

## Not Inviting Surety Claims to a Meeting with the Owner? Think Again.

An outstanding surety claims team proves its real value during pre-claim resolutions.

By Adrian A. Braganza



**In the past**, “Stay away from the surety claims department!” was the unwritten rule among contractors. Any contact with the claims department was thought to put contractors in a negative light with its surety.

The construction industry in recent decades has grown more complex and its disputes have followed suit. The surety bond claim process as an integral part of construction industry has adapted to these changes and can be a great resource to contractors competing in this new environment.

Today, forward-thinking surety claim departments play an expanded role in the dispute resolution process beyond being simply a vehicle for paying or denying claims, as was the case in the past. The surety claim departments of most major sureties like Zurich have become an important resource to contractors by assisting them in resolving disputes *even before a formal claim is filed*.

### Benefit of Early Surety Involvement

Therefore, the “rule” that general contractors should follow is to seek surety claims involvement if a dispute cannot be resolved directly with the owner early in the process. Simply put, involving the surety claims team before a dispute becomes intractable may help avoid a formal claim being filed by the owner and reduce costs for all parties involved. However, any input from surety claims is not meant to replace the advice of in-house or external counsel but rather to supplement that expertise.

The volume of claims handled by a large surety bond provider necessarily results in the accumulation of a tremendous amount of experience in dealing with a wide range of performance and payment disputes. This experience lends itself to providing effective and efficient alternatives when

problems arise. Think of a sophisticated surety claims team as being able to offer both the hard and soft skills necessary to assist you, including the expert knowledge of the surety bond claim process together with the experience developed in having helped resolve numerous past disputes.

### Pre-claim Resolutions Keep Projects Moving

Many construction projects go smoothly but others face unexpected bumps along the way. The primary goal of resolving a performance dispute before a claim is filed is to keep the parties working together in order to stay on track with the project’s budget and schedule. A skilled surety claims team can help an owner and general contractor avoid an impasse and the costs in time and money of a potential default.

Some key intersections where an experienced surety claims team can add value are:

1. Acting as a mediator or referee to help both sides better communicate with each other and help avoid the escalation of a dispute.
2. Providing reassurance to the owner that another stakeholder is monitoring its project.
3. Educating both the general contractor and owner about costs and risks of delays, i.e. finish the project and fight later.
4. Suggesting short-term solutions to problems, i.e. involvement of a consultant to monitor project.
5. Alleviating the owner’s concern over payment bond claims being received.
6. Providing training on how the bond might affect the general contractors coexisting liability under its contract.

### Negotiation in Action

#### Example 1

A large contractor having expanded into a neighboring state ran afoul of the owner early in the project. At a meeting with the owner, it became apparent that the contractor was facing possible termination despite having resolved or addressed most of owner’s complaints. With the principal’s agreement, an off-the-record meeting was then held between the surety and the obligee’s representatives, during which they discussed alternatives to termination. The principal, when apprised of the owner’s position, decided to hire a local contractor as a subcontractor to complete the project. The surety did not hear further from the owner.

#### Example 2

A medium size general contractor was retained by a construction manager (CM) at-risk to build 30 apartment units in an existing community. Late in the project, the surety received notice from the CM advising of the principal’s failure to perform. The principal, confident that it would prevail in the dispute due to the existence of certain unforeseen conditions, had decided to place the CM in default and withdraw from the project.

When advised of the consequences of abandoning the project, the principal reversed course. Having followed the surety’s advice to employ a consultant to assist with its defense during completion, the principal successfully completed the project, defended the suit filed by the CM, and obtained full recovery. The surety had no further involvement in the project or litigation. ■

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