

CONSTRUCTION BONDS and DELAY CLAIMS

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Construction Bonds and Delay Claims

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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 cont. —

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

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)

LABOUR AND MATERIAL PAYMENT BOND cont.

Enforcement:

- Obligee 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 & 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

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

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Seema focuses on the negotiation and preparation of construction contracts, builders liens, disputes and construction litigation, as well as providing insurance and employment advice.



PRACTICE AREAS

- Alternative Dispute Resolution
- Commercial & Civil Litigation
- Construction



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