

# Surety Bond Quarterly

AN OFFICIAL PUBLICATION OF  
THE NATIONAL ASSOCIATION OF  
SURETY BOND PRODUCERS

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## HOT ISSUES in the WORLD OF SURETY

**Meet NASBP President  
Howard Cowan**

**Risks in the  
"New Normal" Environment**

**Drones Take Flight**

**New AIA-A201 Changes**

**Getting Paid by the Feds**



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#### SUMMER 2017

This summer issue of *Surety Bond Quarterly* explores some of the hottest topics in the surety industry today. New leaders are shaping surety policy and practice, while new technology is bringing opportunity and risk to the construction environment. Learning how to expedite federal payments to contractors and understanding significant changes to the AIA A201 family of standardized construction documents are essential. Yet, as changes heat up the industry, surety fundamentals—and NASBP members' commitment to them—remain constant.

View this issue, past issues and Web-exclusive content online anytime at [www.suretybondquarterly.org](http://www.suretybondquarterly.org).



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# NASBP Upcoming Meetings & Events

## **SUMMER SURETY SCHOOL—Levels I, II & III**

July 30–August 4, 2017  
Dallas, TX

## **REGIONS 8, 9, 10 & 11 MEETING**

September 10–12, 2017  
Miramar Beach, FL

## **REGIONS 4, 5, 6 & 7 MEETING**

September 21–23, 2017  
Chicago, IL

## **REGIONS 1, 2 & 3 MEETING**

October 4–6, 2017\*  
Deer Valley, UT

## **MID-YEAR BOARD MEETING**

November 9–11, 2017  
Austin, TX

\*Note new pattern of days with the event starting and concluding a day earlier.

## 2017–2018 Executive Committee



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The three most important things in surety are:

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**R**elationships, **R**elationships

& **R**elationships



From the CEO

# Bringing Summer Heat: A Rundown of “Hot” Stuff in the Evolving World Surrounding Surety



**THIS CONSTANCY OF FUNDAMENTALS—PREQUALIFICATION AND GUARANTEES—IN THE MIDST OF CHANGING BUSINESS AND POLITICAL ENVIRONMENTS AND EVOLVING CONTRACT AND PROJECT RISKS VALIDATES THE WORTH OF SURETY BONDS TO PROTECT STAKEHOLDERS.**

You no doubt have heard the quote “The only thing that is constant is change,” attributed to the Greek philosopher Heraclitus, who believed in the centrality of change to everything in the universe. I think I can state for most that they do not associate change with surety bonding, but such an oversimplification ignores the fact that, although the fundamentals of suretyship have remained constant, the world surrounding surety certainly has changed dramatically over time. This constancy of fundamentals—prequalification and guarantees—in the midst of changing business and political environments and evolving contract and project risks validates the worth of surety bonds to protect stakeholders. Suretyship has adapted to different public needs, legal developments, procurement systems, project delivery methods, and a host of other changes. Today, the paucity of public financing, the need to pursue work through joint venturing, the introduction of new form contracts and bonds, technological innovations for construction and for surety systems, just to name a few recent developments, prove the continued truth of Heraclitus’ statement in our contemporary times.

This summer issue of *Surety Bond Quarterly* explores some of these “hot” topics currently coursing through our world of surety. Readers will learn about important leaders—new NASBP President Howard Cowan and the U.S. SBA Office of Surety Guarantees Acting Director Peter Gibbs—who are shaping surety policy and practice. Significant changes in new 2017 versions of the American Institute of Architects’ primary family of standardized construction documents, the A201 family, are

spotlighted in an article written by Kenneth W. Cobleigh, who serves as the Managing Director and Counsel at the American Institutes of Architects, overseeing the development and revision of its many standardized forms.

The march of technology continues to impact our clients and colleagues. Who would have imagined 10 years ago the prevalent use of drone technology at construction sites and the issues attendant with their use? Jonathan R. Hauser and Elizabeth Wright, attorneys with the firm of Robinson+Cole, overview important considerations to address potential risks posed by drone use. Technology innovations, specifically Insurtech, are also the subject of Robert M. Coon’s article, which details the exciting efforts being undertaken by NASBP and SFAA to imbue surety process transactions with greater efficiency.

What could be a hotter topic than understanding the ways in which to expedite payments from the federal government to contractors? Attorneys Adrian L. Bastianelli, III, and Lori Ann Lange in the Washington, DC, office of the firm of Peckar & Abramson, PC, decode in a two-part article the effective strategies for contractors to receive amounts due in timely fashion without running afoul of pertinent laws and regulations.

I hope this issue gives better insight into some of the hottest issues surrounding surety. I wish everyone a wonderful summer and the ability to beat the “heat.”

Warmest regards,

**Mark H. McCallum**  
NASBP CEO



NASBP President Howard Cowan

# HOWARD COWAN

## Building on a Solid Foundation

HOWARD COWAN, NASBP'S 2017-2018 President, never planned on a career in surety. "I came to the surety industry either through blind, dumb luck or the grace of God," he said.

Cowan graduated *summa cum laude* in philosophy from Louisiana Tech, attended the University of Munich on a Fulbright Scholarship, and served in the U.S. Air Force in Germany as a Russian linguist/intelligence analyst. He anticipated working in the U.S. civil service, but in late 1972, around the time Cowan left the service, President Richard Nixon froze civil service hiring, and Cowan had to make alternate plans. "Sue and I were married, and we had a young son who was exceptionally fond of eating," Cowan recalled.

He interviewed at Safeco Insurance in Dallas, talking to every department. "The last stop was surety. The manager had such a passion for surety that, by the time he finished describing what they did, I knew that was where I wanted to be. Within a few months, I realized I had found a profession that I had a passion for," he added. "They hired me in January of 1973, and 44 years later I still find that every day comes up new and exciting challenges."



NASBP 2017-2018 Officers

Cowan spent five years with Safeco, including two as the regional bond manager for its newly created Nashville region. He left Safeco to work for an agency in Lubbock, Texas, where he spent almost a decade before opening his own agency in 1987. "I was walking across the tarmac at the Lubbock Airport at midnight one night in the middle of winter. I had spent the day in Dallas and Midland/Odessa, and I reflected, 'If I am going to work like this, I might as well be working for myself.'"

Cowan persevered through some difficult early years, and today he

is a principal in the Acrisure, LLC dba Cowan-Hill Bond Agency, Inc., a two-person, surety-only shop. "It has been financially and emotionally rewarding. I am pleased with how my professional life has turned out."

Although Cowan has done some commercial surety work, "by temperament and experience I am a contract bond specialist. I am fascinated by contractors," he said. "They are interesting people, willing to shove everything they have out on the table to bid a job that may have all types of hidden problems, ranging from



Howard Cowan with his wife, Sue.



From left, Howard and Sue Cowan, current NASBP Immediate Past President Lynne W. Cook, and current NASBP Government Relations Committee Chair Tracy Tucker.



In 2014, Howard Cowan, right, met with then Speaker of the U.S. House of Representatives John Boehner (OH-R 8th), center. Also pictured, left, is NASBP Director of Government Relations Larry LeClair.

inadequate plans to underground conditions to bad weather to uncertain labor markets. Somehow, the good ones make it work.”

Cowan knows about making things work. In a schedule crammed with professional obligations, he has found time for his family and civic involvement. Last year, he and wife Sue celebrated their 50th wedding anniversary. They have two sons and six grandchildren.

### Finance and Government Affairs

When Cowan began selling surety bonds in 1978, NASBP was a very different organization. “NASBP was not necessarily an open and welcoming organization, and my then employer never achieved membership,” related Cowan. Cowan only joined NASBP when he opened his own agency in 1987.

“Needless to say, things have changed dramatically, and NASBP today is a highly professional and equal opportunity organization. It has meant so much to my career,” he said. He has served NASBP in many different capacities. As Financial Committee Chairman, Cowan recommended revisions to the association’s investment philosophy, establishing a discipline that has helped it successfully weather the market’s ups and downs.

Cowan also served as Vice Chairman of the Industry Relations Committee. “I am a political junkie.

One of my highway contractors told me that if you are in business and not involved in politics, pretty soon you will not be in business.” He has worked with Larry LeClair and Shannon Crawford of NASBP’s Government Relations team on state and national issues. “It has been a team effort of our Washington, DC staff and agents from all over the country. We have had success in recent years on issues that are not really Republican or Democratic but are critical public policy issues. I find that rewarding,” he added.

In 2009, in recognition for his many contributions to the industry and the association, NASBP presented Cowan with the prestigious John “Jack” J. Curtin, Jr., President’s Award.

### Going Forward

At the 2017 Annual Meeting, NASBP celebrated and reflected upon its 75 years of accomplishments, so Cowan has chosen “Building on a Solid Foundation” as the theme for his presidential year.

NASBP will need to continue its political involvement. “Our fate is tied to the needs of our clients and their particular economies; their points of interest very quickly become our points of interest. On a more parochial side, our product is under attack from alternative products and from politicians who are not familiar with how we add value. That attitude is in

spite of the fact that year in and year out we pay approximately one billion dollars to either finish construction projects or to honor obligations that have been guaranteed with our bonds,” he said.

On the surety industry workforce side, Cowan sees a need to meet the challenges of appealing to younger generations and of recruiting quality talent. “NASBP’s 5-15 Leadership Committee, open to people who have been in the industry at least five years but no more than 15, is a positive and impactful step,” he said.

“I also want to work toward more hiring, training, and retaining minorities so that we have a workforce that reflects our population as a whole,” he said. “We are also trying to help emerging firms in the construction industry to become successful. Such firms frequently are minority-owned or disabled veterans’ businesses.”

Cowan predicts the industry will have many new opportunities in the coming year, especially with the new administration’s push for infrastructure construction and rehabilitation.

As NASBP president, Cowan plans to follow the admonition of the Physician’s Oath to “first, do no harm.”

He concluded, “On a more positive note, I hope that, when my year as president is complete, our association and our industry will be stronger and better prepared for the next 75 years.”



# Mitigating the Hidden Risks in the “New Normal” Construction Environment

## NASBP White Paper



BY THOMAS C.  
SCHLEIFER, PH.D.

THE CONSTRUCTION INDUSTRY, high risk to begin with, is operating in a new post-recession landscape, characterized by tighter margins and serious labor shortages with less room for error. The unprecedented market downturn has weakened some construction organizations to the extent that they may have difficulty financing the growth that comes with market recovery, which, in turn, increases the potential for business failures and contract defaults.

Now more than ever, owners, contractors and designers need to increase risk awareness and risk protection. They should be concerned about the fact that construction business failures are far worse during market recoveries than during market slowdowns. At the beginning of a downturn the balance sheet blossoms as old receivables continue to come in and less money goes out for job costs when less work is performed. The opposite occurs during growth, which eats cash, when spending for current work exceeds money coming in from the lesser amount of backlog. The sustained downturn has financially weakened some companies to the point that they will not be able to finance their increased workload. When this occurs, it is possible for contractors to “cash flow” themselves out of business.

There is risk in any commercial transaction, but the construction industry has more than its fair share. Much of the risk in the building process is poorly defined and often misunderstood, with considerable ambiguity as to who is responsible for it. Designers avoid it, owners prefer to pass it along and contractors absorb it. To contractors, *risk* is not a dirty word. After researching the causes of contractor failure for more than thirty years, I have uncovered a noteworthy truth: The assumption of risk is part of every successful contractor’s DNA.

### THE ASSUMPTION OF RISK IS PART OF EVERY SUCCESSFUL CONTRACTOR’S DNA.

Today’s construction risk environment is dramatically different than it was even ten years ago, and the attendant risk factors are mutating just enough to be almost unrecognizable. The inherent construction risks of changes in project size, type, geographic area, key personnel and/or managerial maturity were documented in my first book, *Construction Contractors’ Survival Guide* (John Wiley & Sons), 27 years ago and are recognized by most construction professionals. The risks evolved over time and were updated in my latest book, *Managing the Profitable Construction Business* (Wiley RSMeans, 2014). However, there are developments in this new environment that will appreciably increase the risk of project and contractor failure. The obvious risks are skilled labor shortage, growth in general and subcontractor risk:

- **Shortage of Skilled Labor Risk** – Following the construction market collapse, a huge number of workers left the industry. Now that the industry is starting to grow again, companies that are short on skilled labor are already straining to complete quality work on time and on budget.
- **Company Growth Risk** – Since the recession, the market has begun to grow again. At such a time, growth is always welcome and rarely seen as a major cause of impending failure. However, research reveals that, when a construction company expands in size, it requires careful management decisions to reduce the risks inherent in the change. Growth itself impacts failure rate and the potential for financial distress.
- **Subcontractor Risk** – Subcontractors are a fundamental part of the construction

process and are subject to these same market changes. Each subcontractor is critical to project success, so it only takes one to disrupt the entire process, thus intensifying project risk.

There are other current industry developments that impact business and project risks:

- **Capital Risk** – Secured equipment loans and unsecured working capital lines of credit, as well as surety credit for bid, payment, and performance bonds, are vital to the growing construction enterprises. The length of the market downturn has financially weakened some companies and impacted their credit worthiness. A construction company may show positive income on its financial statement, yet suddenly have a financial crisis due to a lack of cash and limited borrowing power. A considerable number of construction companies exit the business yearly because they run out of credit.
- **Commodity Risk** – Construction is a custom service and product that owners are beginning to think is a commodity, which causes them to believe that all construction companies perform alike. This in turn can cause owners to be less discriminating about contractor selection and to think price is all that separates them. This is one of the reasons profit margins are low compared with the historic norms of 10 and 20 years ago. When buyers of construction services believe a product is a commodity, they generally expect to pay less.
- **Contract Risk** – In this highly competitive new growth market, contract terms concerning the responsibility of each party to the agreement attempt to shift risk in varying, and sometimes unrecognizable, directions. At the same time, case law (court rulings concerning construction disputes) seem to further cloud the issue of which party is responsible for what.
- **Change Risk** – When an organization expands in size, it is, in effect, becoming a different organization. Change always has risks associated

with it, which can make or break a company. For example, growth-related changes impact the amount of capital required, the time and attention management can spend on multiple projects, and the expertise required to complete new types of projects. Change can be threatening.

Advancements in field and office technology and developments in project funding methods introduce risk potential. Selecting and implementing new technology consumes management time, and, if the selected technology does not perform as expected, can be costly. Innovative project financing methods, combining private and public funding, present risk simply because they are new and there is limited experience with them.

### RISK IS NOT A DIRTY WORD. DESIGNERS AVOID IT. OWNERS PREFER TO PASS IT ALONG. CONTRACTORS ABSORB IT.

Dealing with all these changes, and with an industry that continues to evolve, demands considerable management attention and exposes the organization to increased and, sometimes, unrecognized risks.

- **Management Risk** – Management decisions will determine whether an organization will succeed or fail in this ever-changing construction business environment. The decision-making process begins with beliefs that must be regularly reexamined as the business environment evolves. Beliefs that were appropriate in the past may not be so in this new normal. Some unexamined beliefs in place for a long time are no longer valid, such as *growth is always good*; *having some unprofitable work is unavoidable*; and *past success implies future success*. These beliefs should be reevaluated because they are not true and cannot be embraced by the “Successful Contractor of the Future.” (This term defines contractors who will react quickly

to evolving market conditions as distinguished from those who will continue with business-as-usual.)

Thirty years of accumulated study as a contractor, work-out specialist, consultant, and research professor have verified the following realities about risk in the construction industry:

- Construction is basically risk assumption.
- Risk-taking is embedded in a contractor’s DNA.
- When a contractor signs a new contract, it’s like the contractor’s first day in business again.
- Every time a contractor starts a new project, the contractor voluntarily assumes risks that are not fully defined.

Construction is a highly complex endeavor that is worked out over a relatively long period of time, the success or failure of which is affected by weather conditions, labor problems, inflation, unexpected rises in interest rates, the high cost of equipment, a tightening or shrinking of the market, or simply bad luck. These factors, combined with the risks detailed above, make measuring project risk in advance enormously difficult and requires considerable knowledge about the construction enterprise and the current construction environment—a specialized field in itself. Management can test its beliefs by seeking information and perspective from internal and external accountants, attorneys and insurance and surety partners.

Risk and construction are synonymous. Risk cannot be eliminated, but it can be mitigated. However, risks cannot be mitigated until they are identified, measured and thoroughly understood. This is easier said than done because the various parties to the construction process see their respective roles in addressing risk differently. Many construction risks are attributed to more than one entity, making identification difficult, elimination impossible, and mitigation the only viable alternative. The challenge for owners, contractors, sureties, bankers and designers is to:

- Recognize and identify specific risks in advance



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- Assess and quantify their importance and the exposure
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To accomplish this requires specialized knowledge, industry intelligence and experience with large numbers of similar projects. It is also necessary to have access to hard-to-find, and sometimes very confidential, information. The primary source for this information is sureties, which have extensive experience and data from prequalifying firms in all types of construction in various locations.

### **Mitigating Risk**

The willingness to take risk is at the very core of the construction enterprise, and it is unlikely that risk will ever be eliminated from the building process. The ability to recognize the true nature of risk, assess its impact on an organization, and take steps to mitigate that impact will be a fundamental skillset of successful industry participants—owners, contractors, sureties, bankers and designers.

- Owners have the easiest mitigation route, as they can bond around their exposures, and have a knowledgeable surety do the critical pre-qualification process, screening out ill-equipped enterprises, and cover the costs if things do not work out.
- The contractor of the future needs to elevate risk management within its organization and embrace formal risk management processes, which, fortunately, are becoming the construction industry's newest discipline.
- Sureties have an important role to play in the construction process and bring a unique perspective to contractor and subcontractor screening through the underwriting process, along with financial capability when there is a problem.
- Bankers can have the same protection as owners by requiring payment and performance bonds on the projects they finance.
- Designers will want to assist clients with the selection of contracting methods and project participants, while encouraging

collaboration among all parties to the construction process.

### **Hidden Risk**

- Diligence is required because construction business risks and project risks are often not apparent and may be disguised in many forms. For example, top-line growth may appear to be an avenue to success, but can also lead to failure.
- More tightly drawn contracts pushing any and all risk to others may appear to be needed protection, but can create more problems than they solve.
- An expanding market looks like an opportunity, but can also be a mine field.

The contractor of the future needs to learn an entirely new skillset to recognize risks hidden in the market, hidden in their own management decisions, and hidden in the economic climate. Too often what looks like good news has the potential to be hazardous.

### **Rate of Growth**

Unfortunately, in the construction business, past success is not necessarily an indicator of future success. In fact, my research on the causes of construction business failures indicates that every change in a successful organization, particularly growth, creates a period of risk in spite of all previous success. When a construction organization substantially increases in size, it is no longer the same company it was before growth and often will not be successful if it maintains pre-growth management methods. A construction enterprise growing at what appears to be a modest rate of 15% per year is actually a significant rate if it is continuous because it compounds quickly. At 15% a company doubles in size in five years and triples in eight. The successful construction enterprise of the future will be organized to be market driven and not volume driven. It will strive for carefully planned growth but be prepared to level off or fall back on volume if the marketplace tightens or shrinks. It will use its markup flexibly as a competitive tool but not be forced to take break-even work to

maintain sales. It would have some flexible overhead built into the organization that could be cut immediately when not needed, and the contractor would not hesitate to cut permanent overhead when downsizing is necessary. The successful contractor of the future will be willing to reduce in size to survive.

### **Traditional Risk Management**

Historically, risk management was considered by many to be an insurance issue; however, there are significant business risks that are not addressed by insurance. The hidden risks in market expansion such as skilled labor shortage, limited access to capital, and the ability of management to keep up with a rapidly changing business environment have rendered traditional insurance tools and risk management approaches inadequate. The successful contractor of the future will develop internal risk management policies, procedures, and protocols throughout the organization. Some will engage or employ risk professionals.

### **Conclusion**

Construction is a complicated business that should only be attempted by owners, contractors and subcontractors with strong capabilities in risk recognition, risk management, and risk mitigation, because the nature of construction risks are changing every day, increasing the potential for business and project failures. The dramatic swing in the marketplace since 2008 has challenged construction firms to manage fluctuating sales. The boom may be back, but market conditions are very different in this growth cycle.

The skilled labor force was already being diminished when baby boomers began retiring at a rapid pace at the same time that workers, laid off during the recession, found other employment and left the industry, never to return. At a time when construction enterprises have been forced to downsize and had to spread their skilled labor force thin, they now need to hire new people who will be unfamiliar with their methods and systems and may have limited experience. Some firms





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**THE CONSTRUCTION INDUSTRY HAS NOT DEMONSTRATED PROFICIENCY AT RECOGNIZING, MANAGING AND MITIGATING HIDDEN RISKS, WHICH COMPOUNDS PROBLEMS AND ESCALATES THE POTENTIAL FOR BUSINESS AND PROJECT FAILURES, MAKING THE THIRD-PARTY SCREENING AND FINANCIAL PROTECTION OF SURETY BONDS MORE CRITICAL THAN EVER.**

will find that they have inadequate access to capital and that construction buyers have sharpened their contract negotiation skills, as construction continues to be viewed as a commodity and contractors are in turn relegated to low margins—the “new normal.”

When the market changed from contraction to expansion, unexpected and unrecognized risks were introduced. In this environment, hanging on to old beliefs is a dangerous mindset. There are few choices when it comes to risk: assume it, manage it or transfer it. The construction industry has not demonstrated proficiency at recognizing, managing and mitigating hidden risks, which compounds problems and escalates the potential for business and project failures, making the third-party screening and financial protection of surety bonds more critical than ever. Owners will likely manage risk by increased bonding of prime contractors, while construction managers may seek protection by increased bonding of trade contractors.

The successful contractor of the future will establish formal risk assessment processes and protocols and will adopt a strategy of flexible overhead that can easily adjust to a cyclical construction market that invariably presents new risks.

The successful owner of the future may choose to transfer risk by relying

more heavily on sureties to pre-qualify contractors and provide financial protection against defaults. ●

*Thomas C. Schleifer, Ph.D. is a “turn around” expert in rescuing companies from financial distress. With more than 45 years of contracting and consulting experience, he advises contractors on organization, structure, and strategic planning. He was Founder and President of the largest international consultancy firm serving the contract*

*surety industry. He was a project manager and vice president of a construction company. He is author of Glossary of Suretyship and Related Terms and of Construction Contractors’ Survival Guide. He has B.S. and M.S. degrees in construction management (CM) from East Carolina University, and a Ph.D. also in CM from Heriot-Watt University, Scotland. He was the first Eminent Scholar of the Del E. Webb School of Construction, Arizona State University in 1993.*



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## OUR MEMBERS

### ALABAMA

**Russell, Thompson, Butler & Houston, LLP**  
Michael Thompson, CCIFP  
mike.thompson@rtbh.com

### Warren Averett

Will Aderholt, CCIFP  
will.aderholt@warrenaverett.com

### ARIZONA

#### BeachFleischman PC

Philip Taylor  
ptaylor@beachfleischman.com  
Bryan Eto, CCIFP  
beto@beachfleischman.com

### CALIFORNIA

#### CliftonLarsonAllen

Julian Xavier  
julian.xavier@claconnect.com  
Ross Cofer, CCIFP  
ross.cofer@claconnect.com

### Gelman LLP

Warren Hennagin, CCIFP  
when@gmccpa.com

### RBTk, LLP

Kevin M. Brown  
kbrown@rbtk-cpa.com

### Soares, Sandall, Bernacchi & Petrovich

Rick Heldwein  
rickh@ssbp.com

### SorenMcAdam LLP

Cindy Watts  
cwatts@sorenmcadam.com

### COLORADO

#### EKS&H LLP

Shane Brown, CCIFP  
sbrown@eksh.com

### CONNECTICUT

#### CohnReznick LLP

Dan Donofrio  
daniel.donofrio@cohnreznick.com

### DELAWARE

#### Santora CPA Group

Bill Santora  
bsantora@santoracpa.com

### DISTRICT OF COLUMBIA

#### Thompson Greenspon

Nathan White IV  
nsw@tgccpa.com

### FLORIDA

#### E.F. Alvarez & Company, P.A.

Emilio Alvarez  
ealvarez@efacpa.com

### James Moore & Co., P.L.

Roger Swanger, CCIFP  
roger.swanger@jmco.com

### Kerkering, Barberio & Co.

Shirley Fieber  
sfieber@kbgp.com

### Warren Averett

Kathleen Baldwin, CCIFP  
kathleen.baldwin@warrenaverett.com

### GEORGIA

#### Coker James & Company P.C.

R. David Coker  
rdc@cokerjames.com

### IDAHO

#### Harris & Co., P.A.

Robert Shappee, CCIFP  
robertshappee@harrisccpas.com

### ILLINOIS

#### Heinold-Banwart Ltd.

Scott Carr  
scarr@hbcpcas.com

### Martin, Hood, Friese & Associates, LLC

Mark Czys  
mark@mhfa.net

### Mowery & Scoenfeld, LLC

Tom Keenan  
tkeenan@msllc.com

### Mueller & Co., LLP

Ray Groesbeck, CCIFP  
rgroesbeck@muellercpa.com

### Scheffel Boyle

Mark Korte, CCIFP  
mark.korte@scheffelboyle.com

### INDIANA

#### Harding, Shymanski & Company, P.S.C.

Paul Esche, CCIFP  
pesche@hscppa.com

### Katz, Sapper & Miller, LLP

Ron Lenz, CCIFP  
rlenzen@ksmcpa.com

### IOWA

#### BerganKDV

Brian Collier, CCIFP  
brian.collier@bergankdv.com

### KANSAS

#### CBIZ MHM, LLC

Pepper David, CCIFP  
pdavid@cbiz.com

### KENTUCKY

#### Baldwin CPAs, PLLC

Chris Hatcher  
chris.hatcher@baldwincpas.com

### MCM LLP CPAs & Advisors

Matt Neely  
matt.neely@mcmcpa.com

### LOUISIANA

#### Daenen Henderson & Company

Jacquelyn S. Daenen, CCIFP  
jdaenen@dhc-cpas.com

### LaPorte, CPAs & Business Advisors

Christina Chifci, CCIFP  
cchifci@laporte.com

### MAINE

#### BerryDunn

Linda Roberts, CCIFP  
lroberts@berrydunn.com

### MARYLAND

#### KatzAbosch

Kent Thomas  
kthomas@katzabosch.com

### MASSACHUSETTS

#### BerryDunn

Linda Roberts, CCIFP  
lroberts@berrydunn.com

### CohnReznick LLP

Dan Donofrio  
daniel.donofrio@cohnreznick.com

### MICHIGAN

#### Iannuzzi Manetta & Co.

Chris Iannuzzi  
ciannuzzi@imc-cpa.com

### The Rehmann Group

John Skukalek  
john.skukalek@rehmann.com

### Walburg + Associates, P.C.

Curt Walburg  
cwalburg@walburg.com

### Yeo & Yeo PC, CPAs & Consultants

Carol Patridge  
carpat@yeoandyeo.com

Mike Tribble  
mictri@yeoandyeo.com

### MINNESOTA

#### Boym & Barendscheer, PLLP

Randy Feld  
rfeld@boybarcpa.com

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Larry Taylor  
larry.taylor@claconnect.com

James D. Main, CCIFP  
jim.main@claconnect.com

## NEW HAMPSHIRE

### BerryDunn

Linda Roberts, CCIFP  
lroberts@berrydunn.com

## NEW JERSEY

### Sax LLP

Robert Paz  
rpaz@saxllp.com

## NEW MEXICO

### Atkinson & Co., Ltd.

Michael Mimovich, CCIFP  
mmimovich@atkinsoncpa.com

## NEW YORK

### Dannible & McKee, LLP

Ken Gardiner, CCIFP  
kgardiner@dmcpas.com

### Grassi & Co., CPAs, P.C.

Louis Grassi  
lgrassi@grassicpas.com

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Susan Howell  
showell@vddw.com

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### Smith, Kesler & Company, P.A.

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maspence@skandco.com

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### Barnes Dennig

Jay Rammes  
jrammes@barnesdennig.com

### GBQ Partners LLC

Bob Biehl, CCIFP  
bbiehl@gbq.com

### Kentner Sellers, LLP

Marvin Homan, CCIFP  
mhoman@kentnersellers.com

### Meaden & Moore, Ltd.

Aaron T. Cook  
acook@meadenmoore.com

### Weber O'Brien, Ltd.

R. David O'Brien  
dobrien@weberobrien.com

## OREGON

### Aldrich CPAs + Advisors

Jim Dailey  
jdailey@aldrichadvisors.com

Joe Schneid, CCIFP

jschneid@aldrichadvisors.com

## PENNSYLVANIA

### CBIZ MHM, LLC

Anthony R. Stagliano, CCIFP  
tstagliano@cbiz.com

### Stambaugh Ness, P.C.

Tim Klimchok, CCIFP  
tklimchok@stambaughness.com

## RHODE ISLAND

### Citrin Cooperman

Judith Ventura Enright  
jenright@citrincooperman.com

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James Lundy  
jim.lundy@marcumllp.com

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Jeff Stallings  
jeff.stallings@stallingscpas.com

## TEXAS

### CalvettiFerguson

Mike Karlins  
mkarlins@calvettiferguson.com

## Gollob Morgan Peddy PC

Heather Sellers  
heathers@gmcpa.com

### Lane Gorman Trubitt, LLC

Brad Gross  
bgross@lgt-cpa.com

### Phillips & Associates, CPAs

Jim Phillips  
jimp@pacpas.com

## RSM

Denise Bendele  
denise.bendele@rsmus.com

## UTAH

### CliftonLarsonAllen

Steve Scoggan  
steve.scoggan@claconnect.com

## VIRGINIA

### Thompson Greenspon

Nathan White IV  
nsw@tgccpa.com

### Yount, Hyde & Barbour, P.C.

Kevin Branner  
kevin.branner@yhbcpa.com

## WASHINGTON

### CliftonLarsonAllen

Colette Guckian  
colette.guckian@claconnect.com

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## Feature

# Acting Director of the U.S. SBA Office of Surety Guarantees **Peter Gibbs Looks to the Future**



U.S. SBA Office of Surety Guarantees  
Acting Director Peter Gibbs

**AFTER THE APRIL** 2016 retirement of Frank Lalumiere, who was Director of the U.S. Small Business Administration (SBA) Office of Surety Guarantees (OSG) and oversaw the Surety Bond Guarantee (SBG) Program, the Program has gained leadership with the appointment of Peter Gibbs as Acting Director. Gibbs is a longtime staffer with the OSG, starting in 2005 and most recently serving as Deputy Director of the SBG Program.

Gibbs joined the SBA in May 1991, serving in SBA's Investment Division Office of Examinations, New Markets Venture Capital, and the Rural Business Investment Program. Initially an Examiner, he was ultimately promoted to Deputy Director and successfully launched the New Markets Venture Capital Program, establishing and implementing policies, regulations, and evaluation procedures. This program promotes economic development and the creation of wealth and job opportunities in low-income areas. His primary



From left, Peter Gibbs, NASBP bond producer members Reggie Jarvis of Centennial Surety Associates and Josh Etemadi of Construction Bonds, Inc., and Michael Cox of the SBA's OSG at the May 18 Bonding Across America event in DC.

charge was evaluating private venture capital management teams to determine their eligibility for \$180 million in debenture and grant funding.

A graduate of Central State University with a B.S. in accounting and of Western Carolina University with an M.E. in entrepreneurship, Gibbs' career includes serving 27 years in the Army National Guard, Army Reserves, and on active duty. "I was deployed from 2006 to 2010, serving at the Pentagon and the Defense Intelligence Agency, which included two deployments in the Middle East," he recalled. "My background as a senior logistics military officer has helped me to lead a great team while utilizing innovation to take the SBG Program to the next level." He also worked as a comptroller for an 8(a) construction firm,

giving him "firsthand knowledge of the bonding process and the hurdles small businesses sometimes encounter in applying for surety credit."

As the SBG Program Deputy Director, Gibbs developed and recommended policies, procedures, guidelines, and criteria for evaluating and mitigating all programs and operational efforts. In addition to operations and personnel management, he worked closely with the surety companies that provide more than \$9 billion annually in bond guarantees to small U.S. businesses. Then he concentrated on underwriting and information technology, but he is now responsible for all SBG Program aspects.

Two NASBP bond producers who have worked with Gibbs see him as the right choice for his new position. "Peter is always willing to listen to





NASBP CEO Mark McCallum, left, met with Gibbs at NASBP headquarters to discuss creation of the Bonding Across America program.



Peter Gibbs, third from right, with SBA staff.

your proposal,” noted Josh Etemadi, Assistant Vice President for Construction Bonds, Inc.—A Division of Murray Securus. “He is constantly looking for ways to improve the program. Peter is passionate about the SBG Program and about the surety industry as a whole. His experience as a CFO for a minority-owned construction company allows him to see the varying levels of strengths and weaknesses in small and emerging construction businesses.”

After Gibbs arrived at SBA, “he went out to meet and greet people and got the operations of SBA into the mainstream after years of people thinking SBA’s sureties took too much time and were too expensive,” said Mike Williams, President of CCI Surety, Inc. “He was instrumental in cutting down the paperwork, enabling small and minority contractors to stay in the program. Because of Peter’s hustle, drive, and desire, he was key in helping me attract new surety companies into the SBG Program.”

### Program Improvements

As Acting Director, Gibbs wants to make the SBG Program easier for surety bond producers to use while paying claims more quickly. Several recent initiatives have already contributed to this effort.

Implemented in 2012, Quick Bond Approval (or QuickApp) in the Prior Approval program, which fast tracks bonding applications with a \$250,000 limit, has been extremely successful. “Since 2012, SBA has guaranteed approximately 6,800 bonds using QuickApp with fewer than 50 defaults,” Gibbs said. “Because of that success, SBA is in the process

## NASBP AND SBA DELIVER BONDING ACROSS AMERICA PROGRAMS

On May 18, NASBP and SBA delivered three bonding awareness programs, which were held in Denver, CO; Seattle, WA; and Washington, DC, as part of an educational campaign titled “Bonding Across America.” The programs, specifically designed to be rolled out quickly, introduced such topics as bonding and insurance, banking and finance, federal assistance programs, and local procurement opportunities to small and emerging contractors. The programs are among several initiatives that resulted from the memorandum of understanding that NASBP and the SBA had signed in the fall of 2016.



of increasing the QuickApp limit to \$400,000.” The new higher limit is expected to take effect in 2017. The increase/decrease threshold will change to 25 percent, and the guarantee percentage for the Preferred Program will increase to 80 to 90 percent to match the Prior Approval Program. Other Program enhancements are also expected in 2017.

“QuickApp has created capacity for small, emerging minority contractors who are challenged in some fashion,” Williams said. “It’s created an opportunity for them to get into the ballgame.” Etemadi agrees, saying, “QuickApp has been helpful to small contractors who can’t qualify for the credit applications and don’t have their financial houses in order yet.”

The Pay.gov program allowing contractors to pay their SBA fees with credit cards or direct withdrawal from checking accounts is another success. “This is because

mistakes are minimized and checks are not lost in the mail,” noted Gibbs. “Pay.gov has reduced our bond guarantee cycle time by at least one day.” “Contractors were thrilled when they found out they could make payments with credit cards and improve the processing time,” Etemadi noted.

Although use of digital signatures has not been adopted, now agents and sureties are authorized to upload facsimile copies of all documents. “Creating a paperless environment was a very important initiative of mine, so I am happy SBA has eliminated costs our partners historically incurred in getting their forms to us in a timely manner,” Gibbs said. “Uploading documents is now mandatory and has reduced our bond guarantee cycle time by at least one day.”

Launched in 2014, the General Login System (GLS) E-Application lets

*Continued on page 31*

# DRONES

## TAKE FLIGHT IN THE CONSTRUCTION INDUSTRY



BY JONATHAN R. HAUSNER AND ELIZABETH WRIGHT

THE CONSTRUCTION INDUSTRY is currently one of the leading industries to adopt the use of revolutionary tech advancement—drones (otherwise known as unmanned aerial systems or UAS). The construction industry's adoption of this new technology demonstrates that owners, design professionals, and contractors alike recognize that drone technology provides a means to achieve the ultimate goal of delivering a project on time and on budget while protecting one's anticipated profit.

As with the introduction of any new technology, it is critical to identify any new risks and properly assign responsibility for such risks. This article addresses both the benefits and potential risks of using a drone on a construction project from the perspective of construction counsel who regularly advise owners, construction

managers, and general contractors, trade contractors, and sureties.

### What is a Drone?

Given the multitude of uses provided by drones in both a recreational and military capacity, stories about drones frequently appear in the news. But what is a drone? In general a drone consists of a fuselage connected to arms that mount four to eight rotary blades. Often the drone is connected to a Wi-Fi and/or GPS interface or both. Although drones come in a variety of sizes, the ones most frequently used in the commercial industry are lightweight and controlled by a pilot operating a hand-held remote. Construction drones often carry a high-resolution camera and recording device that can capture images in a variety of formats (for example, HD photo/video,

infrared, thermal). The images and data captured by the drone can be incorporated into a variety of software programs to provide substantial information to the drone user.

### How Does a Drone Help Get the Project to the Finish Line on Time and on Budget?

A standard commercial drone can accurately scan a 150-acre site in less than 30 minutes. Therefore, a drone may be used to quickly and efficiently capture an enormous amount of site information. The ability to quickly and easily collect data may provide numerous cost-, time-, and effort-saving benefits.

For example, a drone can provide cost savings by capturing images of materials in order to identify and track construction waste. The American Institute of Architects estimates that construction-related waste makes up anywhere from 25–40 percent of American's solid waste stream. Construction spending in the United States this past year totaled approximately \$1.13 trillion, which means that waste losses add up to more than \$160 billion in the United States alone. The information gathered by the drone can be used to track efficiency and the use of materials on a project to identify and decrease any



potential waste, resulting in a substantial cost savings.

In addition to tracking materials, drones can also: (1) track construction progress and schedule; (2) conduct site surveys; (3) collect geotechnical data; (4) track excavation and fill volume; (5) provide site security; and (6) monitor employee behavior and site safety. The implications can be significant. The ability to track construction progress and productivity can help a project stay on schedule, reduce inefficiencies, and provide accurate progress reports to the owner. In addition, given the speed by which the drone can travel a project site, it can more efficiently provide site and construction progress information to the user than in-person site visits. Drones may also allow one to collect critical information from hard-to-reach areas where site conditions may be largely unknown or tough to determine with certainty. Having significant site condition information prior to the beginning of construction can help prevent claim over a “differing” site condition.

### **Identifying and Allocating the Risk**

As with any new technology, it is important to properly identify and allocate the risk arising from its use. In order to do so, one must first identify any rules or regulations that govern the use of such technology. The Federal Aviation Administration (FAA) requires that all drones be registered and that anyone operating a drone be properly certified and, of course, comply with certain FAA regulations. So, whether one is training someone in-house or hiring an outside vendor, it is important to understand these requirements to ensure compliance.

One must also identify the drone’s intended use(s). Will it be used to monitor construction progress; measure materials; perform a pre-construction site analysis; or provide security? Regardless, the parties involved must clearly identify the intended use in order to properly assess and allocate risk in the project’s contract documents.

**DRONES CAN PROVIDE A NUMBER OF BENEFITS TO CONSTRUCTION PROJECTS. IN ORDER TO MAXIMIZE THE BENEFITS, IT IS CRITICAL THAT THE PARTIES UNDERSTAND THE ATTENDANT RISKS AND TAKE STEPS TO MITIGATE SUCH RISKS BY ENSURING COMPLIANCE WITH THE RELEVANT RULES AND OBTAINING PROPER INSURANCE COVERAGE.**

For instance, if a party uses a drone to inspect field conditions, the contract documents should identify, at least, (1) what information the party is expected to gather; (2) what other parties (if any) may use and/or rely on that information; (3) to what degree they may use or rely on the information; and (4) who bears responsibility for the dissemination of inaccurate or erroneous information. For example, it is important to consider whether a contractor’s drone-based site inspection increases the contractor’s responsibility as to what it knew or reasonably should have known about site conditions (that is, in support or defense of a claim for a differing site condition). Another example relates to the use of drone-captured information in Building Information Modeling (BIM). Drones have robust capability to scan and capture construction conditions, at any stage and in just about any location, in 3D. If the data collected will be incorporated in a 3D digital model, the contract documents must identify who bears the responsibility for ensuring the accuracy of the data and who bears the responsibility for properly incorporating data into the model.

One final consideration is insurance coverage. A typical Commercial General Liability policy disclaims or excludes coverage for losses arising out of the ownership, maintenance, use, or entrustment to others of any “aircraft.” A drone, per the FAA, is an aircraft. As such, before taking flight, one must ensure that the risks associated with something going wrong are covered. As a threshold matter, consult with your insurance professional to ensure that you

and/or your drone service provider are properly covered for damage to the project, damage to surrounding properties, and injuries to workers or bystanders.

Drones can provide a number of benefits to construction projects. In order to maximize the benefits, it is critical that the parties understand the attendant risks and take steps to mitigate such risks by ensuring compliance with the relevant rules and obtaining proper insurance coverage. The remaining risks should be identified and clearly allocated in the construction documents. With these considerations in mind, one should be ready to take advantage of the many benefits provided by drone use on a construction project. ●

*Jonathan R. Hausner is counsel in the Construction Law Group at Robinson+Cole where he handles all aspects of construction project transactions, dispute resolution and litigation. Hausner represents all parties involved in construction, including public and private property owners, general contractors, subcontractors, material suppliers, and sureties. He can be reached at [jhausner@rc.com](mailto:jhausner@rc.com) or 617.557.5928.*

*Elizabeth Wright is an associate in the Construction Law Group at Robinson+Cole where she focuses her practice in the areas of construction law, commercial litigation, and surety and fidelity law. Wright counsels clients throughout the construction industry, from building and property owners to contractors, subcontractors, material suppliers, and sureties. She can be reached at [ewright@rc.com](mailto:ewright@rc.com) or 617.557.5947.*

# 2017 AIA CONTRACT DOCUMENTS: Selected Key Changes



BY KENNETH W. COBLEIGH



THE AMERICAN INSTITUTE of Architects (AIA) has published construction industry standard form agreements since 1888. AIA Contract Documents have long been viewed as the industry standard, reflecting current industry practices and fairly balancing the risks and responsibilities of all project participants. In order to ensure that these documents stay

current, the AIA reviews and revises its project delivery “families” of documents on a 10-year cycle. In 2017 the AIA released updated versions of its flagship A201 family of documents developed for the design-bid-build delivery model. Revisions made to the *A201 General Conditions of the Contract for Construction*, and its related owner-contractor, subcontract, owner-architect, and consultant agreements will be of interest to all project participants. This article identifies and discusses several of the key revisions.

## New Insurance and Bonds Exhibit

The single most significant 2017 revision to the A201 Family is the creation of an Insurance and Bonds Exhibit to accompany the key owner-contractor agreements. The new exhibit allows the parties to develop specific insurance requirements for any particular project. For basic insurance and bond coverage,

similar to that established in the 2007 AIA Contract Documents, the parties need only insert claims and policy limits for certain basic coverages, and the penal sum for required bonds. However, the new exhibit also prompts the parties to consider additional insurance coverages that might be warranted, depending on the nature of the project and particular risks that might be encountered. The exhibit can be easily transmitted to each party’s insurance and bond advisor(s) or broker(s) for evaluation and completion. Of significance is the new requirement that all insurance and bonds obtained for the project be purchased from companies lawfully authorized to issue insurance or surety bonds in the jurisdiction where the project is located. **This requirement, added at the suggestion of representatives from the National Association of Surety Bond Producers, helps ensure that the project insurance policies and bonds are backed by**



**companies that are adequately capitalized and that the parties will be protected as they intended.**

### **New Sustainable Projects Exhibit**

In addition to the new Insurance and Bonds exhibit, the 2017 release will also include the new E204, Sustainable Projects Exhibit. As the title suggests, E204 sets forth the roles and responsibilities for each project participant as they relate to unique elements of sustainable design and construction to be incorporated in the project. Once the owner determines that the project will involve a sustainable objective, E204™–2017 is incorporated into the owner-architect and owner-contractor agreements, and, as appropriate, into each of the other project agreements. In this way, the project participants obtain the benefit of a detailed and coordinated statement of each party's sustainable design and construction responsibilities.

### **Use of Digital Information and BIM**

The 2017 documents contain a number of new provisions related to digital information and Building Information Modeling (BIM). There can be significant risk and responsibility associated with the exchange of project information in digital format. This is particularly true when it comes to the use of BIM. When using BIM on a project, it is imperative that requirements for the various elements of the Model, at various stages of the project, be well documented, along with the allowed uses of, and reliance on, the Model. Accordingly, the key 2017 owner-contractor and owner-architect agreements expressly require the use of AIA Document E203™–2013 to establish protocols for the development, use, transmission, and exchange of digital data. The 2017 documents further provide that any use of, or reliance on, all or a portion of information contained in a BIM model, without first having established and set forth the necessary protocols, is at the using or relying party's own risk and

without liability to any other project participant. In addition, revisions to section 3.11 of A201™–2017 clarify that the contractor may maintain contract documents, change orders, construction change directives, and other modifications at the site in electronic format. A201™–2017 also now addresses the issue of notice in electronic format.

### **"Notice" Defined**

"Notice" is now a defined term in 2017 documents. A201–2017 requires that Notice be provided in writing to the designated representative of the party to whom the notice is addressed and served in person, by mail, by courier, or by electronic transmission (if a method for electronic transmission is set forth in the agreement). One caveat pertains to notice of claims, which may only be served by certified or registered mail, or by courier providing proof of delivery.

### **Approach Change on Means & Methods**

The AIA Contract Documents have long provided that the contractor is solely responsible for, and has control over, construction means, methods, techniques, sequences, and procedures. However, the 2007 documents contemplated that the owner or architect might, on rare occasion, direct the contractor to proceed with the work as set forth in the contract documents, even if the contractor was concerned that this might impact job safety. In that case the owner assumed responsibility for any loss or damage. A201–2017 takes a slightly different approach. The contractor remains solely responsible for, and has control over, construction means, methods, techniques, sequences, and procedures. If the contractor believes that the contract documents give specific instructions concerning construction means, methods, techniques, sequences, and procedures, and if the contractor determines that the means, methods, techniques, sequences, and procedures might not be safe, the contractor is to give notice to the owner and architect

and propose alternative means, methods, techniques, sequences, or procedures. The architect is to then evaluate the proposed alternative solely for conformance with the design intent for the completed construction. Unless the architect objects to the contractor's proposed alternative, the contractor is to perform the work using the alternatives that it proposed.

### **Termination Fee Fill Point**

Since 1997 the AIA Contract Documents have allowed the owner to terminate the owner-contractor and owner-architect agreements for the owner's convenience. Based on the experience of the AIA Documents Committee members, and counsel to the AIA Documents Committee and input from liaisons, it was determined that owners were often striking the contract provisions allowing for the recovery of anticipated overhead and profit on unperformed work. Accordingly, the 2017 owner-contractor, owner-architect, and architect-consultant agreements eliminate automatic entitlement to lost overhead and profit on unperformed work or services. The new agreement forms contain a fill point to prompt the parties to discuss and insert an appropriate "Termination Fee." The A401™–2017 subcontract agreement still allows for recovery of lost overhead and profit by the subcontractor. Those costs would be recoverable from the owner as part of the "costs incurred by reason of the termination, including costs attributable to termination of subcontracts." Similarly, any termination fee to be paid by the architect to its consultants would be passed through to the owner as part of the cost to terminate the consultant's agreements.

### **Contract Dates**

The AIA Documents Committee substantially revised the provisions in the owner-contractor agreements dealing with the date of commencement and substantial completion of the work. The edits, however, do not result in significant substantive

changes and are instead intended to encourage the parties to be specific about the agreed upon date for commencement of the work, the date for substantial completion of the entire work, and the date or dates for substantial completion of portions of the work, when applicable.

### Liquidated Damages Fill Point

Liquidated damages provisions, establishing an amount certain in terms of contractor liability for

project delay, are often included in agreements to avoid disputes over the specific damages an owner might incur by reason of late completion of a project. In 2017, a specific fill point has been included in the owner-contractor agreements (except A105) to prompt the parties to consider including a liquidated damages provision. The details surrounding the imposition of those damages, the calculation of those damages, and the limitation, if any, on those damages

are left up to the parties to negotiate and include in the fill point. A separate fill point is also included in those documents in the event the parties agree to include bonus or other incentive provisions.

### Choice of Law Rules

The AIA Contract Documents have long provided that the contract is governed by the law of the place where the project is located. However, in some circumstances, a jurisdiction's choice of law rules may require that the law of another jurisdiction be applied in interpreting the contract or resolving contract-related issues. The 2017 owner-contractor and owner-architect agreements continue to provide that the contract will be governed by the law of the place where the project is located, but added a provision that the jurisdiction's choice of law rules will not be applicable to impose the laws of a different jurisdiction.

### More Information on Changes

There are a number of other 2017 revisions of interest to industry stakeholders. As in the past, the AIA will publish comparatives for all of the revised documents, showing the changes in text between 2007 and 2017. The AIA will also post FAQs, articles, and other written materials and will hold webinars and other programs to help industry participants become familiar with the 2017 Documents. To access these materials visit [www.aiacontracts.org/2017aiadocs](http://www.aiacontracts.org/2017aiadocs).

*Kenneth W. Cobleigh, Esq. serves as a Managing Director and Counsel at the American Institute of Architects. He works with a team of lawyers, specialists and support staff, and the AIA Documents Committee, in developing and publishing AIA Contract Documents, and in providing support services to contract document users. Prior to joining the AIA, Ken practiced for 18 years as a construction attorney in private practice Maryland law firms. He can be reached at [kcobleigh@aia.org](mailto:kcobleigh@aia.org).*



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## NASBP to Release Continuing Education Course:

# JOINT VENTURES *in Construction*



BY MICHAEL C. ZISA

IN TODAY'S CONSTRUCTION market, joint ventures play an increasingly important role because they allow contractors to share risks, resources, knowledge, and expertise and to increase bonding capacity and market reach, which in turn creates new business opportunities that alone they may be unable or unwilling to pursue. When considering a joint venture, it is essential for all of the parties—the contractors, the sureties, and the bond producers—to understand and carefully consider a number of factors before taking the leap. Because of the importance of this topic to its members, two years ago NASBP approached me and several members of my firm, Peckar & Abramson, P.C., about producing a series of educational programs and initiatives on the topic. This led to live presentations at the 2015 NASBP Federal Construction Contracting Seminar, 2016 Annual Meeting and Regional Meetings, a NASBP Virtual Seminar, and publication of a number of articles on joint ventures and related issues in NASBP's *Surety Bond Quarterly* magazine.

To further the initiative to educate the NASBP membership on this

important topic, NASBP will soon release continuing education course materials for joint ventures in construction. This comprehensive set of materials addresses essential issues in joint ventures and uses real world experiences and lessons learned to discuss topics including:

- Different forms of joint ventures.
- Advantages and disadvantages associated with each form.
- Liability between the partners to the joint venture.
- Distinctions between a joint venture agreement and a teaming agreement.
- Essential terms of the joint venture agreement—from the basics, such as members, purpose, ownership, and duration to more complex issues and terms involving capitalization, management, profit sharing, default, indemnification, and dispute resolution.

The course materials also include a chapter dedicated to joint venture opportunities with federal government programs such as the U.S. Small Business Administration's 8(a) program and other small and disadvantaged businesses programs that "set aside" contracts for qualified businesses. In particular, the chapter explains the intricacies of the mentor-protégé joint venture program that allows a qualified small business to joint venture with a large business while still taking advantage of the small business set asides. The joint venture relationship in this area raises a myriad of compliance issues that contractors, bond producers, and sureties must understand in order

to qualify for the program and also stay out of trouble for failing to comply with the program's requirements. The materials discuss in depth the latest changes to the requirements of these programs.

The final chapter of the materials addresses issues and considerations for bond producers and sureties when bonding a joint venture. Specifically, the chapter details the materials to examine during the underwriting process, which includes review of the capacity, capital, and character of all partners in the joint venture and the terms of the joint venture agreement. An "angel deal" and why it raises red flags in the underwriting process is also addressed. The materials also discuss the typical indemnity requirements for bonding a joint venture and key practical issues that bond producers must understand when assisting clients to obtain bonds for a joint venture.

In addition to being a useful resource for bond producers and other surety professionals, at the conclusion of each chapter is a series of questions, which allows readers to test their knowledge of key concepts and issues. ●

*Michael C. Zisa is a partner in the Washington, DC office of Peckar & Abramson, P.C. and focuses his practice on construction, surety, and government contracts law and chairs his firm's Surety Practice Group. Zisa is recognized by Washington, DC Super Lawyers in the areas of construction litigation, surety and government contracts. He can be reached at [mzisa@pecklaw.com](mailto:mzisa@pecklaw.com) or 202.293.8815.*

# How Can Construction Contractors Expedite Payment on Federal Contracts?

## Part 1 of 2



BY ADRIAN L. BASTIANELLI, III AND LORI ANN LANGE

**THE FEDERAL GOVERNMENT** is not known for the speed that it does anything, including making payment on a construction contract. So what can the contractor do to expedite its payment? The primary key is for the contractor to understand that it cannot change the system, which is set in regulatory stone. Instead, the contractor needs to learn how to work within the system and make the system work for the contractor. Set out below are some tips how the contractor can do this and thereby expedite its payment.

### **Before the Work Commences**

First and foremost, the contractor needs to read the payment clauses of its contract. Generally speaking, the construction contract will contain two important clauses: (1) the Payments under Fixed-Price Construction

Contracts clause, FAR 52.232-5, which states that the government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates of work accomplished that meets the standards of quality established under the contract, as approved by the Contracting Officer; and (2) the Prompt Payment for Construction Contracts clause, FAR 52.232-27, which states that the due date for making progress payments is fourteen days after the designated billing office receives a proper payment request and the due date for making final payment is thirty days after the designated billing office receives a proper invoice from the contractor or the government accepts the work, whichever is later. The contracting

agency may add additional payment provisions, but these generally concern the type of information required to be submitted by the contractor in order to receive payment.

The contractor needs to perform the ground work even before it receives the Notice to Proceed from the government in order to achieve timely payment once work commences. While regulations govern all federal agencies, each government agency and office within each agency has its own way of doing business. The contractor needs to understand how the particular office with which it has the contract handles payment, which may not be the contracting office. Even before the work starts, it is important for the contractor to discuss the payment process with the government representatives, understand what is important to that office, and reach agreement on an effective process to expeditiously handle payment applications and payment.

An issue that often plagues the contractor and can slow down reaching agreement on the pricing of changes and claims are equipment and overhead rates. The Federal Acquisition Regulation (FAR) allows the parties to enter into advance agreements on equipment and overhead rates that



will be used throughout the project to price changes and claims. FAR 31.109. The contractor should attempt to reach an agreement on these items as early as possible to avoid disputes on changes and claims later in the project. In the early stages, the contractor and government are working together and agreement on rates generally is not difficult. Once disputes arise, the relationship between the parties may have changed, and agreement may be more difficult. In addition, FAR 31.109(b) states that advance agreements may be negotiated either before or during a contract but should be negotiated before incurrence of the costs involved.

In negotiating an advance agreement, the contractor will have to provide cost and pricing information to the government. The contractor, therefore, must present accurate data to the government representative and push to reach an agreement.

Federal construction contracts generally require the submission and approval of a preliminary and baseline schedule prior to starting work, and the contractor's failure to provide the schedule can be a basis for withholding payment. One of the main reasons for a delay in payment at the beginning of the job is the contractor's failure to submit the baseline schedule in a timely manner. The contractor needs to complete the baseline schedule as quickly as it can without sacrificing accuracy and thoroughness. The effort to expedite the schedule should not result in a bad or incomplete schedule, because a bad baseline schedule will haunt the contractor for the entire job, particularly if there is a delay claim.

### **The Payment Application**

Understanding the payment application process is critical to ensure timely payment because the government will not pay the contractor without a proper payment application. Progress payments on a fixed-priced federal contract generally are made on a percentage-of-completion basis through monthly progress payment applications. In preparing the

payment application, the contractor must timely collect the data, including the data from subcontractors, and arrange for an early meeting with the government each month to reach an agreement on the quantity of work properly performed. The contractor needs to be fully prepared with accurate information for this meeting. It is important for the contractor to push back when the government seeks to cut an application without a good reason. On the other hand, the contractor needs to avoid pushing the envelope too far and seeking payment for more work than the contractor has properly performed, which can result in a false claim allegation by the government.

The payment application must include the following information:

- An itemization of the amounts requested, related to the various elements of work required by the contract covered by the payment requested;
  - A listing of the amount included for work performed by each subcontractor under the contract;
  - A listing of the total amount of each subcontract under the contract;
  - A listing of the amounts previously paid to each such subcontractor under the contract; and
  - Any additional supporting data in a form and detail required by the contracting officer.
- FAR 52.232-5(b)(1).
- For the contractor to receive payment, its representative must certify that to his or her best knowledge:
- The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
  - All payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by the certification, in accordance with subcontract agreements and the requirements of 31 U.S.C. Chapter 39;
  - The request for progress payments does not include any amounts that

the contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract. FAR 52.232-5(c).

If the certification is knowingly inaccurate, the contractor may be liable for a false claim, which can have draconian results, including the forfeiture of payment, civil penalties, a poor performance rating, and possibly suspension or debarment. The cost of defense of a false claim can be substantial, and the relationship with the government may be permanently injured. It is, therefore, extremely important that the certification of the payment application be accurate. At a minimum, whoever is signing the payment application must verify that the percentage of work being billed for is accurate, that subcontractors have been timely paid from previous progress payments, and that the contractor is not billing for money it does not intend to pay a subcontractor or supplier.

The contractor is entitled to interest on the government's failure to pay a proper invoice within the specified time. A proper invoice must contain:

- Name and address of the contractor;
- Invoice date and number;
- Contract number or other authorization for supplies delivered or services performed (including order number and contract line item number);
- Description of the work or services performed;
- Delivery and payment terms (such as any discount for prompt payment terms);
- Name and address of contractor official to whom payment is to be sent (this must be the same as that in the contract or in a proper notice of assignment);
- Name (where practicable), title, phone number, and mailing address of the person to be notified in event of a defective invoice;
- Taxpayer Identification Number (TIN) if required by the contract;
- Electronic funds transfer banking information if required by the contract; and

- Any other information or documentation required by the contract. 52.232-27(a)(2).

If the invoice is not proper or does not contain the required information, the government does not have an obligation to pay the invoice; and the interest clock does not begin to run. Thus, the contractor must focus on submitting an accurate payment application complying with the requirements of the contract.

If payment is late, the government should automatically add interest. If it does not, the contractor needs to provide notice of the lack of interest and pursue the issue.

The government typically does not withhold retainage. However, if the contractor is not achieving satisfactory progress, the government may withhold up to 10% retainage. FAR 32.103; FAR 52.232-5(e). The government also can withhold retainage for cause, including defective work

and the failure to provide sufficient supporting data and schedules.

### Billing for Bond Premiums

The FAR specifically addresses billing for bond premiums. It does not allow the contractor to bill for those premiums until the contractor has made payment to the surety. FAR 52.232-5(g). All too often, the contractor bills the bond premiums as part of mobilization before it actually pays the surety, which is a violation of the FAR and can lead to false claim allegations. This is also true on the bond premiums included in changes to the work. Typically, the surety does a true-up at the end of the job and collects the additional bond premiums for increases in the contract price. As a result, the contractor should not bill the bond premiums on change order work until the end of the job when it makes the payment to the surety.

*Read the second part of this article in the fall issue of Surety Bond Quarterly.*

*Adrian L. Bastianelli, III is a partner in Peckar & Abramson's Washington, DC office. He has devoted his practice to construction claims and litigation for 40 years, handling numerous large surety bond cases. He has an active alternative dispute resolution practice having served as an arbitrator, mediator, and DRB member on over 500 disputes. Bastianelli serves on the NASBP Attorney Advisory Council. He can be reached at [abastianelli@pecklaw.com](mailto:abastianelli@pecklaw.com) or 202.457.4036.*

*Lori Ann Lange, a partner in the Washington, DC office of the law firm of Peckar & Abramson, P.C. specializes in government contract law, bid protests, and corporate compliance counseling. She represents a range of government contractors, including construction contractors, major defense contractors, informational technology contractors, and service contractors. She can be reached at [llange@pecklaw.com](mailto:llange@pecklaw.com) or 202.293.8815 ext. 7103.*

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Peter Gibbs at the joint NASBP/SBA bonding awareness pilot program held in the fall of 2016 in Maryland.

sureties submit claim applications online directly to the SBG Program. Gibbs said this electronic claims filing system got off to a slow start in terms of use by the sureties but is now being used by all SBG partners.

Another recent change is realignment of the OSG offices to provide adequate support for the eastern, middle, and western states. Each of these three area offices has a

manager and a marketing specialist to meet the needs of OSG partners and help with their questions or concerns. "My staff understands customer service is important to me and the success of our program, so every effort is made to ensure we're adequately meeting the needs of our stakeholders," Gibbs emphasized.

These changes have speeded up the submission of bonding applications and the payment of bond guarantees. "We process bond guarantee applications in less than two days and claims in less than eight days," Gibbs reported. "We're working efficiently and smarter with our partners to ensure small businesses are supported in a timely manner. In comparison with the paper-based application process in place prior to the initial launch of our electronic application system in 2007, we now approve bond guarantees and claims in less than one-quarter of the time it used to take. Contractors are happy because they receive the bonds they need quickly,

frequently without having to post collateral or other financial support. Our authorized bond producers and surety partners have been sharing their appreciation for the Program and recent improvements with us and with others in the surety industry, especially with regard to the now almost fully electronic application process and our very quick response time. A testament to our success and great relationship with the industry is the recent addition of seven new surety firms partnering with SBA and the SBG Program, bringing the total number of participating sureties to 30.

"SBA's Surety Bond Guarantee Program is not your grandfather's program anymore," Gibbs stressed. "We are constantly looking at innovative ways to improve the process to make sure our partners and contractors benefit from our products. We are striving to open doors to bonding!"

Plan to register for the complimentary July 25 NASBP Virtual Seminar at 2 p.m. ET to learn more. ●

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# INSURTECH FOR SURETY: THE FUTURE IS CLOSER THAN YOU THINK!



BY ROBERT M. COON

**YOU MAY HAVE** heard of Insurtech, but what is it? Insurtech is “the use of technology innovations designed to squeeze out savings and efficiency from the current insurance industry model,” as defined by the website Investopedia.

Imagine that you receive a large contract bond request through your agency web portal, which is forwarded to the surety through your surety management system. The underwriter approves it electronically, with the report of execution and bond premium information automatically downloaded into your agency billing system in seconds. The bond form is populated by the information on the request form—all that is left to do is execute and deliver the bond. Imagine that your client sends you his or her quarterly work in process (WIP) as an email attachment. You open it

with your surety management system, which instantly analyzes all the jobs. This gives you the time to identify and address any areas of concern before forwarding it to the surety.

These are both examples of Insurtech in the surety world, and if you attended the Innovation Center presentations at the NASBP Annual Meeting & Expo in Boca Raton, Florida, you do not have to imagine them. Some of the cutting edge technology in development for surety producers and underwriters was on display. Sureties and software providers demonstrated system improvements based on the developed ACORD and XBRL data standards. ACORD is the Association for Cooperative Operations Research and Development, a global, nonprofit organization serving the insurance and related industries. The XBRL data standard renders paper-based information, such as the WIP report and supporting financials, computer-readable, reducing costs and delays and enabling data to be extracted automatically into sureties’ financial systems without rekeying.

XBRL and The Hartford demonstrated the powerful benefits of using data standards for WIP reporting. Due to a slow internet connection, the WIP analysis took a slow five seconds to

complete—a better connection would have completed the analysis in a fraction of the time. With the use of data standards, the time it takes to analyze a WIP report, whether it is 10 jobs or 1,000, is seconds—without any errors. In comparison, inputting WIP data without standards is a highly manual process, which can take between 20 minutes to 20 hours for a single WIP report. The Hartford estimated that the cost of implementation will be recovered in just a few months. The demonstration, which is detailed in a case study (<https://xbrl.us/research/automation-improves-surety-underwriting-process/>) highlighted the potential of XBRL data standards revolutionizing the underwriting and decision-making process.

Marcum, LLP showed how easily converting an Excel WIP report into an XBRL-formatted report can be done. Liberty Mutual Surety and Insure Vision Technologies provided an example of how ACORD-based standards can facilitate the bond approval, execution, and reporting process. The improved efficiency benefits the agency, the surety, and their mutual clients by reducing response time and eliminating errors.

e-SURETY provided an eye-opening live demonstration of submitting a bond request on the ACORD request



form to the surety, through approval and execution of the bid and performance bond, all of which took about 10 minutes. This demonstrated how the seamless transmission of data between agency and surety systems can eliminate duplicate entry and drive efficiency. The use of real-time data exchange between the agency and surety allows expedited underwriting review and informed decisions.

Insurance Automation Group followed a contractor's bond request from client submission, agency processing, and execution through its surety management system to billing through the agency management system. Its presentation highlighted IVANS' eDocs technology, which facilitates the transmission of data files, such as reports of execution and powers of attorney from the surety to the producer. NIIT Technologies provided a demonstration of how data standards facilitate the communications between all stakeholders in the surety process.

The joint efforts of the NASBP Automation & Technology Committee and SFAA E-Business Advisory Committee to work with industry partners to develop data standards are starting to come to fruition. After watching the presentations, Chris von Allmen with Garrett-Stotz Company, Louisville, Kentucky, commented "The innovation stage at the Annual NASBP Meeting highlighted a turning point of technology in surety. Viewing the ability to download a Work in Progress schedule and have an outputted analysis shows exactly how close we are to this future."

So how can you start benefiting from these technologies? The presentations at the Innovation Stage provided a glimpse of the technology that is coming your way. Keep an eye out for announcements as these improvements go live; they'll be highlighted in the NASBP publications, *NASBP SmartBrief* and *Pipeline*. In the meantime, discuss the benefits and potential usage of the data standards with your surety partners and system providers. XBRL

is an open standard that can be used as soon as it is enabled. As technology providers enable it within their products, producers will be able to benefit from enhanced analytics. For the surety management system providers, if they're an ACORD member, they may already have full access to implement the eLabel technology. For non-members, ACORD is offering a limited license to promote usage and implementation. Encourage your partners to discover how they can help your agency become more efficient, improve the customer service experience, and stay competitive.

The latest resources related to the NASBP Surety Innovation Center are available at <http://nasbp.org/sic>. Contact Dave Golden, Director, Information

Technology, at [dgolden@nasbp.org](mailto:dgolden@nasbp.org) for more information. ●

*Robert M. Coon is Vice-President of Surety for the NASBP Member firm of Scott Insurance in Greensboro, NC. Coon focuses exclusively on the surety industry and has over 30 years of experience as both an underwriter and agent. Based in Greensboro, NC, with clients throughout NC and VA, Coon works with contractors ranging in size from startups to multinational contractors to maximize their surety programs both in the U.S. and internationally. Coon serves as Chair of the NASBP Automation & Technology Committee. He can be reached at [rcoon@scottins.com](mailto:rcoon@scottins.com) or 336.510.0072.*




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I am Marla D. Thompson, Executive Vice President and Co-Founder of Surety Solutions. Standing with me at Surety Solutions are claims and recovery specialists who like me refined their skills in the trenches. Our executive team has decades of experience and expertise in all the services we provide.

I began my surety career as a file clerk in surety underwriting 29 years ago. Early in my career, I transitioned to handling claims against contractor's license bonds. My underwriting knowledge added to my claim handling capability and I advanced to also handle contract, license & permit and property broker bond claims and to managing and training personnel and claim departments.

I understand surety underwriting and claims responsibility at all levels; I have been the underwriter, claim handler, collateral & recovery manager, training program leader, loss mitigation specialist, subrogation department manager, and claims executive. I know the significance of verifying the bond indemnitors' identification and collateral as it applies to both underwriting and claims processes; I know the necessity of identifying fraud at bond application and in claims and ensuring regulatory compliance.

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