Credit Management
Contract Terms
www.FullertonLaw.Com

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Construction Law Survival Manual

By James D. Fullerton
Construction Law Survival Manual

● Credit Management
  ● Fair Credit Reporting Act
  ● Equal Credit Opportunity Act

● Contracts and Preserving Rights
  - Drafting Credit Applications, Quotes, Guarantees, Joint Check Agreements
  - Reviewing and Revising Contracts

● UCC Sale of Goods

● UCC Security Agreements

● Default & Termination
• Mechanic’s Lien General Principles
• Mechanic’s Liens in Virginia, Maryland, Pennsylvania and District of Columbia
• Payment Bonds
• Trust Fund Laws and Agreements
• Enforcement of Judgments
• Bankruptcy Primer for Creditors
  - What to do when your debtor files bankruptcy
  - Defending preference claims
Construction Law Survival Manual is available

in NACM Bookstore

in NACM Reference Library

At www.FullertonLaw.Com
Contract terms will not prevent all problems.

If you do business with the wrong people, you will have problems.

If you supply the wrong project, you will have problems. (Construction)
Do Contract Terms Matter?

- Contract terms usually do not matter.
- Does this mean contract terms are unimportant?

- Contract terms are about:
  - Leverage
  - Cost
  - Risk
Attorney’s Fees and Service Charges

Customer agrees that any amount not paid within 30 days of invoice date will carry interest at the rate of 1 1/2% per month, both before and after judgment, and further agrees to pay all costs incurred in collection, including attorney’s fees in the amount of 1/3 of the total balance due if this account is placed with an attorney for collection, whether suit is filed or not.

- Leverage
- Cost
- Risk
Contract Forms

- Proposals
- Quotes
- Confirmations
- Purchase orders
CREDIT AGREEMENT

Customer Name: ____________________________ State of Origin: ____________________________
Corporation: __ Partnership: ___ Sole Proprietorship: ___ Limited Liability Co.: ______
Street Address: ____________________________ P.O. Box: ____________________________
City: ____________________________ State: ______ Zip: ______ Telephone: __________ Fax: ______
Type of Business: ____________________________ No. of Years in Business: ____________
Name of Predecessor Businesses: ____________________________ Person to Contact Regarding Invoices: ____________ Phone: __________
Parent Company: ____________________________ Street Address: ____________________________ P.O. Box: ____________________________
City: ____________________________ State: ______ Zip: ______ Telephone: __________ Fax: ______
Federal ID#: ____________________________ Sales Tax Exempt #: ____________________________ (Attach copy of form)

INFORMATION ON PRINCIPALS defined as:
For Proprietorship or Partnership: List all Owners and/or Partners.
For Corporation or Limited Liability Company: List all Officers, Directors, Members and Majority Stockholders.

<table>
<thead>
<tr>
<th>Name</th>
<th>Home Address</th>
<th>Phone</th>
<th>Social Sec. No.</th>
<th>Position</th>
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</tbody>
</table>

Have any of the companies or principals listed above ever been a debtor in a bankruptcy proceeding? ____________________________
Has any judgment ever been entered against any of the companies or principals listed above? ____________________________
Are there any legal actions or arbitration pending against any of the companies or principals listed above? ____________________________

CREDIT REFERENCES (Attach separate schedule if necessary)

Primary Bank: ____________________________ Account #: ____________________________
Name: ____________________________ Phone: ____________________________
Address: ____________________________ Contact Name: ____________________________

Other Bank: ____________________________ Account #: ____________________________
Name: ____________________________ Phone: ____________________________
Address: ____________________________ Contact Name: ____________________________

TRADE REFERENCES

Name: ____________________________ Account #: ____________________________
Address: ____________________________ Phone: ____________________________
Contact Name: ____________________________

Name: ____________________________ Account #: ____________________________
Address: ____________________________ Phone: ____________________________
Contact Name: ____________________________

Name: ____________________________ Account #: ____________________________
Address: ____________________________ Phone: ____________________________
Contact Name: ____________________________

Please attach separate financial statement of assets and liabilities.
TERMS AND CONDITIONS

1. I/we certify that this information is correct, complete, and that we are able to pay within thirty days of each invoice date. I/we further understand that Seller will rely on this information for the extension of credit. I/we authorize Seller from time to time to obtain Business and Consumer Credit Reports on Customer or any principals listed above or to obtain credit and funding information from any other source. This is not an agreement by Seller to lend money; it is an agreement by Customer for the benefit of Seller if Seller determines to extend credit. Seller may change credit limits or other credit terms at any time, in its sole discretion. No modifications may be made otherwise to this Agreement, except in writing signed by Seller.

2. Customer agrees that any amount not paid within 30 days of invoice date will carry interest at the rate of 1 1/2% per month, both before and after judgment, and further agrees to pay all costs incurred in collection, including attorney’s fees in the amount of 1/3 of the total balance due if this account is placed with an attorney for collection, whether suit is filed or not. Customer expressly agrees to submit to personal jurisdiction in Virginia and agrees that the forum for any litigation pursuant to this Agreement or any other contract between Seller and Customer, whether Seller or Customer brings suit, shall be the County of Fairfax, Virginia. This Agreement shall be governed by and construed in accordance with the laws of Virginia.

3. Customer further agrees to pay all amounts due under this Agreement until Seller has received written notice closing this account, mailed U.S. Mail Certified Return Receipt Requested. In the event other entities or individuals order or use the labor or materials pursuant to this Agreement, it is agreed that both the Customer and each other legal entity or individuals shall be obligated for all amounts due under this Agreement.

4. All mechanic’s lien, payment bond or similar waivers or restrictive endorsements on checks shall be effective only to the total dollar amount of payments actually received without any bankruptcy filing for ninety days thereafter. Customer agrees that Seller retains its mechanic’s lien, payment bond or other legal rights for unpaid deliveries, regardless of what other waiver documents may imply otherwise. Customer further agrees that Seller has the right to determine, in its sole discretion, how to apply payments and which invoices to pay with all payments received on this account, despite any advice to the contrary.

5. Customer agrees that all funds owed to Customer from anyone or received by Customer to the extent those funds result from the labor or materials supplied by Seller shall be held in trust for the betterment of Seller (Trust Funds). Customer may commingle Trust Funds, but agrees it has no interest in Trust Funds held by anyone and to promptly account for and pay to Seller all such Trust Funds.

6. Seller agrees to replace or, at Seller’s option, repair any defective goods within a reasonable time. Buyer’s remedies for any delay or any defect in the materials are subject to and limited by any limitations contained in the manufacturer’s terms and conditions to Seller. Further, Buyer’s sole and exclusive remedy and Seller’s limit of liability for any and all loss or damage resulting from defective goods shall be for the purchase price of the particular delivery and materials with respect to which loss or damage is claimed, plus any transportation charges actually paid by the Buyer. In no event shall Seller be liable for any damage due to delay of any type, our consequential, special or punitive damages. THE FOREGOING WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESSED OR IMPLIED, INCLUDING THE WARRANTY OF TITLE, AGAINST LIENS, INFRINGEMENT, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

7. Buyer shall make a careful inspection at the time of delivery. Buyer’s failure to give written notice specifying any claim within ten (10) days of delivery shall constitute an unqualified acceptance of the labor and material delivered and a waiver of all claims. Seller will not be liable for any damage, warranty or remedy and back charges will not be accepted without prior notification, an opportunity to view and repair, replace or otherwise cure, and approval by Seller. No returned product will be accepted without prior approval. A restocking charge of 25% will apply on products approved for refund. Seller may stop the manufacture or supply of any labor or materials when it, in its sole discretion, determines that Buyer is in breach of this Agreement or any other contract with Seller, or Seller has insolvency with respect to funding or creditworthiness, until payment is made and any dispute or insolvency has been resolved.

Applicant(s):

By: __________________________  By: __________________________

Name Printed: __________________ Name Printed: __________________

Title or capacity: __________________ Title or capacity: __________________

Date: ____________  Date: ____________

CREDIT APPLICATION NOT ACCEPTED WITHOUT APPROVAL OF SELLER’S CREDIT DEPARTMENT
SUPPLIER QUOTE/ORDER ACKNOWLEDGMENT

<table>
<thead>
<tr>
<th>PROPOSAL SUBMITTED TO</th>
<th>JOB NAME</th>
<th>OWNER</th>
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<tr>
<th>STREET</th>
<th>JOB LOCATION</th>
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<table>
<thead>
<tr>
<th>CITY, STATE AND ZIP CODE</th>
<th>ARCHITECT</th>
<th>DATE OF PLANS</th>
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</thead>
</table>

<table>
<thead>
<tr>
<th>PHONE</th>
<th>DATE</th>
<th>GENERAL CONTRACTOR</th>
<th>JOB PHONE</th>
</tr>
</thead>
</table>

Seller proposes to supply the following OR Seller acknowledges the following order:

<table>
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<tr>
<th>Project shall start by:</th>
<th>Project shall be complete by:</th>
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Exclusions:

Units of:

To be Delivered each:

We Propose hereby to furnish the described for the sum of:

<table>
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<tr>
<th>Price</th>
<th>Dollars ($)</th>
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</table>

<table>
<thead>
<tr>
<th>Payment Terms</th>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>To be returned with this proposal to Seller</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>To be paid upon storage of materials by Seller</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>To be paid upon completion of each unit</td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>To be paid monthly for work in place</td>
<td>$</td>
<td></td>
</tr>
</tbody>
</table>

Authorized Signature By: __________________________ Date: __________

The undersigned authorized signature agrees to all terms and conditions on the reverse side.

Acceptance of Proposal:

Signature: __________________________ Name: __________________________ Date: __________

Date of Acceptance: __________________________
1. Acceptance is limited to terms of this Quote. Seller objects to any different or additional terms contained in any purchase order, offer or confirmation sent or to be sent by Buyer, which are expressly rejected. The price quoted is firm only if an executed copy of this Quote is received by Seller at its office within 30 days of the date of this Quote. All terms of this Quote shall be incorporated into and shall become a part of any further or additional agreement regarding these goods.

2. The full price is due and payable on each unit when Seller is ready for delivery of each unit of the described materials. Buyer agrees to pay a reasonable storage fee if Seller stores materials after ready for delivery. Quoted price is based upon representations made by Buyer to Seller concerning the use and the work schedule. Buyer agrees that Seller shall be compensated at Seller’s normal rates for any different or additional work or schedule requested verbally or in writing by Buyer. Quoted price assumes a clean and unoccupied delivery or installation site and unencumbered access from a reasonable unloading location.

3. Seller agrees to replace or, at Seller’s option, repair any defective goods within a reasonable time. Buyer’s remedies for any delay or defect in the materials are subject to and limited by any limitations contained in the manufacturer’s terms and conditions to Seller. Further, Buyer’s sole and exclusive remedy and Seller’s limit of liability for any and all loss or damage resulting from defective goods shall be for the purchase price of the particular delivery and materials with respect to which loss or damage is claimed, plus any transportation charges actually paid by the Buyer. In no event shall Seller be liable for any damage due to delay of any type, nor consequential, special or punitive damages. THE FOREGOING WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING THE WARRANTY OF TITLE, AGAINST LIENS, INFRINGEMENT, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

4. Buyer shall make a careful inspection at the time of delivery. Buyer’s failure to give written notice specifying any claim within ten (10) days of delivery shall constitute an unqualified acceptance of the labor and material delivered and a waiver of all claims. Seller will not be liable for any damage, warranty or remedy and back charges will not be accepted without prior written consent from Seller.

5. Buyer shall indemnify and hold harmless the Seller and their agents and employees from and against all claims, damages, losses and expenses, including attorney’s fees, arising out of this agreement or the delivered supply of labor or materials, provided that any such claim is attributable to bodily injury, sickness, disease or death or injury to or destruction of tangible property, including the loss of use resulting therefrom, caused in whole or in part by any negligent act or omission of Buyer, any subcontractor, employee, agent, or anyone else directly or indirectly employed by any of them or by any third person, regardless of whether or not it has been caused in part by a party indemnified.

6. Buyer agrees to pay a late charge of $20.00, plus 1 1/2% interest per month on any amount not paid when due, both before and after judgment, and further agrees to pay attorney’s fees equal to 33% of any balance due on default, whether or not suit is filed. Buyer further agrees to submit to personal jurisdiction in Virginia and that the forum for any litigation pursuant to any agreement with Seller shall be the County of Fairfax, Virginia, whether suit is brought by Buyer or Seller.

7. I/we authorize Seller from time to time to obtain Business and Consumer Credit Reports on Buyer or any principals of Buyer or to obtain credit and funding information from any other source. Seller shall have no obligation to begin or continue performance until adequate credit and funding information is provided, at any time on request of Seller. Seller may stop the manufacture or supply of any labor or materials when it, in its sole discretion, determines that Buyer is in breach of this Agreement or any other contract with Seller, or Seller has insolvency with respect to funding or creditworthiness, until payment is made and any dispute or insolvency has been resolved.

8. Buyer agrees that all funds owed to Buyer from or received by Buyer to the extent those funds result from the labor or materials supplied by Seller shall be held in trust for the benefit of Seller (Trust Funds). Buyer may commingle Trust Funds, but agrees it has no interest in Trust Funds held by anyone and to promptly account for and pay to Seller all such Trust Funds. Buyer further irrevocably assigns to Seller any rights it has to Trust Funds to the extent that sums are justly due to Seller under this Agreement. All mechanic’s liens, payment bond or similar waivers or restrictive endorsements on checks shall be effective only to the total dollar amount of payments actually received without any bankruptcy filing for ninety days thereafter. Customer agrees that Seller retains its mechanic’s lien, payment bond or other legal rights for unpaid deliveries, regardless of what other waiver documents may imply otherwise. Customer further agrees that Seller has the right to determine, in its sole discretion, how to apply payments and which invoices to pay with all payments received on this account, despite any advice to the contrary.

9. The undersigned hereby individually guarantee Buyer’s performance of this Agreement.
“Battle of the Forms”

- Proposals
- Quotes
- Confirmations
- Purchase orders

You can control contract terms, even if Customer never reads or signs your form.
Contract Forms

Have forms available

jfullerton@FullertonLaw.com
Forum Selection Clause

Customer expressly agrees to submit to personal jurisdiction in Virginia and agrees that the forum for any litigation pursuant to this Agreement or any other contract between Seller and Customer, whether Seller or Customer brings suit, shall be the County of Fairfax, Virginia. This Agreement shall be governed by and construed in accordance with the laws of Virginia.
Authorization to Run Credit Checks and Verify Funding

I/we authorize Seller from time to time to obtain Business and Consumer Credit Reports on Buyer or any principals of Buyer or to obtain credit and funding information from any other source.
Breach, Insecurity and Adequate Assurance

- Seller shall have no obligation to begin or continue performance until adequate credit and funding information is provided on request of Seller.

- Seller may stop the manufacture or supply of any labor or materials when payments stop pursuant to this agreement until payment is made or any other dispute has been resolved.
Termination of Agreement
Changes in Borrower
Entity

- Customer further agrees to pay all amounts due under this Agreement until Seller has received written notice closing this account, mailed U.S. Mail Certified Return Receipt Requested.

- In the event other entities or individuals order or use the labor or materials pursuant to this Agreement, it is agreed that both the Customer and such other legal entities or individuals shall be obligated for all amounts due under this Agreement.
GUARANTY

Seller/Lender Company Name: ____________________________
Address: ____________________________

Phone Number/Contact Name: ____________________________

In consideration for, and as an inducement to ____________________________ (hereinafter “Seller”) to extend credit to ____________________________ (hereinafter “Debtor”), the undersigned hereby guarantees, jointly and severally with each other and the Debtor, the full performance and observance of all terms, covenants, conditions, and agreements of the Debtor in any Credit Agreement or any other Contract with Seller. The undersigned waives any notice of non-payment, non-performance, or proof of notice or demand and any other defense which may otherwise be available under the principles of guarantee or surety law which would operate to impair or diminish the liability under this Guaranty and further agrees that Seller may proceed against the undersigned separately or jointly before, after or simultaneously with proceeding against Debtor.

This Guaranty is unconditional and shall remain in full force and effect on any change order, renewal, extension, amendment, assignment, sublease, transfer, or other modification of said Credit Agreement or Contract, whether or not Guarantors have knowledge thereof. This Guaranty shall remain in full force and effect with respect to all labor and materials supplied under the account of Debtor before or until Seller has received a written notice closing Debtor’s account or terminating this Guaranty mailed U.S. certified, return receipt requested, no matter what person or entity ordered or used the labor and material supplied on Debtor’s account regardless of any change in the legal structure of Debtor or the existence of entities or individuals legally distinct from Debtor using or benefiting from the labor and materials supplied.

If Seller takes any action to enforce or compel compliance with the terms of this Guaranty or any other Contract with Seller, the Guarantors shall be obligated to pay all costs incurred by Seller and attorney’s fees in the amount of 1/3 of the balance due. Guarantors expressly agree to submit to personal jurisdiction Virginia and agree that the forum for any litigation pursuant to this Guaranty or any other contract between Seller and Debtor shall be the County of Fairfax, Virginia, whether suit is brought by Seller, Debtor or Guarantor. This Guaranty shall be governed by and construed in accordance with the laws of Virginia.

The undersigned agree that that their liability hereunder is joint and several, with each other and with the Debtor, and further acknowledge that any individual Guarantor had the option of applying for individual credit by submitting an individual financial statement for evaluation. The undersigned have waived the right to apply for individual credit, have opted to supply multiple Guarantors and hereby waive any rights they may have under the Equal Credit Opportunity Act to void this Guaranty. All obligations and liabilities of Guarantors pursuant to this Guaranty shall be binding upon their heirs, personal representatives, and assigns. The undersigned understands that Seller may refuse to extend credit at any time and from time to time, that such refusal shall not affect the obligations hereunder and that Seller may obtain consumer credit reports and other credit information on the undersigned from time to time.

Debtors and Guarantors agree that this Guaranty is provided not in payment of, but as additional security for and/or evidence of obligations due to the Seller under existing Contracts and Credit Agreements with Debtor and that this Guaranty is not accepted in lieu of Seller’s mechanic’s lien, payment bond or other legal rights.

IN WITNESS WHEREOF, we have signed and sealed this Guaranty this ___ day of __________, 20__

GUARANTORS:

__________________________
Name (Printed):
Address:

__________________________
Name (Printed):
Address:
Notice and Opportunity to Cure

- Buyer shall make a careful inspection at the time of delivery.
- Buyer’s failure to give written notice specifying any claim within ten (10) days of delivery shall constitute an unqualified acceptance of the labor and material delivered and a waiver of all claims.
- Seller will not be liable for any damage, warranty or remedy and back charges will not be accepted without prior notification, an opportunity to view and repair, replace or otherwise cure, and approval by Seller.
Express warranty

Brochures

Salesmen
Implied Warranty of Merchantability

This means that the goods:

- Would pass without objection in the trade under the contract description
- Are of fair, average quality within the description
- Are fit for the ordinary purposes for which such goods are used
- Are of even kind, quality and quantity within each unit or lot and among all units or lots involved
- Are adequately packaged and labeled
- Conform to the promises or affirmations of fact made on the container or label
Implied Warranty of Fitness for a Particular Purpose

- If the seller has reason to know the purpose for which the materials will be used and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods
Exclusion of Express and Implied Warranties

THE FOREGOING WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING THE WARRANTY OF TITLE, AGAINST LIENS, INFRINGEMENT, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.
Limitation of Liability

UCC Section 2-719. Contractual modification or limitation of remedy.

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this title, and may limit or alter the measure of damages recoverable under this title, as by \textit{limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts}; and

(b) resort to a remedy as provided is optional unless the remedy is \textit{expressly agreed to be exclusive, in which case it is the sole remedy}.

(2) Where circumstances cause an exclusive or limited remedy to \textit{fail of its essential purpose}, remedy may be had as provided in this act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.
Limitation of Liability

Supplier agrees to replace or, at Supplier’s option, repair any defective labor or materials within a reasonable time. Buyer’s remedies for any delay or any defect in any materials are subject to and limited by any limitations contained in the manufacturer’s terms and conditions to Supplier. Further, Buyer’s sole and exclusive remedy and Supplier’s limit of liability for any and all loss or damage resulting from defective labor or materials shall be for the purchase price of the particular delivery of labor and materials with respect to which loss or damage is claimed. In no event shall Supplier be liable for any damage due to delay of any type, nor consequential, special or punitive damages. THE FOREGOING WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING THE WARRANTY OF TITLE, AGAINST LIENS, INFRINGEMENT, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.
Trust Fund Statute in Construction Industry
Trust Fund Statute
in Construction Industry

Owner

Trustee------- General Contractor

Trustee--------Subcontractor

Supplier
Trust Fund

- Tracing issues
- Will beat secured creditors
- Will beat bankruptcy
- Preference defense
Buyer agrees that all funds owed to Buyer from anyone or received by Buyer relating to materials supplied by Seller shall be held in trust for the benefit of Seller, to the extent that sums are justly due to Seller under this Agreement. Buyer may commingle funds, but agrees it has no interest in Trust Funds held by anyone and to promptly account for and pay to Seller all such Trust Funds.
Reviewing Contracts Received from Others

- Business realities
  - Customer will insist on their form
Incorporate Proposal or Quote

Provision in your Quote:

It is agreed that this proposal shall be incorporated into and shall become a part of any further or additional agreement made for this job.

Add provision to reviewed contract:

Supplier’s proposal dated the __ day of ____ 200__ is incorporated herein by reference.
www.FullertonLaw.Com

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703-818-2600

Construction Law Survival Manual in NACM Bookstore
And at
JFullerton@FullertonLaw.com