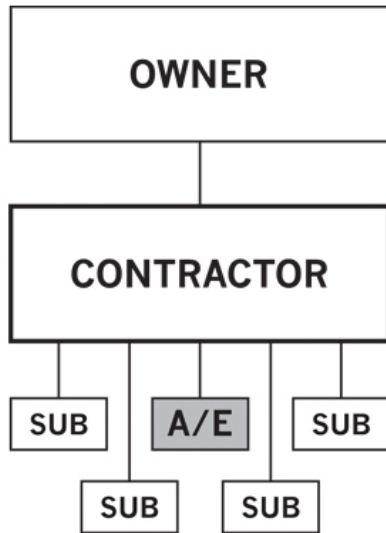


Subcontractors Must be Careful Providing Bonds when General Contractor Does Not

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(Photo credit: Wikipedia)

After I wrote the title to this post, I thought, “Well, that says it all, doesn’t it?” I also considered the fact that for those that read this construction law blog on a regular basis, I am likely stating the obvious. I then thought about the fact that there can be confusion regarding the purpose of bonds versus insurance. Couple this with the fact that [Murphy was an optimist](#), and I thought this would be a good reminder.

Bonds and insurance have one fundamental difference between them. When your construction company buys insurance, that insurance is meant to protect your company. When your company provides a payment and/or performance bond, that bond is there not to protect your company but to protect everyone else on the job and the project itself. Where insurance will pay for your company’s qualifying errors so that that money does not come out of the bottom line, a bond contract will have an indemnification agreement whereby anything paid by the surety will then be reimbursed by you and your company dollar for dollar (as opposed to just the premium).

Given the above, the basic answer to why a subcontractor should be careful of providing a payment and performance bond on a construction project

where the general contractor is not providing a bond is that it adds more imbalance to an already unbalanced relationship. The subcontractor is looking uphill for payment and may face contractual issues from a [“pay if paid” clause](#) to [flow down](#) notice and other provisions from the prime contract. To add payment and performance bonds to the mix, particularly where the general contractor does not provide the same, puts the subcontractor in the position of adding a layer of protection to the general contractor over and above that found in the contract. This is a layer of protection that the general contractor is correspondingly not willing or able to provide to the subcontractor.

Some other questions that should come to mind where this scenario plays out are the following: 1. Is the general contractor in a financial position to be bondable? Its lack of a bond may be due to some financial instability that pushes sureties away because any indemnity would be worthless. 2. Is this a general contractor the subcontractor want to work for? Clearly in this situation, the general contractor is not willing to trust that the subcontractor will be able to complete the work. 3. Is the subcontractor truly willing to take on this additional risk?

Of course, many of these issues are mitigated in the instance where the general contractor provides its own payment and performance bond and exercises its rights either contractually or by statute (such as the [Little Miller Act](#)) to require subcontractors to provide bonds.

Finally, as with everything here at Construction Law Musings, these are general thoughts and I highly recommend that you discuss your contractual and bonding obligations with an [experienced construction attorney](#).

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