



Protecting your Assets: Understanding the Role of Insurance and Bonding in Construction Projects

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Galvanize Law

a progressive law firm focused on serving
the needs of the construction industry



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Risk

Risk is inherent in all construction projects.

Risk allocation is effectuated by contract provisions. Project contractors and subcontractors are often presented with contract terms that seek to shift risk (even over things not within their control) to the contractor/subcontractor.

Protecting against risk – beyond your contract:

- Surety Bonds
- Commercial General Liability Insurance

Presentation Overview

Construction Surety Bonds

- Role of bonds on projects
- Types of bonds & risk protection
- Differences between bonds and insurance

Liability Insurance

- Role in construction defect litigation
- Notice process
- Providing your defense

Role of Bonds on Construction Projects

Public Sector

- Statutory requirements – Federal, state, and local governments
- Protects taxpayer dollars
- Assures lowest bidder is capable of completing project
- Payment protection for subcontractors and suppliers

Private Sector

- Discretionary – depends on the Owner
- Assures qualified contractors, protection against a contractor's failure to complete the project
- General Contractors may require bonds from their subcontractors

Performance Bond

- Protects owner from financial loss in the event contractor fails to perform the contract.
- If owner declares contractor in default and terminates the contract, owner can call on the surety to meet the surety's obligations under the bond.
- Performance Bonds are *not* insurance
 - Limited to the bond amount
 - Limited to the project duration

Contract Surety Bonds

Payment Bond

- Assures the contractor will pay subcontractors, laborers, and materials suppliers.
- Protects owner against liens on the property.

Contract Surety Bonds

Bid Bond

- Helps eliminate unqualified bidders and facilitate competitive bidding.
- Provides financial protection to an obligee if a bidder is awarded a contract pursuant to bid documents but fails to sign the contract and provide required performance and payment bonds.

Contract Surety Bonds

Bonds vs. Insurance

BONDS

- Project specific
- Prequalification to protect against loss
- 3 parties – owner/obligee, contractor, surety
- Covers amount of bond
- Contract

INSURANCE

- Term specific
- Spreads risk among larger group of similar risks
- 2 parties – insurer and insured
- Covers to policy limit, less deductible
- Tort

Role of Insurance on Construction Projects

Construction Defect Liability

- Breach of contract
- Breach of express or implied warranty
- Negligence

Parties

- Plaintiff – owner/buyer
- Defendants – Builder, Developer, and/or General Contractor
- Direct or Third-Party Claims – subcontractors, design professionals

Duty to Defend & Indemnify

Duty to Defend

- Triggered by claim alleging property damage resulting from construction defects (negligence).
- Interpreted broadly in favor of the insured.
- Duty to defend against all claims alleged, even non-covered claims (breach of contract, misrepresentation, etc.)
- Applicable policies: all policies in effect during construction and policies in effect after construction was complete.
- Named insured and additional insureds.
- Reservation of Rights

Duty to Defend & Indemnify

Duty to Indemnify

- Arises from the terms of the policy itself.
- Insurance carrier pays for sums the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” (including “loss of use”) to which the insurance applies.
- Exclusions to look out for:
 - Condominium or townhome exclusion
 - GC required to have written contracts with subcontractors, naming GC as additional insured on the policy

Notice of Claim Process

Colorado Construction Defect Action Reform Act (“CDARA”)

C.R.S. § 13-20-801, *et. seq.*

- Statute governing claims against any “construction professional”
- **Notice of Claim process:**
 - Notice describing alleged defects 75 days before filing litigation.
 - Construction professional allowed to physically inspect claimed defects within 30 days of receiving the notice.
 - After this 30-day inspection period, construction professional may offer to settle claim through corrective work or payment.
 - If offer not accepted, plaintiff may initiate litigation.

Notice of Claim Process

Put your Insurance Company on Notice

- If you receive a Notice of Claim, notify your insurance carrier as soon as possible and demand a defense.
- If you do not put carrier on notice, coverage could be denied and/or premiums increased, or denied coverage in the future.

Coverage Issues

Insurance Defense Counsel vs. Personal Counsel

- Insurance counsel is retained by your insurance company to defend you.
- YOU are the insurance defense counsel's client; counsel reports to the insurance carrier regarding the case.
- Because insurance defense counsel is paid by the carrier, they cannot advise you about coverage issues.
- Personal counsel may be separately retained by you to advise on issues outside the scope of insurance counsel's representation (this is not paid for by your insurance).



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