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SECONDARY SECURITY



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Introduction

In any trade or long-term lending arrangement, the creditor / supplier seeks to maximize the likelihood of repayment. In the normal course of business, suppliers / creditors may retain a secured interest in the collateral against which they are lending or the materials they are providing, based on the language of their contracts. However, circumstances may arise requiring the need for additional or “secondary” security to minimize/mitigate the risk of loss.

Here we will discuss seven different methods that are often used to facilitate this secondary security requirement. Please note, these seven methods do not represent all options, rather they spotlight some of the more commonly used approaches. The methods described in this report and other methods not described are not mutually exclusive and can be thought of as existing in two broad categories: procedural methods and seeking external support.

Procedural Methods: Job Accounts, Joint Check Agreements, Assignments, and Promissory Notes work within the existing relationship between the supplier / creditor and their customer. They seek to leverage different factors in the relationships between the original customer / contractor and the entity they are working with / for; or formally extending or amending previously granted repayment terms / conditions.

External Support: Construction Bonds, Guaranty Agreements, and Letters of Credit seek potential sources of repayment from sources outside the supplier / creditor – customer relationship to supplement the anticipated payment from the original customer.

Satisfactory payment under the existing business relationship is the primary measure of success for our chosen field and, as accounts receivable are typically one of the larger assets on the books for most businesses, these assets must be safeguarded to ensure the successful completion of the normal cash conversion cycle and the continuation of our businesses. The methods described in this report seek to provide additional means to secure those payments and are commonly used throughout the domestic and international economies.

PROCEDURAL METHODS

Job Accounts

Often, material suppliers find it difficult to track their customer's invoices for a particular job, or have difficulties obtaining complete project information for a job they are supplying. As a result, the supplier is unable to preserve any legal remedies available to them. A very useful and simple solution to these common issues is the use of job accounts. A job account is a form of secondary security that is utilized by material suppliers who typically supply material on construction projects. Job accounts are separate accounts from the customer's stock account and are utilized for job specific orders. Most job accounts are typically considered "secured" accounts due to the fact that the supplier has obtained and verified the proper information about the job. This information should include the specific job name and address, project owner name and contact information, general contractor name and contact information, contract terms, job financing information, and bond/surety information, if applicable. The utilization of job accounts can provide many benefits for both the supplier and the customer.

Benefits for the supplier:

- Increased credit limits – Job accounts can provide the supplier with the ability to extend more credit to their customers who may not otherwise qualify for large stock account credit limits.
- Increased visibility – Job accounts allow for segregation of invoices and credits specific to that job. This segregation allows a Credit Manager to quickly view the accounts receivable details to efficiently facilitate lien releases.
- Preserve lien and bond rights – With all the project information provided from the use of job accounts, Credit Managers can more effectively protect their rights per the state requirements. Notice of furnishing, lien and bond notices, and notices of nonpayment can be easily sent to all the required parties.
- Enhanced decision making – With the use of job accounts, Credit Managers can make more informed decisions by being able to research all involved tiers in the project and have a good understanding of the flow of funds.
- Controlled exposure – Job accounts allow the supplier to have more control over their customer's exposure. For example, a Credit Manager may choose to restrict a stock account while continuing to sell on a specific job account.
- Enable more security – When using job accounts, suppliers can more effectively utilize extra secondary security tools such as joint check agreements or joint purchase orders with the general contractor of the project.

Benefits for the customer:

- Buying power – Customers can enjoy more buying power with the use of job accounts and the increased lines of credit can allow for their business to grow.
- Job costing – Job accounts provide the customer more visibility on the profitability of the project, allows them more accurate accounting and can help with project billing.
- Customer service – Job accounts help provide the customer with better service since all orders and project information will be placed on a designated account.
- Collection help – The use of job accounts can provide an additional collection tool for our customers in the event the flow of funds slows or stops on the project. Customers will be more organized to exercise any necessary lien or bond rights.
- Tax Purposes – Job accounts can provide the distinction between taxable and non-taxable projects.

A sample job account sheet is included as “**Appendix A**”.

Joint Check Agreements

A joint check agreement is a contract (or agreement) typically between three parties where the owner or General Contractor (GC) agrees to issue payment to the subcontractor (sub) and the supplier on a specified project. This document can be used to assist in collections, if necessary. A joint check agreement is often standard practice of the GC and/or Owner.

Benefits to a Creditor/Supplier:

- Addresses the creditor/supplier's concerns regarding timely payments, thus keeping the project moving.
- Minimizes the potential for liens or bond claims on projects.
- Provides an additional form of security if the subcontractor is considered a credit risk.
- Provides an additional form of security if the subcontractor is a newly formed company that lacks sufficient credit history to support extending credit.

Parties to a Joint Check Agreement:

1. Supplier (you)
2. Subcontractor (your customer)
3. GC or owner

Provisions that should be included in the agreement/contract:

- Identify all parties and ensure legal entity names are used
- Identify the project including the name and address of said project
 - Clearly express that this agreement is for the specified project only (not a blanket agreement).
- List parties to the contracts (Example: Sub has a contract with GC/owner to install said materials (or labor) at said project.
- Identify the goods/labor being supplied on the project.
- Include "consideration" (Example: someone is providing something of value (goods or services) and someone is going to receive that value (payment)).
- The agreement should be an unconditional agreement with unconditional payments.
- Terms of payment should be included in the agreement.
- The agreement should state that the joint checks are to be mailed to the supplier (YOU!).
- Include instructions in event of contracts being terminated, canceled, abandoned or if disputes arise, for the check to be issued directly to the Supplier.

- Include a provision that allows the supplier to endorse the subcontractor's signature on the check. You may have issues getting timely signatures from the Sub due to schedules, etc. This would allow the Supplier to endorse and deposit the check. *

***Important Note** - Know your state's endorsement rule on joint checks. Example: In Texas, if a Supplier receives a joint check and endorses it, the Supplier is presumed to have received the full amount of the said check and has waived its right to pursue the GC or owner, including filing a lien and/or bond claim. In the event the check is written for more than the amount owed at the time (such as labor included), it is recommended the Supplier issue a separate check back to the Sub for extra funds.

Fraudulent Activity

While the purpose of a Joint Check Agreement is to include all parties in the payment process, there have been documented instances of fraud, on the part of the subcontractor, whereby they received the joint check from the Owner/GC, forged the supplier's signature, and did not remit the applicable funds to the supplier. Should this ever happen you should take immediate action:

1. Notify both the bank the check was drawn upon and the bank where the funds were deposited and/or cashed. You may be required to execute an affidavit stating the endorsement was forged and the funds were not disbursed accordingly.
2. Notify the GC or owner that your company did not receive the funds.
3. Contact local law enforcement as forgery is a crime.

Verbiage to Avoid

- Withholding retainage
- Not to exceed a specific dollar amount
- Subject to the terms in the contract between the other two parties
- This agreement is solely an accommodation, not an obligation
- Releasing lien and/or bond claim rights

A sample Joint Check Agreement has been included as "**Appendix B**".

Assignments

An assignment is the transfer to a third party of all or part of one's rights arising under a contract. While assignments may not be a viable option at the beginning of a job or credit relationship with a customer, they can often be useful for resolving other issues.

Benefits to a creditor/supplier:

- A relatively inexpensive tool, outside of litigation, that can be utilized to secure payment.
- Could be leveraged to support additional business with a customer that may not be possible otherwise.

Important Note – Before deciding on the viability of an assignment, it is important to review the prime contract to ensure an assignment of rights is not prohibited by the language of the contract.

Parties to an Assignment:

1. **Assignor** - the party assigning his or her rights under the contract to the 3rd party.
2. **Assignee** – the party to whom the rights under a contract are transferred or assigned.

Types of Assignments (Construction related)

- **Retainage** – Many construction projects have a “retainage” clause meaning a certain percentage of each payment will be withheld until the end of the job to guarantee completion. This can often cause a cashflow issue for the subcontractor which translates into a past due account status with a supplier. Agreeing to take an assignment could allow you to continue selling the customer on other projects knowing once the retainage is released, the debt on the existing job may be satisfied. Again, it is very important to review the prime contract to make sure there are no “paid if paid” clauses or other language that may hinder your recovery.
- **Lien Rights**: - There may be times when an existing customer does not have the ability to pay but has perfected lien rights on a job. In some states, they can assign those lien rights to a 3rd party giving the 3rd party the right to recover monies due.
- **Bond Rights** – An assignment of bond rights could be a recovery option on a federal Miller Act project when the supplier may reside below tier 2 in the hierarchy and is not otherwise afforded protection under the Miller Act.
- **Proceeds from Future Jobs** - This could be an option that could be leveraged to satisfy an old debt.

Promissory Note

Many times, material suppliers/creditors find themselves in unfortunate situations where their customer or debtor falls into financial distress and, in turn, is unable to pay their account balance or debt within the agreed upon terms of sale. This type of circumstance can often leave the material supplier or creditor in a troublesome position where they are trying to collect the debt without any additional security or commitment from the debtor.

A form of secondary security that could be beneficial to the creditor, in a pay down or payment plan scenario, is the use of a promissory note. A promissory note is a legal instrument or contract that documents a financial promise between the creditor and the debtor. The debtor promises to pay back an amount of money to the creditor and outlines how and when the debtor will return the amount due. Typically for a material supplier, the amount due would be the customer's unpaid account balance plus any interest that the supplier may choose to include.

Benefits to a creditor/supplier:

- Fixed repayment schedule
- Can be more cost effective versus filing suit
- Built in protections in case of default

In general, promissory notes should only be utilized when the customer or debtor has the financial ability to repay the debt. If the Credit Manager has concerns or doubts about the customer's ability to repay, an alternate method of collecting the debt should be considered in lieu of a promissory note such as filing suit or third-party collections. If it is determined that a promissory note is the best option, the note should include the following:

- Date of Note
- Amount of Note
- Schedule of payments
- Interest rate
- Definition and terms of default
- Personal Guarantee of debtor – if an individual is assuming the debt of a business
- Confession of judgment by the debtor – if allowed by state statute
- Payment via electronic funds transfer or wire
- Signatures for the debtor and creditor
- Witness or notary signature

In the event of default by the customer or debtor, the promissory note should be worded so that the material supplier or creditor can accelerate the total amount as immediately due and payable without notice or demand. The creditor or material supplier might also want to consider securing the promissory note with a UCC filing that could give the material supplier or creditor rights to collateral or assets of the debtor to repay the debt. It is also recommended that the

creditor or material supplier consult and work with an attorney in the event they must bring legal action to enforce default of the note.

A sample promissory note has been included as “**Appendix C**”. Again, it is recommended that the material supplier or creditor consult with an attorney to make sure any promissory note and its content complies with all local or state legal requirements.

EXTERNAL SUPPORT

Construction Bonds

A construction bond is a type of surety bond used by investors in construction projects to protect against adverse events that may cause disruptions in the completion of the job, failure to complete the job due to insolvency on the part of the prime contractor, or the job's failure to meet contract specifications.

Benefits to a creditor/supplier:

- Increased credit limits – a job that is backed by a construction bond can provide the supplier with the ability to extend more credit to their customer who may not otherwise qualify.
- It is a guarantee backed by a third party – a bonded job affords a greater likelihood that a supplier will be paid for all materials that can be “proven” to be incorporated into the job, provided all proper notifications have been sent and all deadlines have been met.

Parts of a Construction Bond:

- **Performance Bond** – a guarantee from the contractor to the project owner for the satisfactory completion of the project. The performance bond is usually issued by a bank or insurance company, both of which act as a “surety”.
- **Payment Bond**: - a guarantee from the contractor to the project owner that the contractor's sub-contractors, material suppliers, and laborers will be paid timely. The payment bond is usually issued by a bank or insurance company, both of which act as a “surety”.

Parties to a Construction Bond:

1. **Obligee** - the entity requiring the bond/ usually the project owner or government agency.
2. **Principal** – the individual or company that purchases the bond to guarantee the work performance and payment/ usually the General Contractor or Sub-contractor on the job.
3. **Surety** – the bank or insurance company that backs the bond. The surety provides a line of credit in case the principal fails to fulfill their role and shields the obligee from financial responsibility to or claims from other parties.

Types of Construction Bonds:

1. **Private** – On a private project the bond will often take the place of a mechanic's lien
2. **Miller Act** – Federal law requiring prime contractors on federal construction projects to post performance and payments bonds guaranteeing their contractual duties and payment to first and second tier subs and material suppliers.
3. **Little Miller Act** – A state statute, modeled after the federal Miller Act, that requires prime contractors on state funded construction projects to post performance and payment bonds guaranteeing their contractual duties and payments to subs and material suppliers. Please note, while the Little Miller Act may resemble the federal Miller Act, each state may have adopted significant differences or exceptions. It is very important to review the laws in the state where construction is taking place prior to the delivery of goods or services.

Guaranty Agreements

A guaranty is a contract where one party commits to a third-party creditor/supplier to perform the payment obligations of the creditor's debtor. The guarantor who pledges to perform for the third-party creditor is placing their assets and income at risk should the underlying debtor fail to honor its commitment.

Benefits to a Creditor / Supplier

In a vast majority of instances, a creditor obtains a guaranty in order to have a secondary source of repayment for the underlying obligation. However, creditors should understand that the simple existence of a guaranty does not ensure that the creditor will be repaid as the guarantor may also have insufficient assets and/or income to satisfy the obligation. The best way to think of a guaranty is as a moral commitment. The guarantor is taking on the responsibility to honor the debtor's obligation which should be viewed as being indicative of the guarantor's level of commitment to the financing or supply transaction.

Mechanics of a Guaranty

To maximize the likelihood of enforceability of the guaranty agreement, there are several legal and documentation conventions and requirements that must be followed when preparing such an agreement and in having it signed:

- A general rule is that any uncertainty or lack of clarity in the language of the guaranty will be interpreted to favor the guarantor against the lender.
- All essential components of the guaranty must be in writing to be enforceable. The written guaranty agreement must be signed by the guarantor, and the guaranty agreement must contain the identity of the creditor, the name of the underlying debtor, the name of the guarantor and a description of the obligation being guaranteed.
- As a creditor it is critical to formally establish your ability to rely on the financial commitment of each guarantor in order to remove a possible defense should a guarantor choose to contest the validity of the signed agreement. The essential point here is to gather sufficient financial information on each guarantor to establish a foundation for relying on their support: signed and dated financial statements, tax returns, credit bureau reports for individual guarantors, trade credit reports for incorporated entities, etc.
- Signature verification is a critical element of an enforceable guaranty agreement. For incorporated entities you should obtain verification that the party signing the guaranty is authorized to bind the incorporated entity to this transaction (obtaining a Corporate Secretary's Certificate or a Board Resolution from the entity offering the guaranty

accomplishes this end; each incumbency document should also include signature samples). For individual guarantors, each guaranty agreement should be notarized.

- When listing guarantors on the guaranty form it is critical to use their legal name. For incorporated entities this means the name must exactly match their listing with the Secretary of State in their state of incorporation, and for individuals this means using their full legal name. Further, for individual guarantors it is critical to be able to differentiate the guarantor from other, similarly named individuals by listing additional information such as a home address and social security number.
- When individuals sign as a guarantor, it is critical that their signature block does not contain any corporate title. The guarantor is executing the document as an individual and not in any corporate capacity. Many courts will automatically invalidate a guaranty agreement based on this simple mistake.

Important Notes

A few other points to emphasize in the preparation, execution and enforcement of guaranty agreements are the concept of consideration, the existence of community property laws and the Equal Credit Opportunity Act, and proper post execution notice to guarantors.

- For a general contract to be enforceable there must be an offer, an acceptance and an exchange of consideration. The best way to think about consideration is the benefit that party is to receive in exchange for giving something. One critical circumstance to watch for here is an unrelated entity guaranteeing a third party's obligation (individuals or incorporated entities outside the ownership structure of the entity being guaranteed). Unless the guarantor can be shown to derive some tangible benefit (consideration) from their actions (furthering a key business relationship or ensuring the successful operations of a critical supplier, etc.), the enforceability of that agreement is questionable.
- Community property laws are another troublesome area. There are nine States with community property laws which state that when only one spouse signs a guaranty, the only personal assets that can be attached when enforcing the guaranty agreement are those that are solely in the guarantor's name (nothing jointly titled). Further, Equal Credit Opportunity Act requirements prevent lending discrimination based on marital status. To safely navigate this area, it is critical to formally evaluate the creditworthiness of the initial spouse before attempting to go back and seek the additional guaranty of the remaining spouse should the creditworthiness of the initial spouse prove insufficient.
- Although most guaranty agreements contain specific language where the guarantor waives their right to be notified of lender actions taken against the debtor, it is a good business practice to copy all guarantors on relevant communications (warning letters, default notices, etc.), to send all such communications to the guarantors via traceable means (certified mail with return receipt, Fed-Ex / UPS, etc.), and to save proof of delivery for these communications from the delivery source.

Letters of Credit

A letter of credit is an arrangement where a bank is substituting itself and its ability to pay for its client's ability to pay. The general requirements for letters of credit include that they must be issued in favor of a specific beneficiary, for a specific transaction amount, with a specific expiration date, containing specific instructions regarding payment to the beneficiary and clearly listing any required documents and conditions of that payment.

Benefits to a Creditor/Supplier:

The beneficiary of the letter of credit receives a higher level of assurance that they will be paid for the products and/or services they are providing to a third party (the LC Applicant).

Types of Letters of Credit:

1. **Commercial Letter of Credit** - Commercial letters of credit are used to facilitate trade between parties and are also a direct form of payment between those same parties. The various parties involved in a commercial letter of credit are the Beneficiary, the advising bank (and/or confirming bank), the issuing bank and an Applicant (the buyer). The Applicant arranges with the issuing bank to create the letter of credit which flows through an advising bank (and/or Confirming bank) which then makes payment to the Beneficiary who is typically the manufacturer or seller of the goods and services.
2. **Stand-by Letter of Credit** - Stand-by letters of credit are not intended to be a primary source of payment, rather they serve as a form of insurance protecting one party from the effects of another party's failure to fulfill one or more specific requirements in an agreement or contract.

Important Note

Seeking repayment under a commercial letter of credit is an exacting process and the payment conditions listed by the issuing bank must be followed as written or the Beneficiary must seek approval for any discrepancies relative to the listed payment conditions. It is important to note that the issuing bank cannot independently approve discrepancies as they must all be approved by the Applicant. A few of the more common letter of credit conditions that generate discrepancies include expiration of the letter of credit prior to presentation of the documents, an inconsistency in the description of, the pricing of or the quantities of the goods and services in

the seller's invoices, missing documents, and the bill of lading showing delivery outside of the accepted range of specific dates.

Cost Expectations

From a US participant's perspective, there are a few general guidelines regarding the cost of creating, processing and claiming payment under letters of credit. When an Applicant seeks to create a letter of credit, the typical cost of this activity (to the Applicant) is one-quarter of one percent (per annum) of the face amount of the letter of credit. Should the Beneficiary require a confirming bank to validate the creditworthiness of the issuing bank, the Beneficiary will pay one quarter of one percent (per quarter) of the face amount of the letter of credit. And when the Beneficiary seeks payment under the letter of credit, the Beneficiary will typically be assessed a fee of one quarter of one percent of each draw amount by the confirming or issuing bank.

Helpful Reference Materials

The governing rules for letters of credit flow from Article 5 of the Uniform Commercial Code (UCC), from the International Chamber of Commerce issued Uniform Customs and Practice for Documentary Credits (UCP), and from the International Chamber of Commerce issued International Standby Practices (ISP) for standby letters of credit. It is important to note that the UCP and the ISP do not carry the force of law as they are generally accepted sets of standards and practices that have evolved over many years to facilitate trade, and they can be overridden if specifically noted in the letter of credit language. Another important resource in the interpretation of letters of credit provisions as listed in the UCP is the International Chamber of Commerce issued International Standard Banking Practice (ISBP). The ISBP is a collection of banking practices that are to be applied when creating and processing letters of credit subject to the UCP and indicate how banks examine letter of credit documents to reflect practices agreed to by International Chamber of Commerce national committees.

CLOSING

As stated previously, the strategies and types of secondary securities outlined in this presentation are not meant to represent a complete list of those methods that may be available to you.

The information provided is for your general information and educational purposes only and is not a substitute for professional or legal advice.

JOB INFORMATION SHEET

CUSTOMER	NAME				PHONE NUMBER		CUSTOMER NUMBER		
	ADDRESS				CITY, ZIP CODE				
	TOTAL AMOUNT TO BE SUPPLIED:								
JOB INFORMATION	JOB NAME				BUILDING PERMIT NUMBER				
	ADDRESS OR DESCRIPTION OF JOB SITE								
	START DATE: _____								
	END DATE: _____								
PROJECT TYPE (CHECK ANY THAT APPLY):									
COMMERCIAL		RESIDENTIAL		NEW	REMODEL	CITY	COUNTY	STATE	FEDERAL
OWNER	NAME				PHONE NUMBER				
	ADDRESS				CITY, ZIP CODE				
GENERAL CONTRACTOR	NAME				PHONE NUMBER				
	ADDRESS				CITY, ZIP CODE				
CONTRACT TERMS	PAID FOR MATERIAL STORED ON SITE:				YES		NO		
	PAID FOR MATERIAL STORED OFFSITE:				YES		NO		
	PAID BY MONTHLY REQUISITION:				YES		NO		
	PAID FOR COMPLETE UNITS ONLY:				YES		NO		
	IS JOB TAX EXEMPT (IF YES, CERT COPY REQUIRED):				YES		NO		
OTHER (EXPLAIN):									
BONDING/LENDER INFORMATION	IS JOB BONDED (IF YES, COPY REQUIRED):				YES		NO		
	HOW IS THE JOB BEING FUNDED:				BANK LOAN _____				
					MONEY IN ESCROW _____				
					OTHER: _____				
	DRAW CYCLE OF BANK LOAN / ESCROW ACCOUNT: _____								
	LENDER/SURETY NAME				LOAN NUMBER/BOND NUMBER				
ADDRESS				CITY, STATE, ZIP					
LOAN OFFICER				PHONE NUMBER					

“Appendix A”

JOINT CHECK AGREEMENT

WHEREAS, _____ (“CUSTOMER”) has asked _____ (“SUPPLIER”) to extend credit to CUSTOMER so as to enable CUSTOMER to purchase materials to be installed by CUSTOMER on a project commonly known as _____, located at _____ (“PROJECT”); and

WHEREAS, CUSTOMER has a contract with _____ who is either a contractor or an owner (“CONTRACTOR/OWNER”) to install said materials at said PROJECT; and

WHEREAS, CONTRACTOR/OWNER has also requested SUPPLIER to sell materials to CUSTOMER to enable CUSTOMER to furnish the materials to CONTRACTOR/OWNER;

NOW, THEREFORE, in order to induce SUPPLIER to sell materials to CUSTOMER on credit, it is agreed as follows:

1. As to the materials to be supplied by SUPPLIER (“Supplier Materials”), which SUPPLIER is advised are intended for installation at the subject project, it is the intention of the parties that CONTRACTOR/OWNER, instead of making payments directly to the CUSTOMER for the SUPPLIER materials, shall make unconditional payment for the SUPPLIER materials in the form of a check, with said check being payable jointly to CUSTOMER and SUPPLIER. SUPPLIER will sell and deliver materials so long as (a) SUPPLIER is promptly paid as the indebtedness becomes due, (b) neither CUSTOMER nor CONTRACTOR/OWNER otherwise breach this agreement, (c) CUSTOMER is not default with SUPPLIER with regard to any other agreement. SUPPLIER may mail duplicate invoices to CONTRACTOR/OWNER, but is not obligated to do so, nor is SUPPLIER obligated to monitor the payments due SUPPLIER. CONTRACTOR/OWNER acknowledges that it is responsible to ascertain the correct amount due SUPPLIER. Payment terms are _____ from date of invoice. Payment will be made by CONTRACTOR/OWNER in a timely manner each month by a check payable jointly to CUSTOMER and SUPPLIER. The check will be delivered to mailed to SUPPLIER at its offices at _____.
2. Payment by the CONTRACTOR/OWNER for the materials shall be unconditional. For example, but without limitation, payment shall be made regardless of whether (a) CUSTOMER terminates or cancels the contract between CUSTOMER and CONTRACTOR/OWNER, (b) CONTRACTOR/OWNER terminates or cancels the contract between CONTRACTOR/OWNER and CUSTOMER, (c) CUSTOMER abandons the project, (d) a dispute or disputes arise between CUSTOMER and CONTRACTOR/OWNER, (e) any or all of the materials have not been installed, so long as SUPPLIER delivered the materials to CUSTOMER, (f) CUSTOMER files a petition seeking relief under the Bankruptcy Code, (g) creditors of CUSTOMER file an involuntary petition against CUSTOMER pursuant to the Bankruptcy Code, (h) a receiver is appointed over CUSTOMER or CUSTOMER’S assets, (i) any dispute arises between SUPPLIER and CUSTOMER, (j) any dispute that arises between SUPPLIER and CONTRACTOR/OWNER, (k) any third party asserts a claim against CONTRACTOR/OWNER as to the funds payable hereunder. In the event CUSTOMER files a Petition seeking relief under the Bankruptcy Code, or creditors of CUSTOMER file an involuntary petition against CUSTOMER pursuant to the Bankruptcy Code, or a receiver is appointed over CUSTOMER or CUSTOMER’S assets, then the check(s) shall not be joint, but shall instead be payable solely to SUPPLIER; however, the parties acknowledge that such checks payable solely to SUPPLIER shall, upon clearance by the bank, reduce what indebtedness would otherwise be due to CUSTOMER by CONTRACTOR/OWNER.
3. In the event (a) joint check received pays for matters other than materials (such as labor), or (b) if a joint check received by Supplier is in an amount more than the amount to be then paid to SUPPLIER by CUSTOMER pursuant to the agreement between SUPPLIER and

CUSTOMER; and SUPPLIER then issues its own check to CUSTOMER for that portion of the joint check, then the amount paid to CUSTOMER by SUPPLIER shall not constitute payment to SUPPLIER.

4. CUSTOMER hereby gives SUPPLIER and its agents and representatives the right and authority to endorse the name of CUSTOMER on said checks and deposit said checks in the bank account of SUPPLIER.
5. This agreement and its terms do not constitute payment, but constitute security for payment of the above indebtedness. This agreement does not relieve CUSTOMER of its responsibility to pay SUPPLIER its debts and obligations.
6. If there is a payment bond or bonds which have been procured by any person, firm, or corporation, including any of the parties hereto under which SUPPLIER has or may have any right against any surety or principal, that entering into this agreement and partially or fully performing thereunder by SUPPLIER shall not impair or affect any rights which SUPPLIER now has or may hereafter have under such bond or bonds.
7. The execution of this agreement and partial or complete performance of this agreement shall not impair or affect any rights SUPPLIER has to claim a mechanic's or materialman's lien pursuant to the applicable laws.
8. All parties acknowledge that SUPPLIER is only selling materials, and is under no obligation to furnish labor on the above described project, and is under no obligation to fulfill any of CUSTOMER's obligations under CUSTOMER's contract with CONTRACTOR/OWNER.
9. SUPPLIER's rights and remedies hereunder are cumulative and SUPPLIER may enforce one or more rights and remedies without waiving ore relinquishing any other right or remedy.
10. The parties to this contract expressly agree that the laws of the State of _____ shall govern the validity, construction, interpretation, and effect of this contract.

SIGNED at _____, (STATE), this ____ day of _____, 20_____.

SUPPLIER

By: _____

Its: _____

CUSTOMER

By: _____

Its: _____

CONTRACTOR/OWNER

By: _____

Its: _____

“Appendix B”

Promissory Note Example

Date: _____
\$ _____

The undersigned promises to pay to the order of _____ the sum of _____ dollars in _____ consecutive monthly installments of \$_____ each (except that the last installment in any event shall be equal to the entire balance hereunder), beginning _____, and payable on the same date of each month thereafter until this note shall be paid in full, with interest at _____ percent (_____%) per annum after maturity.

If any installments of this note is not paid when due, or upon death, dissolution or insolvency of a maker, endorser or guarantor hereof (parties) or upon an assignment for the benefit of creditors by any party, or upon the application for the appointment of a receiver for any party, or upon the filing of a petition in bankruptcy by or against any party, or upon the issuance of an attachment or the entry of a judgment against any party, or upon the determination of the holder that the financial responsibility of any party has become impaired or unsatisfactory, then this note shall immediately become due and payable at the option of the holder, without demand or notice. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default. In addition, in the event that any installment shall not have been paid on the date on which it becomes due and payable hereunder, the parties agree to pay and holder may collect a late charge in an amount equal to ____ percent of each such unpaid installment, but not to exceed _____ Dollars in any event in order to reimburse the holder for the extra expense involved in handling the delinquent payments.

All parties to this note hereby waive presentment, demand, protest and notice of dishonor; agree that extension or extensions of the time of payment of this note or any installment or part thereof may be made before; at or after maturity by the holder by agreement with any one or more of the parties without notice and without releasing the liability of any other party to this note; waive the benefit of all homestead exemptions as to this debt; agree to pay all costs incurred in collecting the same, including _____ percent attorney's fees in case this note shall not be paid at maturity or when declared due and payable as provided herein.

(Witness)

By: _____

(Witness)

By: _____

Appendix "C"