

Surety Basics

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- Nothing said here should be considered legal advice.
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Surety – What is it?

- IT IS NOT INSURANCE!
- One party obligates itself to a second party to answer for the default of a third party.
- SDCL 56-2-1
 - Suretyship is a contract by which one who at the request of another and for the purpose of securing to him a benefit becomes responsible for the performance by the latter of some act in favor of a third person or hypothecates property as security therefor.
- Three parties to the relationship;
 - Principal: Party who has assumed a contractual undertaking.
 - Obligee: Party who is due the benefits of the principal's performance.
 - Surety: Provides a bond that secondarily guarantees to the obligee the performance owed by the principal.
- Surety has the right to reimbursement from the principal.

Surety Through the Ages

- Been around for millennia
 - 2750 A.D. – tablet contained a merchant’s promise to guarantee a farmer’s agreement to cultivate another’s land and return half the produce.
- Biblical warnings about becoming a surety
 - “He who gives surety for a stranger will smart for it for he who hates suretyship is secure.” (Proverbs 11:15)
 - “A man without sense gives a ledge, and becomes surety in the presence of his neighbor.” (Proverbs 17:18)
 - “My son, if you have become surety for your neighbor, you have given your pledge for a stranger; if you are snared in the utterance of your lips, caught in the words of your mouth, then do this, my son, and save yourself, for you have come into your neighbor’s power; Go, hasten, and importune your neighbor. Give your eyes no sleep and your eyelids no slumber; save yourself like a gazelle from the hunter, like a bird from the hand of a fowler.” (Proverbs 6:1-5)

Surety Through the Ages

- 106 B.C. Rome – first recorded reference to construction surety
- Magna Carta – right to indemnity
- English Common Law – 18th century
- Use in American construction industry – 19th century
 - To protect public treasuries from the risk of default on public projects.
 - Until then, mostly uncompensated individuals.
- Heard Act
 - Enacted after the 1893 financial panic
 - Predecessor of the Miller Act
 - Federal contractors required to provide a surety bond
 - “Good and sufficient” sureties , including compensated corporate sureties approved by the Treasury Department.
- Miller Act of 1935

Corporate Sureties

- Sureties come in all shapes and sizes!
- General hear about four “markets”
 - Small and Emerging Contractor Market
 - Projects under \$1million.
 - Stringent underwriting, might require full collateral, personal and corporate indemnity
 - Big market with lots of sureties interested in writing these bonds
 - Middle Market
 - Projects anywhere between \$1million and \$100million
 - Not as stringent underwriting, but still need excellent credit history, established line of credit and banking relationship, ability to meet obligations and experience matching contracts

Corporate Sureties

- Large Market
 - \$100million and up
 - Sureties in this space need to have significant capacity to handle the programs of contractors needing bonding in this range
 - Underwriting terms and conditions generally favorable.
- “Mega Market”
 - Projects exceeding \$250million
 - Big contacts, big players
 - More and more \$1billion + projects
 - Joint ventures and co-surety arrangements are used to spread out risk.
 - P3: Public Private Partnerships

The Bond

- Contract between the Owner and the Surety (and the Principal)
- Subject to the terms of the Bond.
 - Might limit the scope of what is covered by the bond.
 - Example: DBM contracts
- Subject to contract interpretation
 - In the case of ambiguity, Court will favor indemnity.
- Penal sum
 - Limit of the Surety's liability
 - In U.S., usually amount of the project.
 - Different in other countries.
 - In SD, must be at least the total amount of the bonded contract.

The Bond

- Established at common law, but exceptions exist.
 - SDCL 56-2-12: “A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty.”
- Time limitations for claims or suits
 - If silent, then statute of limitations for contract will apply.
 - SDCL 53-9-6 prohibits surety from limiting time for suit to less than 2 years.
- Names obligee
 - Only obligee can make a claim
 - Dual obligee rider

Types of Bonds

- Defeasance Bond
 - Archaic, but still pretty common.
 - Much left to interpretation.
 - Example: **“The conditions of this obligation are such that if the Contractor shall well and faithfully perform the said Contract and all modifications, amendments, additions and alterations thereto that may hereafter be made, according to its terms and its true intent, then this obligation shall be null and void, otherwise to remain in full force and effect.”**

Types of Bonds

- AIA 312 Performance Bond
 - Most widely used bond form.
 - Important provisions:
 - Scope of the bonded obligation
 - Trigger for surety's obligations
 - The owner is not in default;
 - The owner notifies the contractor and the surety that it is considering default;
 - The owner requests a conference with the contractor and the surety;
 - Following the conference, the owner declares a default and formally terminates the contractor's right to perform; and
 - The owner agrees to pay the contract balance to the surety or the contractor selected to take over the performance.

Types of Bonds

- Surety Options
 - With the obligee's permission, arrange for completion by the principal;
 - Take over the and complete itself;
 - Tender a substitute contractor to the owner;
 - Buy back the bond; or
 - Deny liability.
- Liability Limitations
 - Lays out exactly what the surety is responsible for.
 - Provides that the Owner cannot reduce or setoff the Contract Balance against unrelated obligations owed to it by the principal.
- Suit limitation period
 - But sometimes state law will trump this.
- Bond will be construed to conform with statutory requirements.

Types of Bonds

- AIA 311 Performance Bond
 - Previous version of AIA Performance Bond
 - Still in use.
 - Less detailed, in particular:
 - Trigger for surety obligations (“Whenever Contractor shall be, and declared by the Owner to be in default under the Contract...”)
 - Surety options more limited
 - Remediating the default
 - Completing the contract
 - Rebidding the remaining work and making available sufficient funds to pay the cost of completion.
 - Does not require that the owner agree to pay the balance of the contract price to the surety.

Types of Bonds

- Indemnity Bond
 - Surety's performance obligation is limited to reimbursing the obligee up to the penal sum for any cost of completion in excess of the unpaid contract balance at the time of termination.
 - No control by surety over costs incurred.
 - Must be "reasonable," but proving "unreasonableness" is not easy.
- Miller Act/Federal Standard Form 25
 - Miller Act does not prescribe the form of the bond.
 - Code of Federal Regulations provides standard form.
 - Basically an indemnity bond.
 - But not necessarily limited to payment; can include whatever the government agrees to accept.

Types of Bonds

- Subcontractor Bonds
 - General Contractor is the obligee and subcontractor is the principal
 - Might be required on large construction projects
 - Usually mirrors bond being used for General Contract
- Bid Bonds
 - Security to ensure that the bidder will enter into the contract if it is determined to be the lowest responsible bidder.
 - Usually between 5 and 10 percent of the bid.
 - Some statutes or RFPs mandate that the bid security constitutes liquidated damages.
 - But typically, the obligee makes a claim against the bond for its actual damages – usually the additional cost of contracting with the next lowest bidder.

Types of Bonds

- Payment Bonds
 - AIA 312 Payment Bond
- Mechanics' Lien Discharge Bonds
 - If a subcontractor has placed a lien on an owner's property, the lien can be removed on the posting of a surety bond.
 - Statute will set the penal sum and conditions
- Developer or Subdivision Bonds
 - Sometimes considered a commercial bond
 - The obligation is not a contract that an owner is paying a contract price for.
 - Guarantees the completion of required improvements by a developer.
 - Streets, utilities, etc.

Types of Bonds

- Commercial and Other Types of Bonds
 - Probate Bonds
 - Bankruptcy and Receiver Bonds
 - Public Official Bonds
 - Reclamation Bonds
 - Commercial Bail Bonds
 - License and Permit Bonds
 - Fringe Benefit Bonds
 - Federal Excise Bonds
 - Workers' Compensation Bonds
 - Appeal Bonds
 - Notary Bonds

What can a surety do for me?

- Professionals familiar with construction contracts
 - Assist the principal with risk identification and negotiating for better terms.
 - Principal is in the best position to negotiate for better terms.
 - Surety cannot directly advocate for terms for a particular customer.
 - Can advocate generally in the face of onerous terms for industry.
- Legal expertise
 - Lawyers or access to legal resources
 - Stay on top of legal landscape for construction/surety law

Onerous Terms - Indemnification

To the fullest extent permitted by law, the Contractor shall, at its sole expense, unconditionally release, defend, indemnify and hold harmless the Owner, its parent, subsidiaries and affiliates, Owner's lender, and their respective officers, directors, shareholders, members, managers, partners, employees, successors and assigns now existing or which may hereafter exist, (collectively, the "Indemnitees"), from and against any and all liabilities, claims, damages, losses, costs and expenses, including, but not limited to, attorneys' fees and paralegals' fees, (collectively "Indemnity Claims") arising out of or resulting from performance of the Work, including, without limitation, Indemnity Claims arising out of bodily injuries, sickness, disease or death of persons (the Contractor's employees, if any, included) and injury to, destruction of, or loss of, tangible property, provided that such Indemnity Claims are caused, in whole or in part, by the acts, omissions or defaults of the Contractor, any of the Contractor's Subcontractors, Sub-subcontractors, suppliers, or agents of any tier or their respective employees, regardless of whether or not such Indemnity Claim is caused in part by any act, omission, or default of an Indemnitee arising from the Contract or its performance.

Onerous Terms

Breaking Down the Indemnification Clause

- To the fullest extent permitted by law, the Contractor shall, at its sole expense, unconditionally release, defend, indemnify and hold harmless the Owner, its parent, subsidiaries and affiliates, Owner's lender, and their respective officers, directors, shareholders, members, managers, partners, employees, successors and assigns now existing or which may hereafter exist, (collectively, the "Indemnitees"), from and against any and all liabilities, claims, damages, losses, costs and expenses, including, but not limited to, attorneys' fees and paralegals' fees, (collectively "Indemnity Claims") arising out of or resulting from performance of the Work, including, without limitation, Indemnity Claims arising out of bodily injuries, sickness, disease or death of persons (the Contractor's employees, if any, included) and injury to, destruction of, or loss of, tangible property, provided that such Indemnity Claims are caused, in whole or in part, by the acts, omissions or defaults of the Contractor, any of the Contractor's Subcontractors, Sub-subcontractors, suppliers, or agents of any tier or their respective employees, regardless of whether or not such Indemnity Claim is caused in part by any act, omission, or default of an Indemnitee arising from the Contract or its performance.

Indemnification Clause Better

To the fullest extent permitted by law, the Contractor shall, at its sole expense, unconditionally release, defend, indemnify and hold harmless the Owner, its parent, subsidiaries and affiliates, Owner's lender, and their respective officers, directors, shareholders, members, managers, partners, employees, successors and assigns now existing or which may hereafter exist, (collectively, the "Indemnitees"), from and against any and all liabilities, claims, damages, losses, costs and expenses, including, but not limited to, attorneys' fees and paralegals' fees, (collectively "Indemnity Claims") arising out of or resulting from performance of the Work, including, without limitation, **provided that such Indemnity Claims are arising out of attributable to** bodily injuries, sickness, disease or death of persons (the Contractor's employees, if any, included) and injury to, destruction of, or loss of, tangible property (**other than the work itself**), provided that such Indemnity Claims are caused, in whole or in part, by the acts, omissions or defaults **but only to the extent caused by the negligent acts or omissions of the Contractor**, any of the Contractor's Subcontractors, Sub-subcontractors, suppliers, or agents of any tier or their respective employees, **or anyone directly employed by them for whose acts they may be liable**, regardless of whether or not such Indemnity Claim is caused in part by any act, omission, or default of an Indemnitee arising from the Contract or its performance.

Indemnification Clause Workers' Compensation

In claims against any person or entity indemnified under this Section 3.18 by an employee of the contractor, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation herein shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the contractor or a Subcontractor under workers' compensation acts or other employee benefit acts.

Damages

- Types of Damages
 - Direct
 - Indirect or Consequential
 - Liquidated
 - Punitive
- Direct vs. Consequential
 - Direct
 - Damages that can be expected to result from a breach.
 - Flow naturally and necessarily from a breach of contract.
 - Cost to complete unfinished work.
 - Cost to repair defective work.
 - Cost to bring completed work up to contract specifications.

Damages

- Consequential
 - Losses and injuries not contemplated by the contract when signed.
 - Remote, not immediately flowing from the breach, but from the results of the breach.
 - Loss of future revenue
 - Lost profits
 - Cost of unknown financing or interest charges
 - Damage to reputation
 - Escalation of material costs
 - Depreciation
 - Can be enormous, well in excess of the contract price.
- Try to get a mutual waiver of consequential damages OR a limit of liability for only certain identified costs in the contract.
 - Can be advantageous to both parties.

Consequential Damages – How bad could it be?

- Perini Corporation v. Greate Bay Hotel and Casino
 - Major renovations to the Sands Hotel in Atlantic City in 1984.
 - \$600,000 contract with no consequential damages waiver.
 - Large ornamental glass façade outside facing the boardwalk.
 - Non-functional, but to attract visitors from the boardwalk.
 - Substantial completion in contract = May 31
 - Façade completion = August 31
 - Substantial completion = September 14
 - Sands sought lost profits for those four and half months
 - Arbitration award = \$14.5 million

Mutual Waiver of Consequential Damages

- Since 1997, AIA standard General Conditions form has a mutual waiver of consequential damages.
 - But still much dispute over what are “consequential damages.”

15.1.6: The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

Consequential Damages in Disguise...

Contractor shall indemnify and hold harmless Owner from and against any and all damages, losses and costs, including third party claims, which may be suffered, sustained, incurred or brought against them as a result of, in respect of, or arising out of any one or more of the following:

- (i) a failure by Contractor to achieve Substantial Completion by the Substantial Completion Target Date;
- (ii) any physical loss of or damage to all or any part of the Primary Infrastructure and the Additional Infrastructure, or to any equipment, assets or other property related thereto;
- (iii) the death or personal injury of any person;
- (iv) any physical loss of or damage to property or assets of any third party; or
- (v) any other loss or damage of any third party,

in each case, arising, directly or indirectly, out of, or in consequence of, or involving or relating to, the performance or any breach of this Agreement by Project Co or any act or omission of Project Co or any Project Co Party.

...but maybe not.

Subject to the foregoing, no claim by either party arising from any breach of this Agreement or under any indemnity given by this Agreement shall include any claim by such party against the other for punitive or exemplary damages, indirect or consequential damages or any claim for pure economic loss, whether or not the other party has been advised of the possibility of pure economic loss, and regardless of whether the action is framed in contract or in negligence.

Liquidated Damages

- Fixes the amount of damages to be paid by one party to another upon the occurrence of specified events.
- Allows the parties to pre-agree on the amounts of damages where actual determination would be difficult costly
 - Most typical = delays
- To be enforceable, the amount must be reasonable and proportionate to the anticipated loss.
 - NOT a penalty.
- Caps on liquidated damages

Indemnification Agreements

- Memorializes the surety's established common law rights.
 - Exoneration
 - Protection of the surety from all losses associated with likely or imminent failure – before it happens
 - Includes related rights to collateral and ability to demand security before a loss occurs
 - Reimbursement or indemnity
 - Repayment of all performance-related losses from its principal
 - Subrogation
 - Right to stand in the shoes of the principal or obligee to enforce their rights or priorities against other third parties

Indemnification Agreements

- Builds on and expands those rights
 - More specificity on when the surety can demand collateral or advance funds
 - Expands reimbursement and indemnification obligations
 - Obligations for any losses sustained as a result of issuing the bonds
 - Obligates not just the principal but others who agree to also be bound by the indemnity agreement
- Confers additional rights on the surety
 - Assignment rights
 - Rights to information
 - Right to settle claims
 - Principal's duty to cooperate
 - Takeover rights
 - Assists in establishing priority in bankruptcy proceedings

Indemnity Agreements

Common Terms

- Indemnity
 - Indemnitors shall exonerate, indemnify, and hold Surety harmless from any and all liability and Loss, sustained or incurred, arising from or related to: (a) any Bond, (b) any Claim, (c) any Indemnitor failing to timely and completely perform or comply with this Agreement, (d) Surety enforcing this Agreement or (e) any act of Surety to protect or procure any of Surety's rights, protect or preserve any of Surety's interests, or to avoid, or lessen Surety's liability or alleged liability. The liability of Indemnitors to Surety under this Agreement includes all Claims made on Surety, all payments made, Loss incurred, and all actions taken by Surety under the Good Faith belief that Surety is, would be or was liable for the amounts paid or the actions taken, or that it was necessary or expedient to make such payments or take such actions, **whether or not such liability, necessity or expediency existed**. Indemnitors shall promptly, upon demand, make payment to Surety as soon as liability or Loss exists, **whether or not Surety has made any payment**.

Indemnity Agreements

Common Terms

- Surety's Right to Settle
 - **The Surety shall have the absolute right and is hereby authorized, but not required to adjust, settle or compromise any claims, demands, suits or judgments upon any such Bond or Bonds, in its sole discretion.**
- Place in Funds
 - **Indemnitors agree to promptly deposit with Surety, on demand, an amount of money that Surety determines is sufficient to fund any liability or Loss. Such funds may be used by Surety to pay Loss or may be held by Surety as collateral against potential future Loss. Any remaining funds held by Surety after payment of all sums due to Surety under this Agreement shall be returned upon the complete release and/or discharge of Surety's liability under all Bonds.**

Indemnity Agreements

Common Terms

- Surety's Takeover Rights

In the event of Default by the Principal, the Surety shall have the right but not the obligation to take possession of all or part of the work under any contract covered by any Bonds, and, at the expense of the Principal and Indemnitors, to complete, to arrange for, or consent to the completion of the Contract, and to take any such other steps which the Surety may deem appropriate or necessary to obtain for the Surety a release or discharge of Surety's bond obligations.

Indemnity Agreements

Common Terms

- Waiver of Notice
 - **“The Indemnitors waive notice of the execution of any Bond or any continuation, extension, modifications, renewal or substitution thereof; any default or any other event that may give rise to or increase liability under any Bond, bonded contract, or under this Indemnity Agreement; any settlement or compromise between the Surety and another Indemnitor; any disposition or compromise of collateral; and any payment or settlement of a claim against a Bond.”**
 - Without a specific waiver provision, courts vary in positions.
 - Sometimes not practicable to notify all of the Indemnitors.
 - Could delay the Surety in making decisions that will mitigate loss.

Indemnity Agreements Common Terms

Indemnity Agreements

Common Terms

- Separate Suits
 - **“Separate suits may be brought under this Agreement as causes of action accrue, and the bringing of suits or the recovery of judgment on any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether arising before or after any other lawsuit or cause of action.”**
 - Can bring more than one lawsuit.
 - Can include one, some or all indemnitors, and can bring separate suits against them.
- Joint and Several Liability
 - **Indemnitors are jointly and severally liable to Surety under this Agreement. Surety may enforce this Agreement against any Indemnitor without joining any other Indemnitor, person or entity.**

Indemnity Agreements

Common Terms

- *Prima Facie* Evidence Provision
 - **“In the event of payment, settlement or compromise of liability, loss, costs, damages, attorneys’ fees, expenses, claims, demands, suits or judgments as aforesaid, in connection with any such Bond or Bonds, an itemized statement thereof, sworn to by any officer or officers of the Surety, or the voucher or vouchers, or other evidence of such payment, settlement or compromise, shall be *prima facie* evidence of the fact and extent of the liability of Indemnitors in any and all claims or suits hereunder.”**

Indemnity Agreements

Common Terms

- Right to Decline to Issue Bonds
 - Execution of the indemnity agreement does not guarantee the issuance of any bond.
 - All bonds would be underwritten separately.
- Specific Events of Default
 - Listed to avoid misunderstanding
 - Examples: breach of a bond, filing of bankruptcy, misrepresentation of facts, surety sets a reserve or incurs loss.
- Uniform Commercial Code
 - Provision agreeing that the Indemnity Agreement constitutes a Security Agreement and a Financing Statement pursuant to the Uniform Commercial Code.
 - Indemnity Agreement can be filed as a Financing Statement with the UCC.

Indemnification Agreements

Common Terms

- Trust Funds
 - **All sums due, to become due, or received by any Indemnitor or Principal for or on account of any Bonded Contract are trust funds in which Surety has an interest as a beneficiary of the trust whether in the possession of such Indemnitor or Principal or another. Such trust funds shall be held in trust for the benefit and payment of all obligations or Loss for which Surety may be liable under any Bond. Surety has the right, but not the obligation, to require that trust funds be placed in a dedicated trust fund account. This Agreement and declaration constitute notice of such trust.**

Subcontractor Default Insurance

Subcontractor Default Insurance

- Called SDI or “Subguard”
- Zurich, Arch, XL
- For contractors with large annual subcontractor volume (\$50million)
- “Features”
 - High retention amounts (\$500k+)
 - Co-payments for the next layer (x% of the next \$Xmillion)
 - Coverage for Direct Losses – ie. Finish uncompleted subcontractor work (subject to limits)
 - Coverage for Indirect Losses – financial losses beyond completion (subject to limits or a % of direct loss)
 - Owners can be added as additional insureds

Subcontractor Default Insurance

- Examples of claims
 - Defective work – 15%
 - Replacement of poor work by a replacement sub
 - Construction defect after project complete
 - Project controls – 15%
 - Overbillings by subcontractors with other problems
 - Unpaid amounts due by subcontractor to others
 - Subcontractor issues – 60%
 - Improper estimation of costs or quantities
 - Solvency issues from other jobs

Surety Bonds vs. SDI

- Prequalification
 - Surety: Underwriting process gives assurance that subcontractors are qualified for the work. By requiring bids, getting higher-quality subs who meet surety standards.
 - Looking in-depth at credit history, equipment, WIP, experience, etc.
 - Is this subcontractor fully capable of doing this job?
 - SDI: GC performs this using its own criteria and resources. Subcontractors might resist giving GC's financial information and other confidential data for due diligence.
- Pricing
 - Surety: based on size of the project.
 - Comes from the standpoint of all defaults are avoidable.
 - SDI: Premium depends on deductibles, co-payments, limits.
 - Assumes an inevitability of default and prices accordingly.

Surety Bonds vs. SDI

- Resolving Project Problems
 - Surety: Incentive for resolving because sub will be liable for all surety loss.
 - SDI: No real incentive for the sub. But encourages GC to become better manager of subcontractor risk.
- Claims handling
 - Surety: Team of experienced surety claims professionals.
 - Obligated to investigate claim for legitimacy.
 - Arranges for completion or pays for it.
 - Could take longer to resolve. Less control over outcome.
 - SDI: GC can take immediate action to remedy default.
 - More flexibility and control over how the work gets done.
 - Will need to file the claim and provide proof of default.
 - Manages the default, handles completion.

Surety Bonds vs. SDI

- Public Projects
 - SDI might not satisfy statutes.
 - No claim rights for sub-subcontractors or material suppliers for payment under the policies.
- Other considerations
 - SDI might encourage use of small and minority subcontractors that cannot obtain bonding.

Resources

- Surety Information Office
 - www.sio.org
- National Association of Surety Bond Producers
 - www.nassbp.org
- The Surety & Fidelity Association of America
 - www.surety.org

Surety Law in South Dakota

- Mostly statutory, not very well-developed common law
- Public improvement projects
 - Performance and payment bonds required.
 - Can be waived by the state under \$50,000.
- Owner or public purchasing agency for a public project may not require a specific surety.
 - Surety must be an authorized insurer/surety in the state.
 - But, can be rejected as to form or sufficiency.

Surety Law in South Dakota

- Notice requirements
 - No statutory requirements.
 - Courts uphold notice requirements and deadlines in the bond.
 - Must be reasonable.
 - No indication in caselaw that prejudice is required.
- Taxes
 - SDCL 5-21-3
 - “Performance” includes contractor’s obligation to promptly pay ;
 - Use tax
 - Realty improvement contractor’s excise tax
 - Alternate realty improvement excise tax.
 - Surety obligation to send a copy of the bond to Secretary of Revenue within 60 days of issuance.
 - Surety’s obligations end 60 days after completion, unless Secretary gives notice of unpaid use or excise taxes due.

Surety Law in South Dakota

- Bid Bonds required
 - Option of Certified or cashier's check for 5 % of the amount or bid bond for 10%.
 - Appears to be a forfeiture, but likely would recover only for actual damage sustained.
 - Many sureties will waive premium.
 - More attractive than check
 - But if contractor fails to enter into contract, could faced double amount.

Payment Bond Claims in SD

- Intervene and become a party in an action instituted by a public obligee on the bond.
 - Recovery of supplier subject to priority of the public entity.
 - If remainder after public entity is satisfied is insufficient for all claim, distributed pro rata.
- If public obligee does not bring suit within six months of completion and final settlements on bonded contract:
 - Supplier may submit affidavit to public entity with what is unpaid.
 - Public entity will provide certified copy of the bonded contract and the bond.
 - Supplier is then authorized to bring suit in the name of the obligee for payment from the principal and surety.
 - Suit may not be brought until six months after completion.
 - Suit must be brought within one year.
 - Only one suit can be brought...other suppliers must join.