

***Scribbles Squibs # 2 (February 15, 2013):*** Getting Paid Through Joint Check Agreements.

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Suppliers and subcontractors take comfort in having joint checks signed by general contractors (as to second tier suppliers and subcontractors) and owners (as to first tier suppliers and subcontractors), believing that these are actual guarantees of payment. Yet, in most cases, they are not. Basically, the main - possibly the *only* - purpose behind a joint check agreement from the general contractor's/owner's (Payer) standpoint, is to give it the ability to make these payments without breaching their contracts, as diversion of contract income to a third party might be a material breach of contract. To get one of these agreements to actually work, there has to be some obligation on the part of the Payer to make payments, not just permission, with some potential liability if the payments are not made. Some key language demonstrating important language for such an agreement follows, first a stronger version and, secondly, a weaker version. The Customer is the first tier subcontractor (whose credit is being 'guaranteed') and **Your Name** is the second tier material supplier requesting such an agreement. Some ideas for the protection of the general contractor/owner asked to sign such an agreement as a Payer follow. Longer article and complete forms at [www.sauerconstructionlaw.com](http://www.sauerconstructionlaw.com).

***Stronger version:*** "Customer and General Contractor hereby agree and guarantee that all of **Your Name's** invoices for the above-referenced job shall be paid in the following manner. **Your Name** shall submit contemporaneous duplicate copies of its invoices to Customer to General Contractor in the ordinary course of business. If, for any reason, Customer objects to any portion of these invoices, it shall notify both **Your Name** and General Contractor of that fact with specific details within seven days of receipt of the invoices and General Contractor is entitled to rely on the accuracy of quantities and prices contained therein in the absence of such written notification. General Contractor agrees that all such invoices will be paid in the ordinary course of business and as per the payment obligations contained in its subcontract/purchase order with Customer but not to exceed forty-five days after receipt of such **Your Name** invoices by joint checks made payable to **Your Name** and Customer, which checks shall be sent directly to **Your Name** at its address. General Contractor's obligations under this agreement, except as provided below, are limited to those monies in Customer's account as may be adjusted. General Contractor is entering into this Agreement as an accommodation to Customer and to **Your Name** and not as an individual guarantor of Customer's credit. General Contractor and Customer agree that **Your Name's** invoices shall be paid out of the first monies Customer is entitled to out of any of Customer's requisitions as to which **Your Name's** invoices are a component part and out of any other of Customer's requisitions to General Contractor on this or on any other job to the extent that any of the monies owed to **Your Name** on this job are overdue. General Contractor herein agrees that if, at any time, there are insufficient monies left in Customer's account to honor **Your Name's** invoices as submitted, General Contractor will so notify **Your Name** in writing of such fact within ten days of receipt of **Your Name** invoices for which there are insufficient Customer funds remaining in its account for this job to satisfy **Your Name** invoices, in whole or in part. Further, General Contractor will have no liability for damages to

**Your Name** out of its own funds in the event of any breach of this Agreement excepting in two circumstances: (1) in a situation where General Contractor fails to give to **Your Name** the written notice (s) of insufficient funds described in the previous sentence and **Your Name** continues to supply the job, in which case General Contractor shall be liable to **Your Name** only for those deliveries made after the ten day period would have taken place; (2) General Contractor fails to live up to its obligations assumed herein for no legally sufficient reason, in which case General Contractor's liability to **Your Name** will be solely limited to **Your Name's** reasonable expense in enforcing this agreement, including attorneys' fees, plus interest on **Your Name's** outstanding invoices at the rate of 1 1/2% per month running from forty-five days after the affected invoices have been sent to General Contractor."

*Weaker version:* "General Contractor's obligations under this agreement are limited to those monies in Customer's account as may be adjusted and that General Contractor is entering into this Agreement as an accommodation to Customer and to **Your Name** and not as an individual guarantor of Customer's credit. General Contractor and Customer agree that **Your Name's** invoices shall be paid out of the first monies Customer is entitled to out of any of Customer's requisitions as to which **Your Name's** invoices are a component part and out of any other of Customer's requisitions to General Contractor on this or on any other job to the extent that any of the monies owed to **Your Name** on this job are overdue. As an inducement to **Your Name** to continue supplying Customer with materials for the above-referenced job, General Contractor herein agrees that if, at any time, there are insufficient monies left in Customer's account to honor **Your Name's** invoices as submitted, General Contractor will so notify **Your Name** in writing of such fact within ten days of becoming reasonably aware that there are insufficient Customer funds remaining in its account for this job to satisfy **Your Name's** invoices in whole or in part."

Now, for our general contractors and owners, you would want the agreement to be very clear that your part of the agreement is: (1) as an accommodation only to Customer and to **Your Name**; (2) not as an individual guarantor of Customer's credit; (3) there is no obligation on the part of the guaranteeing party to make payments at all. Usually, it is material suppliers requesting these agreements. Giving them essentially *any* form of agreement probably will be accepted by them because they might not fully understand the ramifications of such a form or because they feel that something is better than nothing. Your goal, of course, is to give them nothing. If the requested form does not contain elements of the above language, in all likelihood, that is all that you will be giving them.

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*These materials should be considered as general information only. They are not intended as legal advice. As to legal advice, consult with an attorney of your own choosing. Additional resources on many construction law subjects, including forms, can be found in the 'Construction Articles' section of our website: [www.sauerconstructionlaw.com](http://www.sauerconstructionlaw.com).*