



A312 Payment Bond - Caution! Court cases cause contractor conundrum

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The Problem

Contractors and their bonding agents throughout the country are receiving chilling notices from their surety carriers: AIA's Payment Bond Form - A312, in its current form, is not acceptable. They go on to provide language modifying the A312 with a clear indication that absent those modifications, payment bonds will not be written. A panicked call came recently from a GBC member, telling us that he declined bidding a job in his backyard due to this issue. He stated that he was not willing to put his bid security at risk. Others we have spoken with indicate that they are still bidding but hoping that one side or the other (owner or surety) will blink.

It should be noted that this is not a problem on every project. Many specifications simply do not demand use of the A312 or they have indicated that modifications will be accepted. Absent that, contractors are placed in the middle of a very difficult situation.

The Cause

Three disturbing court decisions relating to this matter were handed down in three different states recently. Each decision ruled adversely against Paragraph 6 of the A312 Payment Bond Form. Specifically, the courts found that the surety (and by virtue of the indemnity agreement, the contractor) forfeits its affirmative defenses against a claim on the payment bond if a satisfactory and timely response is not provided within the 45-day time period stipulated in the bond language. The courts' interpretation of Paragraph 6 of the form requires the surety to notify the claimant within 45 days of the filing of the claim relative to any amounts that are undisputed and the basis for which other amounts are disputed. It is also important to note that the courts have even questioned what should be considered a "satisfactory and timely response." The concern with this latter point is that it could call into question the surety's ability to support their clients' denials of illegitimate claims.

The Solution

The NASBP (National Association of Surety Bond Producers) have been holding meetings with the AIA Contract Documents Committee about changing the A312 document. AIA representatives made clear that they understood the gravity of the situation and wished to work productively with NASBP and SFAA in an effort to address concerns with the A312 payment bond. AIA representatives stated that working toward a "stopgap" amendment likely would be the most expeditious means to mitigate the immediate situation. That, unfortunately, takes time and will not help the projects out for bid now and prior to the issuance of this "stopgap."

Owners and designers should simply not require the A312 or, at the least, make it clear that reasonable modifications based on this issue will be accepted. According to Brian Perlberg, senior counsel, construction law, contract documents for the AGC of America, "My advice is to use the

ConsensusDOCS bond forms, specifically the 261. These documents, which are committed to using best practices, avoid this problem." Some sureties have even suggested that, instead of modifying the A312 Payment Bond, use of the out-of-circulation A311 Bond Form could be an acceptable substitute.

Contractors should look early at the bidding documents relative to the bond form required. If the A312 (unmodified) is required, they should consult early with their agent about the best course of action. An early reasonable request of the designer to change the requirement might be successful. If you are a GBC member, call GBC and perhaps we can help.

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