

Liens and bonds: **GETTING PAID**

KNOWING HOW TO APPROPRIATELY USE PAYMENT BONDS AND MECHANIC'S LIEN LEVERAGE CAN GO A LONG WAY TOWARD BRINGING ELECTRICAL DISTRIBUTORS CLOSER TO GETTING PAID FOR MATERIALS SOLD. **BY DAN GOLDBERG**

Because the construction industry is well known for slow payments, it's necessary for those who sell to it to continually address how to get paid. Equally as important is being aware that there is a process for ensuring payment. First of all, unless there has been a complete breakdown in the relationship, it is always a good idea to call a customer first, rather than go directly to his or her general contractor.

Similarly, no general contractor wants a distributor to go directly to the owner, and no owner wants a creditor speaking to a surety—if it can be avoided—since making a claim often can affect how easily the bonded party can get its next bond and whether it will be paying a higher premium.

This article assumes that the materials sold are for a specific job. If materials are sold on a stock basis, there is no reason for a distributor not to ask if the products relate to a specific job. In fact, it's good business practice to consider whether some portion of what is believed is stock is in fact related to a specific job. Even if only a portion of what is sold is job specific, the seller may still have rights related to those specific materials; sellers that are bonded or have lien rights have leverage.

There are a number of issues a distributor should find out about the job, including job completion percentages and whether

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the customer has been paid for the materials. In addition to baseline information—including job address and whether or not the job is bonded—the determination is among the most critical pieces of information to gather about a job. A distributor that has a problem with a customer will generally be in a much better position if the general contractor still owes funds to the customer.

A payment bond

Some tend to think of bonds as insurance policies, which they are not. Others attribute a certain mystique to payment bonds, as if no one truly understands what they mean, but there is really nothing mysterious about them. A payment bond is a contract, nothing more and nothing less. Once it is determined that a job is bonded, the following “Big Bond Rules” can help assess potential bond rights:

1. Get a copy of the bond.
2. Determine who the parties are (whose bond is it?).
3. Review notices and deadlines (these are not the same as lien deadlines).

Bond claims involve appropriate notice and documentation. In order to put in a bond claim, a seller will need to determine who the “principal” is under the bond. Sometimes it will be the direct customer (the subcontractor) and sometimes it will be the direct customer’s general contractor. It is important to remember that notice requirements for a customer’s bond will be different from those of the general contractor’s bond.

There are a few general bond guidelines to keep in mind. On a specific job or account, the seller’s rights will be linked to whether the job is public or private. If the job is public (state or federal), the seller almost always will have payment bond rights, by statute. If the job is private, the seller may have payment bond rights and, as a general rule, will have mechanic’s lien rights.

Bonds generally are different from one another and, to be safe, it is best to assume that the bond in place on one job with a customer is not the same as a bond that may be in place on another job (even if it is the same customer). On a public bonded job (such as an elementary school, high school, or post office), as opposed to a private bonded job (such as a super-market or a drug store), it is also important to pay attention to the specific state’s statutes to determine if there are additional notice requirements not detailed in the bond itself.

Pay particular attention to ship dates, since the seller’s rights will generally run from the last ship date, which often is not the same as the invoice date. If the materials shipped on a different day from the date of the invoice, rights may be lost.

A mechanic’s lien

A mechanic’s lien generally involves asserting rights in the actual piece of real estate involving the construction project. For example, if a seller has not been paid for materials sold to an electrical subcontractor and used in the building of a private office building, the seller may be able to assert a mechanic’s lien in the land where the building sits.

Generally, if the job is a public job, the seller will not have mechanic’s lien rights. (This is because, in most states, the seller’s ultimate remedy in exercising lien rights is to force a sale of the piece of property liened—and state legislatures don’t want ABC Electric owning and running the local elementary school.)

There are a number of discrete issues that need to be considered in order to perfect a lien, and each state has its own statutes

detailing what needs to be done to enforce sellers’ rights. Generally speaking, however, no one wants a seller to assert lien rights on a job: The owner will not want it because a lien may interfere with its construction financing, the general contractor will not want it because of lien-free provisions often found in its contract with the owner, and the electrical subcontractor will not want it because of its contract with the general contractor. This is the leverage a seller can assert in exercising that right.

What else can be done?

In addition to liens and bonds, there are a number of other alternatives that can be considered—including payment plans, promissory notes, personal guarantees, and locking customers into admissions of amounts owed with a statement that there are no offsets or credits they are due. Distributors should pay careful attention to whose terms and

conditions control the transaction. Analyzing the account, minimizing the risk, and securing full payment is the goal. Distributors’ rights, and whether an account is secured or unsecured, will depend on whether the job is public or private and whether it has payment bond rights or mechanic’s lien rights.

The trick is to get in early and recognize a problem as quickly as possible. A distributor’s leverage will depend on job completion, who has been paid, whether bond rights or lien rights exist, and whether or not it can still give timely notices. Distributors work hard to sell materials. Knowing bond and lien rights can help them make sure they get paid for all of that hard work. ■■■

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