



Construction Law Newsletter

Volume 1, Issue 2, July 2010

Employee Free Choice Act

By Brian Hutchins

The Employee Free Choice Act bill was introduced in the 110th Congress as H.R. 800 and passed the House in March of 2007. The Senate version of the bill, S.1041, did not muster enough votes to invoke cloture, so the legislation died. In

(Continued on page 3)

Green Building Standards

By Brian Hutchins

Most construction attorneys are probably familiar with LEED (Leadership in Energy and Environmental Design) certification possibilities through the U.S. Green Building Counsel, Inc. See www.usgbc.org.

(Continued on page 3)

Project Labor Agreements in Federal-Construction Projects

By Evangelin Lee

In FAR Case 2009-005, a final rule was issued on April 13, 2010, amending the Federal Acquisition Regulation ("FAR") to implement President Barack Obama's Executive Order ("E.O.") 13502 encouraging Federal agencies to use project labor agree

(Continued on page 5)

Introduction to Construction Bonds in Nevada

By Kurt C. Faux, Esq.¹ and Colin R. Chipman, Esq.

The downturn in the construction industry and the corresponding insolvency of many contractors has caused an ever increasing focus on the role of surety bonds. Despite the growing attention, the role of surety bonds is still often misunderstood by owners, contractors and subcontractors alike. As the title suggests, this article intends to provide an overview and introduction to the different types of construction bonds, which a Nevada construction law practitioner encounters most often.

INTRODUCTION

A surety is defined as someone who contracts to answer for the debt or default of another.² A bond involves a tripartite relationship between a surety, a principal and an obligee. A construction bond is a guarantee, in which the surety guarantees that the contractor or subcontractor, called the "principal", will perform the obligations stated in the bond. The obligee is the person or entity to whom the principal and the surety owe their obligation. The penal sum is the total amount the surety is obligated to pay, if the principal fails to meet its obligations.

Traditionally, the obligee (such as an owner) demands a bond from the contractor (principal) who then obtains a bond from the surety, typically through an agent. Before a surety provides a bond, it will almost always require indemnification from the principal and

(Continued on page 7)

Message from the editor:

Dear Members:

As you can see, this issue of the Newsletter has addressed a wide variety of subjects: **Construction Bonds in Nevada , Project Labor Agreements, Card Check and Green Building Standards.**

That is due, in part, to the breadth of our members' practice areas. It is also due to some creative thinking by our section board in looking for current trends outside the standard construction practice. I hope this variety inspires you to find and develop other interesting topics that you could share with the section.

For example, we would like to see articles about (i) subrogation in construction defect actions, (ii) construction defect claims against the contractors making construction defect repairs or performing destructive testing, (iii) the public contracting claims process and (iv) compliance with handicap access regulations. Beyond these suggestions, let your imagination be your guide!

Travis Barrick, editor

General Membership Meeting

Date: July 22, 2010

Time: 12:00 p.m.

**Location: Lewis & Roca Offices in Reno/
Las Vegas**

October 2010 Construction Law CLE

Dates: Las Vegas 10/19 or Reno 10/20

**Location :Las Vegas – TBD; Reno -
Northern Nevada Bar**

MESSAGE FROM THE CHAIR

I have had the privilege of being the Chair of the Construction Law Section for the past seven months, succeeding Paul Matteoni. The Section is now in its second year of existence and I am pleased to announce that we now have 199 members.

During our two years of existence, we have presented programs at the State Bar Convention. At last year's convention, Bruce Willoughby and I spoke on Mechanic's Liens. At this year's convention, Leon Mead, Esq. spoke on Trends in Construction Law: Contingency Payment Clauses in Construction Contracts. Both this year's session and last year's were attended by members of the bench and bar. In addition, in April 2010, the Section held a Brown Bag lunch, in both Reno and Las Vegas, regarding Insurance Products, Policy Analyses and The Duty to Defend, which was presented by Jeff Bolender, Esq. On October 19-20, 2010, the Section will be presenting a full day seminar, in both Reno and Las Vegas.

I want to thank all of the past and present Board members and the Section members for all of their hard work in making this Section one of the best in the Bar (in my humble opinion, of course).

Georlen K. Spangler

Chair

(Continued from page 1)

Employee Free Choice

March of 2009, in the 111th Congress, the legislation was re-introduced as H.R. 1409 in the House and was referred to the subcommittee on Health, Employment, Labor, and Pensions where no action has been taken. It was introduced as S.560 in the Senate at the same time with 40 co-sponsors and referred to the Committee on Health, Education, Labor, and Pensions. No action has been taken. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.1409>.

The bill is sometimes referred to as “Card Check.” It would, among other things, amend the National Labor Relations Act to require the NLRB to certify a bargaining representative without directing an election if union officials collect signatures of a majority of the bargaining unit employees without a secret ballot and there is no other individual or labor organization currently certified or recognized as the exclusive representative of any of the employees in the unit. The bill would also require employers and unions to participate in binding arbitration to obtain a collective agreement within 120 days after a union is recognized.

It appears that the main obstacle to the passage of this legislation is the need to obtain 60 votes in the Senate so that it is filibuster-proof. Democrats had 60 votes until Senator Kennedy was replaced last year. Also, several other Democrats announced that they did not support the bill or have questioned its provisions. Business groups and the Chamber of Commerce oppose the bill and unions generally support it.

It is not clear whether the legislation will come up before the end of this Congress. Recently, union officials have called for passage of the legislation. See <http://www.manufacturing.net/News-UAW-Continues-Push-For-Card-Check-Legislation-061410.aspx?menuid> (June 14, 2010); <http://www.washingtonexaminer.com/opinion/Warning-Card-check-isnt-dead-93021969.html> (May

7, 2010). The San Francisco Examiner theorized that the legislation would be attached to another must-pass bill before the November election and said passage would benefit only union bosses. See

<http://www.sfexaminer.com/opinion/Examiner-Editorial-Warning-Card-Check-Legislation-isnt-dead-93021979.html> (May 7, 2010).

(Continued from page 1)

Green Building Standards

These voluntary measures allow construction project owners, designers and contractors to work together to garner points under the LEED rating system and obtain certification through a subsequent record audit by the Green Building Institute. The points can be gained in such categories as materials and resources, energy and atmosphere, water efficiency, and sustainable sites to reach a certification of basic, silver, gold or platinum. The certification leads to marketing and environmental benefits.

In Nevada, the 2007 Legislature required the director of the Office of Energy to adopt a “Green Building Rating System” in order to determine eligibility of a building or structure for a tax abatement. 2007 Nev. Stats. ch. 539 at 3375, *codified at* NRS 701A.100 - .230. The Office of Energy adopted the LEED standard in effect at the time an applicant registers a project with the U.S. Green Building Council. NAC 701A.020, 701A.200. The law allows for local property tax abatements for buildings or structures meeting the criteria. NRS 701A.110. Notably, the law limits the tax benefits to projects related to energy savings, see NRS 701A.200, or the use of recycled material, see NRS 701A.210, and not the

(Continued on page 4)

(Continued from page 3)

broader areas covered by LEEDS.

Now, the State of California has issued regulations which would require new buildings to be more energy efficient and environmentally responsible. The draft 2010 California Green Building Standards Code consists of 197 pages.

<http://www.documents.dgs.ca.gov/bsc/documents/2010/Draft-2010-CALGreenCode.pdf>. The code, called "CALGREEN," was adopted on January 12, 2010 by the California Building Standards Commission and is expected to take effect on January 1, 2011. It is largely based on the LEED standards. The Commission website is at <http://www.bsc.ca.gov/default.htm>. As stated by the executive commissioner of the Commission, Dave Walls,

Among the new requirements under CALGreen, every new building in California will have to reduce water consumption by 20 percent, divert 50 percent of construction waste from landfills and install low VOC materials. Separate indoor and outdoor water meters for nonresidential buildings and moisture-sensing irrigation systems for large landscape projects will be required. There will be mandatory inspections of energy systems, such as furnaces and air conditioners for nonresidential buildings over 10,000 square feet. According to the California Air Resources Board, the mandatory provisions will reduce greenhouse gas emissions by 3,000,000 metric tons by 2020.

http://www.green-technology.org/green_technology_magazine/gamechanger.htm (accessed June 15, 2010). The code becomes the first statewide green building code in the country. Notably, the code eliminates third-party certification, which

may be costly, in favor of building code enforcement authorities. The California Governor's Office released an explanation of the code and a comparison with the points-based LEED system. See <http://images.emaildirect.com/clients/govpressoffice847/GreenBuildingCodeOnepager.pdf> (accessed June 15, 2010).

Some groups have expressed concerns about provisions in the code and have asserted that the code will likely create significant market confusion because local governments are allowed to adopt more stringent goals for some elements. Notably, some environmental groups argued that the code's stricter voluntary measures would be open to conflicting interpretations and be unenforceable by local building inspectors. They asserted that there was a potential for builders to label their buildings green without substantiating their claims and that local officials would not have the expertise that third-party verifiers provide.

Brian Hutchins has been a practicing attorney in Nevada for thirty years. He has had his own legal and consultancy practice (BH Consulting LLC) since 2005 practicing in transportation law, right of way and land use, construction law, and business law. Previously, Brian was a chief deputy attorney general and chief counsel for the Nevada Department of Transportation. He is a member of the Nevada Bar Construction Section. Brian is also affiliated with legal resource committees for the Transportation Resources Board (TRB), a part of the National Academies. He is a member of, and frequent speaker for, the TRB Eminent Domain and Land Use Committee and provides articles for the TRB Committee on Environmental Law Issues in Transportation quarterly publication *The Natural Lawyer*. He resides in Carson City and can be reached at bhconsultingllc@sbcglobal.net or (775) 883-8555.

Project Labor Agreements

ments for large scale Federal construction projects. A project is considered large scale where the total cost to the Federal government is \$25 million or more. This final rule followed the E.O. 13502 signed on February 6, 2009, and a period of public comment. It became effective on May 13, 2010.

Federal agencies are encouraged to consider requiring the use of project labor agreements in large scale projects if it advances the Federal government's interest in "achieving economy and efficiency in Federal procurement..." A "project labor agreement" is a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f). A project labor agreement ("PLA") will typically contain provisions where the signatories agree in advance that: the owner's designee and contractors, regardless of tier, will accept and be bound by the terms and conditions of the agreement, and that the agreement will apply to successful bidders who become signatories, whether they perform work on the project on a union, or nonunion basis the signatory contractors are the sole and exclusive bargaining representatives of all craft employees working on the project within the scope of the agreement there will be established measures to facilitate communication among labor representatives and the owner's designee about any issues relating to labor relations/management and the administration of the agreement that the contractors have full and exclusive authority for management and prosecution of its work, and that the contractors will utilize the most efficient methods of techniques of construction and use of tools that there will be no strikes, work stoppages, sympathy strikes, picketing, slow downs or any other disruptive activities affecting the project for any reason a set dispute and grievance procedure will be followed employee matters pertaining to wages, pension, and benefits, are left to local bar-

gaining

Under the final rule, when a Federal agency requires a project labor agreement, its terms must: bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents; allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements; contain guarantees against strikes, lockouts, and similar job disruptions; set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement; provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and fully conform to all statutes, regulations, and Executive Orders.

The stated policies for the preference of using a project labor agreement are to combat the special challenges posed by large scale construction projects such as labor disputes which may cause delay to a project, a lack of coordination among various employers, or uncertainty about the terms and conditions of employment of various groups of workers. Establishing a pre-hire collective bargaining agreement containing a resolution mechanism would counter the threat of these issues on the timely completion of a Federal construction project.

During the public comment period, the FAR Council—General Services Administration ("GSA"), Department of Defense ("DoD"), and National Aeronautics and Space Administration ("NASA") received comments from more than 700 respondents on the proposed rule. Many of these com-

(Continued on page 6)

ments concerned the level of discretion an agency should be afforded in deciding whether to require a project labor agreement on a particular construction project and the manner in which such discretion is exercised.

A non-exhaustive list of factors was identified that the agencies may consider, in their discretion, in deciding whether a project labor agreement is appropriate for use in a given construction project, such as whether the project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades or whether there is a shortage of skilled labor in the region in which the construction project will be sited. A project labor agreement may also be appropriate when it has been used on comparable projects undertaken by Federal, State, municipal, or private entities in the geographic area of the project, or the project is expected to require an extended period of time. However, a Federal agency can consider any other factors that it decides are appropriate.

In addition to the factors that agencies may consider to help them decide, on a case-by-case basis, whether the use of a project labor agreement is likely to promote economy and efficiency in the performance of a specific construction project, the final rule provides the timing and process of submission of the project labor agreement. Under the final rule, Federal agencies may choose from among three options. Submission may be required: (1) when offers are due; (2) prior to award (by the apparent successful offeror); or (3) after award. If an agency decides that permitting execution of the project labor agreement after award is the best approach, the contractor will be required to submit an executed copy of the agreement to the contracting officer.

In response to those concerns raised

regarding the participation of nonunion contractors, the FAR Council reiterated that E.O. 13502 expressly states that all project labor agreements must allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements. It went on to state that “[a]ny contractor may compete for—and win—a Federal contract requiring a project labor agreement, whether or not the contractor’s employees are represented by a labor union. The same principle of open competition would protect subcontractors as well.”

The final rule does not mandate the use of a project labor agreement, it only encourages agencies to require one if it would advance the economy and efficiency in Federal procurement in large scale construction projects. To permit the consideration of all of the relevant circumstances and needs of the stakeholders, the final rule encourages agency planners to consider the use of project labor agreements early in the acquisition process. Federal agencies are allowed broad discretion and flexibility to craft unique approaches to each project to maximize the success of each project labor agreement thereby promoting procurement goals.

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Ms. Lee graduated with honors from the William S. Boyd School of Law at UNLV and she received her undergraduate degree from the University of Michigan, Ann Arbor.

(Continued from page 1)

Introduction to Bonds

personal indemnification from individuals, including the principal's owners, spouses, business associates or interested parties. The indemnification agreement requires the indemnitors to protect the surety from any and all losses incurred as result of issuing the bonds, including reimbursement of bond loss payments, attorneys' fees, consultants' fee, and litigation costs.

A surety bond is not an insurance policy.³ Bonds are financial arrangements, similar to bank loans, which should not result in any loss to the surety, just as a bank does not expect a loss when it makes a loan. Insurance on the other hand, assumes a risk of loss based on ratings. Accordingly, the premiums for obtaining bonds are typically much less than those for insurance policies and a surety will often ask the principal to provide collateral security to the surety.

The Three Typical Construction Bonds

Bid Bonds

A bid bond secures a contractor's bid. These are typically required on public construction projects. If the principal is the successful bidder but refuses to sign the contract, the surety may be called upon to pay some or all of the penal sum of the bond to the obligee. If the principal is awarded the contract but then unjustly refuses to enter into the contract, the owner must necessarily pay more in contracting with the next lowest bidder. The bid bond is generally designed to protect the owner against this additional expense.⁴

Performance Bonds

A performance bond promises the obligee that the principal will perform the construc-

tion contract. These bonds limit the surety's maximum exposure to the penal sum of the bond and often contain specific notice provisions for asserting a claim, limit the time period in which to commence a lawsuit against the surety, and typically incorporate the terms of the construction contract.⁵ The importance of such provisions cannot be underestimated, as these form the basis upon which the surety will determine how to proceed and/or the validity of a claim. For example, the American Institute of Architects performance bond form A312 ("AIA A312"), which is frequently used, states that the surety may, after proper notice of the principal's default:

4.1 Arrange for the Contractor, with consent of the Owner, to perform and complete the Construction Contract; or

4.2 Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors; or

4.3 Tender a new contractor, secure payment and performance and equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages incurred by the Owner resulting from the contractor's default; or

4.4 Determine not to proceed with steps one through three, after an investigation, and tender to the Owner the amount for which it may be liable or deny liability in whole or in part and notify the Owner citing the reasons therefor.⁶

Payment Bonds

A payment bond, which often accompanies a performance bond, requires the surety to pay laborers, materialmen, suppliers, and subcontractors if the principal fails to pay them. These bonds also frequently contain conditions that must be met before a surety is required to pay under the payment bond, such as notice provisions. Additionally, sureties are entitled to assert all the defenses the prin-

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Continued from page 7)

principal has against any bond claimants. For example, if a principal refuses to pay a supplier for its failure to timely deliver a product or if the product fails to comply with contract specifications, then the surety may likewise not be responsible to pay such a claimant. If the bond is issued pursuant to a particular statute, the terms of that statute will be incorporated into the bond - even if the statute is not mentioned in the bond.⁷

BONDS FOR PUBLIC WORKS PROJECTS

Bonds are required on both State and Federal construction projects. The purpose of these bonds is to protect those who supply labor or materials as mechanic's liens, which can be recorded on private projects, are not available on public works.⁸ These bonds, however, protect only certain entities, have specific notice requirements, and contain short time frames within which to commence litigation. The federal statute requiring such bonds is referred to as the Miller Act. Similar state statutes are referred to as Little Miller Acts.

Federal - The Miller Act

The Miller Act requires a contractor, who is awarded a "contract of more than \$100,000 ... for construction, alteration or repair any public building or public work of the Federal Government" to post two bonds: a performance and labor and material payment bond.⁹

To prove a claim under the Miller Act payment bond, a claimant must show that:

- a. It supplied material or labor in prosecution of the contract work;
- b. Payment has not been provided;
- c. There is a good faith belief that materials were intended for the contract work; and
- d. Timely notice and filing require-

ments are met.¹⁰

A proper beneficiary is one who has contracted expressly or impliedly with the prime contractor or directly with the subcontractor. Absent this contractual relationship a claimant is too "remote."¹¹

The Miller Act payment bond covers subcontract and supplier who have direct contract with the prime contractor. Subcontractors and material supplier who have contracts with a subcontractor are also covered. However, under the statutory scheme, those who supply labor and materials to suppliers, as opposed to subcontractors, are not proper beneficiaries.¹² Therefore, whether one is a subcontractor or supplier is critical. The Miller Act does not define the term subcontractor, but the Supreme Court has held that a subcontractor is one who "performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract."¹³ The actual function of the subcontractor - and the subcontractor's importance and substance in relationship with the prime contractor - not contract labels is outcome determinative.¹⁴

The Miller Act protects laborers (those who physically toil on the project) and suppliers of the bond principal. For an architect, engineer or other professional to recover, evidence must be provided that on-site supervisory or inspection services were performed.¹⁵ Attorneys' fees of a claimant are not recoverable absent a federal statute, or an enforceable contractual provision providing for the award of attorneys' fee.¹⁶

Those claimants not having a direct contractual relationship with the prime contractor must provide written notice to the prime contractor within 90 days from the date on which the claimant provided the last of the labor or material for which the claim was made.¹⁷ This notice must state with substantial accuracy the amount claimed and the

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(Continued from page 8)

name of the party for whom the services were performed or materials supplied. Notice must be sent by registered mail, postage prepaid, to the contractor at any place he maintains an office or conducts his business, or his residence.

Suit to enforce bond rights must be commenced within one year after the day on which the last of the labor was performed or material was supplied by him. This suit must be brought in the United States District Court for any district in which the contract was to be performed, and executed, irrespective of the amount in controversy.¹⁸ Miller Act claims filed in state court will be dismissed for lack of subject matter jurisdiction of the state court.¹⁹

Nevada's Little Miller Act

Nevada's Little Miller Act is found at Nevada Revised Statute 339.025. Its provisions are similar to the Federal Miller Act. However, a preliminary 30 day notice is also required (in addition to the 90 day post work notice) of a claimant who has a direct contractual relationship with a subcontractor but no contractual relationship with the contractor. Failure to give the 30 day notice may be fatal to a claim.²⁰ An awareness that the claimant is on the project or supplying materials does not satisfy the written notice requirement, nor does a brochure which does not set forth the amount of the claim.²¹ Legal action must be commenced within one year of last supplying labor or materials.²² Certain subcontractors are also required to post bonds. NRS 339.025(2).

Highways and Roads

Nevada Revised Statute 408.363 sets forth the procedures for claiming against a bond furnished for the construction of highways and roads on Nevada Department of Transportation projects. To recover on such bonds, among other things, an action must be commenced within six months after the date of

the Department's final acceptance of the project.²³ Claimants are also required to file with the Department a claim in triplicate within 30 days from the date of final acceptance of the contract, executed and verified before a notary public and can contain a statement that the claimant has not been paid.²⁴ One copy of the claim is to be filed in the Department and the remaining copies are to be forwarded to the contractor and the surety.²⁵

PRIVATE PERFORMANCE AND PAYMENT BONDS

Bonds for private works may be mandated by statute or required by the owner or lender as part of the contract. Bonds required by an owner for private works are referred to as common law bonds and may take as many different forms as there are contracts.

Statutory Private Bonds

An example of a statutory private bond is the contractors license bond required by Nevada Revised Statute 624.270 and issued on forms mandated by the Contractors Board. A license bond must be obtained before the Nevada State Contractors Board will issue a license. The amount of the bond required may range from \$1,000 to \$500,000.²⁶ The license bond requirement may be waived after a licensee has acted in the capacity of a contractor for five years.

As set forth by NRS 624.273, the Nevada State Contractor Board license bond form identifies certain conditions to assert a claim and also identifies the bond beneficiaries.²⁷ There is a two year statute of limitation.²⁸ A claim of an employee of the contractor for labor is a preferred claim against a license bond.²⁹ Claims, other than claims for labor, have equal priority. If the bond is insufficient to pay all claims, then claimants must be paid pro rata.³⁰

The surety may deposit the bond sums

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with the court in the event of multiple, competing claims exceeding the penal sum of the bond in order to satisfy all bond claims. This process is referred to as interpleader. When this is done, the surety is entitled to deduct costs from the bond before depositing the funds with the court.³¹ The court will then, upon motion, determine the amount, if any, to be paid to each claimant.

Pool contractors in Nevada are subject to additional bonding notification requirements.³² All pool contractors must include in written contracts with residential purchasers that a performance bond may be required of the pool contractor by the owner.³³ Additional bonds may be required of a pool contractor before obtain its contractors license.³⁴

Common Law Bonds

An owner may demand a performance and/or payment bond although not required by statute. Such a bond is a private contract. It must be carefully reviewed to determine the beneficiaries, the claim procedures and the scope of the surety's obligations. American Institute of Architects A312 performance bond is widely used performance bond form. This form contains important provisions regarding: the scope of the bond obligation; the conditions precedent before the surety's liability arises; the surety options in the event of the principal's default; the surety's liability limitations; and suit limitation period.³⁵

The AIA A312 performance bond provides the following conditions precedent:

3.1 The Owner has notified the Contractor and the Surety at its address described in Paragraph 10 below that the Owner is considering declaring a Contract Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to per-

form the Construction, but such an agreement shall not waive the Owner's right, if any subsequently to declare a Contractor's Default; and

3.2 The Owner had declared a Contractors Default and formally terminated the Contractor's right to complete the contract. Such Contractor Default shall not be declared earlier than twenty days after the Contractor and Surety have received notice as provided in Subparagraph 3.1; and

3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with terms of the Construction Contract or to a contractor selected to perform the Construction Contract in accordance with the terms of the contract with the Owner.³⁶

Courts around the country have consistently held that the foregoing notice requirements and other provisions of paragraph 3 of the AIA A312 performance bond are material and an obligee's failure to comply with them exonerates the surety's obligation to perform under paragraph 4 of the performance bond.³⁷

The AIA also publishes a companion payment bond - the AIA A312 payment bond. The bond contains terms that limit the surety's exposure and mandates specific notice procedures. For example, the AIA A312 payment bond provides the following:

4. The surety shall have no obligation to Claimants under this Bond until.

4.1 Claimants who are employed by or have a direct contract with the Contractor have given notice to the Surety, and sent a copy, or notice thereof, to the Owner, stating that a claim is being made under this Bond and, with substantial accuracy, the amount of the claim.

With regard to the notice, the AIA A312 payment bond provides:

5.1 Have furnished written notice to the Contractor and sent a copy, or notice thereof, to the Owner, within 90 days after

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having last performed labor or last furnished materials or equipment included in the claim stating, with substantial accuracy, the amount of the claim and the name of the party to whom the materials were furnished or supplied or for whom the labor was done or performed; and

5.2 Have either received a rejection in whole or in part from the Contractor, or not received within 30 days of furnishing the above notice any communication from the Contractor by which the Contractor has indicated the claim will be paid directly or indirectly; and

5.3 Not having been paid within the above 30 days, have sent a written notice to the Surety, and send a copy, or notice thereof, to the Owner, stating that a claim is being made under this Bond and enclosing a copy of the previous written notice furnished to the Contractor.

The AIA A311 is another bond form that is used in private construction. The AIA A311 Performance Bond form is similar to A312, in that the surety and the principal are jointly and severally liable for the performance of the contract, which is incorporated by reference. However, the AIA A311's provisions regarding conditions precedent to the surety's liability and surety option are less detailed. The AIA A311 performance also has its companion payment bond form. This form, like the AIA 312 payment bond, contains terms limiting the surety's exposure and mandating specific notice procedures for claimants.

The Engineers Joint Contract Documents Committee and the Associated General Contractors of America also promulgate a common law payment bond with specific notice and claim requirements.³⁸ A claimant without a direct relationship with the principal must provide written notice to two of the following: Principal, Oblige, or the Surety, within ninety days after the Claimant did or performed the last of the work or labor, or furnished the last of the materials for which the claim is made, stating with substantial accuracy the amount

claimed and the name of the party to whom the materials were furnished, or for whom the work was performed.³⁹ Such notice must be served by mailing it by registered or certified mail.⁴⁰

CONCLUSION

Whether the construction economy in Nevada regains its previous strength or continues in its current downturn, the role of construction bonds will continue to be of utmost importance. It is critical that contractors and subcontractors read the actual bond form that has been issued for their work and those bonds on which they may be potential claimants. This needs to be done before the possibility of a claim arises. Whether prosecuting a bond claim or defending and/or participating with a surety in the defense of a bond claim, knowledge of the terms and conditions of the specific bond at issue can prove to be a lynchpin or a fatal flaw to a successful claim or defense. As explained above, the typical construction bonds in Nevada contain different terms and condition, with which a potential claimant must comply if that claimant hopes that the surety will pay its claim. On the other hand, a failure to comply with the terms of the bond will most likely be fatal to any bond claim. In short: **Read the Bond!**

End Notes: Introduction to Large Bonds

¹ Kurt Faux is the President of The Faux Law Group, a Las Vegas based law firm, which representing sureties, insurers, contractors and others involved in the construction industry in Nevada, Utah and California. He is an acknowledged expert in surety and mechanics lien law. Mr. Faux has written papers for numerous groups concerning surety bonds, Nevada construction law, and legal ethics.

² Stearns, The Law of Suretyship ' 1.1 (5th Ed. W.H. Anderson Co., 1951)

³ Insurance Co. of the West v. Gibson Title Co., Inc., 122 Nev. 455, 134 P.3d 698, 702 (2006); Great American Ins. Co. v. General Builders, Inc., 113 Nev. 346, 355; 934 P.2d 257, 263 (1997)

⁴ *See, e.g.*, American Fire and Electric v. City of North Las Vegas, 109 Nev. 357, 849 P.2d 352 (1993).

⁵ American Institute of Architects A201, General Conditions of the Contract for Construction; American Institute of Architects AIA101, Standard Form of Agreement Between Owner and Contractor.

⁶ American Institute of Architects A312, performance and payment bond, 1984 edition.

⁷ Capriotti, Lemon & Assoc., Inc. V. Johnson Service Co., 84 Nev. 318, 440 P.2d 386 (1968).

⁸ United States for use of Wulff v. CMA, Inc., 890 F 2d 1070 (9th Cir. 1989).

⁹ 40 U.S.C. ' 3131(b).

¹⁰ United States ex rel. Hawaiian Rock Products Corporation v. A.E. Lopez Enterprises, Ltd., 74 F 3d 972 (9th Cir. 1996)

¹¹ Wulff v. CMA, Inc., 890 F.2d 1070 (9th Cir. 1989)

¹² Clifford F. MacEvoy Co. V. United States, 322 U S 102 (1944) (suppliers to materialman denied relief).

¹³ Id. At 109.

¹⁴ F.D. Rich Co. V. United States for the Use of Indust. Lumber Co., 417 U.S. 116 (1974), Gulf States Enterprises v. R.R. Tway, Inc., 938 F.2d 583, 587 (5th Cir. 1991)

¹⁵ United States v. W.H. Cates Constr. Co., Inc., 972 F.2d 987 (8th Cir. 1992) (recovery by project manager and estimator performing on-site work allowed).

¹⁶ F.D. Rich, see note 13.

¹⁷ 40 USC ' 133(b).

¹⁸ 40 USC 3133(3)(B).

¹⁹ Airport Constr. & Materials, Inc. V. Bivens, 649 S.W.2d 830 (Ark 1983).

²⁰ AMFAC Distrib. Corp. V. Housing Auth., 100 Nev. 573, 688 P.2d 318 (1984).

²¹ Garff v. J.R. Bradley Co., 84 Nev. 79, 436 P.2d 428 (1968); Capriotti, 84 Nev. 318, 440 P.2d 386 (1968).

²² NRS 339.055(2)

²³ NRS 408.363(2)

²⁴ NRS 408.363(1)

²⁵ Id.

²⁶ NRS 624.270(4)

²⁷ NRS 624.273(1)(a)-(d).

²⁸ The Nevada State Contractors License Bond form provides that ANo action may be commenced on the bond... 2 years after the commission of the act on which the action is based.@ *See also* NRS 624.273(2).

²⁹ NRS 624.273(6)

³⁰ NRS 624.273(7)

³¹ NRS 624.273(5)

³² See NRS 624.276

³³ NRS 597.719(2); NAC 624.6964(7).

³⁴ NRS 624.270(8)

³⁵ AIA Document A312, performance bond (1984).

³⁶ Id.

³⁷ See, e.g., U.S. Fidelity and Guar. Co. v. Braspetro Oil Services Co., 369 F.3d 34, 51 (2nd Cir.2004) (stating that AParagraph 3 of the [AIA A312] Bonds contained a number of conditions precedent to the Sureties' obligations under the Bonds.@); AgGrow Oils, L.L.C. v. National Union Fire Ins. Co. of Pittsburgh, 276 F.Supp.2d 999, 1017 (D.N.D.2003) (A[T]he requirements of paragraph 3 are conditions precedent to the surety's bond performance.@), aff'd, 420 F.3d 751 (8th Cir.2005); Bank of Brewton, Inc. v. Int'l Fid. Ins. Co., 827 So.2d 747, 754 (Ala.2002) (“The [owner] was required by the performance bond to give proper notice, to call a meeting, to discuss the problems, and to attempt to resolve them; and then to declare a contractor default, formally terminating the contractor's right to complete the contract at least 20 days after giving notice; and to agree to pay the balance of the contract to the surety or to a new contractor who would complete the contract as originally agreed.”); LBL Skysystems (USA), Inc. v. APG-America, Inc., 2006 WL 2590497 at 23 (E.D.Pa. Sept. 6, 2006) (Athe language of Paragraph 3 of the Performance Bond . . . creates conditions precedent to the duty of the surety@); Donald M. Durkin Contracting, Inc. v. City of Newark, 2006 WL 2724882 (D.Del. Sept. 22, 2006) (dismissal of owner’s claim for failure to comply with paragraph 3 of the AIA 312 performance bond); Enterprise Capital, Inc. v. San-Gra Corp. 284 F. Supp 2d 166, 177-179, 182-183 (D.Mass., 2003) (discharging the surety of liability under an AIA A312 Performance Bond due to the obligee’s failure to comply with the conditions of the bond.); Hudson Development, LLC v. DiNunno, 8 A.D. 3d 77 (App. Div. 1st Dept’t 2004) (“ [The obligee’s] failure to comply with the notice provisions of the performance bond issued by [the surety] precludes it from maintaining this action for damages against the bond’s surety.”); United States ex rel. Platinum Mechanical, LLC v. U.S. Surety Co., No. 07 Cv. 3318(CLB), 2007 WL 4547849, *3 (S.D.N.Y. Dec. 21, 2007) (granting summary judgment to surety where owner failed to provide proper notice under AIA A312 performance bond that it was considering declaring contractor in default); and 120 Greenwich Development Associates, LLC v. Reliance Ins. Co., No. 01 Civ. 8219(PKL), 2004 WL 1277998, *12 (S.D.N.Y. June 4, 2004) (holding that the language of Paragraph 3 "creates unambiguous preconditions for triggering [the surety's] obligations under the Bond"). See also, Dragon Construction, Inc. v. Parkway Bank & Trust, 678 N.E.2d 55 (Ill. Ct. App. 1997)(finding “that the [obligee’s] failure to provide adequate notice of [the principal’s] termination and hiring of a successor contractor before [the surety] received the late notice stripped [the surety] of its right to limit its liability and constituted a material breach of contract which rendered the surety bond null and void.”); Seaboard Surety Co. v. Town of Greenfield, 266 F.Supp.2d 189, 195-196 (D.Mass., 2003), aff’d by Seaboard Surety Co. v. Town of Greenfield, 370 F.3d 215 (1st Cir. 2004) (holding that owner Absolutely deprived [the surety] of its rights under the Bond@ when it contracted with a different contractor without first allowing the surety opportunity to fulfill its completion options.); Elm Haven Construction Ltd., at 100-01 (improper notice and may serve as a complete dismissal of any claims against the surety); L&A Contracting Company v. Southern Concrete Services, Inc., 17 F. 3d 106, 111, fn. 19 (5th Cir. 1994) (“L&A’s failure to declare Southern in default excuses F&D’s failure to remedy Southern’s breach. F&D did not breach the terms of its bond and accordingly has no liability under the bond.”); Hunter Constr. Group, Inc. v. Nat’l Wrecking Corp., 542 F. Supp. 2d 87, 96 (D.D.C. 2008)(“Where the obligee fails to notify a surety of an obligor’s default in a timely fashion, so that the surety can exercise its options under the controlling performance bond, the obligee renders the bond null and void.”).

³⁸ See EJCDC C-615(A) Payment Bond.

³⁹ Id. at paragraph 4.2

⁴⁰ Id. at paragraph 5.