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Dear Contractor, Material Supplier or Contractor Association:

My name is Fidelis Garcia and I am the former Arizona Registrar of Contractors and now an attorney in private practice. As an attorney, I represent General Contractors, Sub-contractors, Material Suppliers, Bonding companies and homeowners. This letter does not reflect any opinions of any association or other person.

First and foremost, as the former Registrar, and attorney focusing on Registrar of Contractors matters, you should be extremely concerned about the current state of the **over and unnecessary regulation** by the current Registrar - William Mundell. The “new and major changes” of the ROC, with the assistance of the Arizona Attorney General, has dismantled decades of *Due Process* protections for contractors pursuant to the **14<sup>th</sup> Amendment of the United States Constitution, the Arizona Constitution** and also the **Arizona Regulatory Bill of Rights**. This includes processes established by former directors including Michael Goldwater while he was the Registrar for approximately 13 years.

After reading this letter, I strongly urge you, or your association, to email, write or contact (1) the members of the Arizona House of Representatives Public Safety, Military and Regulatory Affairs Committee; and (2) the members of the Arizona Senate Government and Environment Committee and ask them to investigate the ROC.

Below are just a **few** items to consider:

## **UNITED STATES and ARIZONA CONSTITUTIONS**

The Fourteenth Amendment to the United States Constitution and Article II, Section 4, of the Arizona Constitution provide that “no person may be deprived of life, liberty or property without Due Process of law.” In other words, before the ROC can take away a person’s property interest in an ROC license, the ROC must comply with both Constitutions *Due Process* requirements.

## **THE ARIZONA REGULATORY BILL OF RIGHTS**

In addition to Constitutional protections, in 1998, the Legislature created and passed the Regulatory Bill of Rights to ensure fair and open regulation by state agencies. In other words, the Legislature put into law procedural rights individuals (contractors) have in dealing with the ROC. Director Mundell is stating that the objective of the ROC is to protect the public. Aren’t you a member of the Public? Who is protecting you? **ANSWER:** The Legislature, through the Regulatory Bill of Rights to make sure the ROC doesn’t violate your rights as a contractor.

The ROC has become a Prosecuting Agency for consumers against contractors and has issued more “own motion” citations against contractors since Director Mundell took over than in the past 20 years or possibly more. Please look at the “new” ROC Complaint form. Director Mundell asks complainants for their Age, Gender and Race. There is absolutely no reason (none) to collect this information from a complainant. Is the ROC the new BBB or AARP? Director Mundell should explain why collecting this information from complainants is vital and being collected in complaints filed against contractors.

**Helpful Tip:** If the ROC issues a citation against you, in any letters, answers or other documents in response, you should always “invoke” your protections pursuant to the Arizona Regulatory Bill of Rights and state that you will seek attorneys’ fees and costs in any matter before the ROC. Also, it is extremely important that you state that you DO NOT waive any protections pursuant to the Regulatory Bill of Rights in any matters or proceedings before the ROC. If you do not write this, you might waive your protections.

## **ENFORCEMENT**

**Many Attorney Generals have written:** “Agencies should seek to develop an enforcement philosophy that effectively persuades the regulated parties to comply with applicable law with a minimum of formal proceedings. For example, promulgating clear and meaningful rules and substantive policy statements may be more effective in accomplishing enforcement objectives than investigations, complaint proceedings, and disciplinary actions.”

The ROC is doing the exact opposite and has become a prosecuting agency for consumers. This needs to be stopped! In fact, the ROC currently has more attorneys on staff than ever before. To the best of my knowledge, none have any construction background. This includes the Chief of Licensing (the person with the final say on applications in the licensing department) who is an attorney and has no construction background. If you don’t believe me, go to the ROC website and look at the Executive profiles.

Since Director Mundell took over, all senior Assistant Directors, Chiefs (and assistant chiefs) of Inspections, and supervisors with extensive construction and ROC backgrounds have separated from the agency. In other words, the ROC has lost all its experienced construction managers. In short, the ROC is running on four square wheels because it does not have anyone in management with institutional knowledge left at the agency. To make matters worse, the new Assistant Attorney General Section Chief, that replaced an ROC 30 year veteran attorney, does not have any prior experience with ROC laws.

For example, the changes to the ROC Rules returns to the language “minimum” workmanship standards. The word minimum used to appear in ROC Rules and was removed. It was taken out because homeowners thought contractors were only doing the very minimum required. Instead the ROC used “within ROC workmanship standards.” Another example of moving backwards.

On a separate note, good luck trying to figure out what the ROC “changes as of July 1,2014” mean. Go to the ROC website ([www.azroc.gov](http://www.azroc.gov)) and try to make sense of them, I can’t.

## **ROC 2 YEAR STATUTE OF LIMITATIONS**

It is well known that the ROC has a 2 year statute of limitations for an ROC complaint to be filed. This is Arizona law and has been for decades. Despite this fact, the ROC and the Attorney General have taken the position that the 2 year statute of limitations **DOES NOT** apply to the ROC. This is a major problem for contractors. This means that a homeowner can file a complaint for work done more than 2 years ago and the ROC will cite you if it wants.

Recently, I had a client that the homeowner filed a complaint for an HVAC install that was done in 2009. Rather than telling the homeowner the 2 year statute of limitations had passed to file a complaint, the ROC pursued the contractor. Rather than fight, the contractor ended up refunding the homeowner the full contract amount. Again, this was for work done in 2009. To make matters worse, even though the contractor paid a full refund, the ROC Licensed Investigator may still recommend that the ROC legal department issue a citation against the contractor for other possible violations including possible mistakes in his contracts.

Since Director Mundell took over, contractors are now being cited if their contracts don’t comply with the ROC requirements. In fact, the ROC is “suspending” licenses because of this. Previously, the ROC would send Notice Letters informing contractors to correct their contracts. The ROC has started to look at every possible violation against a licensed contractor once a complaint is filed. In fact, what were called ROC Inspectors, are now ROC Licensed Investigators. Director Mundell’s change is going to place a major burden on contractors and cost you money.

### *Double Jeopardy?*

I had a client that was cited by the ROC and went through an ROC hearing. He appealed to Superior Court and the Superior Court Judge issued a final decision. Months later, the ROC filed the exact same complaint against my client. What does this mean to you? This means that the ROC could prosecute you twice for the exact same complaint.

## **SETTLEMENT CONFERENCES**

As part of its prosecuting policy, the ROC is offering contractors a “settlement conference.” I strongly encourage contractors NOT to participate in these conferences based upon my experience with the ROC. I had a case in which my client participated in a settlement conference. All of the statements, facts and documents disclosed during a settlement conference cannot be used by the ROC at a hearing against contractors. During the settlement conference, I disclosed documents showing that the Attorney General had recently investigated my client’s business practices and found no problems. None. This was going to be our defense at a hearing

if the ROC would not dismiss the Complaint. Despite the settlement conference being confidential, the ROC used all of the information disclosed against my client at a hearing to “win at all costs.” In fact, the ROC got a letter from the Attorney General to undermine our defense. Again, I do not recommend participation in a settlement conference with the ROC. Chances are the ROC prosecutors will use any information you disclose against you. This is a violation of your rights.

**Note:** During the hearing, the ROC Inspector testified that he had been drinking while investigating my client. The ROC did nothing when this fact came out.

*What is Director Mundell doing with his time?*

After we went to hearing after the settlement conference, the Judge recommended to the ROC that the case did not merit a suspension of my client’s license. Despite this fact, the ROC ignored the Judge’s ruling and imposed a suspension against my client. What the ROC did was illegal and here is why. Arizona law requires that when Director Mundell changes a Judge’s recommended ruling, he must read, or listen to, the entire record of the hearing and review the entire case file. We were able to prove that Director Mundell never even requested the hearing transcript or recording from the Office of Administrative Hearings. Rather, he just changed the final Order on his own with no regard to the law.

What is Director Mundell doing with his time? Did you know that the Office of Administrative Hearings (OAH) is not a regulatory agency and cannot enforce ROC laws? Despite this fact, OAH is issuing final “certified” decisions because the ROC has not responded to OAH on the recommended decision. As a contractor, you have a right to have the ROC review any decision against your license. OAH does not have any jurisdiction over ROC contractors.

Why isn’t the ROC or Director Mundell taking the time to review decisions against contractors? I was informed by a reliable source that Director Mundell was still performing extensive work for the Corporation Commission although he was no longer a Commissioner. This was being done on ROC contractor time (including driving around the state for AZCC hearings). When I heard this, I made a “public information request” to find out if this was true, including his emails.

The ROC road-blocked my public information request and Director Mundell never produced his emails. In fact, Director Mundell went so far as to block me from emailing any person at the ROC. This is despite the fact that other members of the public email employees regularly. What does he have to hide? By the way, not complying with a public information request is against the law. Later, I spoke with the Assistant Director of IT for the ROC (after he left the agency) about my email requests. He informed me that he told Director Mundell that he could easily comply with my request and this would not be a difficult task to compile his emails. Again, Mundell never complied.

## **IS ARIZONA STILL A RIGHT TO WORK STATE?**

Is your license application being held-up? I have had clients' ROC applications take four (4) to six (6) months to issue. For decades (including Director Goldwater, Director Torres and myself), most applications were issued between 15 to 30 days. The reason is to get contractors to work and contributing to Arizona's economy. The long delays in the ROC's issuance of licenses is causing qualified contractors from working and creating labor demands for a select few only.

For decades, the Attorney General (many of them) have stated:

**“Barriers to Entry.** Entry requirements that must be satisfied in order to obtain a license to engage in a profession or occupation are called ‘barriers to entry.’ Because a requirement that unnecessarily restricts entry restrains competition and may violate antitrust laws, licensing agencies should ensure that the restraint imposed is no greater than necessary to protect the public.”

Did you know that the ROC was asking the Arizona Department of Revenue for your tax records? It was only because contractors and contractor associations spoke out against Director Mundell that he stopped this. However, the ROC is now requiring ROC applicants to provide bank statements and fill out a detailed Financial Statement Form. Applicants are being denied because the ROC is determining that based upon Financial Statements, some contractor applicants do not have enough money (capital) to run a business. Here is the problem. No one at the ROC is qualified to review the financial state of a business and make this determination. In addition, the ROC is gathering bank information that becomes a public record. Should the ROC tell you how to run your business and keep you from getting a license?

### *New License Bond Requirements*

As of July 1, 2014, the ROC is changing and increasing the bonding requirements for contractors. I spoke with a bonding agent recently and he informed me that the new ROC bonding requirements will cause contractors to submit current “financials” to your bonding company to get a ROC bond. In other words, another obstacle that will keep you from getting licensed. It is well known that “bonding issues” are extremely important to contractors. Less, not more, barriers should be imposed in this area.

When I was the Registrar, I introduced a change in the law to get rid of all bonding requirements for all commercial contractors. After studying the issue, I determined that the commercial bonds were completely unnecessary. In fact, one broker told me that insurance companies considered ROC commercial license bonds – “junk bonds.” This change passed the House and the Senate but was killed at the last moment by the insurance companies. Surprise, surprise! Why is Director Mundell keeping commercial license bonds?

**Helpful Tip:** If the ROC issues a denial letter against your pending application, you should always “invoke” your protections pursuant to the Arizona Regulatory Bill of Rights and state that you will seek attorneys’ fees and costs in any matter before the ROC. Again state that you DO NOT waive any protections pursuant to the Regulatory Bill of Rights in any matters or proceedings before the ROC. The Regulatory Bill of Rights also applies to license applications.

## **THE ROC HAS BECOME A COLLECTION AGENCY FOR THE STATE**

### *LICENSE CLASSIFICATIONS AND FEES CHANGED AS OF JULY 1, 2014*

Did you know that Director Mundell wanted to impose a “non-refundable” application fee? Thankfully, the Legislature had written a law making this illegal.

Did you know that the ROC is changing the license classifications? This is a major problem for contractors. First, what are contractors going to do upon renewal? Next, the ROC classifications haven’t been changed because Arizona has reciprocity with California, Nevada and Utah. This means if you have experience in Arizona and want to do business in one of these states, these states understand what ROC classification and experience to apply. The new re-classifications will most likely mean that California, Nevada and Utah will have to try and understand the new classifications and experience. Again creating more barriers for contractors to prove what license classifications they have experience in and do business in these states without taking trade exams.

Did you know that the ROC is solely funded by contractor fees? The ROC is called a 90/10 state agency. This means that 90 cents of every contractor dollar goes to the ROC and 10 cents of every contractor dollar goes to the state’s general fund. Since Director Mundell has taken over, the Legislature has taken millions of contractor dollars from the ROC. In other words, your contractor dollars are being used to fund other state functions and not being used for the ROC. In fact, there was enough money in the ROC when I left, that during this recession, the ROC could have reduced or even refunded a portion of contractor fees. Your contractor dollars should not be used to fund other state functions. This is a backdoor tax.

To make matters worse, your contractor dollars are funding the ROC as a “new” prosecuting agency against contractors.

## **ROC CRIMINAL BACKGROUND CHECKS – USE OF PRIVATE VENDOR**

In 1992, and again in 1993, the Legislature “substantially changed” the state law concerning criminal history record information. Non-criminal regulatory agencies, like the ROC, that are allowed by law to obtain criminal information on a contractor must comply with the many Arizona Department of Public Safety statutory requirements. In other words, DPS has extensive laws to make sure criminal background information on contractors “is not disclosed or provided to any person outside the agency or disseminated to unauthorized persons or the public.” **The**

**wrongful release or use of criminal history information for an unauthorized purpose is a criminal offense pursuant to Arizona law.**

A major change in the ROC licensing (and renewal) process is that each person on a contractors' license must complete a criminal background check from a non-government private vendor, not DPS. Prior to Director Mundell, and for decades, all criminal background checks were completed by DPS to comply with state law passed by the Legislature to protect your information. The ROC has stated that its vendor can process criminal background checks in just a few days. What the ROC does not state is whether this private vendor was approved by DPS to ensure your background information is protected as required by law. For decades, the ROC has used a "secure" and detailed process, and kept personal background check information locked up, to comply with the law and DPS' requirements.

**Is your information safe?** Did you know that almost all of ROC "investigators" and "inspectors" are now telecommuting from their homes; and using cell phones instead of hard lines. In the past (before my tenure), at least one ROC employee was caught with contractor information in his home. After investigating a telecommuting option, I determined it was not feasible. Only in a very limited instance did I allow it, but it was very closely monitored. Did you know the ROC cannot enter an employee's home without a Court Order? Also, who has access to your ROC files at an employee's home? What about the recent Target debit card theft affecting millions of Americans? Are your social security numbers secure? What about the recent CPS violations related to agency records?

Finally, did you know that the ROC's background check is so expansive it includes your credit score and school transcripts among other information. Why is the ROC collecting all this information about contractors?

**ROC NO LONGER TAKING "NO PAY or PROMPT PAY" DISPUTES FROM CONTRACTORS, SUPPLIERS OR EMPLOYEES**

Despite specific laws allowing contractors, sub-contractors, material suppliers or employees to file a complaint against a licensed contractor for non-payment, or under Prompt Pay, the ROC has taken the position that these matters be filed in Superior or Justice Court. This is contrary to law which specifically states that no pay and Prompt Pay disputes can be filed with the ROC.

Recently I had the ROC write me that financial disputes should be handled by the courts and the ROC's limited resources are better used elsewhere. What does this mean to you? Although you are entitled to represent yourself or your company in a ROC complaint, the ROC wants you pay a lawyer and court fees. I guess the ROC would rather use your fees prosecuting contractors than allowing contractors, material suppliers and employees an informal setting to resolve these money disputes.

**Note:** It is clear the ROC does not understand the Public Policy related to no pay disputes. First, if contractors aren't paying material suppliers or other contractors, those suppliers and other contractors aren't collecting money to pay state or local sales taxes on projects. This will affect the amount of taxes the State will collect. Furthermore, material suppliers and other contractors use the ROC website to determine if any complaints have been filed against potential clients. In other words, the ROC website is used as a tool in making your business decisions. I guess the ROC has forgotten that you are also a MEMBER of the PUBLIC.

#### *Stonecreek Court Decision*

Finally, if you are a sub-contractor, this is a major blow to your rights to collect money. Several years ago, the Arizona Court of Appeals issued a decision that favored sub-contractors. A few years ago, changes were made to Arizona law to overturn the Court's ruling. Many general and sub-contractor associations were part of changing the law. When the law was changed, sub-contractors were told the changes also protected their rights.

Now that the ROC is not allowing money disputes to be filed between generals and sub-contractors, this is a huge blow to sub-contractors trying to get paid. Again, ROC laws clearly allow for complaints to be filed to collect for non-payment.

#### **CONCLUSION**

There are so many issues that I can't write them all down here. In closing, I recommend that you or your association ask the Legislature to investigate Director Mundell's "new" ROC. Your business depends on someone taking action to stop the violation of your rights.

Finally, I will make myself available at anytime and in any forum to debate or sit on a panel with Director Mundell to discuss the ROC.

Respectfully,

**Fidelis V. Garcia**  
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