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Regional Breakout Session

Where Is The Money?


VERIFYING FINANCING FOR CONSTRUCTION PROJECTS

JOHN BUSTARD



KING & NEEL

MICHAEL HEIDRICK



THE HARTFORD



MIKE PIPKIN



WRP
WEINSTEIN RADCLIFF
PIPKIN
ATTORNEYS AT LAW LLP

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

JOHN BUSTARD



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Reducing Potential Progress Payment Risks on Private Construction Projects

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



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Typical Contract Language

MIKE PIPKIN



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.



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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.



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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.



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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).



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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.



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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.



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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 act or 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 9.4.1, 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.



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Case Study
The “Historic” Hotel

Underwriting Considerations

MICHAEL HEIDRICK



Contracting

Problem Solving

ABC Construction

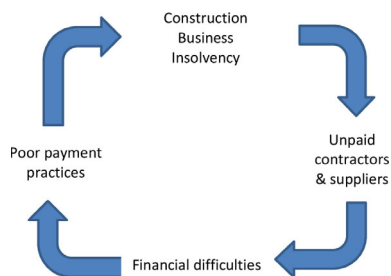


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Fundamental Underwriting

Contracting

- Cash Flow



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Account Level Underwriting

Business Practice

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



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Collaborating with Construction Lenders

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Bid Bond

PROVIDED, HOWEVER, neither Principal nor Surety shall be bound hereunder unless Oblige 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.



BID BOND
(Private Work)

KNOW ALL MEN BY THESE PRESENTS, That we _____ as Surety, are held and firmly bound unto _____ Oblige, in the sum of _____ Dollars (\$ _____ of Bid) for the payment of which we bind ourselves, our legal representatives, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has submitted or is about to submit proposal to Oblige on a contract for _____

NOW, THEREFORE, if the said contract be awarded to Principal and Principal shall, within such time as may be specified, enter into the contract in writing and give such bond or bonds as may be specified in the bidding or contract documents with surety acceptable to Oblige, or if Principal shall fail to do so, pay to Oblige the damages which Oblige may suffer by reason of such failure not exceeding the penalty of this bond, then this obligation shall be void; otherwise to remain in full force and effect.

PROVIDED, HOWEVER, neither Principal nor Surety shall be bound hereunder unless Oblige 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.



Signed, sealed and dated _____



PDF of Document
Included in Handouts

Principal
By _____

Surety
By _____, Attorney-in-Fact



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(TO BE TYPED ON LENDER'S LETTERHEAD)

(Insert Date)
(Surety Company)

Re: Project:
Contractor:
Owner:
Contract Price:

Gentlemen:

This is to confirm that we have completed arrangements for a loan to the Owner in the principal amount of _____. Pursuant to and upon the conditions set forth in the Loan Agreement between us and the Owner, the sum of _____ is set aside to pay the Contractor for work performed by it under its construction contract dated _____, with the Owner for construction of _____.

We will disburse funds directly to the Contractor for work done by it, upon satisfaction of the conditions set forth in the Loan Agreement for each payment requested.

In the event we declare a default by the Owner as borrower under any of the Loan Documents, as defined in the Loan Agreement, and if we elect to discontinue disbursement of any of the loan proceeds to be used for payment of the Contractor, we agree to provide the Contractor with written notice of such default; and in any such event we shall continue to reimburse the Contractor for all costs incurred by it under its construction contract and payable by the Owner for the period up to and including the fifteenth (15th) day after the giving of such written notice.

In the event that the Contractor were to be in default and as a result thereof we require that the Surety complete the work, we hereby agree that the undisbursed balance of the funds set aside to pay the Contractor shall be available to and may be used by the Surety on the same conditions that govern payments to the Contractor. We further agree that the Surety has no obligation to repay any of the loan proceeds advanced by us.

Very truly yours,

ACCEPTED & AGREED:
(Owner)

By _____
Date _____



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Included in Handouts

Bond

LENDER'S DUAL OBLIGEE RIDER TO PERFORMANCE BOND

WHEREAS, Hereinbefore, on or about the _____ day of _____, _____,

as Contractor entered into a written agreement with _____

as Owner for the construction of _____

WHEREAS, the Contractor and _____ a _____ corporation, and _____, as Surety, executed and delivered to the Owner their joint and several Performance Bond, and _____

WHEREAS, the Owner has arranged for a loan for the exclusive purpose of payment for the performance of said Contract and has requested the Contractor and Surety to join with the Owner in the execution and delivery of this Rider, and the Contractor and Surety have agreed so to do upon the conditions herein stated.

NOW THEREFORE, in consideration of one dollar and other good and valuable consideration, receipt of which is acknowledged, the undersigned agree that the said Performance Bond shall be, and is, amended as follows:


1. The name of _____ as Lender shall be added to said bond as a named Obligee.
2. The rights of the Lender as a named Obligee shall be subject to the condition precedent that the Owner's obligations under the contract be performed.
3. The aggregate liability of the Surety under said bond to the Owner and the Lender, as their interests may appear, is limited to the penal sum of the said bond.
4. The Surety may, at its option, make any payment under said bond by check issued jointly to the Owner and the Lender.
5. Except as herein modified, said Performance Bond shall be and remain in full force and effect.

Signed and sealed this _____ day of _____, _____.

(Seal if corporation)
Attest _____ By _____ Owner

(Seal if corporation)
Attest _____ By _____ Contractor


_____ By _____ Attorney-in-Fact



**PDF of Document
Included in Handouts**

Statutory Language

MIKE PIPKIN



**WEINSTEINRADCLIFF
PIPKIN**
ATTORNEYS AT LAW LLP

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.



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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].



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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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ESCROW AGREEMENT

THIS AGREEMENT is made on _____, by and among _____
 _____ (the "Owner"), _____
 (the "Contractor), and _____ (the "Escrow Agent").


THE BACKGROUND

A. The Owner has entered into a Construction Contract dated _____
 (the "Construction Contract") with the Contractor relating to _____. A
 copy of the Construction Contract is attached hereto as Exhibit "A".

B. As agreed by all parties, _____
 (Construction Manager) will certify all payments due to the Contractor under the Construction
 Contract.

C. _____ (the "Surety") has issued in
 favor of the Owner as obligee a Performance & Payment Bond covering the Construction
 Contract.

D. At the request of the Contractor and the Surety, the Owner has agreed to
 deposit with the Escrow Agent the sum of _____ upon the terms and conditions set forth
 below.



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Conclusions and Questions



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