

# WHAT IS A TIME AND MATERIALS CONSTRUCTION CONTRACT IN ARIZONA?

*If a Time and Materials Contract Is Utilized, It Is Essential that the Parties Involved in the Agreement Have Appropriate Legal Representation to Advise Them Of the Risks and to Protect Their Interests During the Drafting of the Contractual Agreement*



A time and materials contract is a contractual agreement for a construction project in which the buyer agrees to pay a contractor based on the time spent performing work and the cost of materials used. Time and materials contracts are an alternative to fixed price construction agreements wherein an investor or buyers agree to pay a contractor a lump sum for fulfilling the terms of the contract and completing the project to acceptable standards.

Time and materials contracts have myriad pitfalls for both buyers/investors and for construction companies. If a time and materials contract is utilized, it is essential that the parties involved in the agreement have appropriate legal representation to advise them of the risks and to protect their interests during the drafting of the contractual agreement.

Lotzar Law Firm, PC provides representation during the negotiation and drafting of times and materials contracts and can assist clients under circumstances where contractual disputes arise.

## WHEN IS A TIME AND MATERIALS CONTRACT APPROPRIATE?

A time and materials contract is typically used in situations when it is not possible to accurately estimate the extent or duration of work at the time when a contract is drafted. If parties involved in a construction project cannot estimate with any degree of accuracy either the costs of materials or the time it will take to perform work, a time and materials contract may be the best and only viable option for creating an agreement that will govern the parties relationships throughout the project.



A time and materials contract may also be utilized in situations where there is limited time prior to a project beginning. Rather than pricing out individual components of work and securing bids from subcontractors prior to putting together a comprehensive proposal, a time and materials contract

can be created much more expediently.

In general, however, situations in which a time and materials contract is used are relatively rare. Buyers and investors may be reluctant to enter into such a contract because there is no upper limit on expenditures and the costs are uncertain. If an upper limit is negotiated into the contract as it is drafted, this simply shifts the risks of unexpected expenditures to the construction company or contractor performing the work.

## DRAFTING A TIME AND MATERIALS CONTRACT

If a time and materials contract is the chosen approach to a contractual agreement for a project, it must be drafted carefully to protect the interests of all parties. Terms of the agreement should be negotiated with the help of an experienced attorney who can provide advice and guidance on possible contingencies and problems and who can advise the client of both his rights and his obligations upon entering into the contractual agreement.

The time and materials contract should provide specifications that are as detailed as possible relating to hourly rates for work performed by contractors and subcontractors. The fixed hourly rates should include profit, wages, administrative expenses, general costs, and overhead expenditures incurred by the contractor or construction company entering into the agreement



In a time and materials contract, the materials should generally be provided to the customer at actual cost. The contractor should not be including a markup on materials because profits should be factored in to the specific hourly rate quoted in the time and materials contract.

The hourly rate, terms and provisions of the contract may be negotiated and may include clauses including an upper maximum limit on the amount of expenditures on materials and labor. Negotiations can sometimes be contentious, but the goal of your attorney will be to make the deal happen and to get the contracts signed while still protecting and looking out for your interests.

## RISKS OF A TIME AND MATERIALS CONTRACT

Time and materials contracts generally provide the lowest risk to the contractor, but the biggest risk to buyers or investors. Lenders may be

unwilling to provide a loan for a Time & Materials job because of the risks associated with unknown expenditures. Lenders may require a “not-to-exceed” clause if they are willing to make an investment. When such a clause is included in the agreement, written authorization is required to do any work once the maximum expenditure level has been reached.



Time and materials contracts may generate more litigation than fixed price contracts as a result of the uncertainty in the projects price and as a result of the absence of a universal definition of billing for time and materials agreements.

Further, because time and materials contracts allow contractors to avoid stating a fixed price before a project begins, this form of contractual agreement increases the chance that the original estimate for the contract will

be low in order for the contractor to get the job. While it is a violation of the duty of Good Faith and Fair dealing to make lowball estimates when it is clear that the project will cost much more, this behavior still occurs and can have detrimental effects for investors and buyers.

## AN ATTORNEY CAN HELP

Your attorney can advise you on the risks of a time and materials contract and can help you to draft such a contract or to find an alternative approach to pricing your project that is more protective of your interests.

## About the Author

Lotzar Law Firm, P.C. was founded in 2005, and serves clients throughout the U.S. We pride ourselves on the level of service we provide our clients and are determined to see each project through to positive results.

In addition to bringing a legal expertise to the table, we offer clients sound ideas and invaluable advice that enhances their business. One of our greatest attributes is our ability to approach projects from a business-owner perspective. Rather than narrowing in on the setbacks of a challenge and informing clients of what stands in the way, we prefer to seek innovative ways to transcend issues and create a better path for clients. With an unparalleled savvy in developing modern methods of financing, we can present you with viable and efficient options.

Our diversified portfolio of clients is comprised of entrepreneurs, real estate developers, contractors and property managers. We also do business with numerous nonprofit clients including Chicanos Por La Causa, Inc.; Tiempo, Inc.; and The Industrial Development Authority of the City of Tucson, Arizona.

We work in a team-based environment, supported by a skilled and caring staff, eager to answer your questions and provide you with consistent access to your team. Whether your needs are small or large in scope, we look forward to working with you.

Lotzar Law Firm, P.C.  
6263 N. Scottsdale Road, Suite 216  
Scottsdale, AZ 85250  
Phone: (480) 905-0300  
Fax: (480) 905-0321  
Email: [info@lotzar.com](mailto:info@lotzar.com)  
Website: [www.lotzar.com](http://www.lotzar.com)