



# Bond Claims

Requirements and Common Issues with Bond Claims  
Associated with Texas School Construction Projects

Trey H. Nesloney  
Senior Associate

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## Purposes and Types of Bonds

- General purpose of a Bond is to ensure that capable and qualified contractors are being used and to protect School Districts from financial losses due to contractor failure.
- Types of Bonds:
  - Performance Bonds – Secured before construction begins on a project to ensure the contract obligations will be “performed” (complete work according to the contract terms)
  - Payment Bonds – Secured before construction begins on a project to protect beneficiaries with direct contractual relationships with the Prime Contractor or subcontractor that provide public work labor/materials on the project
  - Bid Bonds – Provided of Bidders/Proposers to assure that the bid/proposal will not be withdrawn within the period specified for acceptance

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## Performance Bonds – Requirements

- Required if the value is > \$100,000 →TGC 2253.021(a)(1)
- Performance Bond must be “in the amount of the contract” →TGC 2253.021(b)(2)
- Purchased “solely” for the protection of the School District →TGC 2253.021(b)(1)
- Conditioned “on the faithful performance of the work in accordance with the plans, specifications, and contract documents” → TGC 2253.021(b)(3)
- Cannot require a bond from any specific company, agent, or broker →TGC 2253.021(g)

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## Performance Bonds – What do they do?

- Purchased “solely” for the protection of the District →TGC 2253.021(b)(1)
- Guarantees the completion of the project if the Contractor defaults and is unable to complete the project with or without assistance from the Surety
- Protects District from financial default or bankruptcy of a contractor
- Protects District for other non-performance reasons

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## Performance Bond Tip – Keep Track of Your Project

- Periodically review the status of the project after it commences
- Be proactive, not reactive
- Interact with the design professional and contractor
- Keep records of issues and delays (others may not)
- Documentation can be used later to provide detail on reasons for filing on the Performance Bond

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## Performance Bonds – What is the process (of filing on the bond)?

- Start with the language of the Performance Bond
- Many bonds have specific notice procedures and timelines
- Review contract documents for provisions on termination
- Recommendation is to consult legal counsel to secure performance under the bond
- Must take proper steps to invoke obligations of Surety

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## Performance Bonds – What is the process (AIA A312 Bond Example)?

- Section 3, Surety's obligation arises after:
  - District first provides notice to Contractor and Surety that District is considering declaring a Contractor Default
  - Notice must indicate whether District is requesting conference between District, Contractor and Surety to discuss the Contractor's performance
  - If not requested, Surety can request conference in 5 days
  - Conference must be held within 10 days of notice
  - District can declare a Contractor default
- If Owner complies with Section 3, Surety must take one of the actions listed in the Section 5

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## Performance Bonds – What is the process (AIA A201 Example)?

- 14.2 - District may terminate contract for cause for:
  - Repeatedly refuses/fails to supply enough materials/workers
  - Fails to make payment to Subcontractors/Suppliers
  - Repeatedly disregards laws
  - Otherwise guilty of substantial breach
- Certification by Architect that sufficient cause exists
- Give Contractor and Surety 7 days termination notice

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## Performance Bonds – What is the process?

- File Notice of Intent to Declare a Default and Termination of Contract (AIA Example)
  - Dual Notice
  - Cite Contract provisions
  - Give major facts
- Follow procedures in the Bond and Contract
- Participate in Conference if required/preferred

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## Performance Bond – Conference on Contractor Performance

- Common Scenarios:
  - “I’m done”
  - “It’s not you, it’s me”
  - “It’s not me, it’s you [or the Architect]”
- District should prioritize:
  - Just the facts
  - Keep the focus forward facing (looking back can be adversarial, probably better if contractor can finish the project)
  - Make decision on whether to declare default/terminate

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## Performance Bond – Surety Investigation

- If you terminate contract and file claim on the performance bond due to default, surety will conduct investigation. Keep in mind:
  - Surety did not cause contractor default
  - Contractor may have insufficient records
  - Surety has not been monitoring the project
  - District's wants Surety to aid in finishing the project (cooperation)
  - Provide access to site, key information, and District's records
  - Encourage design professional to respond
  - Identify time issues, remaining scope of work, critical vendors

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## Performance Bond – What happens after filing?

- Assuming claim accepted, common remedies by Surety:
  - Takeover – Surety assumes full responsibility (but see TGC 2253.022a → District must ensure new bonds, review takeover agreements)
  - Financing - Funding the completion of contract by the defaulting contractor
  - Payout - Financial settlement with District
  - Arrangement – Surety and District work together to complete (ex: District procures new contractor, Surety absorbs additional costs)

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## Performance Bond – What happens after filing?

- Surety may deny the claim on the bond
- Examples of possible defenses raised by Surety:
  - Failure to provide proper notice to Surety
  - Improper Payments (Overpayments, payments for defective work, progress payments for work not completed, do not pay to “move project along,” prepayment of retainage)
  - Failure to mitigate damages
  - Failure to perform obligation or exercise rights under the contract
  - District self performed work, costs are not reasonable
  - Statute of limitations – 1 year from final completion, abandonment, or termination → TGC 2253.078
  - Failure to require or maintain insurance
  - Delays attributable to District or Architect
  - Negligent inspections by Architect

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## Performance Bonds – Other Issues

- Make Surety perform according to the contract terms
- Expect delays in construction...even if Surety promptly takes over

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## Performance Bond – What if there isn't one?

- Protect District by Proper Payments, Liquidated Damages
- Lawsuits (What if contractor is insolvent?)
  - What if contractor is insolvent?
  - Consider impact of waiving immunity

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## Payment Bonds – Requirements

- Required if the value is > \$25,000 → TGC 2253.021(a)(2)
- Payment Bond must be “in the amount of the contract”  
→ TGC 2253.021(c)(2)
- Cannot require a bond from any specific company, agent, or broker → TGC 2253.021(g)

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## Payment Bonds – What do they do?

- Purchased “solely” for the protection and use of “payment bond beneficiaries who have direct contractual relationship with the prime contractor or a subcontractor to supply public work labor or material” →TGC 2253.021(c)(1)
- No liens on public property; provides substitute for liens by protecting subcontractors and suppliers working on public works jobs
- Relief provided by payment bond is the sole remedy available to the payment bond beneficiary

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## Payment Bonds – Common Issues

- District gets contacted by subcontractors or suppliers
- Notify contractor of issue
- Direct Architect to provide copy of payment bond and address issue
- TGC 2253.026 – District must furnish payment bond, contract, and TDI phone number to person requesting information if the person submits an affidavit that the person:
  - Has supplied labor or material for which the person has not been paid;
  - Has contracted for specially fabricated material and has not been paid; or
  - Is being sued on a payment bond

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## Payment Bond – What if you don't have one?

- Not Required → No liens on public property
- Not Required → Retainage (see TPC 53.101)
- Not Required → Liens allowed on funds held by District due to the contractor for improvements (TPC 53.231)
- Required → District has the same liability that a surety would have if the payment bond had been properly issued by a surety and obtained by the District, TGC 2253.027(a)(1)
- Required → Payment bond beneficiary is entitled to a lien on money due to the prime contractor, TGC 2253.027(a)(2)

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## Bid Bonds – When are they required?

- Not Required by TGC 2253
- Only stated as an option in TGC 2269 as a recourse for providing delayed Performance/Payment Bonds in CMAR and Design-Build Methods
- See CVD/CVE Legal Board Policy

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## Bid Bonds – What do they do?

- Bond required of bidders/proposers to protect the District if a low bidder or selected proposer attempts to withdraw its bid/proposal or fails to agree to a contract on those terms
- Ensures capable and qualified contractors are submitting bids/proposals
- All bidders/proposers will have been vetted by a surety (some initial level of financial, credit, history, and project backlog scrutiny)
- Protects District from Financial Loss Due to Contractor Failure
- Prevents the following:
  - Contractors from failing to honor terms of its bids/proposals
  - Bids/Proposals on multiple projects by Contractors when they only have resources for one
  - Additional costs to District by having to repeat the bidding, review, selection processes

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## Special bond requirements based on Delivery Method

- In Construction Manager-At-Risk projects (TGC 2269.258):
  - Penal sums of bonds must equal to Project Budget specified in the RFQ and must be provided within 10 days of contract execution; or
  - CMAR furnishes a bid bond or other security to ensure CMAR will provide bonds when GMP is established.
- In Design-Build projects (TGC 2269.311), bonds not required to cover design portion of the contract, and:
  - Penal sums of bonds must be equal to the Construction Budget specified in the Design Criteria Package and must be provided within 10 days of contract execution; or
  - D-B furnishes a bid bond or other security to ensure D-B will provide bonds before construction begins.
- In Construction Manager-Agent projects, the CM-Agent may NOT provide the performance/payment bonds (TGC 2269.203(3)).

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**EICHELBAUM WARDELL**  
HANSEN POWELL & MUÑOZ, P.C.

[www.edlaw.com](http://www.edlaw.com) | (800) 488-9045 | [information@edlaw.com](mailto:information@edlaw.com)