



Frequently Asked Questions

From Bond Producers About Their Role
in the Contract Bond Claims Process

Frequently Asked Questions from Bond Producers About Their Role in the Contract Bond Claims Process

What is the role of a professional surety bond producer in the bond claims process? Although the bond producer is not a party to the bond, the producer can be a valuable resource to the parties and can play a significant facilitative role in a claims situation. Probably the best word to describe the bond producer's role is as "facilitator." The producer can facilitate conversations and meetings between principals and surety claims departments, foster appropriate tones during such conversations and meetings, and build mutual comfort levels between the parties. The producer can bring contextual information about the principal to the claims process to help expedite the process and mitigate costs, which is in all parties' best interests.

The bond producer's early involvement in the claims process can facilitate communications between the principal and the surety and help familiarize the surety with the facts and nuances of the situation. The professional surety bond producer should understand that his/her role is not to investigate or evaluate the claim; that is the surety's role. At some point during the claims process, and this will vary for each claims situation, as each is unique, the bond producer may become less involved, because his/her role to inform and facilitate has been essentially fulfilled.

Project types, contract and bond form language, jurisdictional requirements, and project team composition ensure the unique nature of each situation and emphasize the importance of information exchange among the principal, the producer, and the surety claims professional. In addition to bond producers keeping the surety claims department informed, producers should ascertain if surety companies want to keep the surety underwriting department informed in claims situations.

The validity of any claim and the procedures necessary to preserve or assert a claim can be complicated matters. An attorney knowledgeable about the law of a particular jurisdiction can provide legal advice for specific factual situations. As a result, "you should talk to your own lawyer" is often the bond producer's best response to any request for advice on specific claim matters.

The questions and suggested answers below are provided as general guidance to bond producers when they are faced with the inevitable inquiries from obligees, principals, claimants, attorneys, and the press. These questions and answers are meant to be merely illustrative and are not intended to be definitive for any particular situation.



I received a call from a subcontractor on a project who says he/she is not getting paid by my general contractor client and he/she wants to file a claim. How do I respond?

Provide the caller with the address (email and fax number, as necessary) of the surety claims department, if known, and suggest that the caller or his or her own attorney contact the surety directly with regard to any claim. You might also try to obtain the name and contact information of the caller and pass it on to the principal and the surety claims department.

Do not comment on the specifics and/or merits of the claim or any investigation or suggest what you think may be the outcome of any investigation.



I have a subcontractor client who is not getting paid on a job and wants to know what to do to protect his/her rights. What should I do?

After advising the subcontractor to consult with its own attorney, suggest that the subcontractor client obtain a copy of the general contractor's payment bond. In addition, advise the subcontractor client, with the assistance of legal counsel, to meet all notice deadlines in the bond and any applicable statute and to provide as much documentation as possible to the payment bond surety in order to expedite any investigation the surety undertakes. Legal counsel could also advise concerning filing any lien available under state law. (See # 4 below.)

3

Is making a claim on a bond on a private project different from making a claim on a public works project?

Bond producers fielding this question should recommend that potential claimants seek legal counsel. Bonds issued for private projects may contain notice requirements, generally delineated in the bond form itself, and time limits for filing suit. These notice and suit limitation requirements are strictly enforced, and, if a bond claimant is not in compliance, he/she may lose rights under the bond. Bonds issued for public projects also may contain notice and limitation requirements, but the requirements written into these bonds may be superseded by statutes that apply to public works projects.

Statutes requiring bonds on public works projects often include notice requirements and time limits for filing suit. On a public project it is essential to understand these statutory provisions as well as any set forth in the bond. That is one reason a potential claimant should be advised to consult immediately with legal counsel.

4

If a subcontractor files a lien, does he/she still need to make a separate bond claim?

Lien claims and bond claims are separate and distinct actions. A lien claim, which is a claim against the improved real property and, in some jurisdictions, against contract funds, may be “bonded off” after it is filed through a release of lien bond. The lien claimant must comply with applicable state law to establish and enforce its lien.

A payment bond claim is a separate claim that the subcontractor can pursue against the bond principal and the surety. The subcontractor, of course, must comply with any conditions set forth in the bond or applicable statute.

In summary, a claimant is better protected if he/she files both a lien claim and a payment bond claim, to the extent he/she has the option to file both. Please note that filing a lien claim may not always be an option. (See # 2 above.)

5

I have a general contractor client who needs to make a performance bond claim on a subcontract bond. What guidance can I give him/her?

Advise the general contractor client to ascertain the name and contact information of the surety on the subcontractor’s performance bond. In addition to the bond itself, ready sources of contact information for the surety include the surety company’s website and the United States Department of Treasury List (Circular 570), available at www.fms.treas.gov/c570/c570_a-z.html.

Suggest that the general contractor may want to seek legal advice from counsel who can assist with preparing a documented, written claim notice to the surety as soon as possible in order to preserve the general contractor’s rights. Avoid discussing the specifics of any investigation that may be conducted by the surety or any likely outcome of any investigation that may be conducted by the surety. It is important that you limit your role to that of a facilitator.

6

I need to give information about the bonded principal to the relevant surety claims department. Should I relay the information by email or by a phone call?

Relaying information to the surety claims department about the bonded principal by phone call is generally preferable over email. A phone call will allow for a quick verbal exchange and an opportunity for the surety to ask questions in real time and to let you know if it needs for you to send any documents.

7

I received a call from a contractor client who says that he/she sent a letter to the surety regarding a claim but has not heard back. The contractor client asks how long he/she should wait to hear from the surety. Is there a time limit? What advice should I give?

Be very careful here. Understand that you should not make any statements that could be construed as legal or technical advice. Many bond claims are subject to notice provisions, and all are subject to statutes of limitations. You may wish to assist in discerning if the letter was received. Try both the phone and email. If you do not receive a prompt acknowledgment from your follow-up inquiry, ask for the name and phone number of the vice-president of surety claims and place a phone call to him/her.

8

I received a call from a supplier on a project wanting a copy of the payment bond of my general contractor client before shipping materials to the job. How do I handle this?

Suggest that the supplier contact the general contractor or the bond obligee directly and request a copy of the fully executed payment bond. Also, contact your client and inform him/her that the supplier contacted you and request instructions from your client.

If so directed by your client, you may verify the bond over the phone and provide the name of the surety company and the bond number for the supplier to conduct his/her own due diligence.

In some, but not all, circumstances, the general contractor or the bond obligee may have a legal obligation to furnish a copy of the payment bond to perspective subcontractors and suppliers or to subcontractors and suppliers performing work or furnishing materials on a project.

9

I received a call from my contractor and he/she does not want the surety to pay the claim as it is not valid. How do I respond?

Contact the surety claims representative and ask him/her to explain the surety's position. If, after you have spoken with both parties, you are still unclear as to why there is a difference of opinion, suggest a conference call or meeting--to include you, the assigned claims professional, and the contractor--to discuss the matter further. The surety will have to decide whether to pay the claim, but you can help facilitate a full discussion so that the surety has the benefit of all available information.

10

I have been asked to attend a pre-default meeting among the owner/obligee, contractor/principal, and surety concerning alleged improper performance of the contractor/principal on the project. What do I do at this meeting?

Your role in this meeting is that of a facilitator of information exchange and discussion. Do not give an opinion about the relative merits of the positions of the three parties at the meeting. You can facilitate an appropriate tone, helping to mitigate any potential animosity among the parties.

11

An attorney for a claimant has called (or written) and demanded information from my file. How do I handle this request?

Do not agree to provide any information to the attorney. Ask him/her to put any such request in writing and advise him/her that you will seek advice of counsel as to how to respond further. Do not continue with any phone conversation beyond the point of seeking the demand in writing. Notify the party whose information is sought and the surety immediately by phone and in writing as to who called you, when, and exactly what you were asked to provide. It is imperative that you keep any conversation brief and promptly report any conversation or receipt of any written demand to the party whose information is sought, the principal, and the surety.

If the matter is in litigation and you receive a subpoena, immediately consult with your own legal counsel and tell the principal, the surety, and any other party whose information is sought so that they can take steps to protect any privileged information.

12

How do I respond to situations when the obligee contacts me, such as the following?

The obligee is probably contacting you because you signed the bond as attorney-in-fact for the surety. Explain to the caller that you are not the surety and do not represent the surety in claim matters. Provide the caller with contact information for the relevant surety claims department, if known.

a. An obligee contacts me stating that the principal is not performing on a project or paying subcontractors.

Try to keep the conversation to a minimum. Thank the person for calling and advise him/her that you will pass along the information to the contractor. Promptly notify your contractor client and its surety that you received the call. In addition, advise your client that you are notifying the surety.

b. What do I advise the obligee to do?

Do not advise the obligee to do anything or to refrain from doing anything. Thank the obligee's representative for calling and advise him/her that you will pass along the information to the contractor. Promptly notify your contractor client and its surety that you received the call.

c. What do I tell my client, if anything?

Tell your client immediately that you received an unsolicited phone call. Advise your client that you related to the obligee's representative that you would pass along the information to the contractor client and the surety. Advise that you committed to nothing more. In addition, inform your contractor client that you notified its surety about the obligee's call.

d. Does it make a difference if the obligee calls me, emails me, or sends me a registered letter?

No, all communications from the obligee (or its purported representatives) that pertain to performance or non-performance by the contractor should be reported immediately to the contractor client and its surety.

e. I was copied on a letter from the obligee to the principal, advising the principal that it is not performing on the project to the obligee's satisfaction. What should I do with this letter?

Do not reply in any manner to the obligee. Instead, refer the letter immediately to the claims department of the applicable surety and inform the principal that you have done so.

13 **Some states require the subcontractors and suppliers to notify the surety that they are part of the project to protect their rights to make a claim. What should I do with those letters?**

Absent an existing agreement between the bond agency and the surety, these letters should be sent promptly to the surety claims department. Do not respond to the writer of the letter. The surety claims department will decide how to proceed. Notify the principal that you have sent the letter to the surety claims department.

14 **I read in the local paper that my client is not performing on a bonded project. What should I do with this information/newspaper article?**

Inform your contractor client about the article and let your client know that you are informing the surety about the article. Provide a courtesy copy of the article to the surety claims department. If you are contacted by the press and asked to comment on behalf of the principal or the surety, refer any such request immediately to the principal and the surety claims department. Do not make any public statement on behalf of the principal or the surety, regardless of the circumstances.

Disclaimer: These FAQs and responses are for general informational purposes only. The information is not provided as legal advice and shall not be construed as such. The information provided cannot be used for mediation, arbitration, litigation, or any other dispute resolution mechanism. Transmission and/or receipt of this information does not create an attorney-client relationship. No one should act upon this information without seeking appropriate legal counsel on the particular facts and circumstances at issue.



National Association of Surety Bond Producers

1140 19th Street, NW, Suite 800

Washington, DC 20036

Phone: 202-686-3700

Fax: 202-686-3656

www.nasbp.org

January 2014