

### **THE LABOUR AND MATERIAL BOND CLAIMS**

Where a general contractor defaults on a construction project and a sub-contractor remains unpaid for services performed or materials supplied on the bonded project the unpaid subcontractor may bring a claim against the surety (the entity that issues the bond) pursuant to the labour and material bond for recovery of the unpaid account from the general contractor (known as the principal, as the term is defined in the bond) or in some cases for recovery of the unpaid account from a subcontractor of the principal. This is an important tool in very unpaid contractor's arsenal.

#### ***Is the project bonded?***

Unsure of whether the project is bonded; send out a letter pursuant to section 39 of the *Construction Lien Act*, to the parties including the owner, general contractor, and/or subcontractor, asking among other things, to provide a copy of any applicable labour and material payment bonds.

Obtain a copy of the bond.

Read the bond carefully, as wording may vary from bond to bond.

#### ***Is your client a claimant for the purpose of the bond?***

Become familiar with the essential condition precedents stipulated in the surety bond for the presentation of a claim.

A claimant, as the term is defined in a standard labour and material bond, must have a direct contract with the principal for labour, material or both, or in some cases have a direct contract with a subcontractor of the principal.

The claimant has not been paid in accordance with the terms of the contract with the principal.

#### ***Satisfy the notice requirement set out in the surety bond***

As defined in the bond, the claimant must give written notice of its claim, including the amount claimed, to the principal and surety within one-hundred and twenty (120) days, for example, after such claimant should have been paid in full under its contract with the principal or after the date of last supply in respect of any claim other than the holdback.



Mail a copy of the notice letter by registered mail to the principal or if applicable, the subcontractor of the principal, and the surety at the place of business. As a matter of practice, notice should also be provided to the project owner (known as the obligee under the bond) and any mortgagors as identified in the parcel abstract of the project land/s.

***Investigation phase: request for information and documentation by surety in order to properly investigate claim***

As the moving party, provide the surety with the relevant documentation in a timely manner.

Relevant documentation relating to the unpaid account, can include for example, the contract or purchase orders, invoices, change orders, delivery or shipping tickets, etc.

Provide the surety with evidence of the last date of supply, such as a delivery ticket or time sheet which is important for establishing the relevant limitation period.

If applicable, provide the surety with a copy of the claim/s for lien or statement of claim under any applicable lien or breach of trust actions.

***Commence a labour and material bond claim***

The surety bond claim must be issued within one (1) year from the event set out in the bond, for example, the date of the last invoice to the principal or the date, in which the principal ceased work on the contract, otherwise the claim under the labour and material payment bond will expire.

***Why sue the surety when there are other remedies such as the Construction Lien***

A claimant can have competing claims including the lien claim, breach of trust claim and/or surety bond claim for recovery of an unpaid account. Bringing the bond claim places added pressure on the parties and increases a claimant's chances of recovering the unpaid debt.

***Issues to keep in mind during surety bond litigation***

In circumstances where materials are supplied, ensure that the materials supplied by the claimant can be traced to the bonded project/s. In such circumstances, provide delivery or shipping tickets which indicate that the materials were supplied to the shipping address being the bonded project/s.



A surety is not liable to the claimant unless its principal is liable. The surety may raise any defence which the principal might have used if the action had been brought against the principal including the “pay when paid” defence where the principal pleads that they still have not received payment from the project owner.

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