

# How to Use a No-Pay Complaint to Increase the Likelihood of Payment

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## Disclaimer:

This Guide does *not* contain legal advice for your specific case.

This Guide provides general information only.

Every case has its own quirks. If you need case-specific legal advice, you should get in touch with a lawyer.

# Why File a No-Pay Complaint?

## The Pros and Cons

### Introduction

Before you file a No-Pay Complaint at the Arizona Registrar of Contractors, think about the pros and the cons.

### The Pros of Filing a No-Pay Complaint

Here are the pros of filing a no-pay complaint:

- **Inexpensive:** There is no filing fee for filing a No-Pay Complaint at the Registrar.
- **Low-Risk for Complainant:** There is no risk of attorneys' fees being awarded under A.R.S. § 12-341.01 or a contract provision.
- **Powerful Leverage:** The No-Pay Complaint aims directly at a contractor's license.
- **Speedy:** The administrative process is relatively fast, compared with the litigation process
- **Relatively Informal:** The formal rules of evidence do not apply in an administrative hearing.

### The Cons of Filing a No-Pay Complaint

Here are the cons of filing a no-pay complaint:

- **Not a Judgment:** The process ends with a final administrative decision, and there is not an enforceable judgment.
- **Collateral Estoppel:** The final administrative decision could be "res judicata" if you later go to court.
- **Adversarial:** The administrative hearing is like a miniature, informal trial: it is adversarial and requires the person filing a complaint to meet a burden of proof.
- **No Interest, No Fees:** You cannot get an award of attorney's fees or any interest that might have accrued.

- Not Payable from Recovery Fund: Under the Recovery Fund statutes, a no-pay complaint cannot be paid out of the Recovery Fund.

# A Valuable Asset: Why the Contractor's License Matters

## Contracting without a License is Against the Law

The Statute

In A.R.S. § 32-1151, the law states:

It is unlawful for any person, firm, partnership, corporation, association or other organization, or a combination of any of them, to engage in the business of, submit a bid or respond to a request for qualification or a request for proposals for construction services as, act or offer to act in the capacity of or purport to have the capacity of a contractor without having a contractor's license in good standing in the name of the person, firm, partnership, corporation, association or other organization as provided in this chapter, unless the person, firm, partnership, corporation, association or other organization is exempt as provided in this chapter.

What This Means

It is illegal to engage in contracting without a license. An unlicensed person can be:

- Subject to civil penalties of up to \$2,500.00 per day
  - See A.R.S. § 32-1166
- Convicted of a class 1 misdemeanor for the second offense
  - See A.R.S. § 32-1164
- Prohibited from receiving a license for up to 1 year
  - See A.R.S. § 32-1122(D)

## Without a License, the Contractor Can't Sue for Payment

The Statute

In A.R.S. § 32-1153, the law states:

No contractor as defined in section 32-1101 shall act as agent or commence or maintain any action in any court of the state for collection of compensation for the performance of any act for which a license is required by this chapter without alleging and proving that the contracting party whose contract gives rise to the claim was a duly licensed contractor when the contract sued upon was entered into and when the alleged cause of action arose.

### Suspension or Revocation on One License Can Negatively Affect Another License

The Statute

In A.R.S. § 32-1154(A)(20), the law states:

A. 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:

...

20. Having a person named on the license who is or was named on any other license in this state or in another state that is under suspension or revocation for any act or omission that occurs while the person is or was named on the license unless the prior revocation was based solely on a violation of this paragraph.

What This Means

You file a No-Pay Complaint against License No. 1. John is a person named on License No. 1. John is also named on License No. 2.

If License No. 1 is suspended or revoked because of your No-Pay Complaint, then the Registrar can file an Own-Motion Complaint and suspend or revoke License No. 2.

# The No-Pay Complaint Process: An Overview

## The Process

Here are the stages in the process of filing a No-Pay Complaint:

### Intake

- Fill out the Registrar's No-Pay Complaint Form
- File the Registrar's No-Pay Complaint Form
- Wait for the Registrar to Notify the Respondent

### The Citation

If the Legal Department issues a Citation, then *either*:

- The Contractor files a Written Answer on time and the Registrar's Legal Department schedules a Hearing at OAH, *or*
- The Contractor fails to file a Written Answer on time and the Registrar's Legal Department imposes discipline in the Default.

### The Hearing

If the case is scheduled for a hearing, then:

- The Contractor and the Complainant exchange Prehearing Disclosure Statements
- The Contractor and the Complainant present their cases in the Hearing at the Office of Administrative Hearings
- The Office of Administrative Hearings submits its Recommended Decision to the Registrar
- The Registrar Accepts, Modifies, or Rejects the Recommended Decision in a Final Administrative Decision

### Formal Opportunities for Settlement Discussions

During this process, the parties have two formal opportunities for settlement discussions:

- A Settlement Conference at the ROC
- Mediation at OAH



# Two Agencies: The ROC & OAH

## Introduction

When you are handling a no-pay complaint process, remember that you are working with two different agencies:

1. The ROC: The Arizona Registrar of Contractors
2. The OAH: The Office of Administrative Hearings

## Why Two Agencies?

The ROC does not hold its own hearings. The law requires the ROC to send its cases to the OAH.

At the OAH, an Administrative Law Judge:

- supervises the hearing,
- considers the evidence, and
- recommends a decision to the ROC.

## Different Resources and Rules

Because the ROC and the OAH are different, each agency has:

- Its own website:
  - <https://roc.az.gov/>
  - <http://www.azoah.com/>
- Its own building:
  - ROC: 1700 W. Washington St. (Phoenix)
  - OAH: 1740 W. Adams St. (Phoenix)
- Its own statutes in the Arizona Revised Statutes:
  - The ROC
    - Title 32: Professions and Occupations
    - Chapter 10: Contractors
      - Note: The No-Pay Statute is in Article 3 (Regulation) and specifically in § 32-1154(A)(10).
  - The OAH
    - Title 41: State Government
    - Chapter 6: Administrative Procedure

- Article 10: Uniform Administrative Hearing Procedures
- Its own rules in the Arizona Administrative Code:
  - The ROC
    - Title 4: Professions and Occupations
    - Chapter 9: Registrar of Contractors
      - The Easiest Way to Find the ROC's Rules:  
<https://roc.az.gov/rules>
  - The OAH
    - Title 2. Administration
    - Chapter 19: Office of Administrative Hearings
      - The Easiest Way to Find the OAH's Rules:  
<http://www.azoah.com/Rules.html>

# The No-Pay Statute: A.R.S. § 32-1154(A)(10)

## The Text of the Statute

The no-pay statute is in A.R.S. § 32-1154(A)(10):

- A. 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:

...

10. Failure by a licensee or agent or official of a licensee to pay monies in excess of seven hundred fifty dollars when due for materials or services rendered in connection with the licensee's operations as a contractor when the licensee has the capacity to pay or, if the licensee lacks the capacity to pay, when the licensee has received sufficient monies as payment for the particular construction work project or operation for which the services or materials were rendered or purchased.

## The Elements of the Statute

Pay attention to the parts of this statute:

- “Failure by a licensee or agent or official of a licensee”
  - If you are not dealing with a licensee, the No-Pay Complaint process will not help you.
  - You may need to file an unlicensed complaint instead.
- “to pay monies”
  - If you are looking for something besides money, the No-Pay Complaint process will not help you.
- “in excess of seven hundred fifty dollars”

- Make sure that the amount in your complaint is for more than \$750.00.
  - Note: The amount *cannot* include attorney's fees or interest.
- "when due"
  - Review the terms of the contract to make sure that the contract does not contain a defense that the contractor might raise about the money not yet being due.
- "for materials or services"
  - The Registrar and the Administrative Law Judges interpret this phrase as excluding (1) attorney's fees and (2) accrued interest.
- "rendered in connection with the licensee's operations as a contractor"
  - The Registrar has jurisdiction over licensees only to the extent they are acting *as contractors*.
  - If the licensee is acting in some other capacity, then the No-Pay Complaint process won't help.

Condition 1

- "when the licensee has the capacity to pay or,"
  - In this situation, the contractor *could* pay you, but is *not* paying you.

Condition 2

- "if the licensee lacks the capacity to pay, when the licensee has received sufficient monies as payment for the particular construction work project or operation for which the services or materials were rendered or purchased."
  - In this situation, the contractor is *not* paying you, but *should* be able to pay you, because the contractor received the funds for that payment.

## Two Points to Note

- A.R.S. § 32-1154(A)(10) does not focus on the fact that *you are not being paid by a licensee*. The statute focuses on the fact that *you are not being paid by a licensee and should have been paid*.
- Before you file the No-Pay complaint, talk to the contractor and find out what the story is. You may want to double-check that story (e.g., by calling the owner or the general contractor). Otherwise, you might be wasting your time.

## 2-Year Statute of Limitations

The Registrar's statute of limitations for administrative complaints is in A.R.S. § 32-1162(A):

- A. A person may file a written complaint pursuant to section 32-1155 with the registrar alleging a licensee has committed a violation of this chapter. The complaint must be filed:
  1. For new home builds or other new building construction, within two years after the earlier of the close of escrow or actual occupancy.
  2. For all other projects, within two years after the completion of the specific project.

While it's not precisely clear how the statute applies to no-pay cases, it's probably safe to say that if the no-pay complaint is filed with the Registrar more than two years "after the completion of the specific project" involved in the payment problem, your complaint might be rejected.

Err on the side of filing a no-pay complaint sooner rather than later.

# The No-Pay Complaint Form

## Introduction

You can get a copy of the No-Pay Complaint Form at the Registrar's website: <https://roc.az.gov/forms>

You should pay special attention to certain parts of the No-Pay Complaint form.

## Licensee Information

Remember that a No-Pay Complaint works only against a "licensee."

If you don't have a license number for the contractor, you may need to file an Unlicensed Complaint Form.

## Complaint Information

The ROC wants to know:

- What was the date of the contract?
  - Note: Under A.R.S. § 32-1158, a licensed contractor should have a written contract with certain minimum elements.
- What is the amount due?
  - Note: A.R.S. § 32-1154(A)(10) does not permit an award of interest or attorneys fees.
- Is a complaint pending in a court of law?
- Which specific invoices have not been paid?

If your case or complaint is complex or confusing for some reason, you may want to provide a cover letter explaining what is going on.

## The Certification

The No-Pay Complaint requires you to certify two things on "information and belief":

1. "that the above-named licensee has failed to pay monies in excess of seven hundred fifty dollars when due for materials or services rendered in connection with the licensee's operations as a contractor."

2. "that the above-named licensee has the capacity to pay, or has received sufficient monies as payment for the particular construction work project or operation for which the services or materials were rendered or purchased."

#### The Declaration

When you sign this, you are stating to the Registrar that:

- You are the Complainant or Complainant's duly authorized representative.
- Any documents submitted in support of this complaint are true and correct copies of the originals and are accurate to the best of your knowledge.
- You will assist in the investigation or in the prosecution of the contractor or other parties, and will, if necessary, attend hearings and testify to facts.

You are also making a statement under penalty of perjury:

"I declare under penalty of perjury that the information contained in this Form is true and correct to the best of my knowledge."

# Letting the Other Side Know: The Disclosure Statement

## Introduction

In 2017, the ROC made a new rule requiring the parties to an administrative hearing to exchange disclosure statements. This rule applies to hearings for a No-Pay Complaint.

The rule is R4-9-118 in the Arizona Administrative Code.

## Overview

The rule covers:

- What a party must disclose before a hearing
- How a party may make the disclosure
- When a party must make the disclosure
- What can happen if the party fails to make the disclosure

## What You Must Disclose

You must disclose:

- A list of all the witnesses you will call to testify, including:
  - the witnesses' contact information and
  - a brief description of the subject matter of the witnesses' expected testimony
- A list of all the exhibits that the party will use at the hearing
- Copies of the exhibits

## How You Must Disclose

The rule states that serving and filing the disclosure "must be performed in accordance with Arizona Administrative Code R2-19-108 Filing Documents."

That Rule states:

"A copy of a document filed with the Office shall be served on all parties. Filing with the Office and service shall be completed



by personal delivery; first-class, certified or express mail; or facsimile.”

## When You Must Disclose

Basic Rule: 7 Days

The rule states: “The disclosure statement and the exhibits must be served and filed not less than seven calendar days before the date of the hearing.”

The Intricacies

A document is filed at OAH on the date it is received by OAH. That date is established by OAH’s date stamp on the face of the document.

A copy of a document is served on a party:

1. *On the date* it is personally served.
2. *5 days after* it is mailed by express or first class mail.
3. *On the date of the return receipt* if it is mailed by certified mail.
4. *On the date indicated* on the facsimile transmission

## What Happens if You Fail to Disclose

If you fail to disclose the material required, then the administrative law judge has several options. The ALJ can order that:

- Witnesses or exhibits cannot be used at the hearing
- A particular fact is (or is *not*) established for the record
- A charge, a defense, a claim (or a part of those things) is dismissed

# Talking it Out before the Hearing: The ROC Settlement Conference & The OAH Mediation

## Introduction

In the ROC Complaint process, there are two opportunities to resolve the dispute before it gets to the administrative hearing:

- The ROC has a settlement conference
- The OAH has mediation.

## The ROC Settlement Conference

Under A.R.S. § 41-1092.06, the Contractor has the right to request an informal settlement conference.

If the Contractor requests an informal settlement conference, the ROC will invite the Complainant to attend. If the Complainant attends the informal settlement conference, a staff attorney from the ROC will facilitate a settlement discussion.

## The OAH Mediation

The OAH mediation:

- Is handled by an ALJ (not the same ALJ that handles the hearing)
- Happens at the Office of Administrative Hearings

You can learn more about the OAH Mediation here:

<http://www.azoah.com/FAQmed.html>

## Settlement and Compromise are Good Things

Here is Abraham Lincoln addressing lawyers on dispute resolution:

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.”

# A Big Change to A.R.S. § 12-910: A Trial de Novo? No Deference?

## Introduction

At the end of 2021, an amendment was made to a statute governing appeals from ROC decisions: A.R.S. § 12-910.

## The Trial de Novo

In A.R.S. § 12-910(D), the statute now provides for a trial de novo:

For review of final administrative decisions of agencies that regulate a profession or occupation pursuant to title 32, title 36, chapter 4, article 6, title 36, chapter 6, article 7 or title 36, chapter 17, the trial shall be de novo if trial de novo is demanded in the notice of appeal or motion of an appellee other than the agency.

No one, including the superior court judge who handles these appeals, knows precisely what a “trial de novo” will look like.

## No Deference to the Registrar

In A.R.S. § 12-910(F), the statute now prohibits deference to the agency whose decision is under review:

After reviewing the administrative record and supplementing evidence presented at the evidentiary hearing, the court may affirm, reverse, modify or vacate and remand the agency action.

The court shall affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion.

In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, *without deference* to any previous determination that may have been made on the question by the agency.

In a proceeding brought by or against the regulated party, the court shall decide all questions of fact *without deference* to any previous determination that may have been made on the question by the agency. Notwithstanding any other law, this subsection applies in any action for judicial review of any agency action that is authorized by law.

#### What All This Means Practically

No one knows exactly what all these revisions mean practically. As of today, the revisions are too new for any clear vision of how they will be applied.

# Non-Payment Complaint Form Instructions & Checklist



For Current or Suspended Licensees

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## Instructions

- Complete the entire complaint form. Incomplete or unsigned forms may be returned to you, which will delay the complaint process.
- Attach copies of documents and information as listed in the checklist below with your complaint form. Include copies of permits, invoices, advertisements, business cards and receipts. **Do not send originals** as they will not be returned to you.
- **Do not attach the following information or documentation with your complaint:**
  - Photos (this includes photos stored on a disk or flash drive)
  - Sets of plans, specifications, drawings, sketches, etc.
  - Samples (such as flooring, brick, paint, roofing, landscape rock, etc.)

## Checklist

### 1) Contract

- a) For written contracts, provide a copy of the original construction contract signed (by both parties) including all addenda and change orders. If the only written documents describing the contract are a proposal, bid, or invoice, please follow the instructions in b) for “if no written contract.”
- b) If no written contract, **provide a written statement describing the agreement that includes the following information:**
  - i) The reason a written contract is not being provided (e.g. the contractor did not provide a written contract, the contract is lost, the contract was destroyed);
  - ii) A description of any written documents used to describe the contract, e.g. bids, proposals, invoices, receipts. (If you have copies of any of these documents, please provide them with the Complaint Form.);
  - iii) A description of the work to be performed under the contract (including any addenda or change orders);
  - iv) The names of the people who negotiated the contract;
  - v) The agreed upon payment schedule;
  - vi) An explanation of who was to receive payment; and
  - vii) The date the work was to be completed.
- c) For complaints of non-payment between contractors, vendors, or material suppliers, provide a copy of:
  - i) The credit applications. Redact all SSN and/or EIN information.
  - ii) Invoices for services rendered and/or materials delivered.

### 2) **Proof of Debt(s)**; Acceptable forms of proof of debt are copies of:

- a) Invoices.
- b) Contracts.
- c) Promissory notes.
- d) Other negotiable instruments.

# Non-Payment Complaint Form



## Departmental Use Only

Complaint Number: \_\_\_\_\_

Mail to:  
 Registrar of Contractors  
 P.O. Box 18243  
 Phoenix, AZ 85005-8243

<b>Person Filing Complaint (Payee)</b>				
Business Name		Full Name (First Middle Last)		ROC License Number(s) (if any)
Street Address		City	State	Zip Code
Phone Number		Email Address		
I consent to receive communications electronically in connection with this case.    Yes <input type="checkbox"/> No <input type="checkbox"/>				
Name of Attorney (if any)				
Attorney's Street Address		City	State	Zip Code
Attorney's Phone Number		Attorney's Email Address		
<b>Licensee Information (Payer)</b>				
Name (as shown on contracts, invoices, etc.)			ROC License Number(s)	
Street Address		City	State	Zip Code
Phone Number		Email Address		
Name of Person(s) Representing License				
<b>Complaint Information</b>				
Principal Amount Due (excluding interest and fees)			Contract Date (if applicable)	
Have you filed a civil complaint?	Yes <input type="checkbox"/> (If yes, provide a copy of the civil judgment)    No <input type="checkbox"/>			
<b>List all specific invoices which have not been paid. Attach additional pages if necessary.</b>				
1.				
2.				
3.				
4.				
5.				
<b>Certification</b>				
<i>I certify, upon information and belief, that the above-named licensee has failed to pay monies in excess of seven hundred fifty dollars when due for materials or services rendered in connection with the licensee's operations as a contractor. I further certify, upon information and belief, that the above-named licensee has the capacity to pay, or has received sufficient monies as payment for the particular construction work project or operation for which the services or materials were rendered or purchased. A.R.S. § 32-1154(A)(10).</i>				
Printed Name		Signature		Date
<b>Declaration &amp; Signature</b>				
<i>I am the Complainant in this Complaint Form or Complainant's duly authorized representative. I declare under penalty of perjury that the information contained in this Form is true and correct to the best of my knowledge. I further certify that any documents submitted in support of this complaint are true and correct copies of the originals and are accurate to the best of my knowledge. I will assist in the investigation or in the prosecution of the contractor or other parties, and will, if necessary, attend hearings and testify to facts.</i>				
Printed Name		Signature		Date

# PREHEARING DISCLOSURE STATEMENT

## INSTRUCTIONS

**\*\*\*DO NOT SUBMIT THESE INSTRUCTIONS WITH THE PREHEARING DISCLOSURE FORM\*\*\***

### ADMINISTRATIVE RULES

A copy of the Arizona Administrative Code's Rules for the Registrar of Contractors can be located on the Registrar's [Website](#).

### PREHEARING DISCLOSURE REQUIREMENT

Under A.A.C. R4-9-118(A), before a hearing, the parties must prepare a disclosure statement. The disclosure statement must contain:

- A list of all the witnesses the party will call to testify, including the witnesses' contact information and a brief description of the subject matter of the witnesses' expected testimony; and
- A list of all the exhibits that the party will use at the hearing.

### FILE PREHEARING DISCLOSURE STATEMENTS

- The Prehearing Disclosure Statements and Exhibits may be submitted to the Arizona Office of Administrative Hearings using any of the following:
  - Electronically: <https://portal.azoah.com/submission/>
  - In-Person or by Mail: 1740 West Adams Street, Lower Level, Phoenix, Arizona 85007

### EXCHANGING DISCLOSURE STATEMENTS AND EXHIBITS

Under A.A.C. R4-9-118(B) (effective November 5, 2017), a party to the hearing must serve on every other party and file with the Office of Administrative Hearings a copy of:

- The disclosure statement; and,
- Any exhibit that the party will use at the hearing.

**Service:** The disclosure statement and exhibits must be served on all parties in accordance with [Arizona Administrative Code R2-19-108 Filing Documents](#). Under A.A.C. R2-19-108, service is completed by:

- Personal delivery;
- 1<sup>st</sup> class, certified or express mail; or
- Facsimile.

**Timing:** The disclosure statement and the exhibits must be served and filed not less than seven calendar days before the date of the hearing. Under A.A.C. R2-19-108, a document is served on a party:

- On the date it is personally served;
- Five days after it is mailed by express or 1<sup>st</sup> class mail;
- On the date of the return receipt if it is mailed by certified mail; or
- On the date indicated on the facsimile transmission.

### CONSEQUENCES FOR FAILING TO DISCLOSE

Under A.A.C. R4-9-108(C), if a witness or an exhibit is not timely disclosed as required the rules, and good cause for the failure to disclose is not shown, then the administrative law judge may:

- Order that certain witnesses or exhibits not be used at the hearing;
- Order that a particular fact is or is not established for the record; or,
- Order that a charge, a defense, a claim, or some portion thereof, be dismissed.

**PART 1: WITNESS LIST**

**DOCKET NO.** \_\_\_\_\_

*Under A.A.C. R4-9-118(A), before a hearing, a party must prepare a disclosure statement containing a list of all the witnesses the party will call to testify, including the witnesses' contact information and a brief description of the subject matter of the witnesses' expected testimony.*

*If you need additional space to list all witnesses, complete and attach additional Witness Lists.*

**Example**

1. Name <i>John Doe</i>	2. Telephone Number <i>(123) 456-7890</i>	3. Email Address <i>JohnDoe@Gmail.com</i>
4. Subject Matter of Expected Testimony <i>John Doe will testify regarding the poor workmanship and poor installation of the Garage Door. Mr. Doe will also testify regarding the invoices and change orders for the project.</i>		

**Witness**

1. Name	2. Telephone Number	3. Email Address
4. Subject Matter of Expected Testimony		

**Witness**

1. Name	2. Telephone Number	3. Email Address
4. Subject Matter of Expected Testimony		

**Witness**

1. Name	2. Telephone Number	3. Email Address
4. Subject Matter of Expected Testimony		

**Witness**

1. Name	2. Telephone Number	3. Email Address
4. Subject Matter of Expected Testimony		



**PART 2: EXHIBIT LIST**

**DOCKET No.** \_\_\_\_\_

*Under A.A.C. R4-9-118(A), before a hearing, a party must prepare a disclosure statement containing a list of all the exhibits that the party will use at the hearing.*  
**Note:** *All exhibits listed below must be provided to all parties to the hearing. See A.A.C. R4-9-118(B).  
If you need additional space to list all witnesses, complete and attach additional Exhibit Lists.*

<b>Example</b>	
1	Contract for new garage door.
2	Invoice #10001 – Cost for garage door replacement.

<b>Exhibit</b>	<b>Exhibit Name</b>

## PART 3: ACKNOWLEDGEMENT & SIGNATURE

*I certify that the above information is true and correct and that I will serve a copy of this disclosure statement and any exhibits listed in Part 2 to all parties to the hearing in accordance with A.A.C. R4-9-118.*

*I acknowledge and understand that if I fail to properly disclose a witness or exhibit, the administrative law judge may:*

- Order that certain witnesses or exhibits not be used at the hearing;*
- Order that a particular fact is or is not established for the record; or,*
- Order that a charge, a defense, a claim, or some portion thereof, be dismissed.*

I am the (check one):     Complainant     Respondent    Docket No. \_\_\_\_\_

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

1 **Final agency action regarding decision below:**

2  
3 **AACCEP Agency accepts decision**

4  
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 AZ State Electric LLC,

**No. 2018A-04539-ROC**

8 COMPLAINANT

**ADMINISTRATIVE LAW JUDGE  
DECISION**

9 v.

10  
11 Arizona Valley Home Builders LLC,  
12 License No. ROC 302555

13 RESPONDENT

14  
15 **HEARING:** January 17, 2019, at 1:00 p.m.

16 **APPEARANCES:** AZ State Electric LLC (“Complainant”) appeared through  
17 Mohamed Maloum, its qualifying party/member; Arizona Valley Home Builders LLC  
18 (“Respondent”) appeared through Bob Michael Ellis, its member.

19 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

20  
21 **FINDINGS OF FACT**

22 **BACKGROUND AND PROCEDURE**

23 1. According to the Registrar of Contractors’ (“the Registrar’s”) public website, on  
24 or about February 11, 2012, the Registrar issued License No. ROC 277031 Specialty  
25 Dual CR-11 Electrical contracting to Complainant. Mohamed Maloum is the qualifying  
26 party/member and the only person currently listed on the license.

27 2. On or about January 20, 2016, the Registrar issued License No. ROC 302555  
28 for General Dual DB-2 Dual Residential and Small Commercial contracting to  
29 Respondent. Bob Michael Ellis is a member. John Arthur Grabow is the qualifying party.

30 3. On or about September 24, 2018, Complainant filed a complaint with the  
Registrar alleging that Respondent had failed to pay three invoices pursuant to the parties’

1 verbal contract for electrical work.<sup>1</sup> Complainant Mr. Maloum's written statement to the  
2 complaint, which provided in relevant part as follows:

3 [Complainant] has had verbal agreement with [Respondent]  
4 for all work performed for over the past 2 years. Mike Ellis  
5 has been acting as a GC, hiring [Complainant] to do electrical  
6 work for the custom homes he is building. Shortly after hiring  
7 us, he would then hire unlicensed trades to also come and  
8 work alongside his licensed contractors he has also hired. As  
9 a result, he started making more pocket money by  
10 undercutting cost and then decided to not pay his licensed  
11 contractors. His excuse for non-payment on these invoices is  
12 that he's waiting on a draw from the [lender] for months to pay  
13 invoices #0427, #0501, and #0703. We have patiently waited  
14 and have done additional work in a professional manner for  
15 him. However, he has now continuously threatened  
16 [Complainant] that we have done unprofessional electrical  
17 work and there are too many corrections needed to be done  
18 on all his homes.

19 Attached along with this statement [are] brief emails and text  
20 messages from Mike and his office staff to my office staff. At  
21 one point, he states he has mailed a payment however we  
22 never received payment. Throughout this process, we have  
23 warned him that if he is contracting us to do electrical and his  
24 guys touch our work and/or other electrical work within those  
25 homes, we [cannot] warranty our services.<sup>2</sup>

26 4. Complainant attached numerous texts and emails to and from Respondent, as  
27 well as the three invoices, as follows: (1) Invoice No. 0427, dated April 27, 2018, in the  
28 amount of \$3,683.00 for "Electrical Rough in according to print" in a house being built at  
29 35223 N. 7<sup>th</sup> Street, Phoenix, Arizona;<sup>3</sup> (2) Invoice No. 0501, dated May 1, 2018, in the  
30 amount of \$1,425.00 for "Electrical Rough in according to print. Material" in the house  
being built at 35223 N. 7<sup>th</sup> Street, Phoenix, Arizona;<sup>4</sup> and (3) Invoice No. 0703, dated July  
6, 2018, for "Various electrical for hot check throughout home" in a house being built at  
35215 N. 7<sup>th</sup> Street, Phoenix, Arizona.

<sup>1</sup> See the Registrar's electronic file at pdf 20-21, 35-36

<sup>2</sup> The Registrar's electronic file at pdf 21, 36.

<sup>3</sup> See the Registrar's electronic file at pdf 43.

<sup>4</sup> See the Registrar's electronic file at pdf 44

1           5. On October 15, 2018, the Registrar issued a Citation for Alleged Violation of  
2 A.R.S. § 32-1154(A)(10) against Respondent's license.<sup>5</sup>

3           6. Mr. Ellis on behalf of Respondent timely answered the Citation, admitting that  
4 Respondent contracted electrical work to Complainant, that Complainant performed the  
5 electrical work, but denying that Respondent had violated A.R.S. § 32-1154(A)(10), in  
6 relevant part as follows:

7                         [Respondent] contracted with [Complainant] to  
8 completely wire the houses located at 35237 and 35223 N7th  
9 St. Phoenix, AZ 85086. They were also hired by me to wire  
10 the houses located at 35209 N. 12<sup>th</sup> St Phoenix, AZ 85085  
11 and 34904 N. 10<sup>th</sup> St Phoenix, AZ 85085. Our agreement was  
12 that I would provide them with [laborers] to hang the boxes  
13 and drill the holes. Afterwards [Complainant] would pull the  
14 wire.

15                         I paid [Complainant] \$55/hr per man to completely wire  
16 the houses and the panel boxes. However, once the homes  
17 were complete and the power turned on, several issues with  
18 the electrical started to manifest. For instance, they did not  
19 pull enough home runs nor connected them to light switches.  
20 [Complainant] has been made aware of these issues. To date  
21 they have refused to make any repairs in any of the projects.  
22 I have had to hire another electrical subcontractor to make the  
23 necessary repairs so that the houses can function. So far, I  
24 have run up a bill in the excess of \$5,000.00 and the home is  
25 still not completely repaired. In addition, the breakers keep  
26 tripping due to faulty electrical wiring.

27                         Also, the invoice provided for the home 35215 N. 7<sup>th</sup> St.  
28 Phoenix, AZ 85086 . . . is not my home. . . .<sup>6</sup>

29           7. The Registrar referred the matter to the Office of Administrative Hearings ("the  
30 OAH"), an independent agency, to schedule and to conduct an evidentiary hearing.

          8. On November 21, 2018, the Registrar issued a Notice of Hearing to be held  
before the OAH on January 17, 2019. The second page of the Notice of Hearing informed  
the parties that "[b]efore a hearing, the parties must prepare a disclosure statement. See  
A.A.C. R4-918 [sic]." The Registrar attached to the Notice of Hearing blank disclosure

<sup>5</sup> See the Registrar's electronic file at pdf 5-8.

<sup>6</sup> The Registrar's electronic file at pdf 14.

1 forms that the parties could use to disclose their witnesses and exhibits before the  
2 hearing.

3 9. On January 9, 2019, Complainant filed its disclosure statement and provided its  
4 exhibits.

5 10. A hearing was held on January 17, 2019. Complainant submitted six exhibits  
6 and presented the testimony of two witnesses: (1) Mr. Maloum; and (2) Mario Bello,  
7 Complainant's superintendent on the jobs. Mr. Ellis testified on Respondent's behalf.

8 11. Respondent never filed a disclosure statement or submitted any exhibits.

9 **HEARING EVIDENCE**

10 12. The parties took positions that were similar to the positions taken in their  
11 written statements to the Registrar. Complainant withdraw the claim for Invoice No. 0703  
12 for work on the house being constructed at 35215 N. 7<sup>th</sup> St. in Phoenix, Arizona.

13 13. Mr. Maloum testified that all the work for which Complainant sought payment  
14 was performed at the house being built at 35223 N. 7<sup>th</sup> St. in Phoenix, which was going to  
15 be Mr. Ellis' personal residence. Mr. Maloum testified that Mr. Ellis did not start alleging  
16 poor work until after Mr. Maloum threatened to file a complaint with the Registrar if  
17 Complainant were not paid. Before that, Mr. Ellis had stated that it would cut a check as  
18 soon as it received money from the lender.

19 14. Mr. Maloum testified that Complainant does rough-in electrical work for  
20 Respondent and comes back to do some work after mud has been applied to walls. Mr.  
21 Maloum and Mr. Bello testified that when Complainant returned to the jobs, Respondent's  
22 unlicensed laborers were performing electrical work, including hanging fans. Complainant  
23 had to walk away because it cannot take responsibility for unlicensed contractors' work.

24 15. Mr. Maloum testified that it always does a "hot check" of an electrical system  
25 after APS turns on power to the main panel. Mr. Ellis insisted that Complainant use  
26 power for the "hot check" from a generator, which does not produce sufficient power.  
27 Complainant never had a chance to do a "hot check" of the house at 35223 N. 7<sup>th</sup> St.

28 16. Mr. Ellis testified that power through APS is never turned on until the  
29 purchaser sets up an account with APS. A generator allows a quick "hot check" to be  
30 performed. Although the house at 35223 N. 7<sup>th</sup> St. was to be his personal residence, APS  
did not turn on power until after Complainant completed its work and left the jobsite.

1 17. Complainant submitted Mr. Bello's panel notes and calculations for the house  
2 at 35223 N. 7<sup>th</sup> St.<sup>7</sup>

3 18. Complainant submitted emails from Respondent's office manager, Fran, dated  
4 in May 2018, stating that Mr. Ellis had instructed her to pay Respondent's invoices when  
5 the lender released funds<sup>8</sup> and making the same promise in June 2018.<sup>9</sup> On July 13,  
6 2018, Mr. Ellis sent an email that provided in relevant part as follows:

7 I'm replying to your email in regards to payment on 35223 N.  
8 7<sup>th</sup> St. unfortunately we have been waiting for a draw from the  
9 investor on that property. I have yet to receive it.

10 As I understand from the investor he will only give me my red  
11 straw after I have completed the drywall. We are trying to  
12 obtain the framing and electrical and plumbing inspection on  
13 Monday. As soon as that is complete we can insulate and  
14 drywall. And at that point I will get you a draw so I can pay  
15 you thank you sincerely Mike.<sup>10</sup>

14 On July 26, 2018, Mr. Ellis sent the following email to Mr. Maloum:

15 I am working with the bank trying to get more money to pay all  
16 of the subcontractors on this job. I hope to have it all wrapped  
17 up next week it has been a long and exhausting experience.  
18 Thank you for your patience.<sup>11</sup>

18 On August 1, 2018 and August 2, 2018, at 6:12 a.m., the following email exchange  
19 occurred between Mr. Ellis and Marcy Maloum, Mr. Maloum's wife and Complainant's  
20 office manager, in relevant part as follows:

21 August 1, 2018 5:42 a.m.  
22 [Mr. Ellis:] Hi I need to fix a few things at 7<sup>th</sup> street on my  
23 home. I failed the inspection today. Please have Mario come  
24 by in the morning. Thanks mike also I will have a check for  
25 him

25 August 1, 2018 3:47 p.m.  
26 [Mrs. Maloum:] Hi Mike, You can mail out the check or you  
27 can deposit into our Chase account. As for Mario coming  
28 back, we are extremely busy at the moment. I will have to

28 <sup>7</sup> See Complainant's Exhibit 3.

29 <sup>8</sup> See Complainant's Exhibit 6 at 1.

29 <sup>9</sup> See Complainant's Exhibit 6 at 2.

30 <sup>10</sup> Complainant's Exhibit 6 at 5.

30 <sup>11</sup> Complainant's Exhibit 6 at 6.

1 check Mohamed and see which day next seek he can come  
2 out . . . . Let me know if you will emailing the check or doing  
the deposit the account.

3 August 1, 2018 6:12 p.m.

4 [Mr. Ellis:] There are some corrections that have to be made in  
5 order for me to pass my final inspection it will be reinspected  
6 tomorrow it is imperative that Mario come out today to repair  
7 the things that he did incorrectly. If he does not come out  
8 today and make the repairs I will hire an electrician to make  
9 the repairs and back charge you. This is my own personal  
10 home and I have to move in this weekend. All of these things  
11 are simple things that were not done correctly at the time they  
12 were installed. You will be held responsible. I will give you  
13 until 9 o'clock this morning to have someone on site and then I  
14 will hire another electrician. . . .

15 August 2, 2018, at 2:34 p.m.,

16 [Mrs. Maloum:] You've failed to email us over your inspection  
17 report, we have yet to receive it. You also mentioned  
18 yesterday that if Mario came today, you would have had a  
19 check for us but apparently that was just to get Mario to come  
20 back out to your home on your demands. You never informed  
21 us of an inspection date, nor did you even try to schedule with  
22 us. You only demanded us to come out on your terms  
23 because you've failed inspection. You've had multiple trades  
24 doing your electrical.

25 As I've stated to you over the phone, you need to provide us a  
26 copy of your report so that we can schedule our guys to come  
27 back out and see if it's any of the work we did. If so, we can  
28 discuss it.

29 At this stage, you've failed payment and have ignored us for  
30 months on payment therefore I have contacted the ROC and  
will be lodging a complaint against you for NON Payment. . .

<sup>12</sup>

19. Mr. Maloum testified that after Mr. Ellis said that the house at 35223 N. 7<sup>th</sup> St. had failed the county's electrical inspection, he contacted the Maricopa County building department and learned that no final inspection had been performed and that there were only minor issues with the electrical system at the house at 35223 N. 7<sup>th</sup> Street.

<sup>12</sup> Complainant's Exhibit 6 at 7-8.



1 Complainant submitted an email from the Maricopa County Building Department dated  
2 January 7, 2019, in relevant part as follows:

3 310, 330, 340, 350 – DN. Not ready for rough trades  
4 inspection/ courtesy walk done. The following notes do not  
5 reflect a complete inspection. Electric: electric & plumbing is  
6 not fire-caulked, correct where more than 2 wires penetrate  
top plate, complete electrical in attic at HVAC units,  
incomplete inspection. . . .<sup>13</sup>

7 20. Beginning on August 1, 2018, Mr. Maloum and Mr. Ellis exchanged numerous  
8 texts, Mr. Maloum repeatedly requesting the inspection report and offering to schedule Mr.  
9 Bello to perform repairs, Mr. Ellis stating that he had already hired another electrician to  
10 make repairs, and Mr. Maloum stating that Complainant was not responsible for  
11 Respondent's unlicensed laborers' work, including installing fans and fixtures. On August  
12 4, 2018, Mr. Ellis stated that Respondent's office manager would be sending a check to  
13 Respondent. On August 6, 2018, Mr. Ellis started making complaints about the electrical  
14 work on the house at 35237 N. 7<sup>th</sup> St. The emails did not mention problems with any  
15 other houses on which Complainant had worked.

16 21. Mr. Ellis testified that the house at 35223 N. 7<sup>th</sup> St. was still under construction  
17 and that Complainant had also worked for Respondent performing electrical work at  
18 houses located at 35237 N. 7<sup>th</sup> St., 34921 N. 10<sup>th</sup> St., and 35029 N. 12<sup>th</sup> St. Mr. Ellis  
19 testified that electrical problems have started occurring in all these houses. Mr. Ellis  
20 testified that Complainant was aware of the problems, but when Respondent complained  
21 about problems at the house at 35237 N. 7<sup>th</sup> St., Complainant said it could not get out for  
22 two weeks.

23 22. Mr. Maloum testified that he was never told about any problems in the houses  
24 on 10<sup>th</sup> St. or 12<sup>th</sup> St.

25 23. Mr. Ellis testified that the parties' agreement was that Respondent would pay  
26 Complainant \$55/man-hour and that Complainant usually had two men on site. Mr. Ellis  
27 testified that because he was not willing to pay a premium price for someone to drill holes  
28 and hang boxes, he used laborers employed by Respondent to perform this work, and

29  
30 

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<sup>13</sup> Complainant's Exhibit 4.

1 expected Complainant to pull wire and make connections. Mr. Ellis testified that he also  
2 expected Mr. Bello to supervise Respondent's laborers.

3 24. Mr. Bello testified that Respondent's laborers made up switches, installed  
4 fans, and pulled wire to put up the fans. Although he asked Respondent's laborers to stop  
5 performing electrical work, they continued.

6 25. Mr. Ellis testified that Complainant refused to perform repairs at any house  
7 until it was paid. He testified that Respondent paid another electrician \$50.00/hour for 78  
8 hours to repair the electrical system at the house at 35223 N. 7<sup>th</sup> St. Mr. Ellis testified that  
9 he hired "Shane from APS" to perform the repairs. Mr. Ellis did not provide any invoices,  
10 receipts, or the full name and license number of the electrician who allegedly performed  
11 the repairs.

12 26. Pursuant to A.A.C. R4-9-117, administrative notice is taken of Respondent's  
13 disciplinary history on the Registrar's public website on this date. Respondent's license  
14 was current and in good standing. No discipline was shown as ever before having been  
15 taken before against Respondent's license.

### 16 **CONCLUSIONS OF LAW**

17 1. This matter lies within the Registrar's jurisdiction.<sup>14</sup>

18 2. Complainant bears the burden of proof to establish cause to discipline  
19 Respondent's contractor's license by a preponderance of the evidence.<sup>15</sup> Respondent  
20 bears the burden to establish affirmative defenses by the same evidentiary standard.<sup>16</sup>

21 3. "A preponderance of the evidence is such proof as convinces the trier of fact  
22 that the contention is more probably true than not."<sup>17</sup> A preponderance of the evidence is  
23 "[t]he greater weight of the evidence, not necessarily established by the greater number of  
24 witnesses testifying to a fact but by evidence that has the most convincing force; superior  
25 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable  
26  
27

28 <sup>14</sup> See 32-1101 *et seq.*

29 <sup>15</sup> See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); *see also Vazanno v. Superior Court*, 74  
30 Ariz. 369, 372, 249 P.2d 837 (1952).

<sup>16</sup> See A.A.C. R2-19-119(B)(2).

<sup>17</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather  
2 than the other.”<sup>18</sup>

3 4. A.R.S. § 32-1154(A)(10) includes among the grounds for suspension,  
4 revocation, or other disciplinary action against a contractor’s license “[f]ailure by a  
5 licensee . . . to pay monies in excess of seven hundred fifty dollars when due for  
6 materials or services rendered in connection with the licensee’s operations as a  
7 contractor when the licensee has the capacity to pay or, if the licensee lacks the  
8 capacity to pay, when the licensee has received sufficient monies as payment for the  
9 particular construction work project or operation for which the services or materials were  
10 rendered or purchased.” Respondent acknowledged that Complainant performed  
11 \$5,108.00 worth of electrical work on the house that Respondent was building as Mr.  
12 Ellis’ personal residence at 35223 N. 7<sup>th</sup> St.

13 5. Respondent instead argued that it is excused from paying Complainant  
14 \$5,108.00 for the work because the work was deficient, Complainant refused to repair  
15 the work, and any amount that would otherwise be owed is offset by the monies that Mr.  
16 Ellis paid unlicensed contractor “Shane from APS” to repair the work. Respondent also  
17 claimed that repairs were needed on three other houses that should offset any monies  
18 owed for work on the house at 35223 N. 7<sup>th</sup> St. These are affirmative defenses that  
19 Respondent bears the burden to establish by a preponderance of the evidence to avoid  
20 a violation of A.R.S. § 32-1154(A)(10).

21 6. Respondent did not bear its burden to establish any affirmative defenses.  
22 First, Respondent did not complain about the work until after Complainant threatened to  
23 file a complaint with the Registrar. Respondent did not complain about the work at the  
24 houses on N. 10<sup>th</sup> St. and N. 12<sup>th</sup> Street until the hearing. Second, although at one time  
25 Respondent claimed that the house at 35223 N. 7<sup>th</sup> St. had failed inspection, it never  
26 produced any inspection report and Complainant’s evidence shows that the county  
27 inspector found only minor electrical issues at a preliminary inspection. Third,  
28 Respondent did not produce any credible evidence that it paid anyone, much less a  
29 qualified electrician, to repair any problems. Electrical contracting is a protected trade

30 <sup>18</sup> BLACK’S LAW DICTIONARY at page 1220 (8<sup>th</sup> ed. 1999).

1 and Respondent's General Dual KB-2 Dual Residential and Small Commercial license  
2 did not qualify it or its employees to perform electrical contracting work, including  
3 repairs.<sup>19</sup>

4 7. For the foregoing reasons, Complainant has established that Respondent  
5 violated A.R.S. § 32-1154(A)(10) by failing to pay Complainant \$5,108.00 for electrical  
6 work that Complainant performed on the house that Respondent was constructing at  
7 35223 N. 7<sup>th</sup> St. for Mr. Ellis.

8 **RECOMMENDED ORDER**

9 Based on the foregoing, it is recommended that thirty calendar days after the  
10 effective date of the final order in this matter, License No. ROC 302555 of Respondent  
11 Arizona Valley Home Builders LLC shall be suspended until Respondent pays  
12 Complainant AZ State Electric LLC the sum of \$5,108.00.

13 It is further recommended that if, prior to thirty calendar days after the effective  
14 date of the final order, the Registrar receives proof in writing from Respondent that it  
15 has paid Complainant \$5,108.00 in certified funds, the Registrar shall not suspend  
16 Respondent's license but, instead, shall close Case No. 2018-04539.

17 *In the event of certification of the Administrative Law Judge Decision by the*  
18 *Director of the Office of Administrative Hearings, the effective date of the Order will be*  
19 *five days from the date of that certification.*

20 Done this day, January 31, 2019.

21 /s/ Diane Mihalsky  
22 Administrative Law Judge

23 Transmitted electronically to:

24 Jeffrey Fleetham, Director  
25 Registrar of Contractors

26  
27 <sup>19</sup> See A.A.C.R4-9-104(A) (KB-2 license classification "allows the scopes of work permitted by the B-2  
28 General Small Commercial and the B General Residential Contractor licenses."). The B-2 small  
29 commercial license scope provides that "[w]ork related to electrical, plumbing, fire protection systems, air  
30 conditioning systems, boilers, swimming pools, spas and water wells must be subcontracted to an  
appropriately licensed contractor." A.A.C. R4-9-102. Similarly, the scope a residential B general  
contracting license provides that "[w]ork related to electrical, plumbing, air conditioning systems, boilers,  
swimming pools, spas and water wells must be subcontracted to an appropriately licensed contractor."  
A.A.C. R4-9-103.