

# A Conversation With Surety Counsel: Construction Bonding and Claims

**Paula Lee-Chambers** - Partner, Watt, Tieder, Hoffar & Fitzgerald, L.L.P.  
**Kelly Gagliuso** - Shareholder, Bernstein Shur

May & June 2021



# Objectives

- The Process for Obtaining a Bond Including Statutory Requirements (*session 1*)
- The Contractor and Surety's Relationship, Rights and Responsibilities (*session 2*)
- The Surety Claims Process (*session 3*)

# Construction Surety Process And Claim Perspectives

*Session 1: Obtaining A Bond*

# When Do You Need A Performance And Payment Bond?

- Public Project
- Private Project

# General requirements for obtaining a bond

Underwriting the risk

Multiple Factors

- Credit Analysis
- Years in Industry
- Make up of Company (Solo, JV, LLC, LLP, Trusts)
- Previous Bankruptcies
- Prior Claims

# General requirements for obtaining a bond

- Surety review of financials
- Work in progress
- A/P; A/R
- May require cash collateral/letter of credit (LOC) in addition to a General Indemnity Agreement (GIA or GAI)

# Letters Of Credit

A Letter of Credit runs by and between the Bank and the  
Surety - Surety can draw on the line of credit, if  
necessary

# Letters Of Credit

[Insert date]

**TRANSMITTED VIA OVERNIGHT MAIL AND FAX**

[Insert Bank Name]

Re: Letter of Credit No. \_\_\_\_\_

Dear Sir or Madam:

Please find enclosed a copy of Irrevocable Standby Letter of Credit no. \_\_\_\_\_ (“Standby”) issued by [insert Bank] on behalf of [insert Principal/Indemnitor] (“Principal”) and for the benefit of (Surety). Surety hereby demands payment of \$\_\_\_\_\_ under the Standby.

Surety states that Principal is obligated to pay to Surety the amount demanded, which amount is due and unpaid, under or in connection with an Indemnity Agreement between Surety and Principal dated [insert] and (1) a claim has been made or (2) a situation exists under which in Surety’s judgment a claim may be made or (3) liability, loss, costs or expenses have been sustained or (4) in Surety’s sole discretion, funds are required for its protection, under said bond(s).

Surety further states that the proceeds from this demand will be used to satisfy the above-identified obligation(s) and that Surety will account to Principal for any proceeds that are not so used.



# Letters Of Credit

## Stand By Letter of Credit

[Insert date]

**TRANSMITTED VIA OVERNIGHT MAIL AND FAX**

[Insert Bank Name]

Re: Letter of Credit No. \_\_\_\_\_

Dear Sir or Madam:

Please find enclosed a copy of Irrevocable Standby Letter of Credit no. \_\_\_\_\_ (“Standby”) issued by [insert Bank] on behalf of [insert Principal/Indemnitor] (“Principal”) and for the benefit of Surety. Surety hereby demands payment of \$\_\_\_\_\_ under the Standby.

Surety states that Principal is obligated to pay to Surety the amount demanded, which amount is due and unpaid, under or in connection with an Indemnity Agreement between Surety and Principal dated [insert].

Surety further states that the proceeds from this demand will be used to satisfy the above-identified obligation(s) and that Surety will account to Principal for any proceeds that are not so used.

# The General Indemnity Agreement

Generally, the forms are all similar throughout the industry

- Understand what you are signing and your obligations
- Understanding request for certain indemnitors including:
  - Co-Owners
  - LLC
  - LLP
  - Spouse
    - Anyone with an ownership interest in the company

# The General Indemnity Agreement

## Key Definitions

- Indemnitor
- Default
- Principal
- Loss
- Application of Agreement
- Indemnitor and Exoneration

# The General Indemnity Agreement

## Key Definitions

- Demand for Collateral
- Claim Settlement/Mitigation
- Assignment
- Trust Fund
- Attorney-In-Fact
- Termination of Prospective Liability

# The General Indemnity Agreement

## Key Definitions

- Joint, Several and Continuing Obligations
- Equitable Remedies
- Waivers
- Choice of Law
- Credit Reports
- Security Interest

# The General Indemnity Agreement

“**Indemnitor**” shall include, among others, each and every one of the following persons or entities on behalf of itself and all of its existing or prospective heirs, personal representatives, executors, administrators, parent companies, purchasers, successors (through asset acquisition or otherwise), assigns, related entities, co-venturers, joint ventures, affiliates, subsidiaries, divisions, and marital communities along with any entity (whether partially or wholly owned and/or controlled) of whatever description and whenever formed or acquired in which any of the foregoing persons or entities have an ownership or beneficial interest. Indemnitor shall also include any  
Principal.

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

“**Default**” shall include any one or more of the following:

an Indemnitor's breach, abandonment, failure, refusal or inability to timely perform, in whole or in part, any contract for which a Bond has been Underwritten;

an Indemnitor's failure, refusal or inability to timely satisfy any debt or obligation incurred as part of any contract for which a Bond has been Underwritten;

an Indemnitor's failure, refusal or inability to timely satisfy any term or condition of any Bond, any contract for which a Bond has been Underwritten or this Agreement;

an Indemnitor's use of contract funds in any manner which is inconsistent with any obligation for which a Bond has been Underwritten or the requirements of this Agreement; ...

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

... a declaration of default, a demand for Surety to pay or perform, or a termination for default asserted by an obligee relating to any contract for which a Bond has been Underwritten;

a dissipation or diversion of assets by any Indemnitor which impairs the performance of any term or condition of this Agreement or any contract for which a Bond has been Underwritten or any Bond;

an Indemnitor's becoming insolvent or the voluntary or involuntary commencement of any proceeding by or against the Principal on the basis of its actual or perceived insolvency, including, without limitation, the appointment of a receiver or trustee, reorganization, liquidation or any similar proceeding; ...

**BERN  
STEIN  
SHUR**





# The General Indemnity Agreement

... the commencement or continuation of any proceeding which deprives or interferes with the Principal's performance of any obligation for which a Bond has been Underwritten or its use of any supplies, tools, plant, machinery, equipment, wherever located, or the work under any contract for which a Bond has been Underwritten:

the death, disappearance, adjudged incompetence, incarceration, commitment or felony conviction of any Principal;

any material change in the character, financial condition, identity, control, management, beneficial ownership or existence of any Principal;

An Indemnitor's providing, directly or indirectly, any false or materially misleading statement, document or disclosure to Surety, or an Indemnitor's failure to fully and timely disclose material information bearing upon either its ability to perform any obligation for which a Bond has been issued or under this Agreement.



# The General Indemnity Agreement

“Principal” shall refer to any person or entity in whose name a Bond is executed.

# The General Indemnity Agreement

“Loss” shall include all manner of losses, costs, expenses or fees of any kind or nature which are paid or incurred by Surety as a result of or in any way relating to the entering into and enforcement of this Agreement or the Underwriting on any Bonds. Loss shall include, without limitation, any and all expenditures relating to Surety’s financial investigations, claim investigations, claim ...

# The General Indemnity Agreement

...payments, payment to discharge liability and Bond related litigation of any nature, legal, expert, administrative, consultant and other professional fees and costs, court costs, travel expenses, unpaid premiums, unpaid loans which may be extended to, or guaranteed for or on behalf of any Indemnitor and interest on sums expended at the maximum lawful rate. Loss shall be determined broadly in favor of Surety.

# The General Indemnity Agreement

“Application of Agreement” This Agreement shall apply to all Bonds Underwritten by Surety, whether prior to, simultaneously with, or subsequent to this Agreement’s execution (1) on behalf of or at the request of any Indemnitor, or (2) in connection with contracts in which any Indemnitor has an interest; or (3) for or at the request of any present or future parent, affiliate or subsidiary of any Indemnitor; or (4) for any third party at the request of any Indemnitors. This Agreement is solely for the benefit of Surety and no other person or entity shall have any rights under this Agreement.

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

The rights of Surety under this Agreement are in addition to and not in lieu of any and all rights granted by law.

# The General Indemnity Agreement

Surety shall have the absolute right to apply any amount owed by any Indemnitor against the amount owed by that Indemnitor to Surety including the right to set-off any debt owed to any third party against any liability of any Indemnitor that owns or controls said third party.

# The General Indemnity Agreement

“Indemnity and Exoneration” The Indemnitors shall at all times indemnify, exonerate and hold Surety harmless from and against all Loss, claims, demands, liabilities, suits and causes of action which are in any way related to any Underwriting activities, Bonds or this Agreement. Indemnitors shall immediately notify Surety in writing of any demand, notice, suit, claim, action or proceeding relating to any Bond.



# The General Indemnity Agreement

Surety may bring separate suits on this Agreement as causes of action accrue, and the bringing of such suit or suits or the recovery of a judgment upon any cause of action shall not prejudice or bar the bringing of additional suits or causes of actions.

# The General Indemnity Agreement

Confirmation of payments through Surety's electronic claim system, copies of releases, or other evidence of such payments which are maintained by Surety in the ordinary course of business shall be prima facie evidence of the existence and extent of the liability of the Indemnitors to Surety.

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

“Demand for Collateral” Upon Surety’s demand, the Indemnitors shall immediately deposit with Surety funds, as collateral, in an amount Surety deems necessary at the time of said demand to protect itself from actual or anticipated Loss. Demand may be made as soon as a) Surety determines that liability exists; or b) Surety has a reasonable basis to believe that it may incur liability or Loss; or c) in the event any Indemnitor diverts contract funds relating to any Bond in violation of Paragraph 11 of this Agreement or applicable law; or d) in the event Surety deems itself insecure, whether or not Surety has made any payment or established any reserve and whether or not it has received notice of, accepted or denied any claim in whole or in part. Surety shall have no duty to invest or pay interest on any such collateral deposit. Said collateral may be used by Surety in its sole discretion at any time without notice to the Indemnitors to accomplish the purposes of this Agreement.

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

In the event Surety accepts collateral other than funds, Surety is authorized, without notice to Indemnitors, to manage, borrow against, sell, pledge, convey or dispose of said collateral by public or private sale and shall not incur any liability to Indemnitors or others for said actions. The Indemnitors shall be entitled to the return of any collateral or collateral proceeds which may remain upon satisfactory evidence to Surety in its sole discretion that its liability under any and all Bonds has been released and discharged without Loss and Indemnitors have fully complied with this Agreement. The Indemnitors acknowledge and agree that their failure to immediately deposit with Surety any sums demanded under this section shall cause irreparable harm to Surety for which it has no adequate remedy at law. Indemnitors agree and shall stipulate in any legal proceeding that Surety is entitled to injunctive relief for specific performance of said collateral deposit obligation and do hereby expressly waive and relinquish any claims or defenses to the contrary.

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

“Claim Settlement/Mitigation” Surety shall have the absolute right to adjust, settle, dispute, litigate, appeal, finance, or compromise any claim, demand, suit, judgment or exposure relating to any Underwriting activities or Bonds without affecting the Indemnitors' liability under this Agreement and Surety's determination shall be binding upon the Indemnitors. This absolute right includes the right, but not the obligation, to advance funds or guarantee loans to any Indemnitor.

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

The Indemnitors shall be obligated to Surety for all payments occasioned thereby whether said payments were made by Surety in the belief that either (1) Surety was or might be liable therefore; or (2) payments were necessary or advisable to protect Surety's rights or to mitigate Surety's potential liability or Loss.

# The General Indemnity Agreement

Upon Surety's demand, Indemnitors shall establish a trust account or accounts with a financial institution acceptable to Surety, and shall deposit all monies from any contracts for which a Bond has been Underwritten into said trust account(s ). The trust account( s) shall be restricted, requiring the signature of an authorized representative of Surety on all checks or other withdrawal orders drawn against said account(s).

# The General Indemnity Agreement

“Assignment” Effective on the earlier of the date of this Agreement or the date on which Surety first underwrites a Bond, at the request of or on behalf of any Indemnitor, all Indemnitors irrevocably assign, transfer and convey the following to Surety:

All rights of the Indemnitors in, arising from, or related to Bonds or any bonded or unbonded contracts, subcontracts and subcontract bonds and any extensions, modifications, alterations or additions thereto; and



# The General Indemnity Agreement

All right, title and interest of the Indemnitors in and to:  
(1) the work performed on any Bonded or unbonded contract; and (2) all supplies, tools, plant, machinery, inventory, equipment and materials; and (3) all materials purchased for or chargeable to any contract or Bond which may be in the process of manufacture, construction or transportation, or in storage anywhere; and (4) Books and Records, patent rights, copyrights, trademarks, and any and all bond claims or other affirmative claims; and (5) computers, computer systems, programs and licenses; and

# The General Indemnity Agreement

All rights arising out of insurance policies in which any Indemnitor has an interest as a policyholder, beneficiary or otherwise; and

Any and all accounts receivable, accounts, chattel paper, documents of title, intangibles, claims, judgments,

choses in action, purchase orders, bills of lading, federal or state tax refunds, tort claims, premiums, deferred

payments, refunds, retainage or retainage account in which the Indemnitors have an interest.

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

“Default” Upon Default, Surety shall have the absolute right to take any or all of the following actions:

Assert, enforce, and use all of the assigned, transferred or conveyed rights;

Take possession of all or any part of the work under any or all contracts relating to or for which a Bond has been Underwritten;

Take possession of all tools, plant, machinery, equipment, office equipment, Books and Records, hardware, software, stored data, materials, supplies, inventory, work in process and completed assemblies, wherever located;

# The General Indemnity Agreement

Execute any document in the name of any Indemnitor necessary to effectuate the purposes and terms of this Agreement or enforce any common law rights;

Take such other action and enforce such other rights permitted by this Agreement, at law or otherwise.

# The General Indemnity Agreement

“Trust Fund” If a Bond is Underwritten in connection with the performance of any contract, the entire contract price shall be dedicated to the satisfaction of the obligations of the Bond and this Agreement. All money paid or any securities, warrants, checks or evidences of debt given under contracts relating to or for which a Bond has been issued shall be impressed with a trust for the purpose of satisfying the obligations of the Bond Underwritten for said contract and this Agreement and shall be used for no other purpose until all such obligations have been fully satisfied.

# The General Indemnity Agreement

“Attorney-In-Fact” The Indemnitors irrevocably appoint and designate Surety as their attorney-in-fact with all right, but not obligation, to exercise all rights, create, execute and deliver any documents and take and perform all other actions deemed necessary by it to secure all rights provided by this Agreement or at law, including, without limitations, executing documents, stipulations and directives and endorsing securities, checks, drafts or like documents in the name of any Indemnitor. The Indemnitors ratify and confirm all actions taken or to be taken by Surety as their attorney-in-fact. This power is coupled with an interest and shall survive the death or incapacity of any Indemnitor.

# The General Indemnity Agreement

“Termination of Prospective Liability” An Indemnitor's sole and exclusive means of terminating its prospective liability under this Agreement shall be through a written notice sent by overnight delivery, personal service, certified or registered mail to Surety. Said termination shall be effective on the later of the date set forth in the notice or 40 days after actual receipt of the notice by Surety's designated recipient as set forth herein. Said termination shall not release the terminating Indemnitor from obligations under this Agreement for Bonds Underwritten prior to the effective date of termination or which arose prior to the effective date of termination nor shall it affect the continuing liability of any non-terminating Indemnitor.

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

“Joint, Several and Continuing Obligations”  
Indemnitors' obligations under this Agreement are joint, several and continuing. Surety shall not be required to enforce or exhaust its rights or remedies against any one or more Indemnitors before asserting its rights against any other Indemnitors.



# The General Indemnity Agreement

“Equitable Remedies” The Indemnitors acknowledge and agree that their failure to immediately perform any obligation or requirement of this Agreement shall cause irreparable harm to Surety for which there is no adequate remedy at law and the Indemnitors shall upon Surety’s demand stipulate, either directly or through the attorney-in-fact provision, that Surety is entitled to all manner of equitable relief including, without limitation, specific performance and injunctive relief in addition to the relief otherwise afforded by this Agreement or at law.

# The General Indemnity Agreement

“Waiver” In addition to other express waivers contained in this Agreement, the Indemnitors acknowledge and agree as follows:

Waiver of Notice. The Indemnitors expressly waive any right to be notified by Surety of the fact or happening of any act, event, information or occurrence which has or may give rise to the possibility of Loss or promote the recovery of Loss under this Agreement, including, without limitation, Underwriting, cancelling, declining, nonrenewing, or modifying any Bonds, claims, demands, lawsuits, settlements, releases, loans, forbearances or other like acts, events or occurrences, it being expressly confirmed by the Indemnitors that lack of notice to an...

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

Indemnitor of any matter known to Surety shall not be asserted as a defense to any claim by Surety nor shall it form the basis of a demand against Surety regardless of any defenses or objections which might have been asserted by Indemnitors to such actions. Additionally, the Indemnitors expressly waive any right to be notified by Surety, that it (a) executed any Bond for any Indemnitor; (b) effected changes in Bonds or bonded contracts or the plans or specifications relating to them; (c) increased or decreased any Indemnitors obligations under this Agreement.

# The General Indemnity Agreement

Waiver of Homestead/Property. To the extent permitted by law, Indemnitors expressly waive, abandon and agree not to assert in any proceeding or action relating to any Bond or the enforcement of this Agreement, any statutory or common law claims or exemptions relating to Homestead and any claim that any property, whether Homestead or otherwise, is exempt from levy, execution, sale or other legal process under the laws of any State, Territory, Possession or Tribe.

# The General Indemnity Agreement

“Credit Reports” Indemnitors hereby expressly authorize Surety to access their credit reports at any time until all obligations of said Indemnitor have been fully discharged for any of the following purposes: (a) to verify information provided to Surety; (b) for underwriting purposes; (c) to investigate claims or potential claims relating to the Underwriting of Bonds; (d) for debt collection; (e) for enforcement of this Agreement.

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

“Security Interest” This Agreement constitutes a Security Agreement in favor of Surety and also a Financing Statement enforceable in accordance with the provisions of the Uniform Commercial Code (UCC) now or hereafter in force in any jurisdiction.

# The General Indemnity Agreement

The Indemnitors hereby consent to Surety perfecting its rights hereunder without providing notice. Surety may make such additions to this Agreement as may be necessary or desirable to permit its filing as a Financing Statement under the UCC, and the Indemnitors shall, upon demand, immediately execute and deliver such further instruments as may be necessary or desirable to permit either the filing of this Agreement as a Financing Statement or the filing of a Financing Statement based upon this Agreement as a Security Agreement in such places as Surety shall determine.

**BERN  
STEIN  
SHUR**



# The General Indemnity Agreement

A copy of this Agreement shall, if recorded, constitute a consensual lien upon any and all interest in real estate then owned, in whole or in part, by the Indemnitors.



# Live Questions...

**BERN  
STEIN  
SHUR**



# Thank you!

**Paula Lee Chambers** [pchambers@watttieder.com](mailto:pchambers@watttieder.com)

**Kelly J. Gagliuso** [kgagliuso@bernsteinshur.com](mailto:kgagliuso@bernsteinshur.com)

**BERN  
STEIN  
SHUR**



# Construction Surety Process And Claim Perspectives

*Session 2: The Contractor/Surety Relationship, Rights, And  
Responsibilities*

# Performance Bonds

## Performance Bond Forms

- A. AIA 311 Performance Bond
- B. AIA 312 Performance Bond (2010)

# Performance Bonds

- Manuscript Riders
  - Design Rider Exclusion
  - Phase Exclusion Rider

# AIA 311 Bond Form

## AIA 311 Performance Bond

The Bond states:

NOW, THEREFORE, if [principal] shall promptly and faithfully perform said subcontract, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

“Whenever [principal] shall be, and be declared by [obligee] to be in default under the subcontract, [obligee] having performed [obligee’s] obligations thereunder:

# A 311 Bond Form

- 1) [Surety] may promptly remedy the default subject to the provisions of paragraph 3 herein, or;
- 2) [Obligee] after reasonable notice to Surety may, or surety upon demand of [obligee] may arrange for the performance of [principal] obligation under the subcontract subject to the provisions of paragraph 3 herein;

# A311 Bond Form

3) The balance of the subcontract price, as defined below, shall be credited against the reasonable cost of completing performance of the subcontract. If completed by [obligee], and the reasonable cost exceeds the balance of the subcontract price, [surety] shall pay to [obligee] such excess, but in no event shall the aggregate liability of [surety] exceed the amount of this bond.



# AIA 312 BOND FORM

## **AIA 312 Performance Bond- specific provisions:**

The Contractor and Surety, jointly and severally, bind themselves, executors, administrators, successors, and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.

If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligation under this Bond, except when applicable to participate in a conference as provided in Section 3.

If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after

# AIA 312 BOND FORM

The Owner first provides notice of the Contractor and the Surety that the Owner is considering declaring a Contract Default. Such notice shall indicate whether the Owner is requesting a conference among the Owner, Contractor and Surety to discuss the Contractor's performance. If the Owner does not request a conference, the Surety may, within five (5) business days after receipt of the Owner's notice, request such a conference. If the Surety timely requests a conference, the Owner shall attend. Unless the Owner agrees otherwise, any conference requested under this Section 3.1 shall be held within ten (10) business days of the Surety's receipt of the Owner's notice. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default;

The Owner declares a Contractor Default terminates the Construction Contract and notifies the Surety;

The Owner has agreed to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to the Surety or to a Contractor selected to perform the Construction Contract.

# AIA 312 BOND FORM

When the Owner has satisfied the conditions in Section 3, the Surety shall promptly and at the Surety's expense take one of the following actions:

Arrange for the Contractor, with the consent of the Owner, to perform and complete the Construction Contract;

Undertake to perform and complete the Construction Contract itself, through its agents or independent contractors;

# AIA 312 BOND FORM

Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract arrange for a contract to be prepared for execution by the Owner and a contractor selected with the Owner's occurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Section 7 in excess of the Balance of the Contract Price incurred by the Owner as a result of the Contractor Default; or

# AIA 312 BOND FORM

Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances;

After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, make payment to the Owner; or

Deny liability in whole or in part and notify the Owner, citing the reasons for denial

# AIA 312 BOND FORM

Any proceedings, legal or equitable under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after a declaration of Contractor Default or within two years after the Contractor ceased working on within two years after the Surety refuses or fails to perform its obligation under this Bond, which occurs first. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

# AIA 312 BOND FORM

- Paragraph 3 details the default and termination requirements
- Paragraph 5 sets forth the surety's completion options
- Paragraph 6 sets forth the procedure for declaring the surety in default and terminating the surety's right to exercise the options identified in Paragraph 5

# AIA 312 BOND FORM

- The obligations set forth in Paragraphs 3, 5 and 6 are sequential. That is, strict compliance with Paragraph 3 is required before a surety is required to act under Paragraph 5
- Paragraph 6 cannot be invoked until the surety is given a reasonable opportunity to comply with Paragraph 5



# General Overview of Payment Bonds

## Public Payment Bonds

- A 311 Bond Form
- A 312 Bond Form

## Private Payment Bonds

# General Overview of Payment Bonds

- Statutory Provisions
- New Hampshire
- Maine

# New Hampshire

**Statute(s):** N.H. Rev. Stat. §447:16, et seq.

**Tiers:** Limited to claimants in privity with bonded contractor or their subcontractors. §447:16

**Notice:** Statement of Claim due 90 days from completion/acceptance of project. §447:17. Statement of Claim must be filed with the Clerk of Superior Court. Must provide copy to Principal and Surety.

**Time for Suit:** One year from Statement of Claim. §447:18. Must be filed in the county where the project is. Must provide copy to Principal and Surety.

# New Hampshire

- Attorneys' Fees: Not provided by statute
- Interest: 10% annual. §336:1
- Prompt Pay: No
- Pay If / When Paid: No specific statutory or judicial authority
- Extracontractual: Sureties treated as insurers under Unfair Claims Settlement Practices Act. §417:1, et seq.

# Maine

- Statute(s): 14 Me. Rev. Stat. Ann. §871
- Tiers: Limited to claimants in privity with bonded contractor or their subcontractors. §871(4)
- Notice: 90 days from last work for subs/suppliers without direct contract with bond principal. §871(4)
- Time for Suit: One year from claimant's last work. §871(4)

# Maine

- Attorneys' Fees: To substantially prevailing party. 10 Me. Rev. Stat. Ann. §1118(4). Not allowed on the bond.
- Interest: Prejudgment as defined in contract, otherwise adjustable. 14 Me. Rev. Stat. Ann. § 1602. Not allowed on the bond.
- Prompt Pay: Yes. 10 Me. Rev. Stat. Ann. §1111, et seq.
- Pay If / When Paid: Governed by Prompt Pay statute (see above); not allowed under Prompt Pay Statute.
- Extracontractual: No

# Live Questions...

**BERN  
STEIN  
SHUR**



# Thank you!

**Paula Lee Chambers** [pchambers@watttieder.com](mailto:pchambers@watttieder.com)

**Kelly J. Gagliuso** [kgagliuso@bernsteinshur.com](mailto:kgagliuso@bernsteinshur.com)

**BERN  
STEIN  
SHUR**





# Construction Surety Process And Claim Perspectives

*Session 3: The Surety Claims Process*

# General Claims Handling Concepts By Surety

- Collaborative Effort
- Surety's Tender of Claim or Defense of Claim to Its Principal
- Surety's Separate Duty to Investigate Under the Laws of the State
- Letter to Owner and Principal Acknowledging Claim and Defenses

# General Claims Handling Concepts By Surety

## Contact the contractor and if represented, contact the attorney

- Get the information – is there a dispute?
- Usually, two sides to every story
- CO dispute, unpaid rec., holdbacks, weather conditions, differing site conditions, change in scope, delay, design changes

# General Claims Handling Concepts By Surety

## Types of Default

- Voluntary
- Involuntary

# General Claims Handling Concepts By Surety

- Surety's rights to take over the tender
- Completion
- Collateral demand
- Freeze fund letters
- Letters of Direction

# General Claims Handling Concepts By Surety

Contact the agent and see if they can do a drive-by – contact the contractor – reach out – troubleshoot before there is trouble  
Overextended (too many projects on the ground)

Surety may request a financial review of all projects to ensure the solvency of its Principal ( Rights conferred in executing the GIA)

# General Claims Handling Concepts By Surety

Understanding that surety has a separate and independent duty to investigate the claim – it cannot simply “tender the defense or investigation.”

There is a certain level of reliance because of the relationship but there is a line in the sand or a fork in the road in some instances.

# General Claims Handling Concepts By Surety

## Voluntary Default Letter

We regret to advise you that we are unable to complete the captioned contract.

Accordingly, \_\_\_\_\_ voluntarily and irrevocably acknowledges that it is in default on the contract and hereby surrenders its right to remain in possession and control of the work, as well as its right to receive any contract funds. We further waive any notice required under the contract documents.

We request that you discuss completion of the contract with our surety. The individual representative that should be contacted with respect to this matter is [claims professional].



# General Claims Handling Concepts By Surety

## Memorandum of Understanding

# General Claims Handling Concepts By Surety

## Ratification Agreement

# General Claims Handling Concepts By Surety

## Takeover Agreement

# General Claims Handling Concepts By Surety

## Tender Agreement

# General Claims Handling Concepts By Surety

## Tolling Agreement

# General Claims Handling Concepts By Surety

## Joint Check Agreement

# General Claims Handling Concepts By Surety

## Freeze Funds Letter

\_\_\_\_\_ Insurance Company has issued to \_\_\_\_\_, as obligee, a payment bond and performance bond naming \_\_\_\_\_ as principal, in connection with the above-referenced project. \_\_\_\_\_, as surety, has received a number of claims from subcontractors, laborers or materialmen demanding payment for work performed on the project. As a consequence, \_\_\_\_\_ is presently exposed to actual or potential losses under the bonds it has issued.

\_\_\_\_\_ is presently investigating the facts and circumstances surrounding the claims and is attempting to communicate with representatives of \_\_\_\_\_. At this time, we hereby demand, on behalf of \_\_\_\_\_, that no further funds, either earned, unearned or retained be released under the above-referenced contract without the express written consent and direction of \_\_\_\_\_. Any failure or refusal to abide by this demand will be prejudicial to \_\_\_\_\_ and could expose \_\_\_\_\_ to a double payment and could otherwise jeopardize your rights under the referenced bonds.

If you have any questions regarding the foregoing, please contact the undersigned immediately. Please understand that nothing contained in this letter should be deemed a waiver or limitation of \_\_\_\_\_'s rights or defenses under the bonds provided. To the contrary, \_\_\_\_\_ reserves all of its rights and defenses available to it under the relevant bonds and contracts.

# General Claims Handling Concepts By Surety

## Letter of Direction

[Surety] ("\_\_\_\_\_") issued a payment and performance bond in connection with the referenced project naming [Principal], ("\_\_\_\_\_"), as principal, and [Obligee] ("\_\_\_\_\_") as obligee.

[Surety] is working with [Principal] to assure completion of the Project and payment of bond obligations. [Surety] understands that [Principal] and [Obligee] have entered into a joint check agreement whereby checks are being issued jointly to [Principal] and certain specified subcontractors, materialmen and laborers. [Surety] shares the objective of having subcontractors, materialmen and laborers promptly paid for work that is completed in accordance with the contract documents. [Surety] hereby consents to the continued issuance of joint checks but only on the precondition that [Principal] and [Obligee] obtain the prior written consent of [Surety], as surety, for the issuance of joint checks to specified subcontractors, materialmen and laborers. To obtain that consent, [Surety] requires that [Principal] and [Obligee] provide to [Surety], in advance of payment, a list of the payees and the amount of any suggested payment. Within five (5) business days of the receipt of such list, [Surety] will provide its written consent, or objection, with respect to any suggested payments.

With respect to any amounts that are due and owing to [Principal], above and beyond the amount of issued joint checks, [Surety] hereby demands that no contract funds be disbursed to [Principal], or any other entity, without the prior written consent of [Surety], as surety. Any violation of this directive will be directly prejudicial to [Surety], as surety, and may jeopardize [Obligee's] rights under the bonds issued by [Surety].



# Surety Defenses

- Alteration of the bonded contract
- Changes in the Obligee or Principal
- Including without authorization(GIA, fraud, misrep.)
- Improper payment of contract funds by the obligee
- Statutory exoneration defenses
- Obligee's untimely notice

# Surety defenses

- Contractual and statutory limitations
- Bankruptcy Issues

# The Surety's Contract Rights Owners (In Addition To The Above)

- Termination after substantial completion
- The owner's duties incident to project design
- The owner's implied warranty of design adequacy

# The Surety's Contract Rights Owners (in addition to the above)

- The owner's implied warrant of commercial availability of specified construction material
- The owner's implied duty of disclosure
- Blended design and performance specifications

# The Surety's Contract Rights Owners (in addition to the above)

- The owner's approval of contractor plans and equipment or "work plan"
- The owner's implied warranty of design v. the contractor's warranty of materials

# The Surety's Contract Rights Owners (in addition to the above)

- The owner's responsibility for latent ambiguities in its design
- The owner's Implied Duty of Cooperation
- The owner's responsibility for differing site conditions
- Owner's failure to periodically administer the contract

# The Surety's Contract Rights Owners (in addition to the above)

- “Cardinal” changes (define)
- Failing to give direction
- Impossibility/impracticability of performance (define)
- The owner's insistence upon strict compliance in the face of economic waste (define)

# Contractor Performance Issues Affecting The Surety's Contract Defense

- The contractor's implied duty to seek clarification of patently ambiguous design documents
- The contractor's implied warranty of workmanship
- The contractor's product warranties of merchantability and fitness of purpose



# Contractor Performance Issues Affecting The Surety's Contract Defense

- The implied duty to provide technical product information
- The implied duty to warn
- The contractor's site investigation duty
- The contractor's obligation to give timely claim notice and submission

# Arbitration Concerns

- Whether surety is bound to arbitration
- Incorporation by reference
- Damage – not responsible for unfair acts of its principal whether at trial or arbitration
- REA claims

# Live Questions...

**BERN  
STEIN  
SHUR**



# Thank you!

**Paula Lee Chambers** [pchambers@watttieder.com](mailto:pchambers@watttieder.com)

**Kelly J. Gagliuso** [kgagliuso@bernsteinshur.com](mailto:kgagliuso@bernsteinshur.com)

**BERN  
STEIN  
SHUR**

