

CONSTRUCTION FAIRNESS ORDINANCE # 9158

CITY OF TUCSON

TUCSON ARIZONA

(Effective January 9, 1999)

RELATING TO TRADES, PROFESSIONS, OCCUPATIONS AND CONSTRUCTION; AMENDING THE TUCSON CODE, CHAPTER 28, TUCSON PROCUREMENT CODE, BY AMENDING AND ADDING SECTIONS RELATING TO DEBARMENT OF CONTRACTORS; AMENDING THE TUCSON CODE, CHAPTER I 1, BY ADDING A NEW SECTION 11-38 REQUIRING PROMPT PAYMENT, CLASSIFYING AS A CIVIL INFRACTION AND SETTING PENALTY; AND AMENDING THE TUCSON CODE, CHAPTER 8, CITY COURT, BY AMENDING SECTION 8-2.2 TO PROVIDE FOR CONSTRUCTION SPECIAL MAGISTRATES.

WHEREAS, the construction industry in the City of Tucson provides an integral and important component of the local economy; and

WHEREAS, the construction industry is a multi-tiered industry comprised of materials providers, subcontractors, contractors and general contractors who provide materials and perform work for and on behalf of owners; and

WHEREAS, on November 9, 1998, the Mayor and Council of the City of Tucson held a public hearing, relating to payment practices within the construction industry; and WHEREAS, the Mayor and Council have determined that there exist occurrences of late payment to general contractors, contractors, subcontractors and labor and material providers in circumstances in which payment should not have been delayed; and

WHEREAS, the Mayor and Council have determined that it is necessary to adopt regulations to encourage the flow of funds and thereby promote prompt payment to general contractors, contractors, subcontractors and labor and material providers by making certain payment practices a civil infraction and to provide for debarment or suspension from City contracts;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. The Tucson Code, Chapter 28, Tucson Procurement Code, Section 28-1 01, Debarment or suspension causes, is hereby amended by renumbering Sections 28-101(5) and 28-101(6) as 28-101(6) and 28-101(7), respectively, amending Section 28-101(4) by adding a new subsection (d), and adding a new Section 281 01 (5) to read as follows:

Section 28-101. Debarment or suspension causes. Section 28-101(4) (d) Failure to pay a contractor, subcontractor or material provider as required by A. R. S. _ 32-1129.

28-101(5). A determination by the Arizona Registrar of Contractors that the contractor has violated the provisions of A.R.S. _ 32-1129 or a finding of responsibility by the municipal court for a violation of Tucson Code Section I 1 -38.

SECTION 2. Adding a new Section I 1 -38, Prompt Payment hereby amends the Tucson Code, Chapter I 1, Crimes and Offenses.

A Violation. It shall be a civil infraction and punishable as provided in this section if in bad faith: a) an owner fails to pay for work performed by a general contractor or contractor, or b) a general contractor fails to pay for work performed by a subcontractor, or c) a subcontractor fails to pay for labor or materials provided, within 14 days or within the time otherwise agreed upon between the parties following the completion of the work or labor or delivery of materials, and delivery of an initial written request for payment evidenced by an affidavit of service or return receipt of certified mail.

A separate violation may be charged for each segment of completed work, or labor or delivery of materials for which payment is not made. Each day for which payment is not made may be charged as a separate violation after the violation accrues.

Bad faith may be established by the conduct between the parties or other means as allowed by the court but shall at a minimum be evidenced by two subsequent written requests for payment delivered not sooner than two weeks after the initial request and at least two weeks apart and testimony that payment in full has not been made and there is no reasonable basis to delay payment which together shall constitute prima facie evidence of bad faith. A party who acts in compliance with applicable contract provisions shall not be deemed to act in bad faith under this section.

B. Definitions. As used in this section: Completion of work or labor means, unless otherwise agreed upon between the parties, the date upon which the work or labor for which payment is requested has been completed, or if an inspection is required by the City for the work or labor, the date such work or labor passed inspection. Contractor includes any-person, firm, entity, partnership, corporation, association, or other organization licensed under Title 32 of the Arizona Statutes and that undertakes to perform work directly for an owner.

General contractor is synonymous with the terms "commercial contractor" and 'subcontractor' as used in A.R.S. _ 32-1 1 01 (A) and includes any person, firm, entity, partnership, corporation, association, or other organization or any combination thereof that uses subcontractors and engages in construction, repair or alteration.

Owner means the person, firm, entity, partnership, corporation, association or other organization or combination thereof possessing either a fee or lesser interest that enters into a contract, arrangement or agreement with a general contractor or contractor for the construction, repair or alteration of a structure. Owner includes all assigns and successors in interest of the owner.

Subcontractor means any person, firm, entity, partnership, corporation, association or other organization or any combination thereof that undertakes to perform work for a general contractor and has a direct contractual relationship with the general contractor.

C. Penalty. A violation of this section shall result in a fine of not less than \$250.00 for the first offense and not less than \$500 for the second offense.

D. Scheduling of hearing. A violation charged under this section shall be heard by the Construction Special Magistrate not more than 60 days after the violations set forth in the complaint have been answered. For good cause shown, the Construction Special Magistrate may continue the hearing.

E. Defenses. Justification is a defense to a prosecution under this section. Justification means money is unavailable to make payment due to nonpayment by an owner, general contractor, contractor or subcontractor, bankruptcy, force majeure, operation of a stop notice or bonded stop notice or a prima facie showing that any claim for moneys due for work completed, labor performed or materials provided is subject to a legal or equitable defense.

Unavailability of money due to nonpayment is not a defense unless the party asserting nonpayment: a) files an action in a court of competent jurisdiction seeking payment or enters arbitration seeking payment unless to do so would be a futile act in that it would not likely result in the recovery of funds to provide payment, or b) initiates or seeks to initiate an action under this section.

Nonpayment based upon poor quality of work may not be asserted as a defense where there is an agency with jurisdiction over quality issues and a written complaint has not been filed with that agency.

F. Limitation on Action. No violation chargeable under this section may be filed more than one year after the violation accrues. A violation accrues under this section on the date of delivery of the last request for payment required by this section. No action may be brought on behalf of any person, firm, corporation or entity that does not hold a license if a license is required by Title 32 of the Arizona Statutes.

SECTION 3. The Tucson Code, Chapter 8, City Court, Article 1, In General, Section 8-2.2, Appointment of special magistrates; term; powers; duties; qualifications; compensation, is hereby amended by adding a new subsection (a) to read as follows:

Section 8-2.2. Appointment of special magistrates; term; powers; duties; qualifications; compensation.

(a) Subject to the nomination and appointment procedures set forth in subsection (a) above, Mayor and Council shall appoint construction special magistrates possessing a demonstrated experience and familiarity of not less than five (5) years in contract and construction law to hear and decide cases arising under Tucson Code, Section 11 -38. The compensation for such construction special magistrates shall be as set forth in subsection (b) above.

SECTION 4. The various City officers and employees are authorized and directed to perform all acts necessary or desirable to give effect to this ordinance and shall review the effectiveness of the provisions of this ordinance within one year

SECTION 5. Except as provided below, if any of the provisions of this ordinance, or the application thereof to any person or circumstance is invalid, the invalidity shall not affect other provisions or applications of this ordinance which can be given effect without the invalid provision or circumstance, and to this end the provisions of this ordinance are severable. If any of the provisions of Section 2 of this ordinance are determined by a court of competent jurisdiction to be invalid, then Section 2 shall be of no force or effect and to this end Section 2 is not severable.

SECTION 6. Sections 1 and 2 of this ordinance shall be effective on January 9, 1999 and shall be applicable to all contracts, agreements or arrangements for construction, repair or alteration entered into after that date. Sections 3, 4 and 5 of this ordinance shall be effective on the first effective date of this ordinance.

SECTION 7. WHEREAS, it is necessary for the preservation of the peace, health, and safety of the City of Tucson that this ordinance become immediately effective, an emergency is hereby declared to exist and this ordinance shall be effective immediately upon its passage and adoption.

PASSED, ADOPTED AND APPROVED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA.



**For additional information contact Michele Bettini
Phone: (520) 624-3002**