



[Is Moving Away from Construction Bonding Requirements a Good Idea?](#)



Recently, the legal/construction blogosphere (if that's still a word) has been discussing a [move by Ohio State University](#) to eliminate the need for construction payment and performance bonds on public projects for the university. Needless to say, this move is not popular with certain portions of the construction industry. In fact the Surety and Fidelity Association of America (SFAA) and the American Subcontractors Association (ASA) [filed a joint action](#) to require OSU to require

bonding on their projects.

This move by OSU is not the only step toward lowering bonding requirements by various states. The [Commonwealth of Virginia](#), my home turf, [recently enacted a change in the minimum size of a project on which bonding is required](#). This change raised the minimum project value from \$100,000 to \$500,000 and substituted a choice to [pre-qualify contractors for public projects](#).

These matters have been discussed here at [Construction Law Musings](#) and by both of my pals Doug Reiser (@douglasreiser) and Chris Cheatham (@chrischeatham) on their respective blogs (linked above) so I won't get into the specifics of the particular construction projects or the legislation. I do however, want to get thoughts of all of you great readers on the implications of this move.

Clearly, a move from bonding requirements can lower public construction costs by whatever percentage was previously included in bids for these bonds. The cost savings seems to be a great idea at first blush, particularly in these tough economic times. One could look at this as a long overdue streamlining of the public procurement process. Additionally, the pre-qualification requirements, if used properly, could be a much needed screening mechanism to assure that quality contractors and subcontractors work on public projects.

On the other hand, should the pre-qualification process be lax and only go through the general contractor level, the failure to require bonding could be a disaster. The

economics of a low bid environment create incentives to get the lowest possible price for materials and subcontractor services. Without bonding of at least the general contractor, the states could end up paying for corrective work because of low priced but low quality subcontract work. Such corrections would likely cost more than a quality job being done from the start and the recovery of these costs would be far from assured because a subcontractor could go out of business and become judgment proof.

Furthermore, the possibility exists that quality subcontractors and suppliers would avoid unbonded public jobs because of a lack of effective recourse in the event of non-payment. Without the [mechanic's lien rights](#) that exist on a private project, subcontractors and suppliers are left with recovery under the various "[Miller Acts](#)." Without a bond in place, even this last avenue of recovery is cut off. A smart subcontractor or material supplier will build this risk into its costs and adjust its bid accordingly or simply refuse to bid on public construction jobs. As one that represents construction professionals in Virginia, I can only say that the lack of bonding will likely either raise public costs or limit the pool of construction companies willing to bid on public work.

The changes are so new that, like with much in [green building](#), the implications have yet to play out, but play out they will.

So, what do you think? Is the cost savings and streamlining that will likely occur because of these changes in public procurement worth the risks that I've outlined? Do you think I'm being too pessimistic? Too optimistic? Please let me know your thoughts.

Image via [Wikipedia](#)

Please check out my [Construction Law Musings Blog](#) for more on Virginia construction law and other topics.