



CONSTRUCTION E-BRIEF

Summary of Changes to the AIA Payment Bond Form

Most public projects, and some private projects, require the general contractor to post a payment bond that guarantees payment to those who provide labor and materials for the project. The most common payment bond utilized is the American Institute of Architects (AIA) A312 Payment Bond. The AIA recently made substantial changes to its bond forms, including the A312 Payment Bond. Regardless of whether you are a principal or a claimant under A312 Payment Bond, contractors should be aware of these changes.

Expanded Scope of the A312-2010 Payment Bond

One important change in the new form is the expanded definition of claimant. Previously "Claimant" was defined as "[a]n individual or entity having a direct contract with the Contractor or with the subcontractor of the Contractor. . . ." Under this language, any entities that worked below a second-tier subcontractor were excluded. The 2010 form has been amended to include "any individual or entity that has rightfully asserted a claim under an applicable mechanic's lien or similar statute against the real property upon which the Project is located." The amended language allows for third-tier subcontractors and suppliers to make claims on the bond, provided that they have rightfully asserted a claim under the applicable mechanic's lien or similar statute. What is not clear from this language is whether the new claimants must actually file a lien as a condition precedent to being deemed a "Claimant."

In addition, the A312-2010 Payment Bond form simplifies the claim process for claimants that do not have a direct contractual relationship with the bond principal. Previously, a remote claimant (i.e. a second-tier subcontractor or supplier)

About E-Brief

E-Brief is a periodic email newsletter that is sent to our clients and friends to provide information that is important to their success.

Comments Welcome

We welcome your comments on our E-Brief. If there are topics you are interested in learning more about, please email us at: e-brief@woodsaitken.com

About Woods & Aitken LLP

Woods & Aitken has been representing clients in the **construction** industry since the firm was founded in 1921. For more information about the firm and our attorneys, please visit our website:

www.woodsaitken.com.

was required to submit notice of nonpayment to the contractor, and then wait 30 days for a response before sending a notice of nonpayment to the surety. Under the 2010 form, this waiting period has been eliminated. Now a second-tier subcontractor or supplier is required to give *notice* to the contractor, while submitting a *claim* to the surety. These actions can now be done simultaneously.

New Notice of Claim Requirements under the A312-2010 Payment Bond

Previously, a claimant was required to provide the surety with notice of its claim. Such notice had to state with substantial accuracy the amount of the claim and, when a claimant did not have a direct contract with the contractor, the name of the party to whom the claimant supplied material or labor. Under the 2010 form, a claimant must submit a "Claim" to the surety. A "Claim" must include the following: (1) the name of the claimant; (2) the name of the person for whom the claimant supplied materials, equipment, or labor; (3) a copy of the purchase order or agreement pursuant to which the claimant supplied materials, equipment, or labor; (4) a brief description of the materials, equipment, or labor supplied; (5) the date on which the claimant last supplied the materials, equipment, or labor; (6) the total amount earned by the claimant 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 as of the date of the claim.

There does not appear to be any case law yet on a claimant's failure to provide all of the information required to bring a "Claim." However, the surety's duty to respond to the claim may not be triggered until all of the required information has been provided.

Revised Claim Review under the A312-2010 Payment Bond

Of course, not all of the changes were made to benefit claimants. The new form also expands the time frame for the surety to respond to the claim from 45 days to 60 days. Most importantly, the new form addresses the situation where a surety drops the ball and fails to respond to the claim within the 60 day period.

Under the 1984 form, several courts had held that a surety's failure to respond to a claim within the allotted time period

(45 days) constituted a waiver of the surety's defenses and /or counterclaims associated with the claimant's underlying bond claim. Thus, under this interpretation, a surety that took too long to respond to a claim could have found itself obligated to pay the claim even if it was without merit. The amended form expressly states that the surety's failure to comply with its claim-response obligations shall not be deemed to constitute a waiver of defenses by the surety. There is little case law interpreting this new anti-waiver language; thus, it is unclear if such language would be upheld by a court.

Conclusion

The changes discussed above are just a sampling of the revisions to the A312-2010 Payment Bond. Potential bond claimants should always request a copy of the project payment bond prior to problems arising or immediately after payment problems arise. A claimant should then review the requirements of the specific bond prior to submitting its claim. And, as mentioned in the introduction, most payment bonds are issued for public projects. In those cases, the bonds are required by statute. Consequently, bond claimants should make sure that they not only comply with the terms of the bond but also comply with the statutory requirements. Some of the statutory requirements are jurisdictional, which means that if they are not followed, you may not get your day in court.

D E N V E R • L I N C O L N • O M A H A • W A S H I N G T O N , D . C .

This E-Brief is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. An attorney-client relationship is not created or continued by reading this article.

To unsubscribe please [reply](#) to this email

Woods & Aitken LLP | 301 South 13th Street, Suite 500 | Lincoln | NE | 68508