

Who owns whose contract terms?

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, was having lunch at the town diner when he ran into Bobby Busduct, owner of Distributor in Control. Amp always seemed to run into Busduct when things were the worst and always noticed that Busduct never seemed to have any business problems. Here's what was happening: Amp and Busduct's companies each successfully received a \$75,000 purchase order for two separate phases of a large improvement project at the local airport. Each distributor had a different electrical subcontractor.

Amp, always in a rush, didn't read the PO his subcontractor customer, Barney Stone Electrical, gave him. In this economy, he was just glad to get it. He didn't notice, for example, that on page one it stated, "All of the contract terms between subcontractor Barney Stone Electrical and the general contractor are incorporated into this PO between Barney Stone Electrical and Distributor in a Rush."

Busduct, on the other hand, looked carefully at the PO his subcontractor customer, George Slate Electrical, gave him. It had the same language in it: "All of the contract terms between subcontractor George Slate Electrical and the general contractor are incorporated into this PO between George Slate Electrical and Distributor in Control." Busduct, though, called George Slate and said he couldn't just let the subcontractor put all of its terms with the general contractor into the PO. Not only had he never even seen the contract between his customer and the general contractor, but also he didn't know what other specifications there were, did not know whether there were additional warranties or liquidated damages for delay, did not want retainage to be part of their deal, and did not know whether the general contractor was requiring certain delivery schedules.

Due to his thoroughness, Busduct wasn't locked into terms in the contract chain between either his customer and the general contractor or the general contractor and the owner.

Amp and Busduct each purchased

Slate Electrical itself had not been paid.

So what's the takeaway? As simple as it sounds, contract terms matter. Terms that can inadvertently be accepted when a PO is taken are limitless, and an "incorporation by reference" clause can be particularly harmful: retainage, pay when paid, warranties, limitations of liability, etc. There is no standard or boilerplate language. If the words are on the page, they should mean something, and if whomever is asking you to sign can't tell you why they are there, ask the person to take them out. Contract terms are all about risk shift-

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and paid for the materials that they planned to sell. Sure enough, though, just as they did—and almost as soon as the airport job got started—problems arose: The town couldn't get financing and the job was delayed.

Amp called Barney Stone Electrical and asked about being paid for the materials that were sitting in storage. The subcontractor said that he did not have any obligation to pay Amp until the general contractor paid Barney Stone Electrical. He was right, because Amp had unwittingly agreed to a "pay when paid" term. Busduct made the same call to George Slate Electrical, which then paid Busduct for the materials even though George

ing, and taking a job with the right degree of risk is something Amp hopefully will pay better attention to next time around; on this airport job, though, he's out of luck. ■

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