

Incorporated Indemnity Language Doesn't Shoehorn Other Contracts Into Bond

By Gregory R. Veal October 19, 2022

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A recent decision from the Northern District of Georgia confirmed important suretyship principles in granting partial summary judgment against an obligee's attempt to expand the performance bond scope. *IHI E&C Int'l Corp. v. Robinson Mech. Contrs., Inc. and Fidelity & Deposit Co. of Md.*, 2022 U.S. Dist. LEXIS 180174 (Sept. 30, 2022). The court carefully examined the terms of the bond, the language of the incorporated subcontract, and the context of the parties' dealings in ruling that the bond covered only the \$24 million installation subcontract, not an additional \$40 million in fabrication purchase orders by the same principal on the same project.

The subcontract required the principal, Robinson, to indemnify the obligee for damages "arising out of or resulting from Subcontractor's actions and/or omissions in the performance of the Work, the performance of other activities or services of any kind undertaken by [Robinson] or occurring in connection therewith (including [Robinson's] failure to comply with the terms of [the Construction Contract]), whether occurring on or off the Project site."

The obligee argued that "other activities or services of any kind . . . occurring in connection therewith . . . whether occurring on or off the Project site" unambiguously covered Robinson's fabrication work under the two purchase orders that, together, were almost double the amount of the bonded installation subcontract. Because the bond incorporated the contract, the obligee argued, the purchase orders—and over \$30 million in alleged damages—were covered by the bond.

Fortunately, the district court judge applied the rules of construction to the subcontract and bond, then examined the structure of the dealings between Robinson and the obligee, to resolve the dispute. The obligee's indemnity clause was ambiguous, not least because the word "therewith" could relate to the subcontract work or to "other activities or services of any kind." Being the obligee's language, it was construed in favor of the surety. Further, in Georgia performance bonds are strictly construed in favor of the surety. This bond stated, "The surety shall not be liable to obligee or others for obligations of principal that are unrelated to the Construction Contract." The court found the purchase orders to be precisely such unrelated obligations. (The subcontract was for installation only, albeit installation of the materials fabricated under the purchase orders.)

Finally, the court considered the context of the parties' dealings on this billion dollar project where the subcontract and purchase orders together totaled over \$64 million. The obligee had not required bonds for the purchase orders, although it had required a letter of credit for one of them, and the fabrication work was nearly complete before the subcontract was signed and the bond delivered. The bonded subcontract made no reference whatsoever to those purchase orders. The parties even had, by change

order, removed certain work from the purchase orders and added it to the subcontract, showing that the removed work never had been part of the subcontract scope by virtue of the indemnity clause or otherwise. Georgia courts require consideration of the full context surrounding ambiguous contract language, and the court would not ignore these obvious inconsistencies with the obligee's position.

Partial summary judgment for the surety on the bond scope has not ended the case. Robinson and F&D still contest the obligee's right to recover any damages, and a jury trial may yet be required. This critical ruling, though, limits how much of the obligee's claimed damages (if any) can be asserted against the performance bond. With the benefit of a thorough record and persuasive briefing, the court properly found for the surety based on the language of the bond and bonded contract, the context of the parties' dealings, and the application of the rules of construction.

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