

Joint Check Agreements

A Quick Primer



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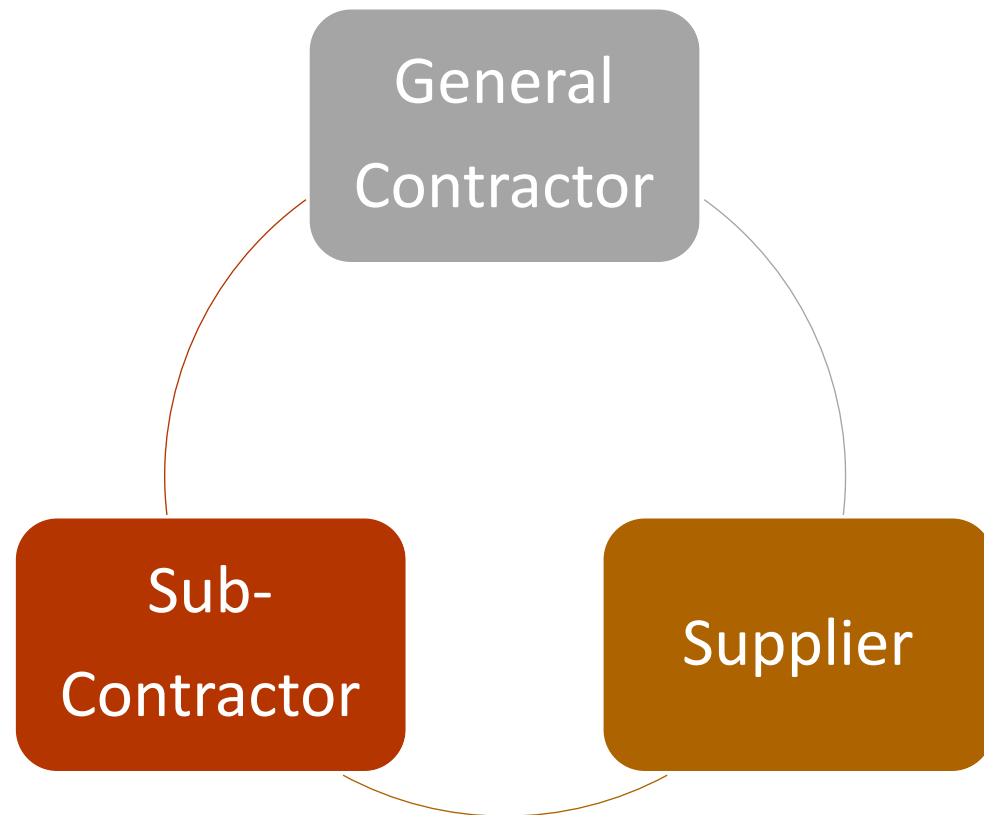
Joint Check

- A check
- One issuer
- Made payable to 2 or more parties as co-payees

Joint Check

- Purposes can include:
 - ✓ Protect GC/Surety from double payment
 - ✓ Protect Sub's payment rights
 - ✓ Protect Owner from liens/foreclosures
 - ✓ Up and downstream contractors paid at same time
 - ✓ Keep \$\$ moving
 - ✓ Keep project moving

Joint Check Arrangements



Joint Check Arrangements

- Without a formal agreement....Risks
- Unilateral issuance of joint check could be a breach of sub-contract
 - May not protect GC/surety against double payment
 - Deposit without proper endorsements – no protections for Owner/GC or lower tier sub
 - Lots of fact questions on intent of parties
 - Messy in litigation

Joint Check Arrangements

- Without a formal agreement....Risks
 - “Joint Check Rule”
 - GC’s issuance of joint check discharges GC/Surety from liability to lower tier subs/suppliers
 - Endorsement presumes actual receipt of \$ and presumes lien releases

Joint Check Arrangements

- Without a formal agreement....Risks
 - “Joint Check Rule”
 - Yikes Suppliers!! Are your projects in Joint Check Rule states?
 - e.g., CA, IA, LA, MO, SC, TX, WA – some form of Joint Check Rule
 - Other jurisdictions – unpredictable impact
 - Miller Act projects – Joint Check Rule typically does not apply.
 - Seek advice of counsel!

Joint Check Agreements

- Better approach...Enter a formal joint check agreement
- Predictable, more certainty, manageable
- Rights, obligations and remedies amongst the parties specified

Joint Check Agreements

- Devil is in the details
- READ before signing
- Leverage in the relationships will dictate

Joint Check Agreements

Tips and Traps

- No “standard” Joint Check Agreement.
- Vary widely
- Depends on the project
- Depends on the needs of the parties
- Depends on the leverage of parties and who may be initiating

Joint Check Agreements

Tips and Traps

- Parties clearly identified
 - ✓ GC
 - ✓ Sub
 - ✓ Supplier
- Identify project
- Identify and integrate with subcontract(s)
 - ✓ Is the JCA part of the subcontract?
- Clear statement of consideration
 - ✓ E.g., extension of credit, supply of materials/labor to project , in exchange for payment

Joint Check Agreements

Tips and Traps

➤ What the GC typically wants...

- ✓ Limit to only the project identified
- ✓ Limit to the amount to be paid for project (based on subcontract)
- ✓ Requirement that lien waivers be executed in exchange for payment
- ✓ JCA made part of subcontract – force sub and therefore supplier to use their form in exchange for progress payments

Joint Check Agreements

Tips and Traps

- What the GC typically wants...
 - ✓ Joint check issuance at GC's option, not a duty or requirement of GC
 - ✓ Joint check issuance solely for convenience
 - ✓ GC is not making a guaranty of payment or endorsement by Sub to Supplier
 - ✓ Clarification that no contractual relationship is created between GC and lower tier sub or supplier
 - ✓ Add in "Paid if Paid" provision to extend to supplier
 - ✓ Require Sub to come to GC to endorse; GC then controls delivery of check to supplier/lower tier.

Joint Check Agreements

Tips and Traps

- What Supplier/Lower Tier Sub typically wants...
 - ✓ Requirement that GC “shall” issue joint checks
 - ✓ Make it an obligation by GC
 - ✓ To Foreclose revocation of JC by GC
 - ✓ GC to ensure (guarantee?) payment and endorsement by Sub to supplier/lower tier
 - ✓ Preservation of lien rights or rights on bond in the event funds not received

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Tips and Traps

- What Supplier/Lower Tier Sub typically wants...
 - ✓ Power of attorney to endorse JC on behalf of sub
 - ✓ Require delivery of JC by GC directly to supplier
 - ✓ Or require sub to endorse and deliver and upon failure within certain time require GC to issue replacement check directly to supplier
 - ✓ Supplier's statement of account to control what is owed and to be paid on JC

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Tips and Traps

- What Supplier/Lower Tier Sub typically wants...
 - ✓ Security interest in goods supplied
 - ✓ Security interest in accounts receivable of sub customer
 - ✓ An assignment of funds directly from GC
 - ✓ Clarify that Sub is trustee of supplier, with no ownership interest in funds paid on JC

Joint Check Agreements

Tips and Traps

- Security interest and trust terms important
- Protect supplier in the event of sub(customer) BK
 - ✓ Secured creditor status
 - ✓ Trust relationship/confirmation of no ownership of funds by sub:
 - Remove funds from BK estate
 - Protect against preference/avoidance actions

Questions? Thank you!

Visit BNM's Covid19 Legal Resource Page

www.bellnunnally.com



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About Karen ...

Karen L. Hart is a business attorney with over 18 years of experience litigating commercial and real estate disputes.

Karen counsels clients on creditor's rights issues, real estate and landlord-tenant matters as well as various other contract and business disputes. She is a tireless advocate for her clients, providing guidance on business legal matters, such as lease, purchase and sale, brokerage and property management disputes, specific performance claims, commercial evictions, lis pendens, lien and bond claims, lien priority disputes, promissory note claims, commercial foreclosures, bankruptcy claims, professional ethics and liability matters, bills of review, confidentiality, non-competition and non-solicitation agreements and related disputes and injunctive proceedings, and business tort claims, including tortious interference with contracts and business relationships, civil theft, fraud, and misappropriation of trade secret claims.

Prior to joining Bell Nunnally, Karen served as a law clerk to the Honorable Hayden Head, Jr., United States District Court, Southern District of Texas, Corpus Christi Division. Karen is an honors graduate of the University of Texas at Austin School of Law.

Karen's recent accolades include: Dallas Top 50 Women Lawyers Award, Texas Diversity Council (2017); Best Lawyers in America (2017-2019); Winning Women Award, Texas Lawyer (2014); Women in Business Award, Dallas Business Journal (2012); Leadership Council on Legal Diversity Fellow (2017). Karen also serves as Bell Nunnally's General Counsel.

Karen is a long-time NACM member, supporter and educator.

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