

CREDIT MANAGEMENT CONTRACT TERMS



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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

A decorative graphic consisting of six circles arranged in two rows of three. The top row has a solid light purple circle on the left, a hollow light purple circle in the middle, and a solid light purple circle on the right. The bottom row has a solid light purple circle on the left, a hollow light purple circle in the middle, and a solid light purple circle on the right.

- Proposals
- Quotes
- Confirmations
- Purchase orders

Seller/Lender Company Name:

Address:

Phone Number/Contact Name:

CREDIT AGREEMENT

Customer Name: _____
 ___ Corporation ___ Partnership ___ Sole Proprietorship ___ Limited Liability Co. State of Origin: _____
 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.

Name	Home Address	Phone	Social Sec. No.	Position
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

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:

Name: _____ Account #: _____ Phone: _____
 Address: _____ Contact Name: _____

Other Bank:

Name: _____ Account #: _____ Phone: _____
 Address: _____ Contact Name: _____

TRADE REFERENCES

Name: _____ Account #: _____ Phone: _____
 Address: _____ Contact Name: _____

Name: _____ Account #: _____ Phone: _____
 Address: _____ Contact Name: _____

Name: _____ Account #: _____ Phone: _____
 Address: _____ 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 a 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 such other legal entities 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 benefit 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, 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.

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 insecurity with respect to funding or creditworthiness, until payment is made and any dispute or insecurity has been resolved.

Applicant(s):

By: _____
Name Printed: _____
Title or capacity: _____
Date: _____

By: _____
Name Printed: _____
Title or capacity: _____
Date: _____

**CREDIT APPLICATION NOT ACCEPTED WITHOUT APPROVAL
OF SELLER'S CREDIT DEPARTMENT**

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 work 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 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, 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 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.
 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 described 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 insecurity with respect to funding or creditworthiness, until payment is made and any dispute or insecurity has been resolved.
 8. Buyer agrees that all funds owed to Buyer from anyone 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 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.
 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 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 and 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 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 effect 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): _____ Name (Printed): _____
Address: _____ 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.

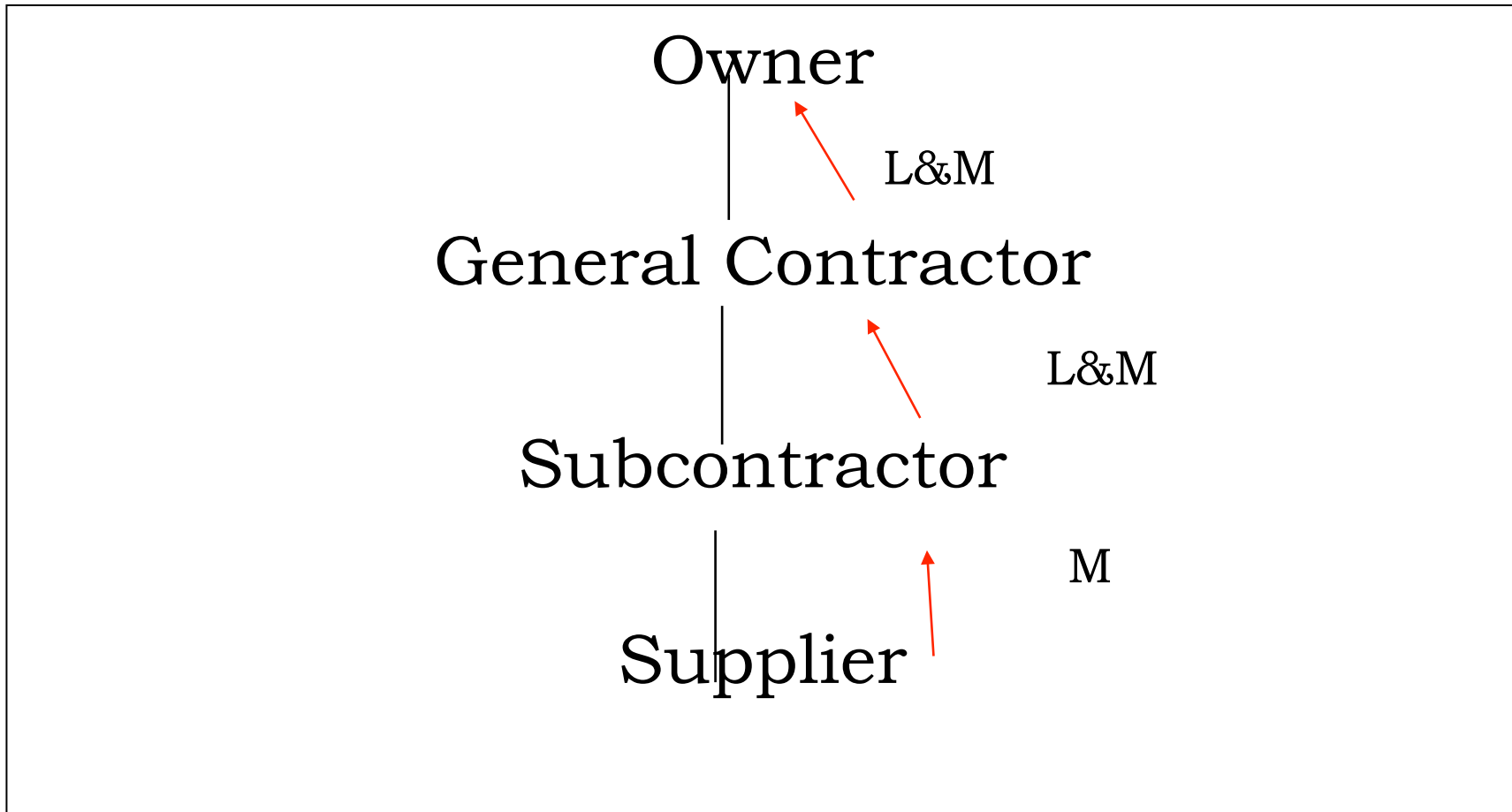
Contractual modification or limitation of remedy.

- (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 *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 *expressly agreed to be exclusive, in which case it is the sole remedy*.
- (2) Where circumstances cause an exclusive or limited remedy to *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.

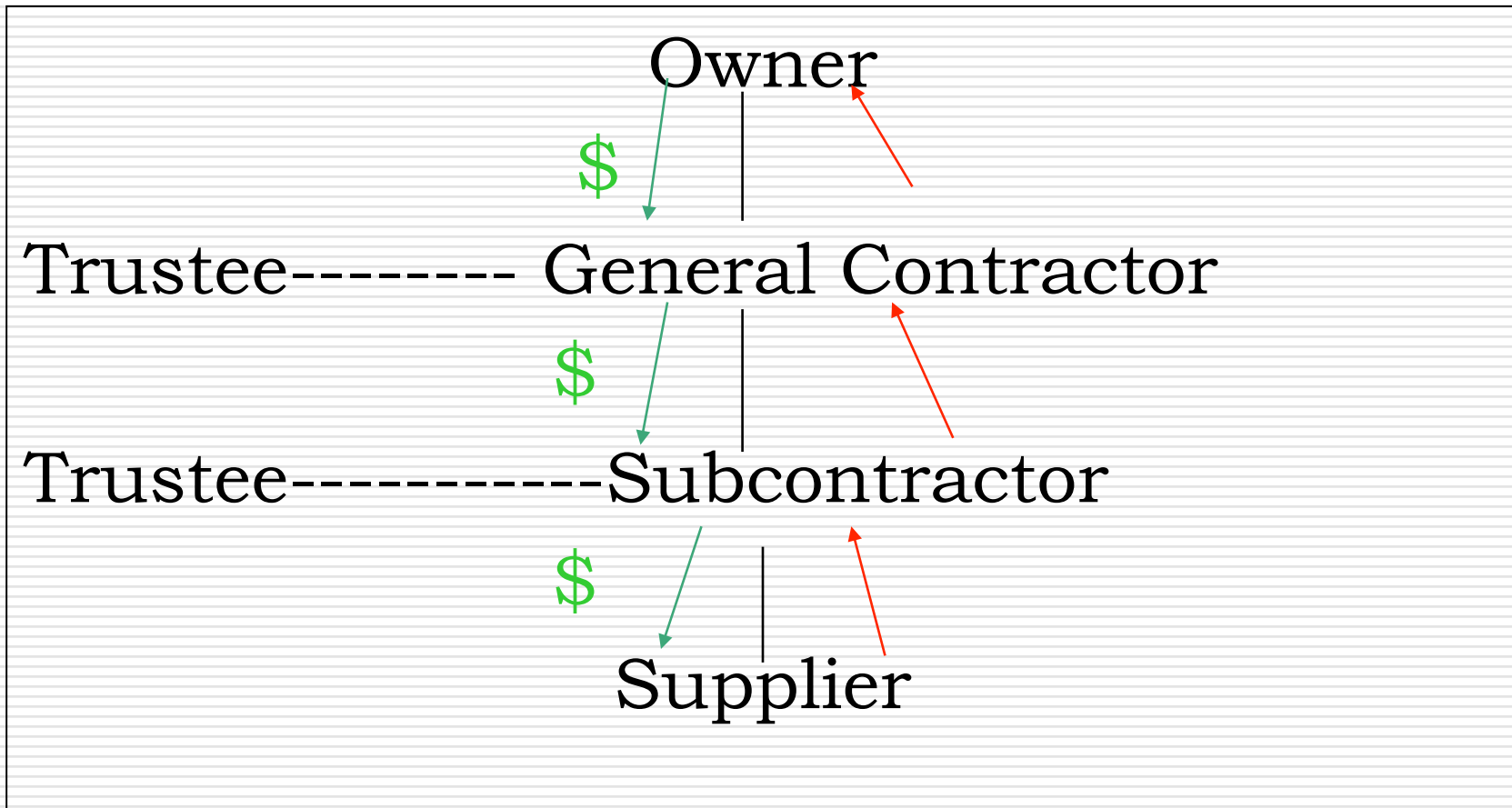
Limitation of Liability

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



Trust Fund

- Tracing issues
- Will beat secured creditors
- Will beat bankruptcy
- Preference defense

Trust Fund Agreement

- Contracts, Proposals, Credit Agreements
- Joint check agreements (Construction)

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.

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