



CLYDE&CO

Construction Bonds & Delay Claims

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Agenda

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 - Labour and material payment bond
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- Delay
 - Compensable & excusable delays
 - Requirements to provide notice of delay
 - Concurrent delays
 - Damage/additional compensation

Construction bonds nature and purpose

- Bond = special form of contract in which one party, the surety, guarantees performance by another party, the principal, of certain obligations (party to whom obligations are owed is called the obligee).
- Bonds are a form of security for construction risks.
- Not insurance! - law of suretyship, including material change to risk.
- Indemnity Agreement – typically the surety requires the principal (and its major shareholders) to indemnify the surety against any loss.

Bid bond

| | |
|---------------|---|
| Principal: | Tenderer. |
| Obligee: | Tendering authority. |
| Usual Amount: | 10% of bid/tender price. |
| Risk: | Failure to enter into construction contract after bid acceptance. |
| Requirements | Surety required to pay difference between amount of tenderer's bid and next lowest bid, up to maximum amount specified in the bond. |
| Enforcement | For CCDC bid bonds, legal action must be commenced within six months of the date of the bond. |

Performance bond



Principal: Contractor.

Obligee: Owner.

Amount: 50% of Contract Price.

Risk: Default in performance of the contract.

Performance bond

Requirements

- Surety options to pay the bond amount, remedy the default, complete the contract, obtain a bid to complete the contract.
- Obligations are triggered when principal is in default.

Enforcement

- Obligees must give surety timely notice of claim.
- Significant change in risk (e.g., material change in contract time) may release surety from its obligations).
- Legal action within two years from the date on which final payment under the contract falls due.

Labour and material payment bond



Principal: Contractor.

Obligee: Owner.

Claimants: Subcontractors/
material
suppliers.

Amount: 50% of Contract
Price.

Risk: Non-payment.

Labour and material payment bond

Requirements

- Non-payment for 90 days after the Claimant's last work or material supply.
- Surety obliged to pay claimant face value amount owed by principal, up to available amount of bond.
- Surety entitled to any defences to payment available to principal/contract (e.g., deductions for deficiencies or other set-offs).

Enforcement

- Obligees must file claim under bond within 120 days after the Claimant's last work or material supply, for non-holdback, or within 120 days of when payment in full should have been made, for holdback.
- Legal action within one year of the date on which the Contractor ceased work.

Lien bond

| | |
|--------------|---|
| Principal: | Contractor. |
| Obligee: | Registrar of the Court or Contractor's lawyer in trust. |
| Claimants: | Lien Claimants. |
| Amount: | Lien amount. |
| Risk: | Non-payment of lien judgment. |
| Requirements | Surety required to pay lien claimant if lien found to be valid and principal does not pay amount ordered by the Court. |
| Enforcement | Lien claimant to file claim of lien and commence action pursuant to limitation periods set out in the Limitation Act and the Builders Lien Act. |

Delay claims - contract time



- Specified date for achieving substantial performance; or
- As per schedule(s).
- Otherwise, within a reasonable time.
- Many contracts include a “Time is of the essence” clause.

Delay

- Delay = event that causes extended time to complete all or part of a project.
- Subject to adjustment for factors beyond the contractor's control, late completion is breach of contract, for which the owner is entitled to claim damages.
- Contractor's entitlement to claim extension of time and additional compensation for delay caused by factors beyond its control.
- The construction contract will often include procedural requirements to be complied with in relation to a contractor's delay claim.

Compensable and excusable delays

- Compensable delay = party contractually entitled to recover damages from delaying party.
- Excusable delay = delay not attributable to fault of any party, and which may or may not be compensable, but entitles parties to extension of contract time.
- Whether delay is compensable and/or excusable is dependent on the wording of the contract.

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Requirements to provide notice of delay

- Many contracts require parties to provide notice of a delay claim within a specified period of time (e.g., CCDC 2 contracts require notice of delay claim to be provided within 10 working days).
- If notice provisions not followed, may result in extinguishment of right to extension of time.

Concurrent delays



- Concurrent delays = delays occur at the same time.
- In cases of concurrent delays, apportioning responsibility becomes difficult or impossible.

Damages/additional compensation

- Critical path = series of activities for which any delay will cause a delay to project completion (i.e., activities for which there is no float).
- Most contracts say that the critical path must be impacted by a delay event in order to be entitled to extension of contract time (i.e., that another party breached a duty owed to claimant).
- Must prove both liability and damages.
- Damages can include additional labour costs, loss of productivity, costs, lost profit.

Thank you. Any questions?

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