

# Surety Bonds



Amy Emerson  
Allensworth

How do I get

Paid?

# BOND, SURETY BOND?

## Performance Bond

- 3-party agreement: surety guarantees contractor obligations for premium payment
- Ensures contractor completes the work
- Contract with statutory overlay



# BOND, SURETY BOND?

## Performance v. Payment Bond

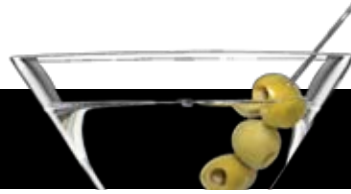
- Performance = assures the contractor performs
- Payment = assures the contractor pays its subs



# BOND LINGO

---

“Shaken, not stirred”

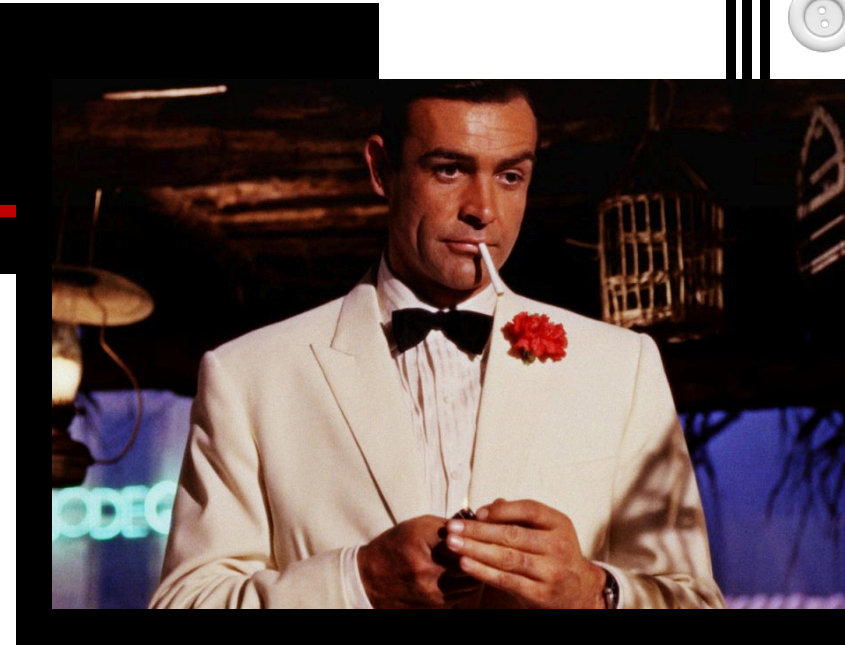


- City (owner): **Obligee**
- Contractor: **Principal** or primary obligor
- **Surety**: Obligor or secondary obligor
- **Indemnitor**: covers the surety's losses on a bond claim
- **Bonded contract**: construction contract between City and Contractor

# GOVERNED BY CHAPTER 2253 OF THE TEXAS GOVERNMENT CODE

- Required on projects > \$100,000
- Limited exclusions
  - Waste & environmental hazards
- Statute incorporated into every bond & defines scope of bond
- SOL = 1 year from termination, abandonment, or ~~final~~ completion\*

Substantial



# KEY DOCUMENTS

**Document A312™ – 2010**  
Conforms with The American Institute of Architects AIA Document 312

*Performance Bond* Bond Number: 107303585

**CONTRACTOR:** (Name, legal status and address)  
[Redacted]

**SURETY:** (Name, legal status and principal place of business)  
[Redacted]

**OWNER:** (Name, legal status and address)  
[Redacted]

**CONSTRUCTION CONTRACT**  
Date: January 12, 2021  
Amount: \$2,386,929.00  
Description: (Name and location)  
[Redacted]

**BOND**  
Date: January 12, 2021  
(Not earlier than Construction Contract Date)

Amount: \$2,386,929.00

Modifications to this Bond:  None  See Section 16

**CONTRACTOR AS PRINCIPAL**  
Company: [Redacted] (Corporate Seal)  
Signature: [Signature] (Corporate Seal)  
Name: [Redacted]  
And Title: [Redacted]

**SURETY**  
Company: [Redacted] (Corporate Seal)  
Signature: [Signature] (Corporate Seal)  
Name: [Redacted]  
And Title: [Redacted]

**OWNER'S REPRESENTATIVE:** (Architect, Engineer or other party)  
[Redacted]

(FOR INFORMATION ONLY - Name, address and telephone)  
AGENT or BROKER: [Redacted]

**Performance Bond**  
(Private Work)

Bond No. 10370

KNOW ALL MEN BY THESE PRESENTS:  
That we, [Redacted] (Here insert the name and address or legal title of the Contractor)  
as Principal, hereinafter called Contractor, and  
[Redacted] (Here insert the name of the Surety) a corporation of the State of New Hampshire, with  
Office, City of Worcester, MA,  
as Surety, hereinafter called Surety, are held and firmly bound unto  
[Redacted] (Here insert the name and address or legal title of the Owner)  
as Oblige, hereinafter called Owner,  
in the amount of Fourteen Million, Four Hundred Ninety-Seven Thousand, One Hundred Seventy-Eight and Dollars (\$ 14,497,178.80 ), for the payment whereof Contractor and Surety bind to their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Contractor has by written agreement dated February 25, 2015 entered into a contract with Owner for [Redacted]

in accordance with drawings and specifications prepared by [Redacted]

(Here insert full name, title and address)  
which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly and faithfully perform said contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

The Surety hereby waives notice of any alteration or extension of time made by the Owner.

PRF8000FX0601F

**PERFORMANCE BOND**

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

**CONTRACTOR (Name and Address):** [Redacted] **SURETY (Name, and Address of Principal Place of Business):** [Redacted]

**OWNER (Name and Address):** [Redacted]

**CONTRACT**  
Effective Date of Agreement:  
Amount: \$1,687,475.48  
Description (Name and Location): [Redacted]

**BOND**  
Bond Number: 4444507  
Date (Not earlier than Effective Date of Agreement):  
Amount: \$1,687,475.48  
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 Performance Bond to be duly executed by an authorized officer, agent, or representative.

**CONTRACTOR AS PRINCIPAL** **SURETY**

[Redacted] (Seal) [Redacted] (Seal)  
Contractor's Name and Corporate Seal Surety's Name and Corporate Seal

By: [Signature] By: [Signature]  
Signature Signature (Attach Power of Attorney)

[Redacted] [Redacted]  
Print Name Print Name

[Redacted] [Redacted]  
Title Title

Attest: [Signature] Attest: [Signature]  
Signature Signature

[Redacted] [Redacted]  
Title Title

EJCDC C-610 Performance Bond  
Prepared by the Engineers Joint Contract Documents Committee.  
Page 1 of 4

**Bond- many versions**



# KEY DOCUMENTS

---



- Construction contract
- “Contract Documents” – plans, specifications, general conditions, etc.
- Status of work and payment documents

# MYTHS BUSTED

## Bonds = Insurance

- Negotiated instrument
- Credit relationship
- Surety looks to indemnitors to recoup costs





# MYTHS BUSTED

---



Surety will save the day  
without more cost/time



- Responsible for contractor's obligations
- Entitled to contractor's defenses
- Independent defenses

# MECHANICS OF A PERFORMANCE BOND CLAIM

---



## STEP 1

### Read the bond

- Strictly construed
- Bond trumps construction contract

STEP

2

# UNDERSTAND SURETY DEFENSES



STEP

2

# SURETY DEFENSES

1

Liability limited to bond's penal sum

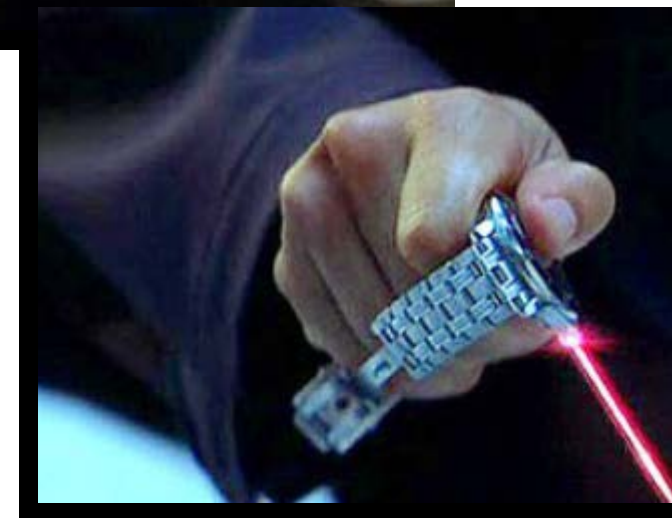
2

Limitations: 1 year

3

Failure to give notice of default or meet other conditions precedent

- Critical to follow bond requirements



STEP

2

# SURETY DEFENSES



4

## Improper default/termination & other contractor defenses

- City's failure to pay
- Design issues
- City's lack of responsiveness
- Substantial compliance
- Non-material breach

5

## Material alteration of construction contract

- Material change
- Without surety consent
- Surety prejudiced

STEP

3

# PRE-DISPUTE BEST PRACTICES

## Confirm bond complies with Chapter 2253

- Texas surety information included
- Penal sum of bond = construction contract price

## Review bond carefully

- Notice
- Conflict with TGC 2253

## Review construction contract for “surety”

- References



STEP

3

# PRE-DISPUTE BEST PRACTICES



Change orders → update penal sum

5

Contract variances → obtain surety consent

- Advances
- Payment when offsets/LDs exceed balance
- Early release of retainage
- Payment for problematic work

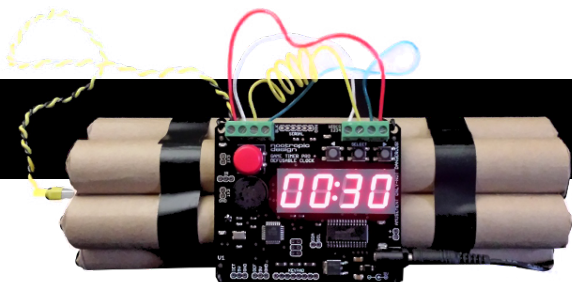
6

Keep surety in the loop & strictly follow notice requirements

STEP

4

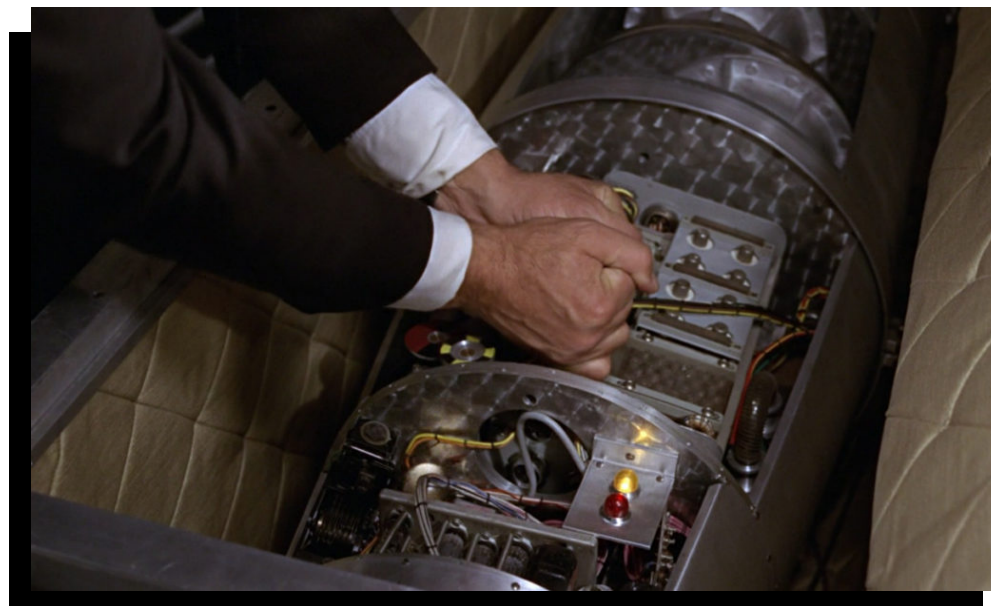
# MAKING THE CLAIM



When?

Read the bond (*Nova v. Turner*)

- Default
- Termination
- Abandonment
- Insolvency/bankruptcy





# STEP

# 4

# MAKING THE CLAIM

## How?

- 1 Review bond for notice requirements
- 2 Compare with notice, default, termination requirements in construction contract
- 3 Follow default or termination procedures in both
  - Notice
  - Opportunity to Cure
  - Conflict? More onerous or both
- 4 Send notice CMRRR to contractor and surety
  - Use addresses in bond & contract
  - Also send notice to surety's registered agent (see TDI website)



# STEP

# 4

# MAKING THE CLAIM

## How? (cont.)

5

Call surety, request meeting

- Document calls, attempts to call, messages, etc.

6

At end of cure period, send second notice to contractor & surety

- Include all previous letters/notices +
- Other attempts to request assistance from surety

7

Comply with any other bond requirements

- Agreement to provide contract balance
- Additional notice for surety default



STEP

5

# THE SURETY'S RESPONSE

## Investigation

- Surety wants to know:
  - Validity of city & contractor positions
  - Status of work
  - Payment & contract balance
- Will request information & documents
- Cooperate



STEP

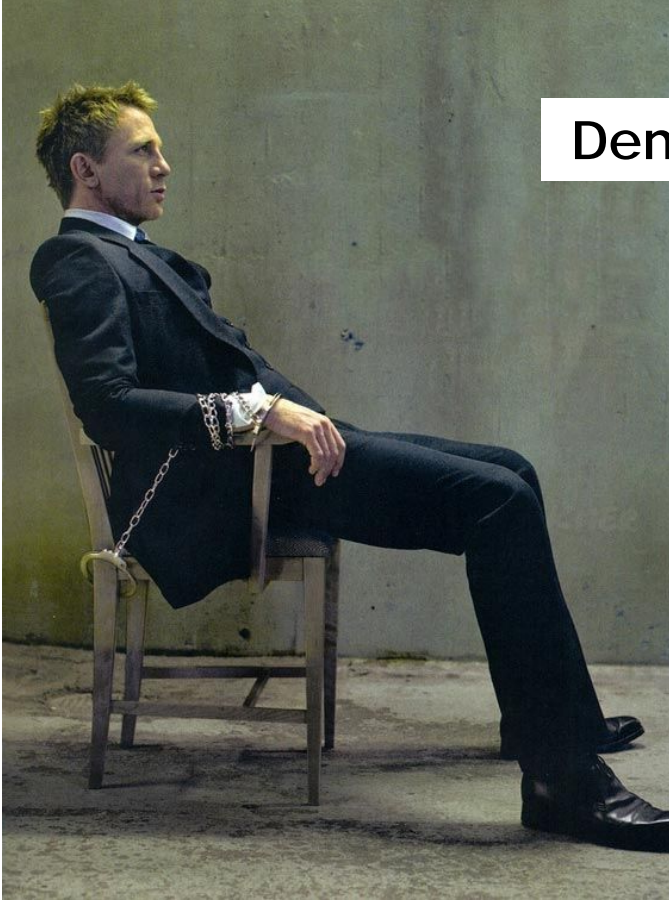
5

# THE SURETY'S RESPONSE

## Surety's Options

### Deny the claim – aka: Do Nothing

- Most common
- Low cost to wait and see
- City's next steps:
  - Suit or arbitration against contractor & surety
  - Beware of 1-year limitation
- What the heck is the point of the bond?!



STEP

5

# THE SURETY'S RESPONSE

## Assist Contractor with Completion



Finance, funds control, consultant assistance to contractor

- Helps cash flow, management
- More likely if project is almost done

STEP

5

# THE SURETY'S RESPONSE

## Takeover the Project

- Takeover agreement
- Completion contract
- Most common with defunct contractor



Questions?



Amy Emerson  
[aemerson@allensworthlaw.com](mailto:aemerson@allensworthlaw.com)  
(512) 708-0507

