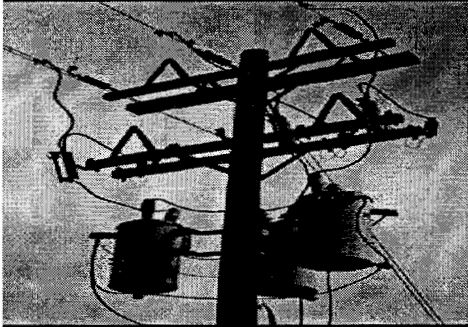


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Massachusetts Electrical Contractors Association

NEWS



How to overcome "Pay When Paid!"

E. Mel Nash & Ross C. Wecker, Attorneys at Law

"The General Contractor shall be obligated to pay the Electrician if and only if the General Contractor receives payment from the Owner." – or – "Payment from the Owner to the General Contractor shall be a condition precedent to the General Contractor's obligation to pay the Electrician."

These types of clauses appear in most Subcontracts provided to Electricians by many General Contractors on both public and private projects. In effect, if the General Contractor does not get paid, the General Contractor is under no legal obligation to pay the

Electrician. This is, for the most part, the law in Massachusetts. Why should the Electrician be held responsible for the credit worthiness of the Owner, about whom the Electrician has little or no knowledge, and with whom the Electrician has no contract? The simple answer is that the Electrician should not have to carry such a burden and should ideally be able to strike such clauses from all Subcontracts! Unfortunately the reality is that this is very often a

"take it or leave it" position by the General Contractor, so the next question is what can be done about such clauses if you can't negotiate them out of your contract?

It is our legal opinion that the Electrician has a couple of possible ways around the "pay when paid" dilemma. On private projects, armed with a written contract, the Electrician can gain protection by recording a Mechanics Lien. This Lien gives the Electrician some

leverage against the Owner by allowing the Electrician to take a bite out of the property. It is my opinion that the law will not allow the Owner to

effectively get out of a Mechanics Lien with a "pay when paid" clause where the end result would be a reward to the Owner for not paying the General Contractor. The Lien also puts the Owner and its Bank at risk from making future payments to the General Contractor without dealing with the Electrician's Mechanics Lien resulting in a lot of pressure on the Owner to see that the Electrician is paid.

...Continued on page 4

"...the development of your case will be much easier and therefore less costly if you have a Proposal or other writing signed by your customer."

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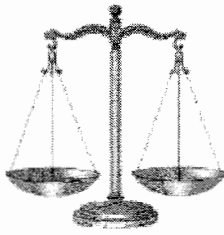
"Pay When Paid" continued...

A similar remedy is available to the Electrician on Public Projects such as public schools, post offices, libraries and fire stations. On these types of public projects, the General Contractor is required by law to furnish a Payment Bond for the benefit of the Electrician to prevent his going unpaid. There is a very good legal argument that the purpose of such a bond trumps the effect of "pay when paid" clauses based on the public policy that persons should be paid for their efforts.

In both the private area (Mechanics Liens) and the Public Area (Payment Bonds) there are harsh time requirements for bringing claims and some complicated procedures which must be followed. These claims should not be undertaken without the assistance of an attorney experienced in this area of the law.

Written Proposal

As alluded to above, there are strong reasons why Electricians should have written contracts before they begin work on a Project. When the Electrician enters into a contract on a private project, whether with the Owner or the General Contractor, the Electrician cannot enforce a Mechanics Lien unless the Electrician has a written contract with its customer. To accomplish this Electricians should have Standard Form Proposals, (the Proposal). This Proposal should have the names and addresses of the



Electrician, the Customer, and the Project. The Proposal should identify, with as much specificity as possible, the work to be performed, the materials to be furnished and the time frame for performing the work. If Unit Prices are relevant, the estimated quantities and Unit Prices should be stated.

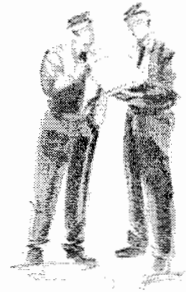
While the foregoing items are certainly important, the Proposal should also indicate those items which are excluded from the Proposal. An example of an exclusion would be Public Service charges whose cost is strictly under the control of a Public Utility Company that serves the area. Another such item might be the installation or movement of Power Poles or Lines which are controlled by a Public Utility.

Many of you, who read this article, will say that we have been doing business for years with only a hand shake. Certainly to change now with existing customers might cause some discomfort! However, you should resist the temptation of performing work without a writing with the hope that "all will go well". Specifying the scope and price of your work will clarify business issues and prove to be to both yours and your customers benefit by avoiding ambiguities and disagreements. In addition, should a Project turn sour and should you have the need for an Attorney, the development of your case will be much easier

and therefore less costly if you have a Proposal or other writing signed by your customer.

It is also recommended that the Payment Terms of your Proposal be set forth. On most Projects you might want to obtain a down payment at the time of your customer's signing the Proposal, with language that requires a second installment when a certain milestone is reached, with the balance due upon the completion of your work. Past due amounts should require that the Customer pay interest of 1 ½% per month. Your Proposal should also require the payment of all Collection Fees, including all reasonable Attorneys Fees should the matter be sent for collection.

MECA is exploring the possibility of developing a Proposal specially designed for the use of MECA Members. If you believe that this would be helpful to you as an Electrician, please inform the MECA office or your Chapter representatives of your feelings, so that they can bring this issue before the State Board. Our office is willing to sit with Members of MECA for the purpose of trying to design such a Proposal for the use of our entire Membership.



MECA members and Massachusetts attorneys Mel Nash and Ross Wecker specialize in construction law.

They may be reached at Nash & Wecker, 1330 Beacon St., Brookline, MA 02446 (Phone 617-264-9998)