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WHAT YOU NEED TO KNOW - Recent Revisions To The AIA Bond Forms

By Thomas L. Isenberg, Jr.

For the first time in over twenty-five years, the AIA has revised and recently released its A312-2010 *Payment and Performance Bonds*.

All owners, contractors, subcontractors and suppliers should take note that the revisions to both the *Payment and Performance Bonds* substantially impact the rights, duties and obligations of all parties to the surety relationship.

A312-2010 *Payment Bond*

Section 1 – Section 1 (i.e. the contractor and surety’s obligation to jointly and severally bind themselves to the owner to pay for labor, materials and equipment furnished for use in the performance of the contract) was ostensibly modified in response to a recent Court decision which held that Section 1 was, in fact, an obligation independent of the rest of the Bond. In attempting to remedy such a ruling, the AIA modified Section 1 to state that the conditions contained therein are, in fact, subject to the remaining provisions and terms of the bond.

Section 4 - Section 4 of the A312-2010 *Payment Bond* now attempts to clarify at what point in the process the surety’s obligations are triggered when there is no owner default. Specifically, Section 4 now states that the surety will defend, indemnify and hold harmless the owner against a properly tendered claim or demand when the owner has satisfied its Section 3 obligations of notice and tender of defense.

Section 5.1 - In an important change for suppliers and material men alike, the AIA has eliminated the thirty day period that a claimant without a direct contract with the contractor had to wait between submitting its notice of non-payment to the contractor and submitting its notice of claim to the surety. Section 5.1 now permits a claimant without a direct contract with the contractor to

provide notice of non-payment to the contractor (within ninety days after having last performed labor or last furnished materials/equipment included in the claim) and to submit a claim to the surety simultaneously. In this regard, it is imperative to note that the term “claim” has also been newly included in the Section 16 definitions, and now requires: (1) the name of the claimant; (2) the name of the person for whom labor was done or materials/equipment furnished; (3) a copy of the agreement/purchase order; (4) a brief description of the labor, materials and/or equipment furnished; (5) the date on which the claimant last performed labor or last furnished material and/or equipment; (6) the total amount earned as of the date of the claim; (7) the total amount of previous payments received by the claimant; and (8) the total amount due and unpaid to the claimant for labor, materials and/or equipment furnished as of the date of the claim.

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Section 7.3 - Not all changes to the A312-2010 *Payment Bond* form are claimant oriented inasmuch as Section 7.3 has been amended in two major respects. First, the time period within which a surety has to respond to a claim has been enlarged by an additional fifteen days to a total of sixty days

from receipt of the claim. Secondly, in response to recent case law, which held that the surety and contractor's defenses were waived due to the surety's failure to respond in a timely manner, Section 7.3 has also been modified to provide that the surety's failure to discharge its response obligations do not constitute a waiver of defense, but rather, subject the surety to an award of attorneys' fees incurred by the claimant in recovering any sums found to be due and owing to the claimant.

A312-2010 Performance Bond

The A312-2010 *Performance Bond* also received substantial modifications which impact the rights and obligations of owners, contractors and sureties in four major areas.

Section 3.1 – In response to certain recent cases which held that a Section 3.1 meeting between the contractor, surety and owner acted as a condition precedent to the surety's bond obligation, Section 3.1 now provides that an owner may request such a conference when making its notice of intent to declare contractor default. The new language now clearly states that the owner is not required to request the conference prior to exercising its rights under the bond. However, it is essential to note that, pursuant to Section 3.1, the surety may also request a conference within five business days after receiving the owner's Section 3.1 notice. If the conference is requested by the surety, the owner is compelled to attend. Finally, Section 3.1 further requires that, the conference must be held within ten business days of the receipt of the owner's Section 3.1 Notice, unless otherwise agreed to by the Owner.

Section 3.2 - In another attempt to remove certain restrictions and waiting periods from a performance bond claims process, Section 3.2 has now eliminated the twenty day waiting period between the owner's Section 3.1 notice of intent to default and the owner's

Section 3.1 declaration of contractor default and formal termination. Moreover, the previous requirement that the owner wait fifteen days (after providing an additional demand for performance of its obligations under the performance bond) before declaring the surety to be in default, has been reduced to seven days.

Section 4 - With regard to the Section 3.1, notice the new Section 4 now specifically states that the owner's failure to comply with the notice requirement in Section 3.1 does not necessarily constitute the owner's failure to comply with a condition precedent to the surety's obligations except to the extent the surety can demonstrate actual prejudice.

Section 8 - Finally, the last major revisions to the A312-2010 *Performance Bond* concerns the surety's limitation of its obligations. Section 8 now provides that the surety's liability is limited to the amount of the bond but only in circumstances wherein the surety: (1) arranges for the contractor to complete the work; (2) obtains bids and hires a new completion contractor; and (3) waives its right to perform and complete the project and with reasonable promptness either pays the owner or denies liability. In those instances wherein the surety elects to perform and complete the construction contract itself, the surety's liability is therefore not limited to the amount of the bond under Section 8 of the A312-2010 *Performance Bond* as aforesaid. ■

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