

Payment and Performance Bonds in Florida

2018 Construction Law Certification Review Course

Bruce Charles King
(Carlton Fields, P.A. – Miami)
and
Gary M. Stein
(Peckar & Abramson, P.C. – Miami)

Surety Bonds Are Not Insurance

- Confusion is understandable
- Tri-Party relationship
- Indemnity expected from bonded principal
- No duty to defend
- No bad faith (Fla. Stat. §624.155)

Performance Bonds

- Designed to guarantee completion or correction of the work
- Not equivalent to comprehensive general liability coverage
- Bond language governs surety's liability (*American Home v. Larkin* – Language of Bond)
(*National Fire v. Fortune* – Incorporation by Reference)
- Ambiguities construed against surety
- Surety's liability limited to penal sum of the bond (*Allegheny Casualty v. Archer Western*)

Performance Bond Surety Options

- Assist principal in completing project
- Take over project and complete with another contractor
- Tender a new contractor and bond to obligee
- “Buy back” bond and obtain release
- Allow obligee to complete and then pay for completion
- Deny liability
- Investigation

Performance Bond Forms

- No standard performance bond
- AIA 311
- AIA 312
- Indemnity or manuscript bonds

Performance Bond Surety Defenses

- Surety not liable unless principal is liable
- Cardinal change to bonded contract
- Overpayment by obligee to principal
- Failure to declare bonded contractor in default
- Failure to terminate bonded contract
- Preemption of surety's rights
- Failure to pay contract balance to surety
- Statute of limitations

(Federal Ins. v. Southwest Florida Retirement)

(BDI v. Hartford)

Payment Bonds

- Required on public projects
- Optional on private projects
- Strict notice, recording, and filing requirements in Florida Statutes Section 713.23
- Subcontractor Bonds

Conditional Payment Bonds

(Fla. Stat. § 713.245)

- Necessary because of *OBS v. Pace*
- Preserves “pay when paid” language in bonded contract
- Complicated procedural rules

Transfer of Lien Bond

(Fla. Stat. § 713.24)

- Used when no payment bond is in effect
- Transfers lien on real property to the bond
- Can be increased, as necessary
- Notice of existing bond different

Miller Act Bonds

(40 U.S.C. § 3131, et seq.)

- Required on all federal projects exceeding \$100,000
- Performance and payment obligations imposed on surety
- Lawsuits must be filed in Federal court
- Delay damages may be recoverable (*Perton v. Harvesters*)
- Consequential damages not recoverable

Payment Bond Surety Defenses

- Strict compliance required by statute
- Release of claim by claimant
- Incomplete or defective work by claimant
- Overstatement of claim
- Supporting Documentation
- Joinder of Principal not necessary
- Last day of work

Right to Attorneys' Fees Against Surety

- Florida Statutes Sections 713.29 and 255.05(2)(a)2, prevailing party
- Florida Statutes Sections 627.428 and 627.756, claim against insurers
- Significant issues test
- Subcontractor bonds

Arbitration

- Arbitration provision in bonded contract, if incorporated in bond, will require surety to arbitrate
- Surety bound by arbitration award if aware of proceedings
- Surety entitled to argue separate bond defenses in court if not presented in arbitration
- Surety can compel arbitration if arbitration provision incorporated in bond

Surety's Right to Indemnity and Subrogation

- Common law right to indemnity
- Contractual right to indemnity
- Subrogation rights
- Assignments
- Collateral Requirements

Liability of Surety

- Governed by language in bond
- Penal sum limitation
- Strict compliance for statutory payment bond claims

Conclusion