

## Getting paid in the construction industry for your work and materials in a down economy

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Everywhere one turns these days, the discussion is focused on the economy. The stock market has dropped dramatically. Credit markets are seizing up. The price of petroleum based products is soaring. And again and again, newspapers, financial journals and trade magazines are emphasizing the housing slump, that lending is off, and that commercial construction has slowed. As a subcontractor or supplier, bidding labor and commodity materials on construction projects is becoming increasingly difficult. All of the rules seem to change every day.

The construction industry is well known for slow payments, and it's necessary for those in the contract chain to continually address how to get paid. It's a perfect time to reassess contract fundamentals. If you are a subcontractor or a supplier, there are certain issues that come up daily including whose contract controls the deal, and how you can best secure your position on a job.

### Terms and Conditions

One of the essentials at the beginning of any job is to determine whose terms and conditions control. Typically, a job will have a standard contract chain: owner, general contractor, subcontractor, supplier. From the supplier's perspective, the ball usually gets rolling when the subcontractor asks for a quote. On the quote, the supplier may say "Supplier's terms and conditions control the sale of materials." What happens if the subcontractor then gives a purchase order to the supplier with terms that are completely different than those on the quote? The short answer is that unless the supplier responds to the subcontractor by acknowledging the order and taking exception to the different terms, the supplier has accepted the new terms.

Sometimes, the subcontractor's terms can include language such as "All terms of the subcontractor's contract with general contractor are incorporated by reference into this purchase order." That single clause can upend an entire order. Unless the supplier is savvy enough to read all terms of the purchase order, the supplier may have married plans and specifications without reviewing them, may have committed to warranty obligations, liquidated damages for delay, retainage, and who knows what else.

The same problems can arise at the subcontractor level. From the subcontractor's prospective, the issue usually comes up when it is given a contract by the general contractor, and the general contractor incorporates by reference terms of its contract with the owner into its contract with the subcontractor.

The take away, as obvious as it sounds, is to read the contracts that are given to you, top to bottom, front and back. Look for references to other documents, ask for copies of them, and understand the issues that are important to you ahead of time. Certain provisions that receive little attention in a stable market, such as escalation provisions, are receiving lots of attention

now. As the cost of steel, copper wire, or various petroleum based products rises steadily during the course of the job, someone is bearing the risk of the price increase, and you need to understand if you own that risk. It's better not to have a deal at all than to sign up the wrong one.

If you are a subcontractor or supplier, there are a number of other questions you should ask on the front end of the job to assess the risks of getting paid for your work. At the outset, for example, in addition to understanding whose terms control the deal, it is critical to understand whether the job is public or private. Depending on the answer to that question, you may have a set of rights flowing from a payment bond on the job, a set of rights linked only to a mechanic's lien on the job, or both sets of rights.

### Payment Bonds

If the job is a public job, state or federal (a school, recycling plant or post office, for example), generally you will have payment bond rights but not mechanic's lien rights. Some attribute a certain mystique to payment bonds, but there is really nothing mysterious about them. A payment bond, quite simply, is a contract, nothing more and nothing less. (They are not insurance policies.) If a job is bonded, you should:

- \*Get a copy of the bond;
- \*Determine who the parties are; and
- \*Review notices and deadlines.

In order to make a bond claim, it's necessary to determine who the "principal" is under the bond. Sometimes it will be the subcontractor and sometimes it will be the general contractor. 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 in place on another job (even if it is the same customer). Bond claims involve appropriate notice and documentation. 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 supermarket or a drug store), it is important to pay attention to Mass. statutes to determine notice requirements not detailed in the bond itself.

### Mechanic's Liens

As detailed above, if the job is a public job, the seller generally will not have mechanic's lien rights. This is because, in most states, the seller's ultimate remedy in exercising mechanic's lien rights is to force a sale of the piece of property liened and state legislatures don't want ABC Contractor owning and running the local elementary school.

A mechanic's lien, as distinguished from a bond claim, generally involves asserting rights against the construction project real estate. For example, if a seller has not been paid for materials sold to a subcontractor and used in a private office building, the seller may be able to assert a mechanic's lien in the land where the building sits.

There are a number of discrete issues that need to be considered in order to perfect a lien, and Massachusetts very significantly amended its lien law in 1996. Generally speaking, however, no one wants a lien asserted. 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 in its contract with the owner, and the subcontractor will not want it because of its contract with the general contractor.

As the construction industry slows, and while the economy is roiling, it's necessary to continually address how to get paid. Equally as important is being aware that there is a process for ensuring

payment. The trick is to get in early and recognize a problem as quickly as possible.

There are a number of issues a company should find out about the job, including job completion percentages and whether or not your customer has been paid for your materials. In addition to baseline information such as the job address and whether or not the job is bonded, determining whether or not your customer already has been paid for the materials you are owed is among the most critical pieces of information to gather about a job. If you are having a problem with a customer, you generally will be in a much better position if your customer is still owed funds on the job.

A party's position, leverage and security will depend on job completion, who has been paid, whether bond rights or lien rights exist, and whether or not timely notices can be given. The process can be done professionally and objectively, and knowing your bond and lien rights can help you get paid for your hard work.

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