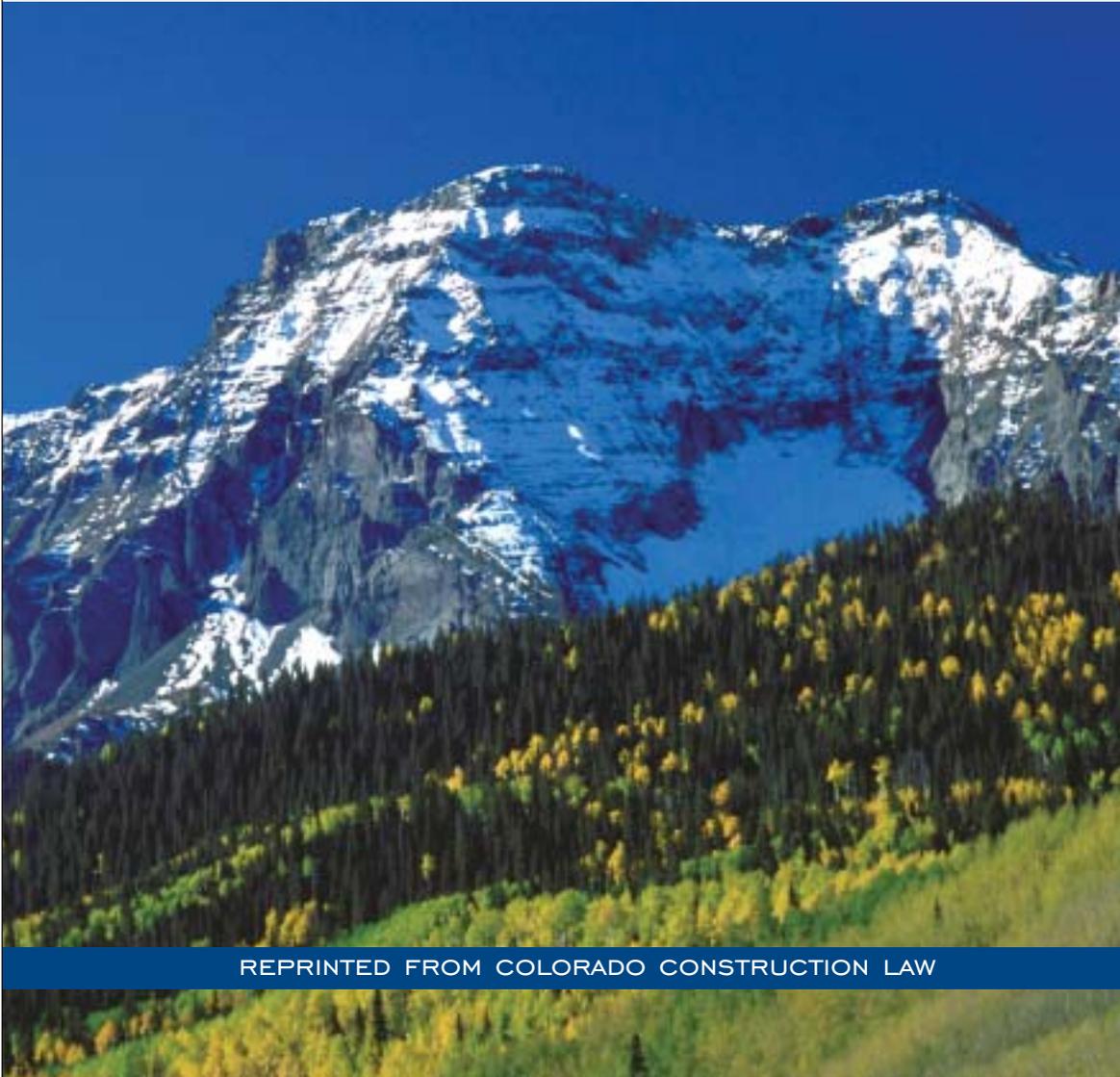




COLORADO LAW OF
SUBCONTRACTORS AND MATERIALMEN

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1. Definitions and Distinctions

1.1. Subcontractors and Sub-subcontractors

“[A]ny person who agrees to perform a substantial, specified portion of the work of construction of a given building which is the subject of a general construction contract in accordance with the plans and specifications of such contract is a subcontractor. . . .”¹ More specifically, a subcontractor is “one who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance.”² In other words, a subcontractor performs work necessary to complete all or some part of the work on a construction project that another contractor has agreed to perform for the owner.³ A subcontractor’s agreement is with the contractor rather than with the owner. A subcontractor may or may not also be required to furnish the materials, supplies and equipment needed to complete his or her part of the job.

A sub-subcontractor is a person who agrees to perform some portion of a subcontractor’s work.

1.2. Materialmen and Suppliers

Generally speaking, a materialman is a person who delivers materials, supplies or equipment used or expected to be used in a construction project.⁴ Materialmen typically do not perform any substantial work on the project.⁵ Materialmen include persons who rent equipment for use in but not incorporation into the project.⁶

1.3. The Importance of Distinction

As is obvious from the definitions of subcontractors and materialmen, the primary distinction between materialmen and subcontractors is in work provided to the project. The distinction between a materialman and subcontractor can be important for lien rights. Subcontractors and sub-subcontractors generally have lien rights against the project, as do materialmen supplying materials directly to the owner, general contractor or subcontractors. However, a materialman or supplier to other materialmen generally will not have lien rights⁷ or protection under the Colorado Public Works Act or the federal Miller Act.⁸

1.4. Materials, Supplies and Equipment

Normally, it is easy to determine what constitutes materials, supplies and equipment. If it can be said that some item is to be incorporated into the project or used in the course of construction, that item can probably be

characterized as materials, supplies or equipment.⁹ Common examples of materials include such things as lumber, bricks, tiles, shingles, paint, plumbing fixtures and the like. Items that might ordinarily be considered to be materials may be treated as subcontracted work on the project if they are custom made and/or have no value apart from the project.¹⁰ Supplies are things that are consumed during a project without being incorporated into the project. Examples include things such as gasoline to run generators and machinery, tools that are consumed in the process of constructing a project (such as drill bits), and even groceries needed to feed work crews.¹¹ Equipment includes any tools, machinery or other work aids used to prosecute work on the project, and may include items such as scaffolding, generators, temporary lights, power tools, heavy equipment, cranes, and virtually anything helpful to the work at hand that might be rented or otherwise used on a temporary basis. Lessors of such equipment are materialmen.¹²

2. Contracting Issues

2.1. Governing Law: Common Law or the UCC

A great deal of Colorado construction contract law is based on common law rather than statutory law. Indeed, apart from the Uniform Commercial Code (“UCC”)¹³, there have been few attempts to comprehensively codify the law of contracts in Colorado. To be sure there is a statute of frauds outlining the circumstances where a writing is required to create an enforceable contract,¹⁴ but beyond that and the UCC there is little statutory law governing contracting issues. It thus is important to determine whether or not the UCC governs a contract. Where the UCC does not govern, the contract will be governed by common law as defined by the Colorado courts. (No attempt is made here to discuss contracting issues unique to federal projects, which may be affected by a variety of statutory and regulatory provisions.)

The UCC only sometimes applies to construction contracts. Article 2 of the UCC, relating to sales, is the only part of the UCC likely to have broad application to construction projects. In most cases, the UCC will apply to materials, supplies and equipment provided by materialmen.¹⁵ More often than not the UCC will not apply to subcontractors unless the “predominant purpose” of the subcontract can fairly be characterized as a sale of goods.¹⁶ This is because Article 2 only applies to the sale of goods, and does not apply to service contracts.¹⁷ “Goods” are things which are moveable at the time of sale, C.R.S. § 4-2-105(1), which is usually a fair description of materials and supplies, but not of subcontracted work. This can, however, be a fertile area for argument.¹⁸

2.2. Is There a Contract?

The most fundamental contracting issue is whether an enforceable contract exists between the parties. The answer does not lie just in whether some written document labeled "contract" exists, and the answer may differ significantly depending on whether the UCC applies. Although it is preferable to have all construction agreements in writing, a construction contract need not be in writing unless by its own terms it cannot be performed within a year.¹⁹ All that is required to form a contract is an offer and acceptance, supported by consideration, and unless the agreement is voided by an applicable statute of limitations a contract will be formed.²⁰ Even if a contract would otherwise be barred by the statute of limitations, the statute may be overcome by part performance or other types of estoppel.²¹ More often than not, however, there will be a written contract between the contracting parties.

The question of whether or not a contract exists comes up more often for materialmen and suppliers, who are more likely to make deliveries based on phone, fax or mail orders. Since materialmen typically are governed by the UCC, they are bound by a different, more stringent statute of frauds. If the price of products to be supplied is more than \$500, then the contract must be supported by "some writing sufficient to indicate that a contract has been made between the parties and signed by the party against whom enforcement is sought"²² The writing itself need not be formal - it can even be in pencil on a scratch pad - so long as it evidences a contract for the sale of goods, is "signed" ("a word which includes any authentication which identifies the party to be charged"), and specifies a quantity.²³

Generally materialmen and their buyers fall within the UCC's definition of "merchants," that is, persons who deal in goods of a particular kind or who have "knowledge or skill peculiar to the practices or goods involved in the transaction. . . ."²⁴ When dealing with a person who is a merchant, the requirement of a signed writing is relaxed and may be replaced with a written confirmation of the contract which is received and not objected to in writing within ten days after receipt.²⁵ This "written confirmation" rule has given rise to what is commonly referred to as the "Battle of the Forms," discussed below.

A writing may not be required to enforce the contract where the party against whom enforcement is sought admits in a pleading that a contract was made, where the goods are specially manufactured for the buyer and are not suitable for sale to others (and the seller has substantially begun the process of manufacture or procurement), or for goods that are paid for (and the payment accepted by the seller) or received and accepted.²⁶ Partial

performance as a substitute for a writing works only for “goods which have been accepted or for which payment has been made and accepted.”²⁷

2.3. Purchase and Delivery Orders

(a) Definition

A purchase order is a form used by purchasers to order goods from a supplier, and a delivery order is a form used by a seller to confirm an order from a buyer. Purchase and delivery orders typically consist of pre-printed forms with a front page where the essentials of the transaction are spelled out, including such things as a description of the items being purchased and sold, quantities, price, and delivery date and location. Purchase and delivery orders also often have detailed terms and conditions spelled out in fine print, commonly on the back side of the form. In essence, purchase and delivery orders are short form contracts in which only the essential terms are negotiated. As such, purchase and delivery orders are best suited to orders of materials and supplies, where little more than item (i.e., paint), price, quantity and place of delivery need be identified to obtain the desired result.

(b) Why a Purchase or Delivery Order

Purchase orders and delivery orders are often used when ordering materials and supplies for a project. They are also occasionally but less often used in place of a subcontract for work to be performed on a given project. The idea of using purchase and delivery orders instead of a subcontract is to save time and money that would otherwise be spent negotiating an agreement. In the typical transaction where the parties have no problems with each other, purchase and delivery orders actually accomplish this purpose. The “one size fits all” approach probably is fine when small amounts and therefore small risks are involved. Unfortunately, many companies use these forms for all transactions, including orders worth hundreds of thousands and sometimes even millions of dollars.

In a typical transaction, a contractor or subcontractor decides it needs a particular material and issues a purchase order to a supplier. If the supplier simply accepts by filling the order, or even if it signs the purchase order, there is no issue: the purchase order and its terms will control the transaction. But what often happens in practice is that the purchase order is not the only form involved.

Very often the supplier has its own form which it delivers in response to the purchase order, and the supplier's form has its own set of detailed terms and conditions, some of which differ from the terms and conditions in the original purchase order. As long as things go smoothly and both parties are happy with the transaction, the fact that the forms do not agree is not a problem.

What if something goes wrong, and both parties used different forms for the same transaction? A big mess results. One party, and often both parties, wind up with something different from what they expected. For example, the contractor's purchase order for a particular product may have called for a two-year warranty, while the supplier's form may have included a warranty of only one-year. If the product fails after eighteen months, whose warranty language controls? The outcome may differ depending on whether the UCC applies to the transaction. Where the UCC does not apply, there may be no contract at all and the parties are stuck with rather limited remedies under theories such as estoppel, part performance, quantum meruit, and possibly tort claims. Depending on the circumstances the parties may have more certain contractual remedies if the UCC applies, as discussed below.

(c) Battle of the Forms

Ideally when a materialman agrees to deliver goods to a project, the parties negotiate the terms of their agreement. In practice, however, the parties often do not negotiate an agreement, but instead agree to the sale and purchase of goods verbally, followed by the buyer issuing a purchase order or similar form, and the seller issuing a delivery order/invoice or similar form. Typically, both forms have a raft of terms and conditions on the back, in fine print.

To the extent that the terms and conditions on the two "crossing" forms are consistent there is no problem. More often than not, though, one or more significant terms or conditions will be inconsistent. So which terms control when there are inconsistencies between the forms? Between "merchants," additional terms in the written confirmation of a transaction become a part of the contract (and therefore control), unless (1) the initial offer expressly limits acceptance to the terms of the offer, (2) the additional terms "materially alter" the terms of the offer, or (3) objection to the additional terms has already been given or is given within a reasonable time.²⁸

The simplest case to consider is one in which the forms simply conflict on certain terms. Consider the following example: supplier gives contractor a quote that provides for a one-year warranty on materials. Contractor then submits a purchase order that calls for a two-year warranty. If the product develops defects after 18 months, which warranty controls? The outcome depends at least in part on whether the two-year warranty in the purchase order is a material alteration of the original offer reflected by the quote. If the two-year warranty is found not to be a material alteration of the quote, then the two-year warranty applies.²⁹ If, as is perhaps more likely, the two-year warranty is found to be a material alteration of the quote, then it does not become a part of the contract and the one-year warranty controls.³⁰

What if, as is often the case, both forms either condition acceptance to the terms of the form or expressly object to differing terms in the other parties' form? Forms often have a merger clause stating that the purchase order constitutes the entire agreement of sale and purchase and that the order is expressly limited to and made conditional upon the acceptance of all the terms and conditions. Such a merger clause might itself be construed to be an objection to any different terms in the other party's form. A more clear example of an express objection that might be found in either or both forms might say the following: "Any additional or different terms or conditions contained in any prior quotation or that might be contained in any acknowledgment of this purchase order shall be deemed objected to by Buyer without further notice of objection, and shall be of no effect nor under any circumstances be binding upon Buyer."

Arguably, where both parties' forms insist on their own terms, and no other terms, they have invoked the "mirror image rule." Because neither form exactly matches the other, no contract is formed. If the parties' conduct nevertheless impliedly recognizes the existence of a contract, then the terms of the contract include those terms on which the forms do agree, plus the "gap fillers" provided by the UCC.³¹ Of course, for a party that attempted, for example, to disclaim liability for the incidental and consequential damages available under the UCC, this could be a disastrous result because those liabilities may slip back in as a gap filler.³² The lesson from all this is that for supply contracts of significant value, buyers and sellers are well advised to compare forms to understand what they are, or are not, getting. Even more preferable on a supply contract of consequence is that the parties negotiate a

contract, rather than simply relying on forms that may not get the job done.

3. Subcontractor Bids

A general contractor, whether on a public works project or a private project, may subcontract by (1) negotiating a subcontract with a particular subcontractor, (2) letting the subcontract for bid, and awarding it to the low bidder, or (3) letting the subcontract for bid, and then negotiating with one or more of the bidders for a final price. In sum, absent agreement between the owner and contractor, or absent agreement between contractor and proposed subcontractors, there is no requirement that a contractor award subcontracts by bid, or if bids are taken, to award it to the low bidder, or to not attempt to negotiate prices even lower than the bid.³³ Of course, this freedom may be restricted by provisions in the owner/contractor contract, or in bid material and bid solicitation or invitation for bid materials or in rare instances, based on legal principles.

3.1. Binding Nature of Subcontractor's Bids

If a subcontractor submits a bid to a contractor, and the contractor incorporates that bid into its bid to the owner, prior to the prime contractor "accepting" the bid, can the subcontractor withdraw it? Under the UCC, if a materialman gives assurance that its bid will be held open, then the bid is not revocable during the time stated, or if no time is stated, for a reasonable time.³⁴ Even more generally, a subcontractor may be deemed to have made an irrevocable bid, at least for a reasonable time until after the low bidder on the prime contractor is determined, under the principle of promissory estoppel, if the general contractor reasonably relied on the subcontractor's bid in making his bid. In Mead Associates, Inc. v. Scottsbluff Sash & Door Co.,³⁵ defendant materialman submitted a bid to plaintiff contractor to provide materials for a project on which plaintiff contractor was going to submit a bid. Plaintiff contractor used the materials bid in preparing its bid for the prime contract. Contractor confirmed each component of the material bid with the defendant's estimator before incorporating the materialman's bid into the prime bid on the project. Subcontractor, however, mistakenly computed its bid based upon supplying "headwall trim" instead of "headwalls" as called for by the plans and specifications.

Plaintiff was awarded the general contract, and then submitted a purchase order to defendant materialman based upon its bid. The purchase order included an indemnification clause imposing liquidated damages for delay in construction completion caused by defendant. It conformed with a liquidated damage clause in the general contract which had been made

available to the defendant materialman prior to the submission of its bid. However, claiming that the liquidated damage clause materially altered the bid, defendant refused to execute or honor the purchase order. Plaintiff proceeded to obtain the materials from other sources and brought suit against the defendant for the difference between defendant's bid and the cost of materials charged by the replacement supplier. On appeal, the award in favor of the plaintiff was affirmed. The basic rule discussed above was cited:

Under the doctrine of promissory estoppel, as applied to construction contracts, a material supplier's bid is binding and cannot be revoked if the bidder should reasonably expect that a general contractor would rely upon that bid in submitting its own bid on a project. And, if the general contractor suffers damages in reasonable reliance upon an erroneous bid, it may recover against the bidding party.³⁶

Here, the court found that the plaintiff had reasonably relied on the defendant's bid. The court also found that where a general contractor relies on a bid and subsequently submits a proposed contract to a subcontractor, the bid price and general work requirements should conform essentially to those which formed the basis for the bid. In this case, the court found that the plaintiff's purchase order tendered to the materialman generally mimicked defendant's bid concerning the number, type and costs of materials ordered. The addition of the indemnification clause did not alter the substance of the underlying bid. Since the defendant's bid did not contain an indemnification clause and none was agreed upon by the parties, it was a collateral matter and its inclusion in the purchase order did not bar the application of promissory estoppel to the terms of defendant's bid. Defendant had a right to reject the inclusion of the indemnification clause in the plaintiff's purchase order but was still bound by the bid upon which defendant expected plaintiff to rely.³⁷

A subcontractor will not be bound to its bid where the contractor cannot demonstrate reliance on the bid.³⁸ "Lack of reliance by the general contractor may be demonstrated by evidence that the general contractor continued to bargain with the subcontractor or failed to reply promptly after award of the general contract."³⁹ Arguably, bid shopping fits this standard, although no Colorado case has addressed the issue directly. Additionally, any attempt to accept the bid on terms materially different than the original bid is evidence of lack of reliance and may even constitute a counteroffer rather than an acceptance.⁴⁰

3.2. Bid Mistakes

In general, the law of a prime contractor's bid mistake is equally applicable to subcontractors. However, one difference arises when the contractor relies upon the subcontractor's mistaken bid in submitting its bid to the owner, which is thereafter accepted. Colorado does not appear to have any reported decisions on this point.

3.3. Bid Shopping

There appears to be no Colorado law on the issue of whether the contractor who incorporates the subcontractor's bid "into the prime contract bid" is obligated to award the subcontract to that subcontractor in the event that the prime contractor is awarded the contract. It may be that the prime contractor is still free to negotiate a reduced price with that subcontractor, or to award the subcontract to still another subcontractor. Of course, these rights can be altered by the solicitation for bid, or by any other express or implied agreement between the bidding subcontractor and the prime contractor. Subcontractors in other states have sometimes asserted that requirements that contractors list subcontractors on bids for public projects prohibit bid shopping. There are, however, no such requirements in Colorado, although a contractor may be required to demonstrate its ability to meet standards by submitting "acceptable plans to subcontract for such necessary items."⁴¹

4. Duties and Liabilities of Owner to Subcontractor and Materialmen

4.1. Express and Implied Duties of the Owner

Because owners do not typically contract directly with subcontractors and materialmen, owners' duties to subcontractors and materialmen are correspondingly limited. Where owners make express promises, representations, assurances and the like to subcontractors and/or materialmen (such as assurances of payment for extra work, issuance of joint checks, etc.), express duties may result.⁴² Implied duties should include at a minimum access to site, non-interference with work, and provision of adequate and accurate plans and specifications. Colorado law on such implied duties in the context of subcontractors and materialmen is unclear at this time, and lack of privity may be a limiting factor. Owners' duties under tort law should be no different than for any other party. Key questions include whether a duty existed, breach, causation, and damages.

4.2. Legal Theories Against the Owner

The major hurdle confronting subcontractors and materialmen who claim against owners is privity. Because their contract is with the contractor or a subcontractor rather than with the owner, subcontractors and materialmen lack privity with the owner and thus may be barred from asserting claims based on their subcontract against the owner.⁴³ The general reluctance to impose duties on owners to subcontractors and materialmen is probably attributable to two factors. The first is a general belief that "an owner should not be forced into 'legal relations with someone other than the contract partner he ha[s] chosen.'"⁴⁴ The second is that there are fairly extensive statutory schemes designed to protect a subcontractor's right of payment, including the mechanic's lien statute, the trust fund statute, the disburser's notice statute, and the federal and state public works statutes.

Of course, one possible means around the privity barrier is through a third party beneficiary analysis.⁴⁵ For obvious reasons, only on rare occasions will a subcontractor or materialman be able to establish the elements for a third party beneficiary claim against the owner. The primary reason is that the owner generally relies on the contractor to get the job done, without specifying who is to do the work or whether subcontractors are to be used at all. In other words, owners usually do not intend to benefit subcontractors and materialmen by their contract with the contractor.⁴⁶ For this reason, contractual claims against owners are very difficult for subcontractors and materialmen to pursue.

Where there is no contract, subcontractors and materialmen may have a claim of unjust enrichment. The elements of a claim of unjust enrichment are: "(1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying."⁴⁷ The first two elements will almost always be easy to prove, since whatever work or materials were supplied to a project will have been at the subcontractor or materialman's expense and will benefit the owner by increasing the value of the property. It is the third element, circumstances that would make it unjust for the owner to retain the benefit without paying, that may be difficult to prove. First, very often the owner will have paid the contractor for the work in question. Under those circumstances a court is not likely to find it to be unjust for the owner to retain a benefit for which it has paid. Second, at least in the context of improvements created at the request of a tenant rather than the property owner, to establish injustice the subcontractor or materialman must demonstrate that the owner has engaged in some form of improper, deceitful, or misleading conduct.⁴⁸ It is not clear whether this requirement extends beyond the tenant improvement context.

Express promises, representations, and assurances may create causes of action sounding in contract, implied contract (quantum meruit/quantum

valebant), estoppel, and unjust enrichment. For example, an owner's "active role in creating a perception that the [goods or services] would be paid for," along with other factors, may be adequate to support a claim of unjust enrichment.⁴⁹ Intentional conduct, and perhaps in some cases merely negligent conduct, may create tort causes of action, the most obvious of which are misrepresentation and intentional interference with contract. The author is unaware of any Colorado cases discussing such claims in the owner/subcontractor context, but some obvious possibilities include refusal of site access (intentional interference with the contractor/subcontractor contract), provision of defective plans and specifications (misrepresentation), failure to adequately maintain access (negligence). Whether any such claims will be viable is a fact intensive inquiry, the answer to which is likely to vary widely from case to case. Additionally, if the obligations of the owner to the contractor are "passed through" by the subcontract, the subcontractor may have certain rights against the owner.

5. Duties and Liabilities of Contractor to Subcontractors and Materialmen

5.1. Express and Implied Duties of the Contractor

A contractor's express duties to its subcontractors and materialmen will be spelled out in the subcontract or purchase order/delivery order.⁵⁰ In general, the subcontract is almost sure to spell the contractor's duty to make payment. As noted in § 9.1 below, the contractor often tries to limit this duty with a pay when paid or pay if clause. In the absence of a valid pay if paid clause, a contractor is bound to pay the subcontractor even if the owner does not pay the contractor.⁵¹ With respect to subcontractors, other express duties depend on what promises and assurances are made by the contractor and what specific obligations he agrees to assume.⁵²

Even if they are not spelled out in the subcontract, a contractor owes certain implied duties to its subcontractors. For example, a contractor has implied duties not to hinder or delay a subcontractor's performance.⁵³ Among other things, the implied duty not to hinder or delay the subcontractor's performance may include an implied duty to provide site access at a definite time.⁵⁴ The duty to provide site access may include a duty to have the site prepared for or ready to accept the subcontractor's work.⁵⁵ While not necessarily an implied duty, a contractor may not complain of defective work by a subcontractor where the contractor's own defective work is the cause of the supposed defect in the subcontractor's work.⁵⁶

Materialmen are usually bound by the UCC, which permits a great deal of freedom of contract among the parties, but which also creates certain express and implied duties. Where by agreement, course of dealing, usage of

trade or implication from circumstances the buyer of materials or supplies is required to specify the particulars of a materialman's performance, there is an express duty by the buyer to cooperate reasonably and in good faith to permit the materialman to perform the contract.⁵⁷ Additionally, the buyer is bound to accept and pay for materials in accordance with the parties' contract.⁵⁸ Proper tender of the materials entitles a materialman to acceptance of and payment for the materials.⁵⁹ In addition to express duties, the UCC imposes certain implied duties, the touchstone of which may be characterized as "commercial reasonableness." For example, there is in every contract to which the UCC applies "an obligation of good faith in its performance and enforcement."⁶⁰ "Good faith" means "honesty in fact in the conduct or transaction concerned."⁶¹

5.2. Liabilities and Legal Theories

Most claims of subcontractors against contractors will proceed on a breach of contract theory. Since there is privity between the contractor and subcontractor, there is no need to find other theories to reach the contractor. Subcontractors often assert, in the alternative, claims in quantum meruit or unjust enrichment. The existence of an express contract does not automatically preclude claims of unjust enrichment.⁶² Unjust enrichment claims also may be applicable to extra work which is outside the contract. Note that a subcontractor that substantially performs its contract may be able to recover the contract price minus damages for its failure to fully perform.⁶³ In fact, even if the subcontractor does not substantially perform, it still may recover the reasonable value of the benefits conferred which exceeds the loss created by its own breach.⁶⁴

6. Duties and Liabilities of Other Subcontractors and Materialmen

Because there is no privity between a subcontractor and the other subcontractors and materialmen on the job, the duties among subcontractors are limited in much the same way such duties are limited between the owner and a subcontractor. In general, it can be said that subcontractors and materialmen have a duty not to interfere with or damage the work of other subcontractors and materialmen, a duty not to breach tort duties, and occasionally duties arising in the third-party beneficiary context. There do not appear to be any Colorado cases discussing the duties of one subcontractor to another, and this is not surprising since subcontractors most often assert claims such as interference with their work against the contractor directly.

7. Duties and Liabilities of Subcontractors and Materialmen to Owner

7.1. Defined by the Contract

Although subcontractors and materialmen do not have a direct contractual relationship with the owner, they may, nevertheless, owe contractual and other duties to the owner. For example, an owner may have a cause of action against a subcontractor based on a third-party beneficiary theory.⁶⁵ An owner is an intended “creditor beneficiary” of the subcontract, meaning that the purpose of the subcontract is to fulfill a duty owed to the owner by the contractor.⁶⁶ However, the owner’s rights against a subcontractor are no greater than the rights of the contractor, and the contractor and subcontractor retain the right to discharge or modify the contractual duty, unless the subcontract provides otherwise or the owner can demonstrate detrimental reliance on the subcontract.⁶⁷ Among other things, this means that a settlement between the contractor and subcontractor discharges any contractual claims by the owner against the subcontractor.⁶⁸ By the same token that an owner may by words or conduct create a direct contractual relationship with a subcontractor, so too may a subcontractor assume express duties to an owner.⁶⁹

7.2. In Warranty

Whether a subcontractor or materialman is liable to the owner in warranty is a two part question: (1) is there a warranty, either express or implied; and (2) to whom does the warranty extend? An express warranty may be contained in the subcontract or it may be created by the promises, representations, and/or affirmations of the parties. Regardless of whether express warranties exist, there may be implied warranties, depending on whether or not the UCC applies. If the primary purpose of the contract is service, then there are no implied warranties.⁷⁰ On the other hand, if the primary purpose of the contract is the sale of goods, the UCC’s implied warranties of merchantability and fitness for a particular purpose will apply unless they are effectively disclaimed.⁷¹

Since warranties generally arise out of contractual relations, privity concepts may limit the group of persons who may legitimately assert warranty claims. Logically, the same principles of third party beneficiary that apply to contractual claims also apply to warranty claims, although the author is unaware of any Colorado cases discussing the issue. At least some state courts have held that principles of privity limit warranties to the parties to the contract.⁷² Most of the time privity is not an issue, either because the subcontract expressly provides that all warranties run directly to

the owner, or because the contractor assigns its warranty rights to the owner.

7.3. In Tort

A subcontractor or materialman may be liable to an owner for personal injuries or property damage resulting from negligence or other tortious conduct.⁷³ However, when purely economic damage results (i.e., the owner did not realize the benefits he expected under the contract), no cause of action lies in tort against the subcontractor.⁷⁴ The rationale for this “economic loss” rule is that parties in an arms length transaction are free to “shape the terms of the contract as they please and restrict the remedies for breach of the contract.”⁷⁵ Permitting negligence claims under such circumstances would permit a “party to avoid the contractual limitation of remedy.”⁷⁶

The economic loss rule “is limited to cases that involve only economic loss and does not prevent a negligence action to recover for physical injury to property or persons because, in that case, the duty breached generally arises independent of the contract.”⁷⁷ The duty to avoid causing such physical harm to others, including harm to property other than the thing itself that is being constructed or repaired, arises from general tort law.⁷⁸ With respect to tort claims in which the economic loss rule is not implicated, contractual concepts of privity do not apply.⁷⁹ Thus, subcontractors and materialmen are subject to tort duties, regardless of whether they are in contractual privity with the owner or such other third parties that may suffer some form of physical damage.

8. Duties and Liabilities of Subcontractor and Materialmen to Contractor

Subcontractors, of course, owe express duties to the contractor to perform in accordance with the subcontract. These express duties will vary from subcontract to subcontract, and often include duties incorporated by reference from the prime contract.⁸⁰ Often, a subcontract includes express warranties of quality. Even where the subcontract does not so provide, the courts are likely to imply a warranty that the work will be performed in a workmanlike manner. A subcontractor does not, however, owe a duty to correct problems created by other subcontractors.⁸¹ Note that a contractor who fails to follow the termination and cure provisions of the subcontract may forfeit damage claims.⁸²

Materialmen are essentially sellers of goods. Accordingly, materialmen have the same duties as any seller of goods. Most of these duties are spelled out in the Uniform Commercial Code (“UCC”), which in Colorado is found at

C.R.S. § 4-1-101, *et. seq.* The most relevant portions of the UCC for materialmen include Articles 1 (General Principles), 2(Sales) and 2.5 (Leases). Obviously, the most basic duty of a materialman is to deliver the goods in question.⁸³ More specific duties, if any, should be spelled out in the agreement between the parties. If there is a missing term in the agreement, the gap filling provisions of the UCC may supply a term. For example, if the contract between the parties does not specify a time for delivery, then delivery must be accomplished within a reasonable time.⁸⁴ The UCC has other gap filling provisions, but these provisions cannot be relied on to supply essential terms such as price and quantity.

Perhaps the most important duties imposed by the UCC are those created by the implied warranties that exist unless expressly disclaimed. Implied warranties under the UCC include warranties of merchantability and (sometimes) fitness for a particular purpose.⁸⁵ Additionally, express warranties are quite easily created by affirmation or promise, description of the goods to be supplied, and samples or models which are part of the basis of the bargain.⁸⁶ Warranties may be modified or even completely excluded if done in writing in a conspicuous manner. For example, by use of language such as "as is," by course of performance or usage of trade, and even by the buyer's failure to note defects which could have been identified by an examination of the goods, warranty liability may be greatly reduced or even eliminated.⁸⁷

Although this treatise makes no attempt to cover the UCC in depth, some aspects of the UCC are worth bearing in mind. The UCC broadly addresses many duties of buyers and sellers, but it does not and cannot cover every possible scenario. Moreover, with notable exceptions, the UCC favors freedom of contract and the right of buyers and sellers to determine their duties to each other and the standard of performance. Thus, the parties may by agreement vary the effect of the UCC, except for the obligations of good faith, diligence, reasonableness, care (and except as otherwise provided in the UCC).⁸⁸ The course of dealing between the parties and normal usage of the trade also may play a role in defining the duties of the parties, so long as they are consistent with the terms of the agreement.⁸⁹

9. Payment and Nonpayment of Subcontractors and Materialmen

Near and dear to the heart of every subcontractor and materialman is the question of payment. Specifically, the questions that matter are "When am I entitled to payment, and what rights do I have if I am not paid?" The first place to look is the contract. As discussed above, in the absence of a contract, materialmen may also look to the UCC. Surprisingly, the contract may leave questions as to whether or not payment is owed. This is discussed

below under the heading "Pay When Paid." When payment is owed under the contract but is not forthcoming for whatever reason, including the contractor's insolvency, a variety of other potential remedies are available, including mechanic's liens, claims under various public works acts, and claims under the trust fund statute. Each of these remedies is discussed briefly below.

9.1. Pay When Paid or Pay If Paid

Contractors naturally prefer to pay subcontractors and materialmen from moneys paid to the contractor by the owner. After all, the subcontracted work and materials are for the owner's benefit and, apart from the ability to obtain payment from the owner, of no value to the contractor. Sometimes contractors include or seek to include a clause in their subcontracts to the effect that payment for the subcontracted work or materials will be due only when or if the contractor is paid by the owner.⁹⁰ If enforced, this has the effect of shifting the risk of non-payment by the owner from the contractor to the subcontractor and/or materialman.

Courts often look with disfavor on such pay when paid clauses, and the majority rule is that absent exceptionally clear language creating a condition precedent, a pay when paid clause only sets a reasonable time for payment by the contractor rather than shifting the risk of non-payment to subcontractors and materialmen.⁹¹ Some states enforce such clauses if there is language clearly indicating that payment by the owner is a condition precedent to payment by the contractor, although even in those circumstances many courts are reluctant to enforce such clauses, often finding ambiguities in seemingly clear language.⁹²

Colorado follows the majority approach, holding that the "when" of such a clause "is not a contingency, but rather means that payment may be delayed."⁹³ In order to create a condition precedent, rather than a mere promise, "the language of the parties' agreement must clearly express their intent that the subcontractor is to be paid only if the owner first pays the general contractor."⁹⁴ In other words, "[i]f the risk of the owner's nonpayment is to be shifted from the general contractor to the subcontractor, then this shift must be clearly articulated in the agreement."⁹⁵

Note that a pay when paid clause will not defeat a Miller Act claim unless it is "clear and express." To be effective, the clause must, at a minimum, "include mention of the Miller Act and unambiguously express intention to waive the rights provided by it."⁹⁶ Even such a clear and express clause may not be enforced by the federal courts. It is not clear whether a pay when paid clause will preclude the assertion of a mechanic's lien, since payment is

not due from the contractor until the owner has made payment to the contractor, but for obvious policy reasons it seems unlikely that a pay when paid clause would permit an owner to avoid mechanics' liens by its own lack of payment.

9.2. License Requirements and Payment

Subcontracts often require that a subcontractor be licensed in the county or municipality where the project is located. Such requirements may not preclude an unlicensed subcontractor from pursuing payment, even when the subcontractor misrepresented its unlicensed status.⁹⁷ At least this appears to be true when the work itself was performed by a licensed sub-subcontractor.⁹⁸ Nor in such a case will an anti-assignment clause bar recovery in quantum meruit.⁹⁹

9.3. Mechanic's Liens

Although subcontractors and materialmen generally do not have direct claims against the owner, on private projects they generally have lien rights against the project. The Colorado Mechanics Lien Act is found at C.R.S. § 38-22-101 to 133. As a general rule, subcontractors, sub-subcontractors, and materialmen who supply subcontractors and sub-subcontractors have rights under the mechanics lien statute. However, suppliers to materialmen do not have lien rights.¹⁰⁰ Subcontractors and materialmen also may take advantage of the Disburser's Notice to require owners, lenders, or others with authority to make disbursements on a project to pay them directly or, in event of a dispute, to impound sufficient funds to cover the claim.¹⁰¹

9.4. Bonds

Bonds may provide another avenue for payment to subcontractors and materialmen. Most public and some private projects require payment bonds to ensure payment to the subcontractors and materialmen working on a project.

9.5. Public Works

While there are no lien rights on public projects, subcontractors and materialmen do have some protection on such projects. First, subcontractors and materialmen are entitled to prompt payment on public works projects following payment of the contractor by the public entity.¹⁰² Second, the Colorado Public Works Act¹⁰³ acts in place of the mechanics' lien statute on public projects.¹⁰⁴ The basic concept behind the statute is to require payment bonds (on public projects exceeding \$50,000) and retainage for the

protection of subcontractors and materialmen.¹⁰⁵ As with the mechanics' lien statute, subcontractors, sub-subcontractors and materialmen who supply subcontractors and sub-subcontractors have rights under the Colorado Public Works Act.¹⁰⁶ And as with the mechanics' lien statute, suppliers to materialmen do not have rights under the Colorado Public Works Act.¹⁰⁷

Subcontractors and materialmen also have rights on federal projects under the Miller Act,¹⁰⁸ although suppliers to materialmen do not have such rights.¹⁰⁹ In rare cases subcontractors and materialmen may even have equitable lien rights to retainage held by the governmental agency and to payments made in contravention of that agency's payment regulations.¹¹⁰ No effort is made here to cover the Miller Act.

9.6. Trust Fund Statute

Colorado's Mechanics Lien Act has a Trust Fund provision that requires contractors and subcontractors to hold payments in trust for the benefit of lower tier subcontractors and materialmen who may have a lien against the project and for whose benefit the payments were made.¹¹¹ The trust fund provisions do not apply where the contractor has a good faith belief that the subcontractor or materialman is not entitled to payment.¹¹² Where the trust provisions do apply, however, the "trustee" may be subject to criminal liability for failure to comply with the statute.¹¹³

10. Suits By Contractor on Behalf of the Subcontractor (Pass Through Claims)

What happens when the owner causes extra work or delays to a subcontractor, whose contract is with the contractor rather than with the owner? There is no privity of contract between the subcontractor and the owner, so the subcontractor does not have a breach of contract claim against the owner.¹¹⁴ The subcontractor's claim under the contract is against the contractor, who obviously has great incentive to force the owner to pay for any extra work or delays caused by the owner. One answer is for the subcontractor to file suit against the contractor for extra work and delay damages, and for the contractor to file suit against the owner for indemnification against any such damages that were actually caused by the owner.

Often the subcontractor and contractor are in agreement that the owner's actions caused the extra work and/or delays. In these circumstances, a lawsuit involving all three parties has an extra layer of litigation, and therefore cost, that may be unnecessary. Sometimes the extra layer of litigation makes sense, such as those instances where the owner claims in its defense that some or all of the extra work and/or delays are the

fault of the contractor. In those instances where the extra layer of litigation does not make sense, the contractor may agree to assert the subcontractor's claim against the owner. Such a claim is referred to as a "pass through claim."

When a contractor asserts a pass through claim on behalf of a subcontractor, it obviously runs the risk of inconsistent results because failure of the pass through claim against the owner will not preclude the subcontractor from asserting the same claim against the contractor. In order to avoid such a result, contractors often seek "liquidation agreements" with the subcontractor as part of the agreement to pursue pass through claims on behalf of the subcontractor. The basic point of a liquidation agreement is to permit the contractor to pursue the pass through claim while protecting the contractor from inconsistent results by requiring the subcontractor to accept the final determination of the pass through claim. There is no reported Colorado law on pass through claims and liquidation agreements, but there is a fairly well developed body of federal law on these topics.¹¹⁵

11. Notes

¹ Kobayashi v. Meehleis Steel Co., 472 P.2d 724, 728 (Colo. App. 1970).

² Black's Law Dictionary 1277 (5th ed. 1979).

³ See Western Metal Lath v. Acoustical & Construction Supply, Inc., 851 P.2d 875, 879 n.4 (Colo. 1993); Lovell Clay Products Co. v. Statewide Supply Co., 580 P.2d 1278, 1280 (Colo. App. 1978).

⁴ Western Metal Lath v. Acoustical & Construction Supply, Inc., 851 P.2d at 879 n.4 (Colo. 1993).

⁵ See Aetna Cas. & Sur. Co. v. Canam Steel Corp., 794 P.2d 1077, 1079 (Colo. App. 1990) (merely contracting to deliver material to the jobsite does not make a party a

subcontractor, focusing specifically on the lack of any work to be performed at the site).

⁶ Cf. Beco Equipment Co. v. Box, 608 P.2d 850 (Colo. App. 1980).

⁷ Schneider v. J.W. Metz Lumber Co., 715 P.2d 329, 332 (Colo. 1986).

⁸ Western Metal Lath v. Acoustical & Construction Supply, Inc., 851 P.2d 875, 878-80 (Colo. 1993) (CPWA); United States ex rel. Bryant v. Lembke Constr. Co., 370 F.2d 293 (10th Cir. 1966).

⁹ See C.R.S. § 38-22-101(1).

¹⁰ See Kobayashi, 472 P.2d at 727-28; Ragsdale Bros. Roofing v. United Bank of Denver, 744 P.2d 750, 755 (Colo. App. 1987).

¹¹ Olson v. Model Land & Irrigation Co., 225 P. 259, 260 (Colo. 1924).

¹² Cf. Beco Equipment Co. v. Box, 608 P.2d 850 (Colo. App. 1980).

¹³ C.R.S. §§ 4-1-101 to -11-102.

¹⁴ C.R.S. § 38-10-110 (non-UCC contracts; C.R.S. § 4-2-201 (UCC contracts)).

¹⁵ See Schneider v. Metz Lumber Co., 715 P.2d 329, 333 (Colo. 1986).

¹⁶ See Colorado Carpet Installation, Inc. v. Palermo, 647 P.2d 686, 688 (Colo. App. 1982).

¹⁷ See C.R.S. § 4-2-102 ("unless the context otherwise requires, this article applies to transactions in goods . . ."); Samuelson v. Chutich, 529 P.2d 631, 633-34 (Colo. 1974) (applying Uniform Sales Act); Johnson-Voiland-Archuleta, Inc. v. Roark Associates, 572 P.2d 1220 (Colo. App. 1977).

¹⁸ For example, is the predominant purpose of a contract calling for the fabrication, delivery and installation of custom cabinetry the sale of goods or the provision of services? One could legitimately argue either side of that question, and there are almost countless other examples where this is equally true.

¹⁹ C.R.S. § 38-10-112(1)(a).

²⁰ See Linder v. Midland Oil Refining Co., 40 P.2d 253 (Colo. 1935).

²¹ See Ridgeway v. Pope, 430 P.2d 77 (Colo. 1967) (part performance); Ralston Oil & Gas Co. v. July Corp., 719 P.2d 334, 339 (Colo. App. 1985) (part performance); Kiely v. St. Germain, 670 P.2d 764 (Colo. 1983) (promissory estoppel).

²² C.R.S. § 4-2-201(1).

²³ C.R.S. § 4-2-201, cmt.1. As with contractors, materialmen may be able to overcome the statute of frauds based on part performance or other types of estoppel.

²⁴ C.R.S. § 4-2-104(1).

²⁵ C.R.S. § 4-2-201(2).

²⁶ C.R.S. § 4-2-201(3).

²⁷ C.R.S. § 4-2-201 cmt.2. See also Colorado Carpet Installation, Inc. v. Palermo, 647 P.2d 686, 688 (Colo. App. 1982).

²⁸ C.R.S. § 4-2-207(2); Offen, Inc. v. Rocky Mountain Constructors, Inc., 765 P.2d 600 (Colo. App. 1988) (additional terms providing for interest and collection costs were not material and therefore became a part of the contract). See also Mead Assocs., Inc. v. Scottsbluff Sash & Door Co., 856 P.2d 40, 42 (Colo. App. 1993).

²⁹ C.R.S. § 4-2-207(2)(b).

³⁰ See Flight Systems, Inc. v. Elgood-Mayo Corp., 660 P.2d 909, 911 (Colo. App. 1982); Cargill, Inc. v. Stafford, 553 F.2d 1222, 1225 (10th Cir. 1977).

³¹ C.R.S. § 4-2-207(3).

³² See Westinghouse Elec. Corp. v. Nielsons, Inc., 647 F. Supp. 896, 900-01 (D. Colo. 1986).

³³ See O. C. Kinney, Inc. v. Paul Hardeman, Inc., 379 P.2d 628, 631 (Colo. 1963).

³⁴ C.R.S. § 4-2-205.

³⁵ 856 P.2d 40 (Colo. App. 1993).

³⁶ 856 P.2d at 41.

³⁷ See Mead Associates, Inc. v. Antonsen, 677 P.2d 434 (Colo. App. 1984).

³⁸ Haselden-Langley Constructors, Inc. v. D. E. Farr & Associates, Inc., 676 P.2d 709, 711 (Colo. App. 1983).

³⁹ Id.

⁴⁰ Id.

⁴¹ 1 CCR 101-9, R-24-103-401-03.

⁴² Cf. White Constr. Co. v. Sauter Constr. Co., 731 P.2d 784, 786 (Colo. App. 1986) (contractor's assurances of payment to sub-subcontractor created contractual relationship).

⁴³ See Brannan Sand & Gravel Co. v. Santa Fe Land & Improvement Co., 332 P.2d 892, 895 (Colo. 1958).

⁴⁴ DCB Constr. Co. v. Central City Dev. Co., 965 P.2d 115, 121 (Colo. 1998).

⁴⁵ E. B. Roberts Constr. Co. v. Concrete Contractors, Inc., 704 P.2d 859, 865-66 (Colo. 1985); Montezuma Plumbing & Heating, Inc. v. Housing Authority of Montezuma County, 651 P.2d 426, 428 (Colo. App. 1982).

⁴⁶ Cf. Heritage Pools, Inc. v. Foothills Metro. Rec. and Park Dist., 701 P.2d 1260, 1262-63 (Colo. App. 1985) (subcontractor was not named in contract and at most was only incidental beneficiary and therefore not entitled to recover as a third-party beneficiary to the contract).

⁴⁷ DCB Constr. Co., 965 P.2d at 119-20.

⁴⁸ Id. at 123; R.A.S. Builders, Inc. v. Euclid & Commonwealth Assocs., 965 P.2d 1242, 1244-45 (Colo. 1998).

⁴⁹ DCB Constr., 965 P.2d at 123, quoting Ninth District Production Credit Assoc. v. Ed Duggan, Inc., 821 P.2d 788, 798 (Colo. 1991).

⁵⁰ For more on whose form controls when purchase orders and delivery orders control, see discussion at § 12.2.3(c) regarding the Battle of the Forms.

⁵¹ Main Elec., Ltd. V. Printz Services Corp., No. 97SC601, 1999 WL 138785 (Colo. March 15, 1999); David C. Olson, Inc. v. Denver & Rio Grande W. R.R., 789 P.2d 492, 496 (Colo. App. 1990).

⁵² For example, where the contractor agreed to supply paint to the painting subcontractor, the contractor assumed a duty to supply paint that was not defective. Wynne v. United States ex rel. Mid-States Waterproofing Co., 382 F.2d 699 (10th Cir. 1967).

⁵³ Burgess Constr. Co. v. M. Morrin & Son Co., 526 F.2d 108, 113 (10th Cir. 1975). Cf. David C. Olson, Inc. v. Denver & Rio Grande W. R.R., 789 P.2d 492 (Colo. App. 1990).

⁵⁴ Burgess, 526 F.2d at 113.

⁵⁵ See Hinds v. Hinchman-Renton Fireproofing Co., 165 F. 339, 341 (8th Cir. 1908).

⁵⁶ DuBois v. B. H. Baker, General Contractors, 511 P.2d 522 (Colo. 1973) (N.S.O.P.).

⁵⁷ C.R.S. § 4-2-311.

⁵⁸ C.R.S. § 4-2-301.

⁵⁹ C.R.S. § 4-2-507.

⁶⁰ C.R.S. § 4-1-203.

⁶¹ C.R.S. § 4-1-201(19).

⁶² Denver Ventures, Inc. v. Arlington Lane Corp., 754 P.2d 785, 787 (Colo. App. 1988).

⁶³ Id.

⁶⁴ Id.

⁶⁵ Jardel Enterprises, Inc. v. Triconsultants, Inc., 770 P.2d 1301, 1303 (Colo. App. 1988).

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ See White Constr. Co. v. Sauter Constr. Co., 731 P.2d 784, 786 (Colo. App. 1986) (where privity was created by promise to insure payment by issuance of joint checks, sub-subcontractor owed obligation to perform in a workmanlike manner).

⁷⁰ Samuelson v. Chutich, 529 P.2d 631, 633 (Colo. 1974) (installation of gas pipe); Johnson-Voiland-Archuleta, Inc. v. Roark Assocs., 572 P.2d 1220 (Colo. App. 1977) (engineers).

⁷¹ Aetna Cas. & Sur. Co. v. Crissy Fowler Lumber Co., 687 P.2d 514, 516 (Colo. App. 1984) (whether implied warranty of fitness for a particular purpose applied to roof trusses is question for trier of fact); Thomas v. Bove, 687 P.2d 534, 536 (Colo. App. 1984) (UCC warranties applied to heating system).

⁷² See B&C Constr. Co. v. Grain Handling Corp., 521 S.W.2d 98, 102 (Tex. Civ. App. 1975) (applying third party beneficiary analysis); Cox v. Curnutt, 271 P.2d 342, 344 (Okla. 1954).

⁷³ Jardel Enterprises, Inc. v. Triconsultants, Inc., 770 P.2d 1301, 1304 (Colo. App. 1988).

⁷⁴ Id. at 1303-04.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id. See also Metropolitan Gas Repair Serv. v. Kulik, 621 P.2d 313, 317 (Colo. 1980) (contract does not transform the measure of tort liability arising out of contractual performance); Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041, 1043 (Colo. 1983) (same); Lembke Plumbing & Heating v. Hayutin, 366 P.2d 673, 677 (Colo. 1961).

⁷⁹ Iverson v. Solsberry, 641 P.2d 314, 315-16 (Colo. App. 1982).

⁸⁰ Dutton & Kendall Co. v. Hoffman, 264 P. 1092 (Colo. 1928).

⁸¹ See J.F. White Engineering Corp. v. United States ex rel. Pittsburgh Plate Glass Co., 311 F.2d 410, 412 (10th Cir. 1962).

⁸² Denver Ventures, Inc. v. Arlington Lane Corp., 754 P.2d 785, 788 (Colo. App. 1988).

⁸³ C.R.S. § 4-2-301.

⁸⁴ C.R.S. § 4-2-309(1). See also C.R.S. 4-2-503.

⁸⁵ C.R.S. § 4-2-314 and 315.

⁸⁶ C.R.S. § 4-2-313.

⁸⁷ C.R.S. § 4-2-316.

⁸⁸ C.R.S. § 4-1-102(3).

⁸⁹ C.R.S. § 4-1-205.

⁹⁰ Absent such a clause, there is no question that “the failure of an owner to pay a . . . contractor does not relieve the . . . contractor of the obligation to pay a subcontractor.” David C. Olson, Inc. v. Denver & Rio Grande Western R.R., 789 P.2d 492, 496 (Colo. App. 1990).

⁹¹ David R. Hendrick, John I. Spangler, III, & Robert B. Wedge, Battling for the Bucks: The Great Contingency Payment Clause Debate, *The Construction Lawyer*, July 1996, at 12. See also Byler v. Great American Ins. Co., 395 F.2d 273, 276-77 (10th Cir. 1968).

⁹² Id.

⁹³ Main Elec., Ltd. v. Printz Services Corp., No.97SC601, 1999 WL 138785, at 2 (Colo. March 15, 1999).

⁹⁴ Id. (emphasis in original).

⁹⁵ Id. At 65.

⁹⁶ United States ex rel DDC Interiors, Inc. v. Dawson Construction Co., 895 F. Supp.270, 274 (D. Colo. 1995).

⁹⁷ A.T.E., Inc. v. Nelson West Constructors, Inc., 757 P.2d 151 (Colo. App. 1988). See also Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 601 P.2d 1369, 1371 (Colo. 1979) (stating in dicta that the lack of a contractor’s license is no impediment to the enforceability of the contract).

⁹⁸ A.T.E., 757 P.2d at 152.

⁹⁹ Id. at 152-51.

¹⁰⁰ Schneider v. J.W. Metz Lumber Co., 715 P.2d 329, 332-33 (Colo. 1986).

¹⁰¹ C.R.S. § 38-22-126.

¹⁰² C.R.S. § 24-91-103.

¹⁰³ C.R.S. § 38-26-101 to 107.

¹⁰⁴ Western Metal Lath v. Acoustical & Constr. Supply Co., 851 P.2d 875, 877 (Colo. 1993); Flaugh v. Empire Clay Products, Inc., 402 P.2d 932, 933 (Colo. 1965); Continental Cas. Co. v. Rio Grande Fuel Co., 119 P.2d 618, 620 (Colo. 1941).

¹⁰⁵ C.R.S. § 38-26-105.

¹⁰⁶ South-Way Constr. Co. v. Adams City Service, 458 P.2d 250, 252 (Colo. 1969).

¹⁰⁷ Lovell Clay Products Co. v. Statewide Supply Co., 580 P.2d 1278, 1280 (Colo. App. 1978).

¹⁰⁸ 40 U.S.C. § 270 (a)-(f).

¹⁰⁹ United States ex rel. Bryant v. Lembke Constr. Co., 370 F.2d 293 (10th Cir. 1966).

¹¹⁰ Kennedy Electric Co. v. United States Postal Service, 508 F.2d 954 (10th Cir. 1974).

¹¹¹ C.R.S. § 38-22-127(1).

¹¹² C.R.S. § 38-22-127(2).

¹¹³ C.R.S. § 38-22-127(5).

¹¹⁴ See Brannan Sand & Gravel Co. v. Santa Fe Land & Improvement Co., 332 P.2d 892, 895 (Colo. 1958).

¹¹⁵¹¹⁵ For an excellent general discussion of pass through claims and liquidation agreements, see Carl A. Calvert & Carl F. Ingwolson, Jr., Pass Through Claims and Liquidation Agreements, *The Construction Lawyer*, October 1998, at 29.

12. Holland & Hart LLP Construction Practice Overview

Holland & Hart's Construction Practice Group has represented both public and private entities at the local, state and federal levels. Members of the group have extensive experience with construction agreements, including the various widely used standard forms. The firm is actively involved in construction litigation before state and federal courts throughout the Rocky Mountain West as well as before agency boards of contract appeals. Holland & Hart trial lawyers have extensive arbitration experience, both as advocates and arbitrators, and utilize various alternative dispute resolution mechanisms

to achieve favorable, prompt and economic settlements wherever possible. Holland & Hart's Construction Practice Group has represented both public and private entities at the local, state and federal levels. Members of the group have extensive experience with construction agreements, including the various widely used standard forms. The firm is actively involved in construction litigation before state and federal courts throughout the Rocky Mountain West as well as before agency boards of contract appeals. Holland & Hart trial lawyers have extensive arbitration experience, both as advocates and arbitrators, and utilize various alternative dispute resolution mechanisms to achieve favorable, prompt and economic settlements wherever possible.

Lawyers in the Construction Practice Group have substantial expertise in preparing, presenting and defending construction disputes, including:

- architect and engineer liability for defective design;
- delay and disruption claims;
- terminations for default;
- claims for interference;
- lost productivity;
- cost escalation;
- construction failures;
- insurance claims;
- and a wide variety of other controversies pertaining to all parties involved in the construction process.

The firm has represented a broad spectrum of owners, engineers, architects, contractors, subcontractors, surety companies and professional liability carriers. The Construction Practice Group is experienced in representing both public and private entities at the local, state and federal levels in disputes arising over public construction projects.

Business

Holland & Hart's Construction Practice Group offers general business advice to clients engaged in the construction industry, including drafting, or reviewing and modifying standard industry forms of construction contracts, bid packages, architect's contracts and subcontracts, drafting and reviewing contract documents prior to bid or proposal; reviewing insurance coverage including errors and omissions insurance and builder's risk insurance; advising clients in regard to liens and Miller Act claims; reviewing bonds and other surety relationships; preparing pension and profit-sharing programs;

developing key personnel compensation programs; and drafting and negotiating commercial loan documents.

Litigation

Holland & Hart has extensive litigation support in-house to provide the kind of assistance that can be crucial to successful construction litigation. Our in-house capabilities include computerized document management, document imaging systems, computerized trial presentation systems, sophisticated graphics (including custom-made charts, computer animations, and enhanced videographics), and trial presentation strategy from our in-house trial consultants.

Alternative Dispute Resolution

Holland & Hart also utilizes alternative dispute resolution (ADR) procedures, including arbitration, mediation and mini-trials. In appropriate circumstances, these ADR procedures may provide a more economical and expeditious means of resolving a dispute. While not always appropriate, Holland & Hart believes that ADR should be considered in most disputes. Holland & Hart lawyers have extensive experience in ADR and are prepared to utilize the various ADR methods when they will best achieve the client's objectives.

13. Holland & Hart LLP Construction Law Attorney Resumes

J. Kevin Bridston • Denver Office

(303) 295-8104 • kbridston@hollandhart.com

Mr. Bridston has been with the firm since 1988. He has represented both plaintiffs and defendants in a variety of contract, commercial, and construction disputes including trials, appeals, protests, arbitrations and mediations. His construction experience includes disputes regarding termination backcharges, bidding and contract award issues, change orders, delay claims, defective plans and specifications, defective design, defective

construction and warranty issues, and an array of payment issues. Mr. Bridston contributed the chapter on "Subcontractors and Materialmen" to the Colorado Construction Law book published in 1999 and updated in 2003 by CLE in Colorado. He has undergraduate and law degrees from the University of Colorado.

**Daniel R. Frost • Denver Office
(303) 295-8323 • dfrost@hollandhart.com**

Mr. Frost has over 20 years of broad experience with the defense and prosecution of complex construction claims, including litigation, arbitration, mediation and negotiation. He has handled hundreds of construction claims involving delays, interferences and accelerations, change orders, design deficiencies, quality of work, flow-down provisions, contract issues, changed conditions, indemnity and bond claims, mechanic's liens and similar claims. He has represented owners, contractors, subcontractors, developers and construction lenders on all types and sizes of public and private construction projects. Many of the claims handled by Mr. Frost involve large-scale environmental projects. He has significant experience in the drafting and negotiation of all types of construction contracts and documentation. Mr. Frost also has experience in claims avoidance and management, including prevention procedures, documentation, negotiation, and mediation; bid protests and bid mistakes; project development, including site acquisition, land-use planning, legislative assistance, and environmental planning; project administration, including bonding, insurance and other pre-construction requirements; and public contracting matters. He has significant experience in local, state and federal contracting issues, including MBE and DBE matters. Mr. Frost is a frequent speaker on construction topics and construction trial techniques and has authored a chapter on mechanic's liens in Real Property Practice and Litigation, published by Shepards/McGraw-Hill in 1990. Mr. Frost has taught trial advocacy at the University of Colorado and has handled cases across the Rocky Mountain West.

**Robert E. Benson • Denver Office
(303) 295-8234 • rbenson@hollandhart.com**

Mr. Benson has been with the firm for over 30 years and has been active in all phases of construction litigation, mediation, and arbitration, including major construction disputes involving wrongful termination of contracts; delay, acceleration, interference and extended performance; changed conditions; extra work and change order compensation, defective construction; negligent supervision and inspection; and defective design. His practice also encompassed a wide variety of commercial litigation cases. He

now primarily serves as an arbitrator and mediator and is a member of the College of Commercial Arbitrators. Mr. Benson is a frequent speaker, lecturer, and author on construction law and alternative dispute resolution. He was the founding chairman of the Colorado Bar Association Construction Law Committee and is the chair of the Continuing Legal Education Annual Construction Law Symposium and other seminars. He is the Managing Editor of *The Practitioner's Guide to Colorado Construction Law* (2d Ed. 2003). Mr. Benson is a graduate of the University of Iowa and the University of Pennsylvania Law School. He is the co-author of the book *How to Prepare For, Take and Use Depositions* as well as numerous articles, including "Drafting Arbitration Clauses for Construction Contracts," "The Power of Arbitrators and Courts to Order Discovery in Arbitration," and "Application of the Pro Rata Liability, Comparative Negligence and Contribution Statutes." Mr. Benson has spoken on many construction topics, including "Contractual Management, Allocation, and Transfer of Construction Project Risks."

**David S. Prince • Colorado Springs Office
(719) 475-7730 • dprince@hollandhart.com**

Mr. Prince has an active commercial and construction litigation practice handling cases ranging from disputes involving upscale home construction to multi-million dollar commercial construction disputes. Mr. Prince has chaired recent CLE seminars on construction contracting with public entities, insurance coverage in construction projects, and construction damages. Mr. Prince also devotes a considerable amount of his time to refining the use of technology in the efficient and innovative support of modern litigation. Mr. Prince has written and spoken on topics such as Colorado statutes affecting construction (a chapter in *Colorado Construction Law*), construction dispute resolution, using "private trials" to streamline the litigation process, and legal resources on the internet. He has undergraduate and law degrees from the University of Utah and has been with Holland & Hart since 1990.

**Donald I. Schultz • Cheyenne Office
(307) 778-4217 • dschultz@hollandhart.com**

Mr. Schultz has practiced in construction law for 15 years. He has represented owners in litigation of construction disputes involving pipelines, gas plants, refineries, coal mines, trona mines, and resort properties. He was lead trial counsel in several jury and bench trials in construction cases. He has advised owners in the negotiation and drafting of engineering, procurement and construction contracts and consulted on project management issues and claim negotiations. Mr. Schultz has experience with

claims relating to mechanical failures and has worked with metallurgical and engineering experts on claims relating to oil and gas well blowouts, casing failures, coiled tubing failures, rig brake failures, bearing failures and pipeline and tank leaks and explosions. Additionally he has worked extensively on lost profits claims arising from plant and well down time. Mr. Schultz co-authored the chapter "Wyoming Construction and Design Law" for A State-By-State Guide to Construction & Design Law published in 1998 by the American Bar Association Section of Real Property, Probate and Trust Law. He has an undergraduate degree from the University of Wyoming and a law degree from Harvard Law School.

**Todd W. Miller • Denver Tech Center Office
(303) 290-1625 • tmiller@hollandhart.com**

Mr. Miller has practiced with Holland & Hart since 1986, and is a partner in the firm's litigation department. He is primarily involved in construction and real estate litigation. Mr. Miller has handled matters throughout the Rocky Mountain region, including a series of cases related to the construction of the Denver International Airport. He has also handled a number of condemnation actions and other matters involving significant land valuation issues. Mr. Miller also has experience with insurance matters, including complex coverage issues related to construction projects and claims. Mr. Miller's trial experience includes a number of jury and bench trials throughout the federal and state courts in Colorado and the Pacific Northwest.

**David W. Zimmerman • Salt Lake City Office
(801) 517-7848 • dzimmerman@hollandhart.com**

Mr. Zimmerman joined Holland & Hart's Salt Lake City office in 2003. His practice focuses on construction, oil and gas, insurance, and general commercial litigation. He is involved in representing clients in all aspects of dispute resolution, including practicing before State and Federal Courts, mediations, and arbitrations. Mr. Zimmerman has experience representing owners, contractors, and subcontractors on a variety of construction-related disputes including prosecuting and defending mechanics' lien and bond claims in connection with projects throughout the Western United States. He frequently advises clients in connection with drafting construction contracts and modifications to the most frequently used standard form contracts including AIA, ACG, and EJCDC contracts. Mr. Zimmerman also has

experience representing oil and gas clients in royalty and gas gathering contract disputes.

Tanya M. Trujillo • Santa Fe Office
(505) 988-4421 • ttrujillo@hollandhart.com

Ms. Trujillo represents clients in general civil litigation matters in state and federal court. Ms. Trujillo has tried cases involving employment law, contract disputes, title insurance defense, construction disputes, and commercial matters. Ms. Trujillo has experience representing various parties in construction disputes, and has participated in arbitration proceedings and lawsuits on behalf of contractors and owners.

Wendy T. Wendrowski • Boise Office
(208) 342-5000 • wwendrowski@hollandhart.com

Ms. Wendrowski specializes in construction litigation, and has prosecuted and defended construction defect claims, breach of contract claims, and claims of violation of federal and state False Claims acts. Ms. Wendrowski has been involved with disputes regarding back-charges, change orders, defective work, defective plans and specifications, and delay. She has extensive pre-trial experience, including all aspects of discovery and law and motion practice, and trial experience. Ms. Wendrowski was a law clerk for Chief Judge Loren A. Smith of the United States Claims Court in Washington, D.C. She is admitted to practice in the States of California and Idaho, the District of Columbia, and before the United States Court of Federal Claims. Ms. Wendrowski received undergraduate and law degrees from the College of William and Mary.

Timothy W. Gordon • Denver Office
(303) 295-8173 • tgordon@hollandhart.com

Mr. Gordon's practice focuses primarily on construction and real estate litigation, as well as construction claims. As a member of Holland and Hart's Construction Practice Group, Mr. Gordon counsels and represents project owners, general contractors, subcontractors, and material suppliers. Mr. Gordon joined Holland & Hart in 1999. During law school, Mr. Gordon served as a member of the Denver University Law Review. After law school, he served as a Judicial Clerk for the Honorable D. Nick Caporale of the Nebraska Supreme Court.

Mary V. York • Boise Office
(208) 342-5000 • myork@hollandhart.com

Ms. York has an active real estate and construction litigation practice, specializing in eminent domain and takings litigation. Ms. York's construction experience includes disputes regarding delay claims, bidding and contract award issues, residential construction claims, and defective construction claims. Prior to coming to Holland & Hart LLP in 2001, Ms. York spent several years as a Deputy Attorney General at the Idaho Transportation Department where she gained experience in all stages of construction projects, including drafting of construction contracts, acquiring property for transportation projects, handling contract bid disputes and representing the Department in construction litigation. Ms. York has recently chaired CLE seminars on eminent domain and takings laws and has written and spoken on topics such as rights of access and inverse condemnations. Ms. York received her undergraduate degree from Gonzaga University in Spokane, Washington and her law degree from the University of Idaho.

Douglas A. Karet • Denver Office
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Mr. Karet practices in all areas of construction and real estate litigation. He represents developers, general contractors, subcontractors, and material suppliers. He also has experience representing property owners in condemnation action by state and local authorities and representing contractors regarding payment issues. Mr. Karet joined Holland & Hart in the fall of 2001, as a member of the Construction and Real Estate Litigation Group. He has a Masters in Construction Engineering and Management from the University of Colorado.

Brett I. Gross • Denver Office
(303) 295-8343 • bgross@hollandhart.com

Mr. Gross advises clients on matters arising out of complex construction delay and impact claims. He has represented owners, architects and engineers, contractors and subcontractors in both the public and private sectors. Prior to law school, Mr. Gross was a construction management and litigation consultant. He was involved in EPC and construction management projects up to \$162MM in individual value. Mr. Gross has extensive experience in project controls consulting and training for various multi-national clients. He is a licensed Professional Engineer in Colorado and Alabama, and Class "A" General Contractor in the Pikes Peak Regional Building Department.

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	Tobie Hazard	[303] 295-8280
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Federal Income Tax	John Maxfield	[303] 295-8341
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