

# For the Client

## The Surety's Role in Disputes

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True happiness for anyone on a construction job is never having to be aware of the surety's existence. The surety's invisibility suggests that the bonded contractor is doing its job properly and paying its bills.

When things go wrong, however, the progress of the job can be impeded, schedules go awry, disagreements arise over the scope of the work, arguments rage over the parties' respective responsibilities, or cash flow problems rear their ugly heads. When any or all of these events present themselves, finger-pointing often ensues and the battles begin in earnest.

At this point, someone, usually the owner but often the design professional, may decide to call in the surety. The response of the surety can be either a blessing or a nightmare.

### Providing Assistance

People often do not realize that a surety bond is, in fact, a three-party agreement among the surety, the project owner, and the contractor. The underlying basis for the responsibilities of each party are the contract documents. These documents detail what the respective rights, duties, and obligations of the parties are each to the other. In addition, local and state laws and regulations often influence who does what to whom, when, where, and how. Finally, the language of the bond has a strong bearing on what the surety is obligated to do and to whom it is responsible.

If the argument is fundamentally between the contractor and the architect/engineer, the surety will listen closely but might not be in a position to take any action. By its very presence in the discussion, however, the surety is now aware of the issues and, if it believes that a serious

problem is emerging, the surety may strongly advise the contractor against intransigence or an unwillingness to resolve the apparent problem.

If there are clear errors of omission or commission or ambiguities in the contract documents (which include design plans and specifications), the surety usually will assist in seeking clarifications or corrections.

If the problem arises, however, because the owner lacks the wherewithal to continue making payments to the contractor, the surety is unlikely to be sympathetic to the owner. In fact, if the owner is having monetary problems, the surety may stand up for the bonded contractor and foster negotiations that allow the parties to go their separate ways.

On the other hand, if it's the contractor that is clearly having financial problems or is in jeopardy of not being able to fulfill its contractual responsibilities, the surety generally will take action to rectify the problem. For example, the surety can, if it chooses, provide funds or guarantee a bank loan.

### Conducting Investigations

Before the surety commits to a course of action, the surety usually is legally required to independently investigate the problem. Unfortunately, evaluating the exact nature of a problem on any given project and determining the best solution can take a significant amount of time. This delays getting the project completed and is probably the number one source of friction between the surety and the owner.

In a situation where a contractor has been defaulted and its contract terminated, the surety will determine whether the termination was proper and just. If the surety concludes that the termination was justified, the surety has several options, including the following:

- Taking bids from other contractors and tendering the low bidder to the owner to complete the project.
- Offering to pay the owner the bond penalty.

- Arranging for the owner to complete the job and, if the cost of completing is greater than the amount left in the contract, paying the owner for the additional cost.
- Entering into a contract with the owner and having the original contractor physically do the work.

If, instead, the surety's investigation concludes that the default of its principal was not justified or that the problem was caused by the owner's actions or inaction or by defective contract documents, the surety will so advise the parties, and each can seek whatever remedies exist in law or in the contract.

### Avoiding Delays

Time usually is a critical element in a construction project. Everyone is expected to work at "warp speed" all the time.

Clearly, when a surety has to open an investigation, it will slow down the progress of the job. Sadly, this often gives the appearance that sureties are foot-dragging, and, consequently, may people consider sureties to be an impediment to the timely resolution of a problem.

The fact remains, however, that sureties have paid out billions of dollars in the past few years, belying the myth that sureties play the role of villain in construction projects. To the contrary, if sureties had not paid out that money, the cost of unfinished projects and unpaid subcontractors, laborers, and suppliers would have had to have been absorbed by those least able to afford it.

The key point to remember, therefore, is that the length of delay arising from a surety's involvement largely depends upon how early in the game the surety is made aware of the problem. Early notification can start the process informally and often can resolve problems before they escalate out of control.

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