

PERFORMANCE BONDS AND PENALTIES LACK UNIFORMITY, ADD TO COSTS

By Dave Johnstone, business columnist

As contracts get larger and you begin bidding on government jobs you will encounter an extra layer of legalese, performance bonding and penalty clauses. The additional time and cost of meeting these new requirements has to be considered in bidding.

There appears to be little consistency with performance bonds and penalty clauses. You must approach each job case by case. Some relief can be found in public projects since uniformity is an obsession. So far as we can find out, no body such as the National Commission on Uniform State Legislation—which generated the Uniform Commercial Code in force in every state except Louisiana—or the National Conference of Building Code Officials has taken up the task of hammering out model provisions. The neglect may be oversight, but the task is also difficult. State governments, on the other hand, have striven for some degree of uniformity, at least as far as suggestions go. Since states administer federal funds and are faced with a multiplicity of political subdivisions, they have some interest in keeping things orderly. The alternative is for staff to spend most of its time in court.

Instruments of Control

If you're dealing with the public sector, the chances are you won't be able to modify the deal extensively, since any state guidelines will probably be followed. However, like other specifications, performance bond and penalty provisions

A refusal by insurance and bonding companies to cover you indicates you are not ready for that job.

can sometimes be tempered if you go in before the invitation to bid is written up. To be able to do this, you must be on good terms with your public works officials. You can get on good terms by visiting them with descriptions of your capabilities to go into the file. Sometimes, the performance bond and penalty provisions may be picked up as a chunk from a bricks-and-mortar guideline that has nothing to do with the new job. Spec writers are as human as anyone else. Our favorite story dates back to 1970, when the Federal EPA, observing that coho salmon had been successfully introduced to Lake Michigan, transferred a



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water quality standard from Puget Sound to that freshwater lake in order to meet a deadline. The only thing Puget Sound has in common with Lake Michigan is wetness.

We have to face reality, and it would be silly to deny that performance bond and penalty provisions, like other specifications, can be tailored to the profiles of favored organizations or the provisions may be ignored. In the event you encounter something funny on a governmental level, you may want to contact your F.B.I. or U.S. Attorney or the Public Responsibility Section of the Department of Justice. All these officials have full discretion, which means they can ignore you or heed you as they will. Challengers of sweetheart deals are not too popular.

Add Bond and Insurance Expense to Your Bid

You may or may not be able to make the performance bond and penalty provisions more realistic (easier) by talking things over with public works officials and with your industry sources (you stand a better chance with the latter, who will probably be more flexible and understanding of your money bind).

If your bonding company and insurance carrier have had good experience with you, you will get a good rate, even though rates like other costs are on the upswing. If they have had bad experience with you, they may not accept the risk and their refusal or reluctance to handle you will be another indication to you that you are not yet ready to take on the business. If your bonding company and insurance carrier have had no experience with you, they will have to develop it—but in the meantime, if you present them with the same kind of information you would give to a bank in application for a loan or the same kind of information you would use to sell a new customer, they may look upon you favorably. Essentially, this information would include: 1) Photographs of your headquarters, equipment and

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people; 2) Detailed financial statements, covering a period of three years to demonstrate responsible growth; and 3) References, listing not only your happy customers but describing the type of work done for them.

Whatever your rating with bonding companies and insurance carriers, be certain to include the costs in your bid; and when you get the opportunity, point out to your prospect orally the additional dollar costs his requirements have gener-

Standardization of bonding would be welcomed by insurance carriers and bonding companies.

ated. It may be that by loosening up his requirements somewhat, he might have saved a substantial sum. It is very difficult to generalize, but chances are the job you have bid on is not as critical to safety as a highway bridge, nor as critical to income-generation as a commercial building, and there is no valid reason why tight performance specifications appropriate to those projects should be carried over and applied to a task which may be largely aesthetic. If there is indeed no room for play—and schedules must be closely

maintained, then you should be compensated accordingly, with a differential that will cover your increased cost of doing business, risk, and effort.

Common Jobs Should Permit Model Provisions

One argument against standardization of performance bond and penalty provisions is that every job carries a different risk. Jobs involving earthmoving, planting, maintenance and landscape design have common elements that can be weighed, measured, and evaluated. There is no good reason (except empire-building) that performance bond and penalty provisions cannot be standardized at varying level of risk. The bonding companies and insurance carriers should welcome it.

Such standardization, however, is more appropriately the work of city, state and national associations than it is the work of a single company.

The group with the greatest political power is probably the Associated General Contractors with its state organizations. Perhaps it's time to activate them. In any case, the state organization would be a good one for you to support, if you are not now associated. Associated Landscape Contractors of America and National Landscape Association should be interested, as well. **WTT**



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