

## **“WARRANTIES” IMPOSED BY THE REGISTRAR OF CONTRACTORS**

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Contractor warranties are express or implied promises a contractor makes to its customer about the quality or nature of its undertaking. *See Columbia Western Corp. v. Vela*, 122 Ariz. 28, 592 P.2d 1294 (App. 1979). Most often, a contractor promises to perform its work (a) in accordance with the plans and specifications for the project; or (b) in a good and workmanlike manner. The former is usually an express promise made by the contractor in the contract itself, while the latter often is an implied promise imposed by law. *See Lofts at Filmore Condominium Association v. Reliance Commercial Construction, Inc.*, 218 Ariz. 574, 190 P.3d 733 (2008).

The statutes governing the conduct of Arizona contractors are set forth in Title 32 Chapter 10, Arizona Revised Statutes. These statutes do not specifically impose or recognize contractor warranties. Nevertheless, the statutes—and especially the rules and regulations promulgated by the Registrar of Contractors (“ROC”) “to effectually carry out the provisions and intent of” Chapter

10<sup>1</sup>--do impose duties upon contractors that are akin to express or implied warranties. More specifically, the ROC will enforce certain express promises made by contractors, and impose upon them implied duties intended to “discourage certain bad practices which might be indulged in to the detriment of the public . . . .” Preamble to A.A.C. R4-1-101 *et seq.*

**I. THE ROC’S STATUTORY AUTHORITY: WORKMANSHIP-RELATED.**

The statutes addressing regulation of contractors by the ROC are primarily set forth in Article 3. The meat of those powers appears in § 32-1154, which identifies twenty-four independent “acts or omissions” in which all Arizona contractors are prohibited from engaging.

As you might expect, § 32-1154 gives effect to both the express promises made by and the implied promises imposed upon contractors.

**A. ROC Enforcement of Express Contractor Promises**

One of the main prohibitions set forth in § 32-1154 is a requirement that contractors perform their work in accordance with the plans and specifications:

The holder of a license or any person listed on a license pursuant to this chapter shall not commit any of the following acts or omissions:

- (2) Departure from or disregard of plans or specifications or any building codes of the state or any political

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<sup>1</sup> A.R.S. § 32-1104(A)(5)

subdivision of the state in any material respect which is prejudicial to another without consent of the owner . . . .

This provision recognizes perhaps the most basic and common promise a contractor makes to its customer; namely, that the contractor will follow the project design. *See, e.g.*, ¶ 3.1.1 AIA A201 (1997)(“The Contractor shall perform the Work in accordance with the Contract Documents”).

Thus, even if the contractor’s work is otherwise “acceptable,” grounds to suspend or revoke its license may exist for any material departure from the plans and specifications. *See, e.g., J.W. Hancock Enterprises, Inc. v. Registrar of Contractors*, 126 Ariz. 511, 617 P.2d 19 (1980)(suspension of contractor’s license upheld because the stain color it applied materially differed from color specified); *but see* Op. Atty. Gen. 62-43 (contractor’s installation of defective equipment was not a material non-conformity unless contractor knew the equipment was defective).

### **B. ROC Enforcement of Implied Duties Related to the Quality of Construction**

Both the statutes and especially the Registrar’s regulations impose implied duties on contractors related to the quality of their work.

In 2008, for example, the Legislature amended § 32-1154(B) to expressly recognize the implied duty of good workmanship:

The registrar . . . shall on the written complaint of any owner or contractor that is a party to a construction

contract or a person who suffers a material loss or injury as a result of a contractor's **failure to perform work in a professional and workmanlike manner or in accordance with any applicable building codes and professional industry standards** . . . temporarily suspend . . . or permanently revoke any or all licenses issued under this chapter . . . .

(Emphasis added) Long before the 2008 legislative amendment, the Registrar had enshrined the importance of “workmanship” and “professional industry standards” in its effectuating regulations:

**RULE 4-9-108 WORKMANSHIP STANDARDS**

- A. A contractor shall perform all work in a **professional and workmanlike manner**.
- B. A contractor shall perform all work in accordance with any applicable building codes and **professional industry standards**.
- C. All work performed by a contractor in a county, city, or town that has not adopted building codes or where any adopted building codes do not contain specific provisions applicable to that aspect of construction work shall be performed **in accordance with professional industry standards**.

(A.A.C. R4-9-108) (Emphasis added).

Arizona courts have held that “workmanlike” as used in the regulation means “doing the work in an ordinarily skilled manner as a skilled workman should do it.” *J.W. Hancock*, 126 Ariz. 514, 617 P.2d at 22. “Professional industry standards” have not been specifically defined by the courts or the

Registrar. Nevertheless, it appears that mere compliance with the applicable building code, by itself, is not necessarily sufficient for a contractor to have performed its work in a workmanlike manner because the contractor must satisfy code requirements “and” professional industry standards.

Over the years, the Registrar has attempted to set forth specific workmanship guidelines for major categories of construction. In its WORKMANSHIP STANDARDS FOR CONTRACTORS guidebook, for example, the Registrar publishes acceptable tolerances for cracks in stucco (1/16-inch); ponding on concrete slabs (3/16-inch on concrete driveways); and lippage on Saltillo tile (3/16-inch), among other things. If there is any conflict between the Registrar’s workmanship standards and building code requirements, code requirements prevail. *Introduction, WORKMANSHIP STANDARDS FOR CONTRACTORS* at 1 (2009 ed.).

Finally, the extent to which the contractor’s work deviated from industry standards or was intentional is relevant to any civil penalty imposed by the Registrar under A.R.S. 32-1166. (A.A.C. R4-9-131)

### **C. Exceptions to ROC’s Workmanship Standards**

The Registrar’s workmanship standards are subject to two statutory exceptions:

The registrar shall not issue a citation for failure to perform work in a professional and workmanlike manner

or in accordance with any applicable building codes and professional industry standards if either:

1. The contractor is not provided an opportunity to inspect the work fifteen days after receiving a written notice from the registrar.
2. The contractor's work has been subject to neglect, modification or abnormal use.

A.R.S. § 32-1155(C). The former exception creates a condition precedent—giving the contractor a right to inspect its allegedly improper work—to further registrar involvement or investigation. The latter recognizes common defenses to contract and product liability claims. *See, e.g., Jimenez v. Sears Roebuck & Co.*, 183 Ariz. 399, 904 P.2d 861 (1995).

Similarly, the Registrar's regulations attempt to distinguish issues that are the contractor's responsibility from those of the owner:

The contractor should stand behind the product, but the buyer should be responsible for owner-maintenance items. Contractor responsibility under these standards should not extend to items which have been subject to owner neglect, modification or abnormal use.

Defects in appliances and plumbing and electrical fixtures properly installed by the contractor should be limited to the manufacturer's warranty. These standards are subject to revision as methods of construction or materials used in construction continue to change.

*Introduction*, WORKMANSHIP STANDARDS FOR CONTRACTORS at 1 (2009 ed.); *see also* Op. Atty. Gen. 62-43 (contractor’s installation of defective equipment was not a material non-conformity unless contractor knew the equipment was defective).

#### **D. Duration of Workmanship Obligations**

The Registrar may enforce workmanship standards against a contractor for two years after the earliest of (a) close of escrow; or (b) actual occupancy for new building construction; or (c) completion of the project. A.R.S. § 32-1155(A).

## **II. THE ROC’S STATUTORY AUTHORITY: NON-WORKMANSHIP-RELATED DUTIES OF CONTRACTORS**

Not all of the Registrar’s regulation and enforcement tools focus on workmanship issues. In fact, most of the prohibitions set forth in § 32-1154(A) do not involve the quality of the contractor’s work, but instead prohibit contractors from:

- Abandoning a contract or otherwise refusing to perform work without a valid excuse;
- Failing to pay income taxes;
- Misrepresenting a material fact;
- Engaging in fraudulent or “wrongful” conduct;
- Being convicted of a felony;
- Failing to comply with safety or labor laws;

- Contracting beyond the scope of its license;
- Publishing false, misleading or deceptive advertising to the public;
- and
- Threatening a subcontractor or materialman from serving a preliminary 20-day notice pursuant to A.R.S. § 33-992.01.

In other words, the statute imposes a wide range of additional duties upon contractors that generally would not be expressly addressed in the typical construction contract.