Scribbles Squibs[1] #47 (July 11, 2016):

PROTECTING YOUR ACCOUNTS RECEIVABLE

By Attorney Jonathan Sauer

I. INTRODUCTION.

You did the work, running up bills for labor, materials and equipment in the process. But, the big question is are you going to get paid? Here are nine things to know (and do) which will increase the odds in your favor for first and second tier material suppliers and subcontractors with many of these items also improving a general contractor's ability to get paid.

And, for those readers who service the construction industry – accountants, insurance and contract bond salesmen – providing this information to your clients and to your prospects might be perceived as added value in their doing business with you as they might not see it otherwise if they are not on our list currently.

II. NINE THINGS TO KNOW AND DO.

(1) Having a written contract is a lot easier than you might imagine.

Everyone knows that they should have written contracts. Various statutes, entitled 'statutes of fraud', require written contracts as their absence assists those who are inclined to lie to practice their craft, which is lying. You don't want to ever put yourself in the position that you have to try a legal case based on an oral contract. The other side might lie better than you can tell the truth.

There are three elements to a contract: an offer, an acceptance and consideration. The 'offer' is your proposal to do certain work. The 'consideration' is what you will get paid for doing that work. And, 'acceptance' is an agreement by your customer to accept your proposal.

Today, a lot of this can be accomplished through emails. You can make an offer by emailing a quotation to a potential customer (provided that it is reasonably clear what you are going to do and what you will get paid for doing it.) The consideration (for you) is the amount of money you will receive for doing this work and, as to your customer, the amount of work you are going to do for him or her for that amount of money.

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[1]A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

The proposal needs to be in writing, as does the acceptance. Where I see a lot of folks get into trouble is that they will make a reasonably clear offer (proposal) but begin work without receiving an actual written acceptance. (When the pedal is pressed to the metal – and people are starting to get very vague or loose as to the facts - an oral acceptance is usually not enough.) Keep in mind that a 'written contract' is a statutory requirement to be able to file a mechanic's lien. And, even when there is no 'legal' requirement for a written contract, often the absence of a written contract will make the chase of your money take longer and be more expensive, especially if you have to engage legal counsel.

What might this look like if it were done purely by emails? Well, let's say it's electrical work we are talking about. The one making the offer – usually, the electrical subcontractor – would send an email to Good Guy General Contractor such as the following: "Last Chance Electrical Corp. proposes to do all of the electrical work including addenda 1-4 as described in the electrical specification section 15000 and drawings E-1 through 14 all dated July 6, 2016 for the construction of "North Walpole Pizza, Hair Salon and Alligator Farm" for the sum of $150,000." Good Guy General Contractor replies to that email with its own email from a corporate officer or project manager saying: "This company accepts your proposal dated July 6, 2016" referencing this project.

Presto! You have a contract with an offer, acceptance and consideration. In my view, this is an enforceable written contract. Now, that wasn't so hard, was it? It didn't take too long and yet both parties gave themselves the benefits and protections and certainty of having a written contract.

Is that a good contract, you might ask? Hardly. Obviously, scheduling and payment terms, plus a variety of other possible terms and conditions, are not included or discussed. For example, to what extent things such as the general contract and general conditions are incorporated by reference into the subcontract are not discussed. This can be cured by having a good proposal form, which you will use on the majority of your jobs, drafted by your company construction attorney. This will have sufficient terms and conditions to protect the party making the proposal.

So, if you were to call me and say: "Geez, for the North Walpole Pizza, Hair Salon and Alligator Farm job I don't have a written contract," I might say that you should know better. I'll check my email mailing list and if you are on it, I'll send my Construction Contract Formation Assistance Paralegals, Rocco and Luigi, to discuss with you the error of your ways. They can be quite helpful and very convincing. And then, for one reason or another, that will never happen again. Ever. Capisce?[2]

[2]If you are an East Boston or North End contractor, to facilitate – and make safer – your meeting with my paralegals, I would have delivered just when they are scheduled to arrive at least ten very large hot pizzas with meat on them. A lot of meat. It's not even necessary for the meat to be cooked. If you or your employees are going to want to eat some pizza also, then you need to order more pizzas above the ten you will be having delivered for my paralegals. Another tip would be that if you have a pit bull or Rottweiler at your office as some sort of protection or security, to protect them, I'd get them some distance out of the office so that they don't see my

(2) For private jobs, understand what are the steps that must be taken - and when - to preserve and enforce your mechanics lien rights.

I have an article on my website explaining this in great detail. Basically – with some exceptions – the first lien document (a notice of contract) has to be filed at the registry of deeds within ninety days of the general contractor's last working on the job. The second lien document (a statement of account) has to be filed within one hundred twenty days of that same last day of the general contractor's work. And, suit to foreclose the lien has to be filed within ninety days of the filing of the statement of account. The first two documents are filed only at the registry of deeds. The third document – the complaint - has to be filed both in court and at the registry of deeds.

(3) For public jobs, understand what are the steps that must be taken - and when - to preserve and enforce your payment bond rights.

You will usually have to sue the general contractor's payment bond surety within one year of the last day you supplied labor, material or equipment included in your claim. (There is a common misconception that the one year requirement is fulfilled by merely writing to the surety within that year. Such is not the case!) As to all other payment bond claims (against a subcontractor on public work and against either a subcontractor or a general contractor on private work) you have to obtain and read the bond to find out what you have to do and when.

Again, there are articles on my website discussing this in some detail.

(4) For second tier material suppliers and subcontractors, being those whose contracts are with subcontractors and not general contractors, there are almost always additional steps that must be taken in mechanics lien and payment bond situations.

In a lien situation, you have to provide the general contractor with a written notice of identification within thirty days of commencing your work at the project under your contract.

In a claim by a second tier supplier or subcontractor against the general contractor's payment bond for public work, the subcontractor will have to provide written notice to the general contractor within sixty-five days of completing its work for all municipal and state jobs in Massachusetts, with that time period being ninety days on federal projects.

There are a variety of articles discussing these matters on our website.

(5) While you are working on a job, you need to develop information as to other projects being worked at by your contracting party because, with the right facts, you may be able to 'reach and apply' (attach) other of his/her jobs to secure your claim on this job, if you don't get paid.

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paralegals. For some reason, my paralegals tend to scare dogs, particularly the so-called 'aggressive breeds'.

This is really important. Since everyone more or less eats lunch at the job most of the time, various subcontractor employees eat with employees of other subcontractors and with employees of the general contractor. And, since there is no trouble yet – and field people may not be aware of what the people in the office are doing, for better or worse, even when there is trouble - people are a lot freer in exchanging information. So, direct your employees to work at developing this information. Maybe you could make some kind of game out of it to encourage your employees to seek out this information. Perhaps, you might pay the employee a small bonus for each other job of your customer's he/she is able to ascertain. Or, give the employee a couple of tickets to a Red Sox or Patriot game to reward their diligence. Maybe a larger bonus still, should that new identified job be the one from which you actually get paid as the result of a reach and apply action.

Find out what other projects your customer is working at now and what jobs your customer will be doing in the future. If, for whatever reason, bond and lien rights are not sufficient to get you paid from the receipts from this project, perhaps your customer's present and future earnings on other projects can be attached using the reach and apply mechanism available in Massachusetts.

(6) The importance of giving your contracting party notice when a differing site condition, change or delay develops.

There are steps that might be provided for by contract which, for subcontractors, means the other contract documents applicable to the project which are incorporated by reference into your subcontract, as well as might be required from the subcontract itself. Unfortunately, there is no substitute for reading the contract. Other requirements might come from a statute. So, for example, with a differing site condition claim on a public project, by statute, a subcontractor or a general contractor has to provide notice to his/her upstream contracting party "in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered."

With regard to the giving of notice, Massachusetts through its case law decisions is pretty tough. Namely, if there are contractual or statutory requirements for giving notice, a failure to comply with them might be the end of your claim. And, on a related subject, with regard to patent defects in contract documents on public jobs, a failure to submit an RFI prior to bidding requesting clarification from the architect or owner might mean that you might not be able to successfully pursue a claim concerning that issue subsequently if you knew about it before you bid or you should have known about it before you bid.

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I have given a lot of seminars. In some of these seminars, I advise attendees that they should cut out early on some day they wish to get away and go to the nearest public library and copy certain statutes they should be familiar with. For mechanic liens, this would be various sections of C. 254 of the Massachusetts General Laws (MGL) and for public construction, this would be a variety of sections of Chapters 30, 149 and 149A of the MGL. Most of the home improvement contractor statutes are contained in various sections of Chapter 142A of the MGL. If you would like some guidance on what section(s) of the statutory scheme of laws might apply

to your problem, give us a call and we will, very briefly, give you some statutory references to look up and at.

(7) How signing the wrong partial lien waivers and releases can destroy your rights to get paid.

This is a very complex subject and there are a variety of construction law articles and Squibs on our website that cover this subject very comprehensively and with examples.

A few brief comments. By statute, there can be no mechanic liens on Massachusetts public work. Therefore, when someone asks you to sign a 'lien waiver' on a public project, in all likelihood, they are really asking you to sign a 'release'.

By definition, a pure, no words added, bare bones 'lien waiver' is simply an agreement that with regard to the project at issue, you agree to give up some or all of your mechanic lien rights. The filing of a mechanics lien is a 'remedy', meaning a kind of claim to help you enforce and collect on your underlying contract claim. Giving up this one remedy does not mean you still can't sue a payment bond or your contracting party in contract or for unfair and deceptive trade practices, as some examples only.

A 'release', on the other hand, can be a surrender (legally, a 'sale') of some or all of your claims. And, just to keep things interesting, a court in interpreting what a document really means is governed by the content or substance of the document, not (just) by the title. So, for example, a document entitled 'partial lien waiver' might actually be, in reality, a partial or even complete release.

(8) Pursue your claims at the appropriate place and at the appropriate time.

Your contract, including incorporated documents, will tell you whether you have to file for arbitration or sue in court to pursue your claim, when and, sometimes, where. For certain claims, you might have to do both, although this may not be completely disclosed in the contract documents. (This is something your lawyer should know.)

Various statutes may tell you which court you have to use. So, for example, an action on a general contractor's payment bond by statute has to be 'a petition in equity filed in the superior court.' There have been court cases which have held that such actions for less than twenty-five thousand dollars – the usual required amount in controversy to qualify for the superior court - can also be filed in the district court, a lower (inferior) court to the superior court.

If you have gotten to the point that you are considering filing arbitration or suing or both, this should be something you should run by your construction lawyer. In all likelihood, he or she will be handling the matter from that point forward, in any event. By law, a corporation has to be represented by an attorney in court cases in Massachusetts and cannot represent itself.

(9) Don't let the receivable sit too long. Receivables, like infections, can fester and get worse.

This is one of the most frequent (and painful) errors that I see. Your rights may be impaired, even lost, if you do and this acts to encourage your customer not to pay you. After all – in debtor logic - if you were really interested in getting paid, you would have done something to try to get paid. I, myself, had a client which hadn't paid a bill for quite awhile. When I contacted the client, his bookkeeper said, in all sincerity, 'but you didn't call.' Meaning, that if I had really wanted my bill to be paid, doing the work and sending the bill in the mail was apparently not enough. For that particular contractor, apparently only mere introductory steps!

I've been doing this legal thing for quite awhile now. (I entered fourth grade when Andrew Jackson ran for president. For the second time. The first time didn't turn out so well for him.)

By my experience, there are at least three kinds of customer response to a bill that is submitted to them.

The first class is people who simply pay their bills more or less when they are supposed to. What a pleasure to deal with! If you only dealt with this class of folk, reading articles such as this one would be a waste of your time. And, if this were widespread, I might actually have to get a real job! You'd be better served spending your time looking at new boats.

The second class is, unfortunately, those who can't pay your bill no matter what you do to them. My personal debt collector paralegals, Rocco and Luigi, are usually quite successful early in their collection efforts and often before too many fingers have to be consulted with! (Rocky, the boxer, by his own admission in the first Rocky film, had this thing for thumbs.) Still, there are days when they come back to the shop looking glum. No one likes to fail at his job!

The third class of people are people who could pay your bill, assuming they are sufficiently motivated, but otherwise won't unless and until they are given a good reason to do so, such as they want you to bid another job for them or to keep you from making a claim against their payment bond surety. It is with this class of people that a routine employment of these techniques may prove to be most effective. So, if these folks won't move favorably in your direction without some encouragement, why not give them that encouragement? Like, right now?!! After all, we could all use a bit more encouragement in life!

In general, people just wait too long before pulling the trigger on chasing their money. Two examples.

First, mechanic liens. People have the tendency to wait until the job is done or almost done before they lien. As to mechanic liens, general contractors have a more favorable law, which means that under some circumstances - particularly if they are aware of a single step they need to take - they can lien the owner's interest in the real estate. Generally speaking - again, because of a different wording in the subcontractor lien statute - subcontractors can't lien the owner's interest. The maximum they can lien - generally speaking - is the amount of money

remaining to be paid by the owner to the general contractor at the time the lien is filed. Obviously, towards the very end of the job, there is less and less money owed as the months pass. Also, if one subcontractor is having a collection issue not related to defects in his/her performance, chances are that other subcontractors are having their own problems. This means that there could be other liens. In that case, the subcontractors as a group will individually only be entitled to take pro rata shares of 'the pot' and the first lien filed won't take priority over subsequently-filed liens.

Earlier liens, also, have a greater tendency to get paid. There is more money available to fund the lien. Also, chances are that the general contractor and owner are getting along better than they will towards the end of the job when all of the errors are obvious. There might be a greater tendency for the general contractor to pay the lien just to keep the owner from getting nervous/angry/upset. This is so particularly as to unbonded jobs.

Second example. Payment bond claims. Again, some subcontractors wait almost to the very last day before the one year period expires. And, so there is no confusion The problem with that is that they may be depending on one single day to come within the year. But, that day may not be sufficient. This is because one can only use as a last day for the one year statute of limitations a day that has yet to be paid for. The last day one worked on a job might have been for a warranty item, for which there is no charge. Or, that day one last worked on a job, it might be for a repair of previous work that had been done, for which you have already been paid. Or, that last day might be for an item of work that was contained within a change order that has already been paid.

In addition, in Massachusetts, contract court cases earn (at least) 12% simple interest per year on successful claims figured from the date a complaint is filed with the court. They tell me that's a bit better than what Bank of America is paying this week on its savings accounts. Deferring legal action might actually cost you some real money, particularly when dealing with larger claims.

If you are not paid in 60 days or 90 days, what is the point of waiting any longer? If your customer is upset with you for acting business-like and showing too much of an interest in being paid your money, which the customer has already received and is using, who cares? If he or she is not going to pay you, you won't want to be working for him or her again anyway.

III. CONCLUSION.

There's no substitute for having a good construction lawyer. He or she (we have one of each!) will understand these things - and more - and in far greater detail than someone not trained in the law can easily learn. You don't know this stuff as well as you might need to. After all, the practice of law is not your business. But, you need to have someone advising you as to your receivables on a monthly basis. This is a kind of service that Sauer & Sauer could provide for your business.

We at Sauer & Sauer would be pleased to give you a flat rate quote that is very competitive to come to your shop and review your accounts monthly to identify actions that

should be taken. (The cost of taking that additional action wouldn't be included in the quote.) Or, if you like, we can review your accounts over the phone or through emails. If we can't point out at the end of the first year that the extra amount of money you recovered but wouldn't have without our assistance isn't at least twice the amount of our fee, the next year is half price.

For a number of years, I gave seminars at Bentley College on construction collection practices. One fellow attended the first or second such seminar. I saw him back there the following year. I said, "This is the same material we covered last year. Why are you back?" He said, "Using what you taught me last year, I collected an additional 195k that I wouldn't otherwise have gotten." My question to you: Couldn't you/your business use an additional 195k?[3]

In any event, don't be your own worst enemy. After all, a non-paying customer is already your enemy. Who needs two enemies? Isn't one enough?[4]

These things matter in the real world. Today's good payer might be tomorrow's nightmare. Modern Continental, at one time, was one of the largest contractors in the United States, employing in excess of four thousand employees on a weekly basis. But, in time, it filed bankruptcy and, undoubtedly, a lot of material suppliers and subcontractors were hurt, many, perhaps, fatally. R. W. Granger, TLT, Peabody Construction and Eastern Contractors were all fairly big players in their time. Only, now, their time has passed.

Most of my clients are pretty smart and successful. But, no one is perfect. There was the mechanical subcontractor who lost out on a 125k bond claim by not filing against the bonding company in time. The receivable was lost inasmuch as the customer was in bankruptcy. Then, there was the mechanical subcontractor who lost out on a 150k bond claim by not filing against the bonding company in time. There was also a lien waiver issue. I was able to get 125k for the subcontractor on that claim in a reach and apply action but the receivable could just as easily have been completely lost. Another mechanical subcontractor[5] told me over the course of almost a year during construction that he was going to file a 100k claim against the general contractor for either delay or a differing site condition (I can't remember which) in the construction of a public high school after his work on the job was done and he had gotten most of his money. When that time came, however, we found that, month to month, lien waivers had been signed which acted as a complete release of the claims he wanted to pursue. The general contractor is no longer in business, in any event.

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[3] I know I could!

[4] If you want two or more enemies, for many, there is always the family. For some, providing a nearly inexhaustible supply of potential enemy fodder. Especially around the holidays, when you tend to see those relatives that you only usually see once a year. A half hour in their presence, you are reminded why!

[5] I must confess that I especially enjoy working with the mechanical trades. Maybe this is because of the innate mechanic in me. Or, possibly, this is because of the latent architect/engineer in me. As to the latter, I would plead the fifth. After all, no one is perfect! After all, we all have our darker sides!

Perhaps a word to the wise is sufficient. But, getting paid for all you do is a lot better than just being merely wise!

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