing agency in writing of any payment less than the amount or percentage approved for the class or item of work as set forth in this section.

C. A subcontractor may notify the purchasing agency in writing requesting that the subcontractor be notified by the purchasing agency in writing within five days from payment of each progress payment made to the contractor. The subcontractor's request remains in effect for the duration of the subcontractor's work on the project.

D. Nothing in this chapter prevents the contractor or subcontractor, at the time of application and certification to the owner or contractor, from withholding such application and certification to the owner or contractor for payment to the subcontractor or material

supplier for unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, third party claims filed or reasonable evidence that a claim will be filed, failure of a subcontractor to make timely payments for labor, equipment and materials, damage to the contractor or another subcontractor, reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention that does not exceed the actual percentage retained by the owner.

E. If any payment to a contractor is delayed after the date due interest shall be paid at the rate of one per cent per month or a fraction of the month on such unpaid balance as may be due.

F. If any periodic or final payment to a subcontractor is delayed by more than seven days after receipt of periodic or final payment by the contractor or subcontractor, the contractor or subcontractor shall pay the contractor's or subcontractor's subcontractor or material supplier interest, beginning on the eighth day, at the rate of one per cent per calendar month or a fraction of a calendar month on such unpaid balance as may be due.

G. Notwithstanding anything to the contrary in this section, this section applies only to amounts payable in a construction services contract 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 or any other related services included in the contract.

**E. Arizona State University System – Az Board of Regents Policy §3-804(G & H).**

1. §3-804(G). Contract Payment Retention

1. Ten (10) percent of all construction contract payments shall be retained by a university as insurance of proper performance of a contract or, at the option of the contractor, a substitute security may be provided by the contractor in an authorized form pursuant to a policy adopted by the university. When the contract is 50 percent completed, one-half (1/2) of the amount retained shall be paid to the contractor by the university provided that the university has determined that the contractor is making satisfactory progress on the contract and there is no specific cause or claim requiring a greater amount to be retained. After the contract is 50 percent completed, no more than 5 percent of the amount of any subsequent progress payments made under the contract shall be retained by the university provided that the university has determined that the contractor is making satisfactory progress on the project, but if at any time the university determines satisfactory progress is not being made, then 10 percent retention shall be reinstated for all progress payments made under the contract subsequent to that determination. The contractor is entitled to all interest from any substitute security. Any retention shall be paid or substitute security shall be returned to the contractor within sixty (60) days after final completion and acceptance of work under the contract. Retention of payments by a university longer than sixty (60) days after final completion and acceptance requires a specific written finding by the university of the reasons justifying the delay in payment. A university may not retain any monies after sixty (60) days which are in excess of the amount necessary to pay the expenses the university reasonably expects to incur in order to pay or discharge the expenses determined by the finding justifying the retention of monies. A university shall not accept any substitute security unless accompanied by a signed and acknowledged waiver of any right or power of the obligor to set off any claim against either the university or the contractor in relationship to the security assigned. In any instance in which the university accepts substitute security as provided in ABOR Policy 3-804G (Professional Services, Construction and Construction Services, Contract Payment Retention), any subcontractor undertaking to perform any part of the contract is entitled to provide such security to the contractor.

2. Notwithstanding anything to the contrary in ABOR Policy 3-804G (Professional Services Construction and Construction Services, Contract Payment Retention) or in any other ABOR policy or in any other law:

a. There shall be no retention for Job-order-contracting construction services contracts and the university may elect to have no retention for construction-manager at-risk and design-build construction services

b. ABOR Policy 3-804G (Professional Services, Construction and Construction Services, Contract Payment Retention) applies only to amounts payable in a construction services contract 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 any other related services included in the contract.

## 2. §3-804(H). Progress Payment

1. Progress payments may be made by a university to the contractor on a monthly basis and within thirty (30) days after receipt of a certified and approved estimate of the work performed during a preceding period of time, except that a percentage of all estimates shall be retained as and to the extent provided in ABOR Policy 3-804G (Professional Services Construction and Construction Services, Contract Payment Retention) above. The progress payments shall be paid on or before fourteen (14) days after the estimate of the work is certified and approved. The estimate of the work shall be deemed received by the university on submission to any person designated by the university for the submission, review and approval of the estimate of the work. An estimate of the work submitted under this paragraph shall be deemed approved and certified after seven (7) days from the date of submission unless before that time the university or university's agent prepares and issues a specific written finding detailing those items in the estimate of the work that are not approved and certified under the contract. The owner may withhold an amount from the progress payment sufficient to pay the expenses the owner reasonably expects to incur in correcting the deficiency set forth in the written finding. On completion and acceptance of separate divisions of the contract on which the price is stated separately in the contract, payment may be made in full including retained percentages, less deductions, unless a substitute security has been provided pursuant to ABOR Policy 3-804G (Professional Services, Construction and Construction Services, Contract Payment Retention) above. 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.

2. The contractor shall pay to the contractor's subcontractors and material suppliers and each subcontractor shall pay to the subcontractor's subcontractor or material supplier, within seven (7) days of receipt of each progress payment, unless otherwise agreed in writing by the parties, the respective amounts allowed the contractor or subcontractor on account of the work performed by the contractor's or subcontractor's subcontractors, to the extent of each such subcontractor's interest therein, except that 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. These payments to subcontractors or material suppliers shall be based on payments received pursuant to this section. The subcontractor or material supplier shall notify the Registrar of Contractors and the university in writing of any payment less than the amount or percentage approved for the class or item of work as set forth in ABOR Policy 3-804 (Professional Services, Construction and Construction Services).

3. A subcontractor may notify the university in writing requesting that the subcontractor be notified by the university in writing within five (5) days from the payment of each progress payment made to the contractor. The subcontractor's request remains in effect for the duration of the subcontractor's work on the project.

4. Nothing in the university procurement code prevents the contractor or subcontractor, at the time of application and certification to the university or contractor, from withholding such application and certification to the university or contractor for payment to the subcontractor or materials supplier for unsatisfactory job progress, defective construction

work or materials not remedied, disputed work or materials, third party claims filed or reasonable evidence that a claim will be filed, failure of a subcontractor to make timely payments for labor, equipment and materials, damage to the contractor or another subcontractor, reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum, or a reasonable amount for retention that does not exceed the actual percentage retained by the owner.

5. If any payment to a contractor is delayed after the date due interest shall be paid at the rate of 1 percent per month or a fraction of the month on such unpaid balance as may be due.

6. If any periodic or final payment to a subcontractor is delayed by more than seven (7) days after receipt of periodic or final payment by the contractor or subcontractor, the contractor or subcontractor shall pay the contractor's or subcontractor's subcontractor or material supplier interest, beginning on the eighth (8 TH ) day, at the rate of 1 percent per calendar month or a fraction of a calendar month on such unpaid balance as may be due.

7. Notwithstanding anything to the contrary in ABOR Policy 3-804H (Professional Services, Construction and Construction Services, Progress Payment) ABOR 3-804H applies only to amounts payable in a construction services contract 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 or any other related services included in the contract. Summary of Provisions

**F. School District Procurement Code – Arizona Administrative Code R7-2-1114, R7-2-1115**

1. R7-2-1114. Contract Payment Retention and Substitute Security

A. Contract payment retention. Ten percent of all construction contract payments shall be retained by the school district as insurance of proper performance of the contract or, at the option of the contractor, a substitute security may be provided by the contractor pursuant to this Section. The contractor is entitled to all interest from any such substitute security. When the contract is 50% completed, 1/2 of the amount retained or securities substituted pursuant to this Section shall be paid to the contractor upon the contractor's request provided the contractor is making satisfactory progress on the contract and there is no specific cause or claim requiring a greater amount to be retained. After the contract is 50% completed, no more than 5% of the amount of any subsequent progress payments made under the contract shall be retained providing the contractor is making satisfactory progress on the project, except if at any time the governing board determines satisfactory progress is not being made, 10% retention shall be reinstated for all progress payments made under the contract subsequent to the determination.

B. The form of substitute security. The form of substitute security is limited to the following:

1. An assignment of time certificates of deposit by financial institutions licensed by this state;
2. Share certificate of a savings and loan institution or credit union authorized to transact business in this state; or
3. Security issued or guaranteed as to principal and interest by:
  - a. The United States;
  - b. The state;
  - c. Counties, municipalities and school districts within this state.

C. Conditions for use of substitute security.

1. A contractor may submit substitute security to replace contract payment retention if:
  - a. The use of substitute security is requested of the school district or designee for work performed under the contract. The contractor shall have the option of submitting the substitute security:

- i. Prior to each progress payment in an amount of no less than 10% of each progress payment; or
  - ii. Once, prior to the first progress payment in an amount no less than 10% of the total contract amount.
- b. The interest earned on such security shall accrue to the benefit of the contractor, but shall be retained until the school district has approved completion and acceptance of all work to be performed under the contract;
  - c. The term of such security shall not mature until after the estimated contract completion date; and
  - d. The security shall mature no later than one year after the estimated contract completion date.
2. The substitute security shall not be released without written approval by the school district.
  3. A contractor may submit a single substitute security for more than one project provided that:
    - a. The amount of such security is sufficient to cover the aggregate retention amount;
    - b. The school district determines that such single substitute security is advantageous to the school district; and
    - c. Such security complies with the requirements of subsection (C)(1) of this Section.
- D. Any retention shall be paid or substitute security shall be returned to the contractor within 60 days after final completion and acceptance of work under the contract. Retention of payments by a school district longer than 60 days after final completion and acceptance requires a specific written finding by the governing board of the reasons justifying the delay in payment. No school district may retain any monies after 60 days which are in excess of the amount necessary to pay the expenses the governing board reasonably expects to incur in order to pay or discharge the expenses determined in the finding justifying the retention of monies.
  - E. The school district shall not accept any substitute security unless accompanied by a signed and acknowledged waiver of any right or power of the obligor to set off any claim against either the school district or the contractor in relationship to the security assigned. In any instance in which the school district accepts substitute security as provided in this Section, any subcontractor undertaking to perform any part of the contract is entitled to provide such security to the contractor.

## 2. R7-2-1115. Progress Payments

A. Progress payments may be made by the school district to the contractor on the basis of a duly certified and approved estimate of the work performed during the preceding month if the contractor agrees to adhere to the provisions of A.R.S. § 41-2577(B), (D), and (F). Payment shall be made within 30 days after receipt of the estimate of the work performed, except that a percentage of all estimates shall be retained as provided in R7-2-1114. The estimate of the work shall be deemed received by the school district on submission of the estimate of the work to the school district or a person designated by the school district for the submission, review or approval of the estimate of the work. An estimate of the work submitted under this Section shall be considered approved and certified after seven days from the date of submission unless before that time the school district or designee prepares and issues a specific written finding detailing those items in the estimate of the work that are not approved and certified under the contract. The school district may withhold an amount from the progress payment sufficient to pay the expenses the school district reasonably expects to incur in correcting the deficiency set forth in the written finding. 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. On completion and acceptance of separate divisions of the contract on which the price is stated separately in the contract, payment may be made in full including retained percentages, less deductions, unless a substitute security has been provided pursuant to R7-2-1114.

B. A subcontractor may notify the school district, in writing, requesting that the subcontractor be notified by the school district in writing within five working days from payment of each progress payment made to the contractor. The subcontractor's request remains in effect for the duration of the subcontractor's work on the project.

C. If any payment to a contractor is delayed after the date due, interest shall be paid at the rate of 1% per month, or a fraction of a month, on such unpaid balance as may be due.