

You mean I can't lien the job?

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, had a difficult 2010, as did many in the industry, and he wanted to put it all behind him. He heard about a shopping center being built with some of those big box stores as anchors, and he wanted in. He knew that Bobby Busduct, owner of Distributor in Control, would have all the details and invited him out for coffee. Although they were fierce competitors, they often bounced ideas off of each other. Busduct explained that the electrical subcontractor—Rocky Start Electrical—was new in town. Busduct said he was reviewing a bill of materials but was being careful since he had never worked with this customer before.

After the meeting, Amp called Rocky Start to say that he had heard about the shopping center project and wanted to bid the job. Start explained the specifications over the phone and said he would follow up with the written documents later. Start also explained Amp's timing was good because Busduct had also expressed interest but was taking too long to review the documents.

Start asked whether Amp could place an order with Amp's distributor right away based on Start's verbal PO and discussion. Amp did precisely that: He called his gear and lighting reps and, before the day was out, had ordered \$35,000 in gear and a \$28,000 lighting package. Amp never got a written PO from Start, did not ask for project information, and sent no preliminary notices to anyone.

Twelve weeks later, the materials were delivered to Amp's shop. Amp called Start. No one answered. He drove over to Start's shop. The lights were out, and it appeared closed. Amp had one of those awful feelings in the pit of his stomach, but, he thought, at least he could file a lien on the job.

He called the GC, who said he had terminated Start. The GC said he had purchased the material elsewhere since he had no idea that Start had even ordered it. The GC informed Amp that he could not lien the job because noth-

ing was in writing, no materials were ever delivered, and a preliminary notice had not been received. In any event, he said that the specifications did not call for gear or lighting packages nearly as large as what Start had ordered. Could all of that be right? Unfortunately for Amp, it could—and it was.

So what's the take-away? Understanding your credit risk involves understanding not only your customer's financial condition and ability to pay for materials, but also your secondary protection on a job securing your right to be paid. Not only did Amp not undertake any credit review of Start's financial condition or get anything in writing, but he also misunderstood his rights on the job.

So when can you lien a private job? Not all jobs can be liened. Lien rights, which involve asserting an interest in the actual piece of real estate where the project sits, generally are available only on private jobs such as a commercial office building or a shopping center.

They will depend on the specific state involved, where you fit into the contract chain, who you are selling to, and whether you need to give a preliminary lien notice or notice of furnishing.

Knowing the type of job you are selling into will allow you to assess if you have any secondary protection in addition to your direct rights for breach of contract. In this case, since Start was gone and Amp had no breach of contract rights he could exercise, all of his rights depended on the job, which, unfortunately, did not exist as lien rights on this job.

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Amp took a PO on a public job right after this shopping center setback, which will let us look at the differences between bond rights and lien rights in next month's column. ■

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.