




	<h2>Poor Performance During Construction</h2>
	<p> Mark Kelley <i>Miller Brown & Dannis</i> </p> <p> Terry T. Tao, AIA <i>Atkinson Andelson Loya Ruud & Romo</i> </p>


	<h2>What to Do with the Underperforming Contractor</h2>
	<ul style="list-style-type: none"> ■ Identify causes <ul style="list-style-type: none"> ■ Including evaluating the Owner's team (District, Architect, CM, Project Inspector) own problems <ul style="list-style-type: none"> ■ Design issues: Analyze whether the poor performance is due to a design deficiency ■ Coordination issues: Analyze whether the poor performance is due to poor coordination, especially on multi-prime project ■ Need a documented history of the contractor's problems, in the project file and correspondence

	<h2>What to Do with the Underperforming Contractor, Cont.</h2>
	<ul style="list-style-type: none"> ■ The Cooperative Approach <ul style="list-style-type: none"> ■ Correct District Team's own problems ■ Offer whatever assistance the District and/or its team can offer to the contractor ■ Request specific written assurances that each deficiency will be corrected, with time frame and steps to be taken ■ And if that doesn't work, develop record of material breach by the contractor

	Contractor Problems: Money and Quality
	<ul style="list-style-type: none"> ■ Stop notice claims from subcontractors or material suppliers ■ The contractor has supplied an insufficient number of workers ■ Inferior workmanship ■ Look out for District overpayment


	Contractor Problems: Time/Schedule
	<ul style="list-style-type: none"> ■ The schedule has significantly slipped for reasons not attributable to District's team ■ Project will not/has not completed on time ■ There is little or no activity on the project with little or no justification ■ Liquidated damages are being/are likely to be assessed


	Contractor Problems: Non-Performance
	<ul style="list-style-type: none"> ■ Refusal to perform critical work after a directive is issued ■ Failure to coordinate subcontractor work ■ Material deviation from contract requirements and refusal to correct the deviation ■ The District is suspicious that the contractor may be in the process of abandoning the job



When Troubles Arise...


- Notify the Surety
 - Problems may be averted because of the Surety's expertise in dealing with Contractors and seeing projects through to completion
 - Some sureties will step in to help a contractor prior to a District terminating a contractor.






When Troubles Arise...


- Declaration of Default (Formal, Written)
 - Be careful of improperly worded letters to avoid a "Wrongful Default"
 - Follow specific contract requirements, which may include:
 - Number of days for Contractor to cure,
 - Notice to all parties,
 - Termination (Board action) before time begins to run for surety action











Bonds / Sureties (Back-end)



- A Surety Bond is based upon an underlying *CONTRACT* which must be in writing - a guarantee of an underlying agreement
 - The obligation of the Surety is spelled out in the terms and conditions of the agreement
 - Construction Contract
 - Statute



 	<h2 style="text-align: center;">What are Surety Bonds?</h2>
	<ul style="list-style-type: none">■ A Surety Bond is based upon an underlying <i>CONTRACT</i> which must be in writing - a guarantee of an underlying agreement ■ The obligation of the Surety is spelled out in the terms and conditions of the agreement<ul style="list-style-type: none">■ Construction Contract■ Statute



 	<h2 style="text-align: center;">Contractors must QUALIFY for Surety Bonds</h2>
	<ul style="list-style-type: none">■ A Surety <i>DOES NOT</i> lend the Contractor money, but “co-signs” with the Contractor to allow the Surety's financial resources to back the commitment of the Contractor. This backing enables the Contractor to acquire a contract with the Owner ■ Obtaining bonds is more like obtaining bank credit than purchasing insurance

 	<h2 style="text-align: center;">Performance Bonds</h2>
	<ul style="list-style-type: none">■ Assures the faithful fulfillment of the underlying agreement by guaranteeing that the Surety will complete the work in the event that the Contractor fails to do so

Payment Bonds



- Protects labor and material suppliers for the payment of services
- Protects Owners from disputes and legal expense of verifying the interests of the claimants

The Surety is not obligated to respond until there is a formal declaration of default


Declaration of Default

Defined legal position, predicated on the definition of default contained in the underlying agreement

What is the responsibility of the Surety in the event of a notification of a claim?


- Acknowledge the complaint from the Owner or payment bond claimant
- Investigate the complaint with their Principal
- To insure the completion of the original contract requirements
- To insure payment to properly documented labor and material suppliers



Managing the Claims Process

When having problems, provide an early warning to the Surety:


- Consult your legal counsel
- File your complaint in writing
- Ask for a specific response from the Surety
 - Request a “face to face” meeting to discuss your complaint and the findings of the Surety



What can the Surety do when a default is declared?

The Surety may . . .


- Retain the original Contractor
 - Provide trained personnel
 - Offer financial assistance to the Contractor
 - Provide payment for the subcontractors and suppliers



What can the Surety do when a default is declared? (cont..)

The Surety may . . .


- Do nothing and let the Owner finish the project
- If this happens:
 - Notify the Surety of your intent to finish the project
 - Mitigate the cost of the uncompleted work
 - Document all Owner extra costs separately
 - Keep the Surety informed of the progress




What can the Surety do when a default is declared? (cont..)

The Surety may . . .


- Take over and complete the project
- Tender a new replacement Contractor






Takeover Agreements with Performance Bond Sureties


- This is a negotiated agreement, setting out the terms of the Surety's completion of the Project
 - Incorporate all original bid and contract documents
 - Specifically state any changes in plans or specifications.
 - Reserve all if District's rights and authority under the Contract
 - Surety may reserve its rights as well











Tips to Remember About Surety Claims


- The Surety may act on behalf of the Contractor *ONLY* after the Owner has found and declared the Contractor to be in default of obligation to the Owner
- Proper default triggers responsibility of the Surety to take action
 - Complaints and allegations of deficiencies may prompt the Surety to conduct an investigation, but does not necessarily result in immediate action



 	<h3>Tips to Remember About Surety Claims</h3>
	<ul style="list-style-type: none">■ Be prepared with critical information, contracts, project documentation, payment history, critical unfinished items■ Have the Architect provide a written opinion as to the basis for the default

 	<h3>Potential Errors to Avoid</h3>
	<ul style="list-style-type: none">■ Untimely notice of the default■ Don't default a Contractor unless a <i>material breach of contract</i> has occurred■ Make sure the Contractor has not been significantly overpaid■ Don't terminate a Contractor unless you are certain that the situation can not be recovered through acceleration

 	<h3>Potential Errors to Avoid</h3>
	<ul style="list-style-type: none">■ Failure to acknowledge major revisions in the contract documents■ Unauthorized extension of time■ If there is a certainty of the incurring liquidated damages, make sure the Contractor is notified in writing

	Location of Additional Information
	<ul style="list-style-type: none">■ Dept. of Treasury Circular 570 listing of approved Sureties - www.fms.treas.gov/c570/ ■ AM Best rating service - www.ambest.com ■ Surety Information Office - www.sio.org

