



Legal Corner

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"Court Decides Who Pays the Subs Bond Premium"

As most in the construction industry are aware, there was significant legislation passed in 2004 which modified many of the procedures by which public construction projects were to be bid. The primary emphasis was on the vertical or building side of construction which would include treatment plants, pump stations or other structures in which filed subbids were going to be required.

Previous articles have dealt with the specific scope of the changes including the institution of new procedures for having construction managers at risk on projects over a certain threshold, together with other "changes and additions". Once the legislation had been in effect, questions arose concerning the interpretation and application of some of the provisions.

One significant question had to do with filed subbidders. The change to the provisions impacting filed subcontractors in the 2004 legislation required that subcontractors be prequalified by the awarding authority prior to their being able to submit a bid. The legislation then provided that the subcontractor who was prequalified must also furnish a payment and performance bond if that subcontractor was ultimately selected by the general contractor to perform the work.

The issue which arose shortly after the legislation went into effect was that while subcontractors were required to furnish performance and payment bonds, who was supposed to pay the premium for the bonds. The subcontractors were claiming that the general contractor was to pay and the general contractor was claiming that legislation mandated that the subcontractor pay it.

The prior practice had been for a general contractor to be able to check off on its general bid form (which was well after the filed subbids had been bid) whether it wanted the subcontractor to furnish a payment and per-

formance bond. If the general contractor did check off that it wanted such bonds, then it was obligated to pay the cost of the bonds.

The subcontractor argued that the new legislation merely required the subcontractor to automatically furnish payment and performance bonds if it was prequalified, but that the old practice was still in effect whereby the general contractor would have to pay the premiums for such bonds.

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In an action which ended up in the Superior Court, a subcontractor had claimed that it was owed \$23,000 for the premiums paid for payment and performance bonds which it was required to provide as part of its filed subbid. It demanded payment from the general contractor who refused to pay.

There were motions for summary judgment which were filed, and the court subsequently ruled that for those subcontractors who are prequalified by the awarding and subject to the "2004 Legislation", must furnish payment and performance bonds at their cost. It was not the general contractor's responsibility.

Thus, there is now guidance which does establish and help to clarify that in situations involving filed sub-bidders who are prequalified, it will be the obligation of the subcontractor to carry these premiums. This will hopefully end one of the controversies created by the new legislation. ■