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AIA Gives Its Bonds a New Look

By: Eric Radz

Earlier this year, the AIA revised and released bond forms A-310 Bid Bond and A-312 Performance and Payment Bonds. This marks the first time the AIA has modified the A-310 since 1970 and the A-312 since 1984.

The changes with respect to the A-312 bid bond are minimal and the highlights are as follows:

1. Parties are now referred to as Contractor, Owner and Surety instead of Principal, Obligee and Surety.
2. Language has been included that grants a sixty (60) day extension of the time for acceptance of the bid specified in the bid documents, without notice to the surety. However, any time extension beyond 60 days requires notice to, and consent of, the surety.
3. Language has been added stating that if any statutory language conflicts with any provisions in the bond, the bond provisions will be deemed deleted and the statutory language will be read into the bond. This is applicable in situations where public owners require bid bonds to meet statutory requirements.

The AIA decided to make more substantial revisions of the A-312 Performance and Payment Bonds. With respect to the Performance Bond, the AIA has revised the Section 3.1 provision that required the owner, upon providing notice to the contractor and surety that it is considering declaring the contractor in default, to request and attempt to arrange a meeting among it, the contractor, and the surety. In response to certain jurisdictions holding that such a meeting acted as condition precedent to the surety's bond obligation, the language now states that the owner may request such a meeting, but is not required to do so, before terminating the contractor and exercising its rights under the bond. However, if the Owner does not request a meeting, the Surety may request it within five (5) business day after receiving the owner's notice. In that event, the owner is required to attend.

In an effort to remove some of the waiting periods that many believed were unnecessary, Section 3.2 has been revised to eliminate the twenty (20) day period in which the owner had to wait until it declared the contractor in default. Also, the A-312 1984 requirement that the owner wait fifteen (15) days after sending an additional demand for the surety's performance before deeming the surety in default has been reduced to seven (7) days.

The Performance Bond has also been revised to do away with the requirement that an owner provide notice to the surety that it is considering declaring the contractor in default. Under the 1984 version, this notice requirement was a condition precedent to the surety's obligations and failure on the part of the owner to provide this notice would release the surety from its obligations. Now, Section 4 specifically states that the owner's non-compliance with the 3.1 notice requirement does not constitute a failure to comply with a condition precedent to the surety's obligations, except to the extent that the surety can demonstrate actual prejudice.

The final major revision to the A-312 Performance Bond deals with the limitations to the surety's obligations. Under new Section 8, the surety's liability is limited to the amount of the bond, but only under circumstances where the surety does not elect to perform and complete the construction contract itself. When the surety does elect to perform the construction itself, the preservation or waiver of the limit of the amount of the bond will, theoretically, be set out in the takeover agreement.

The A-312 Payment Bond received a facelift as well. Section 1 has been modified to state that the conditions of Section 1 are subject to the remaining provisions of the payment bond. A court in one jurisdiction had held that Section 1 was an obligation independent of the rest of the bond. The AIA sought to rectify this ruling.

New Section 4 clarifies the point at which the surety's obligations are triggered, stating that the surety will defend, indemnify, and hold harmless the owner against a duly tendered claim, demand, lien or suit upon the owner satisfying its Section 3 obligations of notice and tender of defense.

In another effort to do away with waiting periods, the AIA eliminated the thirty (30) day period that a claimant without a direct contract with the contractor had to wait between submitting its notice of non-payment to the contractor and sending notice to the surety. Section 5.1 now allows a claimant without a direct contract with the contractor to provide notice of non-payment to the contractor and submit a claim to the surety simultaneously.

Also, the time period within which a surety has to respond to a claim has been enlarged to sixty (60) days under Section 7.3. This extends the period an additional fifteen (15) days.

Lastly, recent court decisions, including one in Maryland, have held that a contractor's and surety's defenses under the bond were waived upon the surety's failure to comply with its reply obligations. Section 7.3 now addresses this by clearly stating that the surety's failure to discharge its obligations does not constitute a waiver of the surety's and contractor's defenses, except as to undisputed amounts for which the surety and claimant have reached agreement. However, should the surety fail to discharge its obligations, the surety is required to indemnify the claimant for reasonable attorney's fees the claimant incurs in recovering any sums found to be due and owing to the claimant.

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Bidding On Baltimore City Contracts – Pay Attention to MBE/WBE Details

By: Paul S. Sugar and Jackson B. Boyd

General contractors must always pay close attention to details when submitting bids for local, state, or federal government contracts. This simple reminder, though, is easier said than done because of the last-minute rush that inevitably occurs in submitting a bid. For example, a general contractor may not be able to confirm its subcontractors' prices until just before the bid submission deadline, causing it to scramble to finalize its bid amount.

This last-minute rush can cause a general contractor to make mistakes in its bid submission, which may lead the contracting authority to reject the bid as nonresponsive. Fortunately, for an apparent low bidder, if these errors are minor (meaning their significance as to the bidder's price, quantity, quality, or delivery are trivial), the contracting authority usually has discretion to waive the minor defects if it is in the government's best interest to do so.

One area, in particular, where bidders make mistakes is in completing Baltimore City participation forms for minority and women's business enterprise ("MBE/WBE") subcontracts. In Baltimore City, as part of its MBE/WBE bid package, a bidder must submit a Part B: MBE/WBE Participation Disclosure Form and a Part C: MBE/WBE and Prime Contractor's Statement of Intent Form. These two forms require a bidder to identify, among other things, each certified MBE/WBE to which it intends to award a subcontract, the dollar amount of the respective subcontracts, the percentage of the total contract amount that each subcontract represents, and the work/services to be performed or the materials/supplies to be furnished pursuant to each subcontract.

Unfortunately, for the apparent low bidder, errors in the Part B and Part C forms – even if they appear to be minor – have been used as grounds for the City of Baltimore Minority and Women's Business Opportunity Office ("MWBOO") to recommend to the contracting authority that the bid be rejected as nonresponsive.

And in such cases, the contracting authorities routinely defer to MWBOO's decisions, with the result being that an otherwise clean low bid is rejected.

This result is unfortunate, even given Baltimore City's stated purpose of "encouraging full and equitable participation by [MBE/WBEs] in the provision of goods and services to the City on a contractual basis" in order "to overcome the effects of past discrimination and to prevent ongoing discrimination in the City's contracting process." See Baltimore City Code § 28-3(a) and (b). MWBOO's intolerance for defects, regardless of how minor they may be, requires a prospective bidder to make sure that its Part B and Part C forms are flawless.

MWBOO's conduct encourages bid protests. Contractors will scramble to be awarded scarce contracts by combing through competitor's MBE/WBE bid documentation, and will file a bid protest, no matter how trivial the error. As a result, avoidable errors in MBE/WBE forms can – and do – sabotage otherwise responsive bids.

Given this reality, there are several areas in the City of Baltimore's MBE/WBE documentation where a prospective bidder must pay particular attention to details. Three such areas are as follows. First, a bidder must be sure that every MBE/WBE included in its Part B and Part C forms is certified by MWBOO for the type of work that the MBE/WBE intends to perform. This certification is required before bid opening, and the failure to comply will result in the dollar amount listed for the non-certified subcontractor being deducted from the bidder's overall utilization goal. See Baltimore City Code § 28-76(b).

Second, a bidder must be sure that it is counting the correct percentage of a particular MBE/WBE subcontract amount towards its overall utilization goal. There are various provisions in sections 28-31 to 28-45 of the Baltimore City Code that set forth what percentage of a proposed MBE/WBE subcontract amount may be counted towards the overall utilization goal. For example, if the MBE/WBE is a non-manufacturing supplier, only 25% of the intended contract amount may be counted. However, if that supplier warehouses the goods to be supplied, then 100% of the intended contract amount may be counted. See Baltimore City Code § 28-37.

Third, a bidder must be sure that the dollar amount listed for a particular MBE/WBE subcontractor on the Part B form equals the amount listed for that subcontractor on the Part C form. A discrepancy in the two forms will raise questions about what amount the bidder truly intended to contract for with the MBE/WBE – questions that can cause an otherwise flawless bid to be rejected.

Therefore, while it is easier said than done in the last-minute rush to meet a bid submission deadline, bidders must remember to pay careful attention to every single detail in their Baltimore City MBE/WBE documentation. Inadvertent errors, which may have gone unnoticed in better economic times, will not escape the competition's scrutiny and may serve as grounds to reject an apparent low bid.

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Maryland Statute of Repose

By: Matthew T. Vocci

Forty years ago, the Maryland legislature enacted the Statute of Repose (the "Statute"), which bars the right of plaintiffs from pursuing certain stale (old) claims. In its current iteration, the Statute prohibits a plaintiff's cause of action from accruing for damages to person or property resulting from the defective and unsafe conditions of improvements to real property that were completed more than 20 years before the injury. In addition, the Statute provides heightened protection to certain professions within the construction industry. Claims for damages against architects, professional engineers, and contractors no longer accrue 10 years after the improvement was completed. So, a plaintiff's damages must have occurred within 10 years after the completion of the improvement for their lawsuit to proceed against architects, professional engineers, and contractors.

The Statute, found in the Courts and Judicial Proceedings Article of the Maryland Code, states, in part:

> (a) Injury occurring more than 20 years later. -- Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use.
>
> (b) Action against architect, professional engineer, or contractor. -- Except as provided by this section, a cause of action for damages does not accrue and a person may not seek contribution or indemnity from any architect, professional engineer, or contractor for damages incurred when wrongful death, personal injury, or injury to real or personal property, resulting from the defective and unsafe condition of an

> improvement to real property, occurs more than 10 years after the date the entire improvement first became available for its intended use.

Of course, there are factual issues that must be resolved in each case, such as affixing the date the entire improvement first became available and determining the date on which the injury or damage occurred. However, in all situations, the Statute mandates that an action must be filed within three years of its accrual. Such accrual may not occur later than 10 or 20 years after the completion date depending on whether the defendant is a design professional subject to the shorter period of repose.

While the Statute provides a definite time bar for actions against many of the individuals and companies involved in the construction of improvements in Maryland, certain defendants are not afforded the benefit of the Statute. Owners and tenants, who were in actual possession and control of property when injury occurred, may not avail themselves of the Statute. The legislature also excluded certain suppliers and manufacturers of asbestos or asbestos containing products from availing themselves of the Statute.

The bottom line for plaintiffs and defendants involved in construction defect litigation is that the Maryland Statute of Repose may produce dramatic results. Before engaging in litigation, plaintiffs should review the Statute to determine whether their claims may be time barred. Defendants, on the other hand, should recognize the power of the Statute and its ability to efficiently resolve suits in their favor.