Where Is The Money?
VERIFYING FINANCING FOR CONSTRUCTION PROJECTS

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What We’re Going to Cover

- Reducing Potential Progress Payment Risks on Private Construction Projects - John Bustard
- Typical Contract Language and Case Study—Mike Pipkin
- Underwriting Considerations—Mike Heidrick
- Collaborating with Construction Lenders To Confirm Funding - John Bustard
- Statutory Language and Case Study—Mike Pipkin
- Situations, Cases, and Techniques in the Underwriting and funding Confirmation Process - Mike Heidrick and John Bustard
- Conclusions and Questions—John Bustard
Reducing Potential Progress Payment Risks on Private Construction Projects

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Reducing Potential Progress Payment Risks on Private Construction Projects

- Economic conditions
- Timing
- Leverage
- One size fits all?
- Contractor/Bond obligations
Typical Contract Language

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AIA A201 General Conditions

§ 2.2 Evidence of the Owner’s Financial Arrangements

§ 2.2.1 Prior to commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence. If commencement of the Work is delayed under this Section 2.2.1, the Contract Time shall be extended appropriately.
AIA A201 General Conditions

§ 2.2 Evidence of the Owner’s Financial Arrangements

§ 2.2.2 Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract only if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor’s request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor’s reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.

AIA A201 General Conditions

§ 2.2 Evidence of the Owner’s Financial Arrangements

§ 2.2.3 After the Owner furnishes evidence of financial arrangements under this Section 2.2, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

§ 2.2.4 Where the Owner has designated information furnished under this Section 2.2 as “confidential,” the Contractor shall keep the information confidential and shall not disclose it to any other person. However, the Contractor may disclose “confidential” information, after seven (7) days’ notice to the Owner, where disclosure is required by law, including a subpoena or other form of compulsory legal process issued by a court or governmental entity, or by court or arbitrator(s) order. The Contractor may also disclose “confidential” information to its employees, consultants, sureties, Subcontractors and their employees, Sub-subcontractors, and others who need to know the content of such information solely and exclusively for the Project and who agree to maintain the confidentiality of such information.
ConsensusDocs 200

4.2 FINANCIAL INFORMATION Before commencing the Work and thereafter, at the written request of Constructor, Owner shall provide Constructor with evidence of Project financing. Evidence of such financing shall be a condition precedent to Constructor’s commencing or continuing the Work. Constructor shall be notified before any material change in Project financing.

EJCDC C-700 (Rev. 1) General Conditions

9.11 (A) Upon request of Contractor, Owner shall furnish Contractor reasonable evidence that financial arrangements have been made to satisfy Owner’s obligations under the Contract Documents (including obligations under proposed changes in the Work).
Case Study—Key Contract Language

§ 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER
§ 2.2.1 Prior to commencement of the Work, the Contractor may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract. Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

Case Study
The “Historic” Hotel
The “Historic” Hotel—Key Contract Language

§ 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER
§ 2.2.1 Prior to commencement of the Work, the Contractor may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract. Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

The “Historic” Hotel—Key Contract Language

ARTICLE 14: TERMINATION OR SUSPENSION OF THE CONTRACT
§ 14.1 TERMINATION BY THE CONTRACTOR
§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 90 consecutive days through no fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:
1. Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
2. An act of government, such as a declaration of national emergency that requires all Work to be stopped;
3. Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.6.1., or because the Owner has not made payment on a Certificate that is properly due on an Application for Payment within the time stated in the Contract Documents; or
4. The Owner has failed to furnish to the Contractor promptly, upon the Contractor’s request, reasonable evidence as required by Section 2.2.1.
Case Study
The "Historic" Hotel

Underwriting Considerations
MICHAEL HEIDRICK
Contracting

Problem Solving

ABC Construction

Fundamental Underwriting

Contracting
- Cash Flow

Construction Business Insolvency

Poor payment practices

Unpaid contractors & suppliers

Financial difficulties
Account Level Underwriting

Business Practice
- Hung Account Receivable
- One poor job
- Liens, Foreclosure, Sub Litigation, Pay clauses
- Mitigate and avoid

Collaborating with Construction Lenders

JOHN BUSTARD
Bid Bond

PROVIDED, HOWEVER, neither Principal nor Surety shall be bound hereunder unless Obligee prior to execution of the final contract shall furnish evidence satisfactory to Principal and Surety that financing has been firmly committed to cover the entire cost of the project.

PDF of Document Included in Handouts
Statutory Language

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Tex. Bus. & Comm. Code § 56.054(g)

(g) A primary obligor shall furnish the information described in Subsection (d) or (e), as applicable, to the contingent payor not later than the 30th day after the date the primary obligor receives a written request for the information. If the primary obligor fails to provide the information under the written request, the contingent payor, the contingent payee, and their sureties are relieved of the obligation to initiate or continue performance of the construction contracts of the contingent payor and contingent payee.

Tex. Bus. & Comm. Code § 56.054(g)

(g) [An owner] shall furnish the information described in Subsection (d) or (e), as applicable, to the [general contractor] not later than the 30th day after the date the [owner] receives a written request for the information. If the [owner] fails to provide the information under the written request, the [general contractor], the [subcontractor], and their sureties are relieved of the obligation to initiate or continue performance of the construction contracts of the [general contractor] and [subcontractor].
Case Study

The Retirement Complex

Situations, Cases, and Techniques in the Underwriting and funding Confirmation Process

JOHN BUSTARD AND MICHAEL HEIDRICK

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Conclusions and Questions