

EJCDC Issues Interim Payment Bond Form

The Engineers Joint Contract Documents Committee (EJCDC), a leading publisher of construction contracts and forms, has published a revised edition of its standard Payment Bond form. The new form, EJCDC C-615(A), is intended to be used on an interim basis as a substitute for EJCDC's standard payment bond form, EJCDC C-615, pending a full review and re-issuance of the standard form. The interim form addresses a concern regarding the misapplication of the standard form's section on the time limit for the surety's response to a claim on the bond. That concern arose as a result of court decisions in a few jurisdictions, and led users and sureties to request a revision of the form.

Paragraph 6 of C-615 required the payment bond surety to answer a claim within 45 days. This was generally accepted as a non-controversial procedural provision. Another commonly used standard bond form, AIA A312, contains a virtually identical provision. In 2005 a Maryland appellate court held that a surety that had failed to meet the 45 day deadline in the A312 form had waived all its defenses, including the right to seek proof of the claim or challenge the specific amount demanded by the claimant. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. David A. Bramble Inc.*, 879 A.2d 101 (Md. App. 2005). Despite the concerns raised by the Maryland decision, sureties generally continued to write bonds using the AIA and EJCDC forms, while at the same time requesting revisions and warning that the Maryland decision might be cited as a persuasive precedent in other cases.

In late 2007 a second adverse decision was published, based on the reasoning of the Maryland case. *Gibson Plastering v. XL Specialty Insurance Co.*, U.S. District Court (Fla., Oct. 8, 2007). This second case inspired widespread surety reluctance to use the standard payment bonds. The sureties argued that the potential consequences of missing the 45 day deadline had become too harsh as a result of the Maryland and Florida cases--worse than the consequences of a default in answering a complaint in a civil lawsuit.

As a follow-up to the judicial decisions, the National Association of Surety Bond Producers and the Surety and Fidelity Association of America have discussed their concerns with EJCDC, and have suggested several changes to the standard payment bond wording, including changes to the wording of standard paragraph 6 concerning the claim response process. EJCDC intends to analyze and take appropriate action on the suggested revisions, with full input from all

involved parties, including owners, contractors, subcontractors, suppliers of materials and equipment, and design professionals, as well as sureties and brokers. The goal of the analysis will be to address the need for clear and reasonable procedures that serve the interests of the project and promote prompt payment of meritorious claims, without creating unintended or open-ended liabilities for sureties and bond indemnitors. On an interim basis, EJCDC has removed paragraph 6, pending the results of a systematic analysis and dialogue; the great majority of the standard form's text, including the fundamental obligations of the surety when a subcontractor or supplier is not paid, remain unchanged in C-615(A). The Surety and Fidelity Association of America has informed EJCDC that it is recommending the acceptance of the interim form, EJCDC C-615(A), to its member sureties. The National Association of Surety Bond Producers has also expressed its support of the interim form.

A sample of form EJCDC C-615(A) is attached.

PAYMENT BOND

Any singular reference to Contractor, Surety, Owner, or other party shall be considered plural where applicable.

CONTRACTOR (*Name and Address*):

SURETY (*Name, and Address of Principal Place of Business*):

OWNER (*Name and Address*):

CONTRACT

Effective Date of Agreement:

Amount:

Description (*Name and Location*):

BOND

Bond Number:

Date (*Not earlier than Effective Date of Agreement*):

Amount:

Modifications to this Bond Form:

Surety and Contractor, intending to be legally bound hereby, subject to the terms set forth below, do each cause this Payment Bond to be duly executed by an authorized officer, agent, or representative.

CONTRACTOR AS PRINCIPAL

SURETY

(Seal)
Contractor's Name and Corporate Seal

(Seal)
Surety's Name and Corporate Seal

By: _____
Signature

By: _____
Signature (Attach Power of Attorney)

Print Name

Print Name

Title

Title

Attest: _____
Signature

Attest: _____
Signature

Title

Title

Note: Provide execution by additional parties, such as joint venturers, if necessary.

1. Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors, and assigns to Owner to pay for labor, materials, and equipment furnished by Claimants for use in the performance of the Contract, which is incorporated herein by reference.
2. With respect to Owner, this obligation shall be null and void if Contractor:
 - 2.1 Promptly makes payment, directly or indirectly, for all sums due Claimants, and
 - 2.2 Defends, indemnifies, and holds harmless Owner from all claims, demands, liens, or suits alleging non-payment by Contractor by any person or entity who furnished labor, materials, or equipment for use in the performance of the Contract, provided Owner has promptly notified Contractor and Surety (at the addresses described in Paragraph 12) of any claims, demands, liens, or suits and tendered defense of such claims, demands, liens, or suits to Contractor and Surety, and provided there is no Owner Default.
3. With respect to Claimants, this obligation shall be null and void if Contractor promptly makes payment, directly or indirectly, for all sums due.
4. Surety shall have no obligation to Claimants under this Bond until:
 - 4.1 Claimants who are employed by or have a direct contract with Contractor have given notice to Surety (at the address described in Paragraph 12) and sent a copy, or notice thereof, to Owner, stating that a claim is being made under this Bond and, with substantial accuracy, the amount of the claim.
 - 4.2 Claimants who do not have a direct contract with Contractor:
 1. Have furnished written notice to Contractor and sent a copy, or notice thereof, to Owner, within 90 days after 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 or equipment were furnished or supplied, or for whom the labor was done or performed; and
 2. Have either received a rejection in whole or in part from Contractor, or not received within 30 days of furnishing the above notice any communication from Contractor by which Contractor had indicated the claim will be paid directly or indirectly; and
 3. Not having been paid within the above 30 days, have sent a written notice to Surety (at the address described in Paragraph 12) and sent a copy, or notice thereof, to Owner, stating that a claim is being made under this Bond and enclosing a copy of the previous written notice furnished to Contractor.
5. If a notice by a Claimant required by Paragraph 4 is provided by Owner to Contractor or to Surety, that is sufficient compliance.
6. Reserved.
7. Surety's total obligation shall not exceed the amount of this Bond, and the amount of this Bond shall be credited for any payments made in good faith by Surety.
8. Amounts owed by Owner to Contractor under the Contract shall be used for the performance of the Contract and to satisfy claims, if any, under any performance bond. By Contractor furnishing and Owner accepting this Bond, they agree that all funds earned by Contractor in the performance of the Contract are dedicated to satisfy obligations of Contractor and Surety under this Bond, subject to Owner's priority to use the funds for the completion of the Work.
9. Surety shall not be liable to Owner, Claimants, or others for obligations of Contractor that are unrelated to the Contract. Owner shall not be liable for payment of any costs or expenses of any Claimant under this Bond, and shall have under this Bond no obligations to make payments to, give notices on behalf of, or otherwise have obligations to Claimants under this Bond.

10. Surety hereby waives notice of any change, including changes of time, to the Contract or to related subcontracts, purchase orders, and other obligations.

11. No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the location in which the Work or part of the Work is located or after the expiration of one year from the date (1) on which the Claimant gave the notice required by Paragraph 4.1 or Paragraph 4.2.3, or (2) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Contract, whichever of (1) or (2) first occurs. If the provisions of this paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

12. Notice to Surety, Owner, or Contractor shall be mailed or delivered to the addresses shown on the signature page. Actual receipt of notice by Surety, Owner, or Contractor, however accomplished, shall be sufficient compliance as of the date received at the address shown on the signature page.

13. When this Bond has been furnished to comply with a statutory requirement in the location where the Contract was to be performed, any provision in this Bond conflicting with said statutory requirement shall be deemed deleted herefrom and provisions conforming to such statutory requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory Bond and not as a common law bond.

14. Upon request of any person or entity appearing to be a potential beneficiary of this Bond, Contractor shall promptly furnish a copy of this Bond or shall permit a copy to be made.

15. Definitions

15.1 Claimant: An individual or entity having a direct contract with Contractor, or with a first-tier subcontractor of Contractor, to furnish labor, materials, or equipment for use in the performance of the Contract. The intent of this Bond shall be to include without limitation in the terms "labor, materials or equipment" that part of water, gas, power, light, heat, oil, gasoline, telephone service, or rental equipment used in the Contract, architectural and engineering services required for performance of the Work of Contractor and Contractor's subcontractors, and all other items for which a mechanic's lien may be asserted in the jurisdiction where the labor, materials, or equipment were furnished.

15.2 Contract: The agreement between Owner and Contractor identified on the signature page, including all Contract Documents and changes thereto.

15.3 Owner Default: Failure of Owner, which has neither been remedied nor waived, to pay Contractor as required by the Contract, or to perform and complete or otherwise comply with the other terms thereof.

FOR INFORMATION ONLY – *(Name, Address, and Telephone)*

Surety Agency or Broker:

Owner's Representative *(Engineer or other)*: