



CHANGE ORDERS AND BOND PREMIUMS

Contributing Staff

Does a Performance Bond cover change orders? It is a common question. While there may be instances when the surety may claim that a ‘cardinal change’ has been made to the original contract, basically the surety never intended to bond such a project, the answer is often “yes”.

This article’s focus is not on the legal issues of a ‘cardinal change’. Our focus will be on the more routine change order work and the additional bond premiums that are incurred as a result.

The bottom line is that the bond covers the contract. Therefore, the contractor is responsible for the additional premiums that are incurred as a result of a contract over-run on a bonded project.

For example, the AIA Document A312, a frequently used Performance Bond form, states in Section 1 that “The Contractor and the Surety, jointly and severally, bind themselves... to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.” The Construction Contract is defined in Section 12.2 as “The agreement between the Owner and the Contractor ... , including all Contract Documents **and changes thereto** (emphasis added).”

So, if there are change orders to the existing contract, the bond automatically covers those change orders. The bond premium is calculated on contract price. Therefore, if the contract price increases, additional premiums are due. Conversely, if the contract price decreases, the contractor should be entitled to a return premium. As you will read, however, this may not always be the case.

Most sureties, but not all, will return the premium when a final contract price is lower than the original contract price, subject to certain minimum thresholds. However, there was an interesting case a few years ago when a court determined that the surety company was not obligated to return the premium. The contractor was awarded a \$2.5 million construction contract and paid the appropriate premium. The project was terminated (not defaulted) when it was 13% complete. The contractor sought the pro rata return of premium on theories of unjust enrichment and breach of implied contract. The contractor argued that once the project was terminated, there was no further risk under the bonds. The court found that the contractor received what it had bargained for – performance bonds for the full contract price, which put the surety at risk for the full amount of the contract and without which the contractor would not have been awarded the contract. [Taken from www.constructionweblinks.com *Bullard-Lindsay Contracting Co., Inc. v. Universal Bonding Insurance Co.*; Supreme Court, New York County; Index No. 122066/00; Justice Schoenfeld; January 2, 2002; *aff’d*, 303 A.D.2d 317, 755 N.Y.S. 2d 844 (1st Dept. 2003).

How is the premium calculated for an additional / over-run premium? The Bonding company calculates the premium on the final contract price, then subtracts the premium that was paid based on the original contract price. Since many sureties have ‘sliding-scale’ rates, it is very important to perform the calculation this way. One cannot assume that the overall rate paid for the original bond will be the rate charged for the additional / over-run premium.

Continue page 2

Louis J. Spina
Denese Thompson
Stephen Grieco

Famous Quotes

You can build a throne on bayonets, but you can't sit on it for long

-Boris Yeltsin

If no one ever took risk, Michelangelo would have painted on the Sistine Floor

-Neil Simon

You may not be responsible for getting knocked down, but you're certainly responsible for getting back up.

-Rev. Jesse Jackson

There are no traffic jams when you go the extra mile.

Every time I close the door on reality, it comes in through the windows.

-Jennifer Unlimited

Famous Quotes

The question “Who ought to be boss?” is like asking “Who ought to be tenor in the quartet?” Obviously, the man who can sing tenor.

-Henry Ford

I definitely am going to take a course on time management.....just as soon as I can work it into my schedule.

-Louis E. Boone

An executive is someone who makes a decision quickly and gets somebody else to do the work.

-Joe Moore

If the only tool you have is a hammer, you tend to see every problem as a nail.

-Abraham Maslow

When people begin to ignore human dignity, it's not long before they begin to ignore human rights.

-G. K. Chesterton

You can preach a better sermon with your live than with your lips.

-Oliver Goldsmith

Everyone is a moon and has a dark side which he never shows to anybody.

-Mark Twain

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It is very important that the contractor factors in the additional premium that will be charged into the change order proposal. If the Project Owner does not want the additional work to be covered under the bonded obligation, it is important that they issue either a separate, unrelated contract or purchase order for this work. However, if the Project Owner states that the change order work is part of the existing, bonded project, the bonding company will typically seek the

**‘CONTRACTORS FOR KIDS’ is Formed
Louis J. Spina Accepts Board of Directors Position**

“Contractors for Kids” is a not-for-profit company founded for the purpose of providing assistance to families in our communities. The goal for the organization is to assist children and their families overcome obstacles that have unfortunately changed or have impacted their lives. They want to give hope and reassurance for their futures.

“Contractors for Kids” is the brainchild of Kevin Harney and Alan Nahmias, principals of Stalco Construction Inc. Already philanthropic by nature, they have been able to energize, motivate and inspire through example. They not only commit their money, but their time and resources as well to this cause.

“I am proud to be a part of this organization, although I wish there were no need for it. The individuals involved all share the common values of personal commitment, professionalism, character, integrity, honesty and a sincere, burning desire to help. I became involved because, as a parent, I can appreciate the hardship that parents must

endure as they try to spend time with their child that has fallen ill, as they try to care for them and protect them.

All while the financial realities of the situation place an increasingly heavy burden upon them. This organization will, hopefully, make those families feel that they are not so alone during those trying times; that their community is with them. Never doubt that a group of caring individuals can change the lives of children and their families in need,” comments Louis J. Spina.

The organization’s first annual gala event was held on January 20, 2006 at the Atlantis Marine World Aquarium in Riverhead. The evening was a huge success. Thank you to everyone that supported the group and the event so generously.

Please visit the organization’s website at www.contractorsforkids.org for upcoming events, including the First Annual Golf Outing to be held June 12, 2006 at the Stonebridge Golf & Country Club.

Keeping Your Information Current With Your Surety

Throughout the year your bonding company requests updated information from you and your company. This information is extremely important in ascertaining your bonding limits and allowances.

This is the time of year that you are meeting with your CPA, gathering year-end information and finalizing the year-end reports. This information must be submitted to your surety within 90 to 120 days of the close of the fiscal year-end. Check with your surety to determine their requirements. The surety industry has taken a harden position in this area and are not willing to wait beyond 120 days and continue to provide surety support without the updates.

If there is going to be any kind of delay in obtaining this information, as soon as possible.

If preliminary information can be provided in the interim, this may enable the surety to continue to provide surety support until the final reports are ready.

The following information needs to be included with the year-end update.

- Corporate year-end financial statements
- Aging Schedule of Account Receivables— concurrent with your financial statements
- Work in progress schedules, including completed contract information – as of statement date as well as a current report
- Personal financial statements -concurrent with corporate year-end statements
- Updated Certificate of Insurance
- Bank statements to verify current cash balances.
- Tax Returns, Corp. and Personal

New Affiliation to Expand Our Services

Atlynx, through its affiliation with The Amerisc Benefits Corp., is now in a position to offer its clients many new important products and services that can address many of your business insurance and financial planning needs

Some of these services include:

- Retirement Planning through a 401K Plan or other designed Defined Contribution or Defined Benefit Plan.
- A comprehensive review of your Group Health Insurance; Long and Short Term Disability, Group Life, Dental and Vision Coverage.
- Plan for the transition of a business (through a funded Buy and Sell or Shareholders' Agreement) so the business can continue uninterrupted.
- Insure Key Employees / Persons, so the business can continue unencumbered.
- Reward Executives or Key Employees with a flexible selective incentive plan for retirement (Deferred Compensation Plan).
- Provide Voluntary Programs to your employees, at no cost to the business, in order to supplement and enhance the employee benefits.

Most business owners don't plan to fail, they fail to plan. We can help you plan for success.

If you are interested in obtaining more information on these products, complete the section below and fax it to the attention of Stephen Grieco or Anthony Martillotti in our Life and Benefits Dept. at 516-794-2920, and we will be in touch with you.

I am interested in more information on these products. Please contact me:

Name: _____

Phone #: _____ Fax # _____

Products Interested in:

WOMENS INSURANCE NETWORK OF LONG ISLAND - SAVE THE DATE

It's that time of year again. Women's Insurance Network of LI (WINLI) is having their 10th Annual Charity Auction on Wednesday, March 29, 2006. It's a fun night for all at the Crest Hollow Country Club, Woodbury, NY. There will be a Sports Memorabilia Silent Auction; Chinese Auction, Door Prizes and the main event, Male Bachelor Auction. All proceeds go to Breast Cancer Research and Special Olympics. Contact Denese Thompson at 516-745-7504 for additional information and to inquiry as to how you can be a sponsor, bachelor for the auction or donate prizes.

Company News

Join us in congratulating Nicole and Billy Gruter on the birth of their first child. Ryan Hunter who was born on Tuesday night, January 10, 2006 weighing in at 8lbs 13oz and 21-1/2 inches long.

We also extend congratulations to Frank Abbatiello and his wife, Diana on the birth of their son—Lucas Daniel, born Friday morning, January 6, 2006 weighing in at 7lbs 4oz and 21 inches long.

Everyone is doing well.

Letter from the Editorial Staff

This newsletter is designed with our readers in mind. All inquires and ideas regarding this or future newsletters are appreciated. Please send all inquires to me at denese@esuretybond.com. If you know anyone who you feel would like a copy of our newsletter, please let us know so that we can include them in our mailing list. Please let us know if you would like to receive this newsletter via e-mail.

Disclosure

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