



## Remedies for Contractor Failures

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## Setting the Context

- The Warning Signs
- Deciding When and How to Default the contractor
- What You are Likely to Hear From the Surety
- What You are Likely to Hear from Your Attorney
- What You are Likely to Hear from Your Construction Manager
- Dealing Effectively With Sureties: Strategies for Success

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## The Warning Signs

- Initial Signs
  - Extremely Low Bid
  - Difficulty Returning Contract Documents
  - Failure to Mobilize Timely
  - Missing Activity Durations
  - Insufficient Manpower
  - Unable to Procure Necessary Materials/Subcontract Work
  - Employees Not Being Paid/Not Being Paid Prevailing Wage
  - Unable to Contract Contractor – Not on Site When Needed. Rental Equipment Disappearing. PM/Supervision Abandoning Ship.

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## Deciding When and How to Default the Contractor

- First, We Are Talking About Termination For Cause Or “Defaulting” The Contractor
- This Is Not Termination For Convenience

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## Deciding When and How to Default the Contractor

- Dirty Laundry: What Do My Plans Look Like?
  - Bad plans could mean that the delays and bad performance may not be the contractor’s fault
  - Will my good friend the architect be an asset or a liability?

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## Deciding When and How to Default the Contractor

- Dirty Laundry: Will Those 548 RFIs Mean The Contractor Will Sue Me If I Terminate?
  - I know that all contractors submit RFIs, some a lot
  - But if many of those RFIs are valid, then do I have problem?

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## Deciding When and How to Default the Contractor

- My Good Friend The Architect Says:
  - "All of those RFIs were #\$\$%@"
  - "The contractor can't read plans"
  - "Our response time on RFIs are standard in the industry"
  - "Can we get rid of this contractor?"

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## Deciding When and How to Default the Contractor

- My Other Good Friend The CM Says,
  - "The contractor will never get done on time"
  - "The contractor isn't staffing the project with enough workers"
  - "Can we get rid of this contractor?"
  - "I can get this project done in half the time it'll take the contractor"

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## Deciding When and How to Default the Contractor

- Here's What I Think,
  - "The contractor wanted more money for every change my Board made"
  - "This contractor is the worst I've ever worked with"
  - "This contractor never cooperates to help solve problems"
  - "Can we get rid of this contractor?"

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## Deciding When and How to Default the Contractor

What Should You Do?

Let's Review Some Options

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## Deciding When and How to Default the Contractor

### ■ Try To Work It Out

- Terminating will almost never speed up construction
- Have a "get religion" discussion with the contractor
- Post meeting letter

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## Deciding When and How to Default the Contractor

### ■ Remove Scope

- Short of termination, remove a portion of the contractor's work so the contractor can get back on schedule
- Can result in an angrier and an even less cooperative contractor
- You may have just removed its profit

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## Deciding When and How to Default the Contractor

- Remove Scope (Cont'd.): What Do You Do With The Scope You Removed?
  - Have the CM do it
    - Can be a problem (reporters love this kind of story)
  - Do I have to bid this scope?
    - Lawyer's answer: maybe, maybe not

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## Deciding When and How to Default the Contractor

- Get The Surety Involved Short Of Termination
  - Notify surety of problems
  - State clearly that termination will be the District's only other option

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## Deciding When and How to Default the Contractor

- Get The Surety Involved Short Of Termination (Cont'd.)
  - Some sureties are more cooperative than others
  - Suggest the surety determine if surety's assistance in staffing, expertise, or funding would keep the Contractor out formal default

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## Deciding When and How to Default the Contractor

- Do it: Terminate The Contractor In Writing
  - Address a "notice of termination" letter to the contractor and the surety that:
    - Terminates the contractor
    - Demands performance from the surety
  - State that District staff will go to the Board to approve the termination
    - Termination not effective until Board action

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## Deciding When and How to Default the Contractor

- Do it: Terminate The Contractor In Writing (cont'd.)
  - State all pending timelines (e.g., approaching milestones, past milestones)
  - State whether the District will self perform any work
  - Cite contract provisions on termination and failures of the contractor

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## What You are Likely to Hear From the Surety

- What You See
- What You Won't See
- What You May Not Understand (and what you really need to know)

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## What You Will See

- Correspondence from the Surety or its Lawyer
  - Seeking clarification of the Notice or Demand Letter
  - Confirming the initiation of the Surety's independent investigation
  - Preliminary document request
  - Initial reaction based upon language of the bond or available documents
  - Reservation of rights

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## What You Won't See

- Notification to branch and agency
- Internal evaluation of current claim activity, financial status of contractor
- Demand for explanation from bonded principal
- Possible notification of indemnitors

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## What You May Not Understand

- It's Not Insurance
  - Risk Pooling
  - Law of Large Numbers
- Underwritten for No Loss
- Tripartite Relationship

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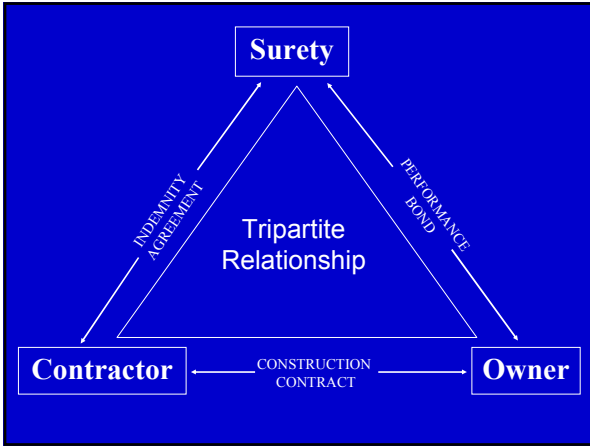
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### General Indemnity Agreement Common Provisions

- Assignments
- Indemnification
- Exoneration
- Collateral Demand
- Ability to Settle Claims
- Access to Information
- Power of Attorney
- Discontinue Surety Credit
- Control Performance of Bonded Projects
- Take Projects from Contractor

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### What You are Likely to Hear From Your Attorney

- Back to our "Dirty Laundry" Scenario:  
Will Those 548 RFIs Mean The  
Contractor Will Sue Me If I Terminate?

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## What You are Likely to Hear From Your Attorney

- 548 RFIs And You're Only Calling Me Now !!?

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## What You are Likely to Hear From Your Attorney

- We Are In A Termination Situation
  - Which means, we are in a pre-litigation situation
  - Get to know your lawyer even better
  - Don't release any funds or sign anything without attorney review

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## What You are Likely to Hear From Your Attorney

- Remember, The Surety Is Not On Your Side Of The Table
  - But working with a surety will usually benefit the District
    - At least work more closely with the surety than you might the contractor

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## What You are Likely to Hear From Your Attorney

- Give The Surety Some Time
  - Again, getting the surety involved will not necessarily speed up completion
  - But keep the pressure on for quick action
    - Silence will not trigger quick action. Keep on the surety

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## What You are Likely to Hear From Your Attorney

- Bankruptcy Potential
  - A defaulting contractor is often a pre-bankrupt contractor
    - Even so, contractor (it's lawyer?) should usually be notified of all actions being taken by District and surety

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## What You are Likely to Hear From Your Attorney

- Other Option: Terminate But Do Not Demand The Surety Perform
  - Terminate the Contractor without demanding the surety perform or complete the project
  - Similar to "Remove Scope" scenario

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## What You are Likely to Hear From Your Attorney

- Other Option: Terminate But Do Not Demand The Surety Perform (cont'd.)
  - Many Considerations:
    - Am I holding sufficient funds to complete the project without making a claim on the bond?
    - Should I "notify" surety (without demanding performance) that District is taking over project or scope.
      - Yes, almost always

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## What You are Likely to Hear From Your Attorney

- Other Option: Terminate But Do Not Demand The Surety Perform (cont'd.)
  - Again, who is going to do the work (Removing Scope Redux):
    - Have the CM do it?
      - Can be a problem (reporters love this kind of story)
    - Do I have to bid this scope?
      - Lawyer's answer: maybe, maybe not

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## What You are Likely to Hear from Your Construction Manager

- Strategies to Move the Project Forward
  - Schedule Evaluation and Potential Impacts
    - Long Lead Items
    - Other Contractors
    - Project Completion
    - Activity Takeover
  - The Timing of Contractor Default
  - Potential Bridging Steps
  - Shuffling Activities
  - Payment Issues and Work to Complete
  - Phased/Delayed Opening

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## Dealing Effectively With Sureties: Strategies for Success

- Draft the bonds and contracts to be consistent with one another
- Familiarize yourself with the terms of the bonds and contracts before contacting the surety
- Clouds on the horizon – notify the surety early
- Anticipate responses which redirect focus to the contractor's performance

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## Dealing Effectively With Sureties: Strategies for Success

- Anticipate the countervailing demands of the contractor and indemnitors on the surety
- Become familiar with your surety claim handler and the claim organization
- Cooperate with the surety's independent investigation

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