

The Agreement Of Indemnity: Practical Applications By The Surety

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case-by-case basis, taking into account the specific risks transferred to the design-builder as a result of its assumption of design responsibility.¹⁶⁹ The major specific areas of surety concern in underwriting a DB contract include traditional surety concerns as well as some unique to DB:

1. Performance complexity (use of new technology or required performance guarantees).
2. Clarity of contract scope.
3. Structure, experience, management skills, and working relationships of the design-build team.
4. Contractor's financial ability to finance the work and indemnify the surety.
5. Owner's sophistication, experience, and reputation.
6. Contract terms and conditions.
7. Bond terms (penal sum, scope, and duration).
8. Overall insurance programs of project participants.¹⁷⁰

In assessing a project and contractor for issuance of a bond for a DB project, sureties will carefully undertake traditional underwriting in light of the perceived enhanced risk associated with DB. Most contractors seeking a bond for a DB project are larger companies, with fairly sophisticated and experienced DB skill sets, or they consist of JV partners, where one venturer is a design entity with a track record that can be evaluated relatively easily. Thus, sureties approach DB projects by engaging in traditional underwriting, buttressed by additional investigation into the risk appetite of the contractor or joint venturers, further evaluation of insurance coverage of the contractor or venture partners, and further inquiry and evaluation of capabilities, experience, knowledge of the industry, and the skills of the companies.

The most significant concern usually stems from the scope and size of the project, with the increasing number of variables or more onerous contract terms leading to greater concerns. To address these concerns, some industry-developed bond terms recognize and limit the surety's obligation for the contractor's design responsibility by expressly excluding performance bond coverage for design¹⁷¹ or limiting the owner's recovery against the surety to the level of design defect insur-

ance coverage under the general liability or professional liability insurance required of the design-builder.¹⁷²

2. Bonding Extended Warranties and Performance Guarantees

Owners often seek to impose warranty periods in excess of the standard 1-year workmanship warranties. It is common to see extended warranties on certain types of equipment, roofing material, and even paving to ensure the durability of the product or work, but efforts to expand the general 1-year warranty of workmanship is frequently a hard sell to sureties. Sureties are willing to bond contracts with extended warranties for specified portions of the project, but typically are only willing to bond an extended general workmanship warranty for a maximum period of 3 to 5 years. Where the transit project includes maintenance, sureties will usually refuse to include that scope in the bond. Note that Section IV discusses the negative view of the SFAA on extended warranties.

3. Bonding Performance Guarantees

Major project contracts frequently contain performance guarantees that the contractor or JV must meet. Performance guarantees are a risk, like design risks, which are difficult for sureties to assess and which they prefer not to bond. In some situations, the surety will either not be able to evaluate the risk or will deem the risk of performance guarantees as too great and will refuse to bond. In those circumstances, the owner may be able to obtain alternative forms of security, such as liquidated damages supported by LOCs.

4. Bonding Rolling Stock

Rolling stock consists of all transit vehicles, whether powered or unpowered, such as locomotives, rail cars, trolley cars, coaches, wagons, buses, vans, cars, and ferry boats, and including vehicles used for support services.¹⁷³ Some transit projects using PPP delivery systems (such as the Houston METRO 4-Lines project) include the purchase of rolling stock in the contractor's work scope. Depending on how the contract is structured and the type of contract vehicle, the cost of procuring the rolling stock may be bundled with the construction scope of work. Owners will typically seek to have the surety bond cover the contractor's procurement of the rolling stock.¹⁷⁴ This request poses several

¹⁶⁹ *Id.* (citing the AGC's Consensus DOCS 470, Design-Build Performance Bond (Surety is Liable for Design Costs of the Work), which provides that the surety is not liable for any damages specified to be covered by required insurance).

¹⁷⁰ See 49 C.F.R. § 661.3 and App. A.

¹⁷¹ For public contracts partially or wholly funded by a federal grant, bonding of the portion of the contract involving rolling stock is not required by FTA; the decision whether to bond lies within the owner's discretion. See FTA Dear Colleague Letter C-01-04, dated Jan. 20, 2004, *Performance and Payment Bonding Requirements*, available as a (doc.) form at www.fta.dot.gov/documents/BPPM_appA2.doc.

¹⁶⁸ As the body of completed design-build projects grows, historical experiences support the conclusion that design-build, with its heightened control and cooperation, is far less risky for the surety than a design-bid-build project. *Id.* at n.7, citing Loulakis and Sheen, Risk Transference in Design-Build Contracting, *Construction Briefings* No. 96-5, at 12 (Apr. 1996).

¹⁶⁹ BREINER & O'CONNOR, JR., *supra* note 89, at 264-66 § 12.86.

¹⁷⁰ BREINER & O'CONNOR, JR., *supra* note 89 § 12.86 (citing the AGC's Consensus 1171, Design-Build Performance Bond (Surety is Not Liable for Design Services)).

The agreement of indemnity: practical applications by the surety. American Bar Association. Fidelity and Surety Law Committee. Midwinter Meeting (New .An indemnity agreement is a contract that 'holds a business or company harmless' for any burden, loss, or damage.sions. For purposes of this article, pertinent GIA illustrative provisions found in Illustrative Provisions of Indemnity Agreements by Surety on Construction Contract: .. BondandPayment Claims, in The agreement of indemnity: practical applica.principal") applies to be bonded by a surety, the application for the surety bond invariably member of the Section of Tort and Insurance Practice. and, in the case of indemnification agreements concerning attorneys' fees which a surety .A bond is a three-party contract entered into by the surety, the principal a financial interest in the contractor to sign a General Agreement of Indemnity (GAI) . [3] illustrates why contractors should understand the scope and application of As a practical matter, a contractor's ability to negotiate a GAI with a surety is limited.For more on guarantor rights, see Practice note, Enforcing guarantees: guarantor's . For more on the application of unfair contract terms and consumer rights.Surety companies often rely on contracts called indemnity agreements to minimize risk. Find out more by reading our guide to surety bond indemnity agreements. the application being subject to underwriting, no indemnity agreement is.Case law does not focus particular attention on "indemnity agreements," as . Thus, such a practice of requesting such confirmation, even where the surety is not In addition, case law holds that use of a corporate seal serves as prima facie.A surety requires the execution of an indemnity agreement in exchange for its . Editor, THE AGREEMENT OF INDEMNITY: PRACTICAL APPLICATIONS BY.Acme uses for its Film Completion Bonds the same type of agreement that another . Under most indemnity agreements, once the surety has established a 'reserve' .. This is generally more of a theoretical right than an actual, practical right.The wider undertaking is called a contract of indemnity. creditor and the validity of the contract of suretyshio is normally dependent may not be very important in practice to make this distinction; but The mere use of the term "indemnity" is.A Surety Bond Indemnity Agreement is an agreement between the principal and the surety bond company stating the company will be indemnified if it pays out a.The surety bond indemnity agreement is always in writing and is frequently included as part of the bond application you fill out for your business's surety bond. in background investigations and spent almost two decades in legal practice.Agreement of Indemnity - The Surety's Handling of Contract Bond Problems: PRACTICAL APPLICATIONS BY THE SURETY (George J. Bachrach, ed.).for various reasons (maybe they were submitted as part of bond applications, new . 2 The Surety's Indemnity Agreement: Law and Practice, 2nd ed. (Marilyn.provisions of a typical general agreement of indemnity. SETTING THE .. The Agreement of. Indemnity: Practical Applications by the Surety (ABA) at Fidelity & surety law bibliography, by American Bar Association(Book) The Agreement of indemnity: practical applications by the surety by TIPS.purposes, does not contain or convey legal

advice, and Instead, the article is intended to be a practical guide that. D. Hull erally Houlihan Lokey Purchase Agreement Study (May.). Similarly .). Contracts of surety and guaranty.A surety bond is a three-party agreement between a surety company, an obligee and Just as a bank evaluates loan applications, surety company Indemnity agreements are a standard of the industry. . "Fixing Personal Lines Coverage Gaps" Through scores of real-life claims examples and court cases.and gathering the bond form examples that are used in this guide under the leadership As a practical matter, a surety bond is also an instrument of .. and contains the agreement to indemnify the surety in the event of loss.gation remedy was not available since it had a convenient, practical . to a surety and the application included a general indemnity agreement containing the.indemnity agreements, often from the owners of the principal, and will This bid bond, CCDC , describes the surety's obligation as follows: .. proposal by the surety to use Dallas Contracting as a replacement contractor. At trial, the displays the practical inability on the part of Dallas to perform the contract in a.Table of Contents for Practical guide to construction contract surety claims Surety Bonds [G] Indemnity and Collateral [H] The Ongoing Surety-Principal or Mistake in the Bond Application or Contract [A] Fraud or Misrepresentation by.Practical Guide to Construction Contract Surety Claims provides clear guidance on the methods, procedures and case law surrounding the.

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