

Position yourself for payment

Continuing our look at routinely encountered legal issues through the eyes of two fictitious electrical distribution companies: Make sure you get your money, even if your customer doesn't. by **Daniel Goldberg**

The following is a true story; the names, amounts, and locations have been changed, but it did happen to a client of mine. For the purposes of this article, we'll revisit our fictitious distribution company, Distributor in Control, which was owed \$90,000 on a job in the western U.S. for which lien rights are available for only \$45,000. The customer, ABC Electrical, was under water on the job. ABC's owner initially claimed he was owed about \$30,000 in retainage, but later acknowledged that he was, in fact, owed nothing. Bobby Busduct, the owner of Distributor in Control, knew this wasn't a good sign: You always want your customer to be owed more on a job than you are.

Under circumstances such as these, one thing to keep in mind when trying to determine whether payment will eventually be received is the relationships between the involved parties—in addition to whether you have good rights on a job (including the lien and bond rights). There should be no surprises.

As you move up the construction hierarchy, your customer will not want you speaking to the GC before you speak to the customer. Similarly, the GC will not want you speaking to the owner before you speak to the GC. So, as you talk to each party further up the rung, think through how much business they do (or don't do) with each other and how important it is (or isn't) to them that rights, like filing a lien, may be exercised.

In this case, even though Busduct did not have full lien rights, filing a lien still would have affected the relationship between the GC and the owner. With that in mind, a call was made to the GC to discuss the lien, the fact that a notice had to go out, and whether there was a way to reach an agreement that would keep the relationship with the owner intact. Whether or not this can be done

depends in large part on how much time there is to file a lien; in this case, there was some time.

Because the GC wanted to keep its relationship with the owner from being affected by a lien (in fact, wanted to avoid a lien altogether), the GC wanted Busduct to give ABC a chance to pay what was owed, and Busduct wanted to get paid, Busduct sent out the initial notice and then worked directly with the GC to contact the owner. He wanted to make clear the fact that the initial notice would be filed, but that attempts would be made at an agreement directly between the GC and himself to make sure the amount was paid in full before the actual lien had to be filed.

The agreement ultimately reached was for the GC to guarantee payment to Busduct by a certain date in the event ABC did not pay it first, and the date was ahead of the lien deadline. The preliminary notice was sent out to preserve

Busduct's rights, but only after it had been discussed. It's noteworthy that the GC was willing to guarantee the full amount that Busduct was owed, even though the GC owed ABC less than that amount, all in consideration of Busduct being willing to try to avoid actually filing the lien.

When speaking to people about your rights on a job, remember: There should be no surprises. It could have been quite different if Busduct had just filed the lien and then spoke to the GC after. By speaking to the customer first, the GC

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next, and then approaching the owner with the GC in this case, Busduct ended up in a much better position. ■

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