

If a job is bonded, are you certain you'll be paid?

A look at a routinely encountered legal issue through the eyes of two fictitious electrical distributors. **by Daniel Goldberg**

Alvin Amp, owner of Distributor in a Rush, wanted to make certain he understood all of his rights in 2011. Like lots of other distributors, he was glad to put 2010 behind him. His sense was the economy was turning around, but he wanted to try to be more careful in 2011, like his friend and competitor, Bobby Busduct, owner of Distributor in Control. Over a recent lunch meeting, the topic of bonds came up. Amp knew some of the fundamentals about lien rights (see this column in the February issue of *tED*; go to tedmag.com and click on “Digital Edition”), but he still needed to figure out how a lien and a bond were different and what bonds were all about. Here’s what he found:

A bond is a contract, and there are many kinds of bonds—including bid bonds, performance bonds, and payment bonds. A bid bond guarantees the price of a bid to certain parties on a job, and a performance bond is a bond that guarantees a party’s performance on a job—neither of which is directly involved in getting paid on a job.

A payment bond was the bond Amp was interested in. Provided he gave the right notices and could properly support his claim, he could make a claim under a payment bond if his electrical subcontractor didn’t pay him what he was owed for any materials sold to a customer on the particular bonded job.

The next question Amp had was: Are payment bonds available on both public and private jobs? In order to answer this, we have to go back to liens. Liens involve exercising rights on private jobs, like a retail store in a shopping center. If a distributor sells \$36,200 of materials to a customer on that private job and the distributor doesn’t get paid, it could exercise its lien rights (assuming it did everything that was required under its state’s mechanic’s lien statute to “per-

fect” the lien). Exercising lien rights to conclusion means actually foreclosing on the store that was improved with the materials supplied.

It is for that reason that lien rights are not available on public jobs. For public policy reasons, in all 50 states, it’s been decided that a supplier should not be able to foreclose on a public job—an elementary school, for example—because it would make no sense for the supplier to run the school. Lien rights, therefore, don’t exist on public jobs.

However, with certain limited exceptions (the overall size of the state, local, or municipal contract, for example), every public job is required to have a payment bond in place. So, even though there are no lien rights on a public job, payment bond rights on public jobs are almost always available.

Turning back to private jobs, and whether payment bonds exist on that type of job, the answer is “maybe.” The question is controlled by the contract requirements and whether the owner on the job requires its general contractor to obtain payment bonds on the job. And yes, that means that on a private job the supplier could have two

separate groups of rights: a set of lien rights and a set of payment bond rights—and can exercise both in order to get paid.

Very generally speaking, with a number of exceptions on private and public jobs, including certain liens on public jobs known as liens on funds, and without addressing specific state requirements or limitations or notices or conditions, what Amp was learning sketched out something like this:

	PRIVATE JOBS	PUBLIC JOBS
Lien rights	Yes	No
Bond rights	Maybe	Yes

SO WHAT’S THE TAKEAWAY?

Understanding the credit risk on specific jobs initially means determining with certainty what kind of job it is, public or private, and whether lien rights, bond rights, or both apply.

Finally, it’s always important to remember that lien rights and bond rights are in addition to contract rights. ■

Daniel Goldberg is an attorney specializing in liens and bonds at Ruberto, Israel and Weiner, P.C., in Boston. He can be reached at 617-570-3560 or djg@riw.com. This column was published for informational purposes only, is not legal advice, and does not create an attorney-client relationship. The materials concern topics offered for general information only and should not be relied on or used as a substitute for professional advice. Consult an attorney before making any decision with legal implications.