

30 Sec. 4. Section 34-221, Arizona Revised Statutes, is amended to
31 read:

32 34-221. Contract with successful bidder; payments to
33 contractor and design professional; security;
34 recovery of damages for delay; progress payments;
35 changed or additional work; attorney fees;
36 definitions

37 A. The agent shall enter into a contract with the lowest
38 responsible bidder whose proposal is satisfactory, except that in
39 determining the lowest responsible bidder under this section, the board of
40 supervisors may consider, for no NOT more than five projects, the time of
41 completion proposed by the bidder, the value over time of completed
42 services and facilities and the value over time of interrupted services if
43 the board determines that this procedure will serve the public interest by
44 providing a substantial fiscal benefit or that the use of the traditional
45 awarding of contracts is not practicable for meeting desired construction

1 standards or delivery schedules and if the formula for considering the
2 time of completion is specifically stated in the bidding information.

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

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

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

14 2. The owner by mutual agreement may make progress payments on
15 contracts of less than ninety days and shall make monthly progress
16 payments on all other contracts as provided for in this paragraph.
17 Payment to the contractor on the basis of a duly certified and approved
18 estimate of the work performed during the preceding calendar month under
19 such contract may include payment for material and equipment, but to
20 ensure the proper performance of such contract, the owner shall retain ten
21 percent of the amount of each estimate until final completion and
22 acceptance of all material, equipment and work covered by the contract.
23 An estimate of the work submitted shall be deemed approved and certified
24 for payment seven days after the date of submission unless before that
25 time the owner or owner's agent prepares and issues a specific written
26 finding setting forth those items in detail in the estimate of the work
27 that are not approved for payment under the contract. The owner may
28 withhold an amount from the progress payment sufficient to pay the
29 expenses the owner reasonably expects to incur in correcting the
30 deficiency set forth in the written finding. The progress payments shall
31 be paid on or before fourteen days after the estimate of the work is
32 certified and approved. The estimate of the work shall be deemed received
33 by the owner on submission to any person designated by the owner for the
34 submission, review or approval of the estimate of the work.

35 3. When the contract is fifty percent completed, one-half of the
36 amount retained, including any securities substituted under paragraph 5 of
37 this subsection, shall be paid to the contractor on the contractor's
38 request if the contractor is making satisfactory progress on the contract
39 and there is no specific cause or claim requiring a greater amount to be
40 retained. After the contract is fifty percent completed, not more than
41 five percent of the amount of any subsequent progress payments made under
42 the contract may be retained if the contractor is making satisfactory
43 progress on the project, except that if at any time the owner determines
44 satisfactory progress is not being made, ten percent retention shall be

1 reinstated for all progress payments made under the contract subsequent to
2 the determination.

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

11 5. Ten percent of all estimates shall be retained by the agent as a
12 guarantee for complete performance of the contract, to be paid to the
13 contractor within sixty days after completion or filing notice of
14 completion of the contract. Retention of payments by a purchasing agency
15 longer than sixty days after final completion and acceptance requires a
16 specific written finding by the purchasing agency of the reasons
17 justifying the delay in payment. A purchasing agency may not retain any
18 monies after sixty days that are in excess of the amount necessary to pay
19 the expenses the purchasing agency reasonably expects to incur in order to
20 pay or discharge the expenses determined by the purchasing agency in the
21 finding justifying the retention of monies. In lieu of the retention
22 provided in this section, the agent, at the option of the contractor,
23 shall accept as a substitute an assignment of money market accounts,
24 demand deposit accounts, time certificates of deposit of banks licensed by
25 this state, securities of or guaranteed by the United States of America,
26 securities of this state, securities of counties, municipalities and
27 school districts within this state or shares of savings and loan
28 associations authorized to transact business in this state, in an amount
29 equal to ten percent of all estimates, which shall be retained by the
30 agent as a guarantee for complete performance of the contract. If the
31 contractor opts for substitute security as described in this paragraph for
32 the ten percent retention, the contractor is entitled to receive all
33 interest or income earned by such security as it accrues, and all such
34 security in lieu of retention shall be returned to the contractor by the
35 agent within sixty days after final completion and acceptance of all
36 material, equipment and work covered by the contract if the contractor has
37 furnished the agent satisfactory receipts for all labor and material
38 billed and waivers of liens from any and all persons holding claims
39 against the work. The agent may not accept a money market account, A
40 demand deposit account, A time certificate of deposit of a bank or shares
41 of a savings and loan association in lieu of the retention specified
42 unless accompanied by a signed and acknowledged waiver of the bank or
43 savings and loan association of any right or power to setoff against
44 either the agent or the contractor in relationship to the certificates or
45 shares assigned. The amount deposited in a money market account or demand

1 deposit account in lieu of the retention provided in this section shall
2 not be released by the financial institution to the contractor except on
3 written authorization of the agent.

4 6. If the agent has accepted substitute security as provided in
5 paragraph 5 of this subsection, any subcontractor undertaking to perform
6 any part of such public work is entitled to provide substitute security to
7 the contractor on terms and conditions similar to those described in
8 paragraph 5 of this subsection, and such security is in lieu of any
9 retention under the subcontract.

10 D. A contract for construction or design professional services may
11 not materially alter the rights of any contractor, subcontractor, design
12 professional or material supplier to receive prompt and timely payment
13 required to be included in the contract under subsection C of this
14 section.

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

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

25 G. The contractor shall pay to the contractor's subcontractors,
26 design professionals or material suppliers and each subcontractor shall
27 pay to the subcontractor's subcontractor, design professional or material
28 supplier, within seven days after receipt of each progress payment, unless
29 otherwise agreed in writing by the parties, the respective amounts allowed
30 the contractor, subcontractor or design professional on account of the
31 work performed by subordinate subcontractors or design professionals, to
32 the extent of each such subcontractor's or design professional's interest
33 therein, except that a contract for construction may not materially alter
34 the rights of any contractor, subcontractor, design professional or
35 material supplier to receive prompt and timely payment as provided under
36 this section. Such payments to subcontractors, design professionals or
37 material suppliers shall be based on payments received pursuant to this
38 section. Any diversion by the contractor or subcontractor of payments
39 received for work performed on a contract, or failure to reasonably
40 account for the application or use of such payments, constitutes grounds
41 for disciplinary action by the registrar of contractors. The
42 subcontractor or material supplier shall notify the registrar of
43 contractors and the purchasing agency in writing of any payment that is
44 less than the amount or percentage approved for the class or item of work
45 as set forth in this section.

1 H. A subcontractor or design professional may notify the purchasing
2 agency in writing requesting that the subcontractor or design professional
3 be notified by the purchasing agency in writing within five days after
4 payment of each progress payment THAT IS made to the contractor. The
5 subcontractor's or design professional's request remains in effect for the
6 duration of the subcontractor's or design professional's work on the
7 project.

8 I. This chapter does not prevent the contractor or subcontractor,
9 at the time of application and certification to the owner or contractor,
10 from withholding such application and certification to the owner or
11 contractor for payment to the subcontractor, design professional or
12 material supplier for unsatisfactory job progress, defective design
13 professional services or construction work or materials not remedied,
14 disputed design professional services, work or materials, third-party
15 claims filed or reasonable evidence that a claim will be filed, failure of
16 a subcontractor or design professional to make timely payments for design
17 professional services, labor, equipment and materials, damage to the
18 contractor or another subcontractor or design professional, reasonable
19 evidence that the subcontract or design professional service contract
20 cannot be completed for the unpaid balance of the subcontract or design
21 professional service contract sum or a reasonable amount for retention
22 that does not exceed the actual percentage retained by the owner.

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

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

33 L. IF THE OWNER DIRECTS THE CONTRACTOR IN WRITING TO PERFORM
34 CHANGED OR ADDITIONAL WORK IN ACCORDANCE WITH THE CONSTRUCTION CONTRACT
35 AND THE CONTRACTOR SUBMITS TO THE OWNER A REASONABLE COST ESTIMATE OF THE
36 CHANGED OR ADDITIONAL WORK AS MAY BE REQUIRED UNDER THE CONSTRUCTION
37 CONTRACT, PENDING A FINAL DETERMINATION OF THE TOTAL AMOUNT TO BE PAID FOR
38 THE CHANGED OR ADDITIONAL WORK, THE CONTRACTOR MAY REQUEST PAYMENT FOR
39 CHANGED OR ADDITIONAL WORK THAT THE CONTRACTOR COMPLETED DURING THE
40 PRECEDING CALENDAR MONTH IN MONTHLY PAY ESTIMATES BASED ON THE COSTS THE
41 CONTRACTOR INCURRED TO PERFORM THAT WORK. THE PERSON DESIGNATED IN THE
42 CONSTRUCTION CONTRACT TO CERTIFY AND APPROVE THE MONTHLY PAYMENT ESTIMATE
43 SHALL MAKE AN INTERIM DETERMINATION FOR PURPOSES OF APPROVAL FOR PAYMENT
44 OF THOSE COSTS AND CERTIFY FOR PAYMENT THE AMOUNT THAT PERSON DETERMINES
45 TO BE REASONABLY JUSTIFIED. EITHER PARTY MAY DISAGREE WITH THE INTERIM

1 DETERMINATION AND MAY ASSERT A CLAIM IN ACCORDANCE WITH THE TERMS OF THE
2 CONSTRUCTION CONTRACT.

3 M. IF THE OWNER DIRECTS THE CONTRACTOR IN WRITING TO PERFORM
4 CHANGED OR ADDITIONAL WORK IN ACCORDANCE WITH THE CONSTRUCTION CONTRACT
5 AND THE CONTRACTOR SUBMITS TO THE OWNER A REASONABLE COST ESTIMATE OF THE
6 CHANGED OR ADDITIONAL WORK AS MAY BE REQUIRED UNDER THE CONSTRUCTION
7 CONTRACT AND IF THE CONTRACTOR DIRECTS THE SUBCONTRACTOR TO PERFORM THE
8 CHANGED OR ADDITIONAL WORK IN ACCORDANCE WITH THE TERMS OF THE AGREEMENT
9 BETWEEN THE CONTRACTOR AND SUBCONTRACTOR AND THE SUBCONTRACTOR SUBMITS TO
10 THE CONTRACTOR A REASONABLE COST ESTIMATE OF THE CHANGED OR ADDITIONAL
11 WORK AS MAY BE REQUIRED UNDER THE CONSTRUCTION CONTRACT, PENDING A FINAL
12 DETERMINATION OF THE TOTAL AMOUNT TO BE PAID FOR THE CHANGED OR ADDITIONAL
13 WORK, THE SUBCONTRACTOR MAY REQUEST PAYMENT FROM THE CONTRACTOR FOR THE
14 CHANGED OR ADDITIONAL WORK THAT THE SUBCONTRACTOR COMPLETED DURING THE
15 PRECEDING CALENDAR MONTH IN MONTHLY PAY ESTIMATES BASED ON THE COSTS THE
16 SUBCONTRACTOR INCURRED TO PERFORM THAT WORK. EITHER PARTY MAY DISAGREE
17 WITH THE INTERIM DETERMINATION AND MAY ASSERT A CLAIM IN ACCORDANCE WITH
18 THE TERMS OF THE AGREEMENT BETWEEN THE CONTRACTOR AND SUBCONTRACTOR.

19 N. IN ANY ACTION OR ARBITRATION BROUGHT PURSUANT TO THIS SECTION,
20 THE SUCCESSFUL PARTY SHALL BE AWARDED REASONABLE ATTORNEY FEES AND COSTS.

21 ~~1.~~ 0. For the purposes of this section:

22 1. CONTRACTOR DOES NOT INCLUDE AN AGRICULTURAL IMPROVEMENT DISTRICT
23 FORMED PURSUANT TO TITLE 48, CHAPTER 17, AN ELECTRIC COOPERATIVE FORMED
24 PURSUANT TO TITLE 10, CHAPTER 19, ARTICLE 2 OR 4 OR A DOMESTIC WATER
25 IMPROVEMENT DISTRICT OR A DOMESTIC WASTEWATER IMPROVEMENT DISTRICT FORMED
26 PURSUANT TO TITLE 48, CHAPTER 6, ARTICLE 4.

27 2. "COSTS" MEANS THE AGGREGATE COST OF ALL LABOR, MATERIALS,
28 EQUIPMENT AND SERVICES.

29 ~~1.~~ 3. "Design professional service contract" means a written
30 agreement relating to the planning, design, construction administration,
31 study, evaluation, consulting, inspection, surveying, mapping, material
32 sampling, testing or other professional, scientific or technical services
33 furnished in connection with any actual or proposed study, planning,
34 survey, environmental remediation, construction, improvement, alteration,
35 repair, maintenance, relocation, moving, demolition or excavation of a
36 structure, street or roadway, appurtenance, facility, development or other
37 improvement to land.

38 ~~2.~~ 4. "Design professional services" means architect services,
39 engineer services, land surveying services, geologist services or
40 landscape architect services or any combination of those services
41 performed by or under the supervision of a design professional or an
42 employee or subconsultant of the design professional.

1 ~~5.~~ 5. "Subconsultant" means any person, firm, partnership,
2 corporation, association or other organization, or a combination of any of
3 them, that has a direct contract with a design professional or another
4 subconsultant to perform a portion of the work under a design professional
5 service contract.

6 6. SUBCONTRACTOR DOES NOT INCLUDE AN AGRICULTURAL IMPROVEMENT
7 DISTRICT FORMED PURSUANT TO TITLE 48, CHAPTER 17, AN ELECTRIC COOPERATIVE
8 FORMED PURSUANT TO TITLE 10, CHAPTER 19, ARTICLE 2 OR 4 OR A DOMESTIC
9 WATER IMPROVEMENT DISTRICT OR A DOMESTIC WASTEWATER IMPROVEMENT DISTRICT
10 FORMED PURSUANT TO TITLE 48, CHAPTER 6, ARTICLE 4.

11 7. "WORK" MEANS THE LABOR, MATERIALS, EQUIPMENT AND SERVICES TO BE
12 PROVIDED BY A CONTRACTOR OR SUBCONTRACTOR UNDER A CONSTRUCTION CONTRACT.

13 Sec. 5. Section 34-609, Arizona Revised Statutes, is amended to
14 read:

15 34-609. Contracts for construction-manager-at-risk,
16 design-build and job-order-contracting construction
17 services; payments to contractor; security;
18 recovery of damages by contractor for delay;
19 progress payments; changed or additional work;
20 attorney fees; definitions

21 A. An agent shall enter into a contract with the selected person or
22 firm for construction-manager-at-risk construction services, design-build
23 construction services or job-order-contracting construction services.

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

26 1. A surety company bond or bonds as required by this chapter.

27 2. The owner by mutual agreement may make progress payments on
28 contracts of less than ninety days and shall make monthly progress
29 payments on all other contracts as provided for in this paragraph.
30 Payment to the contractor on the basis of a duly certified and approved
31 estimate of the work performed during the preceding calendar month under
32 the contract may include payment for material and equipment, but to ensure
33 the proper performance of the contract, the owner shall retain ten ~~per~~
34 ~~cent~~ PERCENT of the amount of each estimate until final completion and
35 acceptance of all material, equipment and work covered by the contract.
36 An estimate of the work submitted shall be deemed approved and certified
37 for payment ~~after~~ seven days ~~from~~ AFTER the date of submission unless
38 before that time the owner or owner's agent prepares and issues a specific
39 written finding setting forth those items in detail in the estimate of the
40 work that are not approved for payment under the contract. The owner may
41 withhold an amount from the progress payment sufficient to pay the
42 expenses the owner reasonably expects to incur in correcting the
43 deficiency set forth in the written finding. The progress payments shall
44 be paid on or before fourteen days after the estimate of the work is
45 certified and approved. The estimate of the work shall be deemed received