Scribbles Squibs # 6 (March 13, 2013): Bond. Payment Bond. License, 007, to kill this receivable.

By Attorney Jonathan Sauer

Contractors and Friends: Private jobs sometimes have one. Public jobs sometimes will have *two* of them. Belly Buttons? Hardly. Time to demystify the payment bond. Besides, even if you have an 'outie' at this point in time, after this, you'll have an 'inny'. Many benefits to that. Lint collection (and retention) being two of them, less likely to catch on things. More information on our website. But, who has the time to read it? *That* guy apparently thought he was getting paid by the *word!* Case citations? Just what the h*** are those? Now that I have the gastric bypass, I know you only need to know the *skinny!* And, that's only *seven* things. In other words, 007. (That's like another way of saying '7'. Somewhat British. Cheerio, old chap!)

First thing: <u>filing on the bond</u>. Almost all public jobs have a payment bond from the general contractor, both state (Massachusetts and its departments and municipalities) and federal. There are exceptions (as to very small jobs) but, in the main, subcontractors are reasonably safe in assuming this but, whenever possible, get a copy of the general's payment bond from the owner as quickly as you can once problems appear on the horizon. A mistake we see at Sauer & Sauer over and over is a lack of understanding of the expression 'filing on the bond'. Many contractors assume that 'filing on the bond' is writing the surety within the time frame required by the bond. *They are wrong!* Filing on the bond means – requires – *suing* the bond within the applicable period: more on this later. These are statutory requirements. Are you right or am I right? Well, *you* don't drive a paid-for 2013 Bentley and have a ten acre mansion on Nantucket with a 250 foot yacht parked out back now, do you?*

Second thing: <u>statute of limitations.</u> Sounds complicated, but it isn't. This simply defines how long you have to 'file' on the bond. For public jobs, this is typically one year from the last date you supplied labor or materials or equipment for which claim is made. Not one year from the date of providing warranty work, corrective punch list work, customer service (that won't be charged for) or change order work for which you have already been paid. One year from the last date you did the last thing necessary to complete your contract work and for which you have not been paid. Figure this *conservatively*. Meaning, don't wait to sue until one year from the *very* last date you supplied labor. Pick and earlier date. What if a court concludes that this was not a 'compensable' date (meaning, it was warranty, corrective punch list, customer service or a change order for which you have been paid?) Now 007 doesn't do *anything* conservatively. At the same time, this is why they have to replace him every several years because he simply doesn't *last* too long: he kind of *wears out.* Keep in mind that once you sue, an *excellent* result would be to get paid in six to ninth months: it certainly won't be next week (or next month).

Third thing: <u>notice.</u> Generally, on public work, first tier subcontractors and material suppliers (those contracting directly with the general contractor) have no notice requirements, 'notice'

meaning some kind of written notification of the claim to the general contractor or surety or both before suit can be filed. If you are a second tier supplier or subcontractor (your contract is with a subcontractor), there will be a 65 day notice requirement (Massachusetts state and local work) or 90 day notice requirement (federal) before you can sue, the notice period figured from your last date of work as defined above. These notices are simple, certified mail letters to the general contractor identifying yourself, the project and for whom you worked and what you are owed. These date requirements – 65 days or 90 days - mean that the general contractor has to actually *receive* this notice within this time period. If the general won't sign for the certified mail, I can have anyone in Massachusetts served in one day (generally) by a constable I use. So, if you are a second tier, just assume that you will have to give notice to the general and/or the general's surety, both public and private. Give them both notice, the owner as well, as quickly as you can. The fact that you may have 65 days or 90 days to do this doesn't mean that you have to wait that long. After all, haven't you waited long enough for your money?

Fourth thing: <u>submitting your payment bond claim as a claim, not a lawsuit.</u> Assuming that you understand the notice requirements and statute of limitations requirements of your payment bond claim and situation, there may be time to do this. A lot of detailed information about this on our website. A key thing to understand is that if you have a 'clean' claim – you're entitled to be paid and there are no significant backcharges or claims that you didn't perform – more likely than not, the surety is not going to require you to try your case in court. Why would you submit your claim as a claim? One of the most expensive parts of litigation is 'discovery', where the other side uses court-available devices (requests for production of documents, interrogatories and, especially, depositions) to find out about your claim. If you supply this information and documentation while the matter is still a claim, this may reduce your legal costs down the road, as the surety may no longer require these steps. As unusual as this might seem, the sureties are as interested in limiting costs as you are, for reasons explained in our longer articles. (Make sure, though, that you understand Proofs of Claim and Affidavits, two subjects discussed in 'Sauer Thoughts' on our website.) Before any insurer/surety pays a claim, a 'reserve' for that claim has to be established, meaning that the insurer or surety removes a certain sum of money from its investments, which amount it deems sufficient to pay your claim. Supplying your paperwork earlier, as part of a claims process, helps establish the reserve *earlier* and, if you have to sue, this may possibly shorten the time necessary for you to receive your check. Also, by providing sufficient information about your claim while it is still a claim, you are improving your chances of getting interest on your claim in litigation when it settles and, in some very limited cases, attorneys' fees, as well. Remember, if you do this, the 'filing' requirements on your claim discussed earlier, will not be changed (unless you get a 'tolling agreement', discussed in our longer articles on this subject.) What documents should you supply with your claim? Your contract, your invoices, your change orders and claims, important correspondence and emails concerning your performance and payment situation and, if possible, a third party verification letter (discussed on our website.) If you are a material supplier, also supply delivery tickets. If you have evidence your trade has been punched out, provide that

evidence, as well. If you can prove your contracting party got paid for your work, supply that evidence, as well. Remember that many requisition forms are sworn statements. So, if the general contractor swore to the owner you were entitled to be paid for your work, it's difficult for him later to contradict himself. Supplying *more* documents sooner has some tendency towards shortening the claims process procedure and could very likely save you some money down the road in litigation. In other words, more back-up is probably better than less back-up. Submittals? Shop drawings? As-built drawings? Don't supply these unless they are asked for or you know there will likely be an issue over them.

Fifth thing: <u>the subcontractor's bond.</u> On certain public projects, 'filed subbidders' will be bonded and second tiers may have rights on that payment bond, as well as on the general's bond. On certain private projects, the mechanical contractors are bonded instead of the general contractor's submitting a bond. With regard to 'contractor at risk' public projects, *all* of the 'trade contractors' are supposed to be bonded. So, if you are second tier, try to get a copy of the first tier's (the subcontractor's) payment bond, as well as the general's bond. Typically, the notice requirements of a subcontractor's bond will be less (as to the second tier) than those as to a general contractor bond claim from the second tier. There are certain tactical reasons for claiming against either or both of these bonds. If I had two, I would generally go after both.

Sixth thing: <u>payment bonds on private projects.</u> There are no legal requirements as to the content of *any* payment bond on a private project in Massachusetts, either the general's bond or the sub's bond. Legally, claims against such bonds must be made 'in accordance with their terms'. So, if you don't have a copy of the payment bond on a private project, you are merely guessing, which is dangerous. Ask the general contractor for a copy of the subcontractor's payment bond, the owner for a copy of the general contractor's payment bond. If you meet resistance, remind them that this is why they got payment bonds: so that you would not file a mechanic's lien. Here's an idea. If you are either a first tier subcontractor or a second tier subcontractor, if you don't have a copy of the payment bond, give all other parties associated with the job (your contracting party, the general contractor, the owner, the surety, even the architect) written notice by certified mail of your claim within thirty days of your last working to complete your contract work or earlier, if payment problems are anticipated, such letter containing the same information as indicated above. Likely, such notice will probably be sufficient, although having a copy of the payment bond first is preferable and, usually, necessary.

Seventh thing: <u>see all of the James Bond movies.</u> And, 'why should I do that?' you might ask. Five reasons. First, this *Squib* won't work with only six topics: we need the seventh to get to 007. It's a kind of creative thing. Sort of. Secondly, they can be exciting and the ladies are not generally too hard to look at either, albeit not likely to be found in the wild looking quite as perfect as that. Thirdly, there are usually some cool cars and gadgets to look at and James sometimes is mechanically-challenged, which can be fun to watch. Fourthly, they told me I have four pages for this and I *will* absolutely use *every* line of it! Lastly, a payment bond and

James Bond are obviously related, both members of the 'bond' family. Understand one will help you to understand the other: "Bond. Payment bond. A license to kill . . . this receivable!"

**Uh, neither do we. We do live in a trailer park hard upon Route One in a double wide, which we simply rattle around in, as all eighteen of our children are grown and out of the house, the majority of them are either in jail or making 'craft moonshine' down South where copper and distillation equipment are very reasonably-priced, particularly in the hill country. Where there is no season for shooting 'revenooers'. These materials are general information only, not legal advice. Other resources on this subject: www.sauerconstructionlaw.com.*

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1. We guarantee our billing rate for five years in writing and give a 25% discount as to the fees on the first file for new clients.

2. We endeavor to maintain wherever possible future business relationships with your contracting party by emphasizing a fair and reasonable approach, which often helps promote earlier (and cheaper) case resolutions than does 'mean and angry'.

3. We try to defer until later in the case the more expensive elements of discovery – i.e. depositions – in order to try less expensive discovery first and, where possible, mediation. (We recently obtained 1.5 million dollars for a subcontractor against a bankrupt general contractor's payment bonds (three projects) without a single deposition ever being taken and without having to even answer interrogatories!)

4. No charge for quick answers to *general* Massachusetts construction law questions.

5. Being a smaller firm, our attention is *solely* on our clients, not on feeding the overhead of a fancy office and many partners and associates. We only have to feed our five dogs, most of which are *quite large!* (The Rottie , by the way, says 'Hey!')

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