PP001 – Extended/Long Term Warranties

Introduction

An important feature of a standard performance bond is the warranty protection it provides to obligees against faulty workmanship and/or materials. A standard performance bond includes a warranty period (one year from the date of substantial performance), but obligees should understand that performance bonds are neither designed nor priced to include protection for extended warranties.

Background

Occasionally obligees call for long-term warranties in contract documents that can range from five to 25 years and believe that sureties will respond to these warranty requirements under the terms of their performance bond.

SAC Position

The Surety Association of Canada (SAC) believes that it is inappropriate to impose extended warranty obligations upon both a contractor and a surety for the following reasons:

1. Wear & Tear

Providing surety support for long-term warranty periods is problematic because as time passes following the completion of a project, it becomes more and more difficult to discern between defects in the work and simple wear and tear.

2. Limiting Competition

Obligees that call for surety bonds on long-term warranties will likely find them unavailable to all but a select few firms. This will have the effect of minimizing competition and driving up construction costs.

3. Suit Clause

Obligees should be aware that standard performance bonds provide an additional restriction on a surety's responsibility for long-term warranties under the terms of the suit clause. The SAC Performance Bond states:

It is a condition of this Bond that any suit or action must be commenced before the expiration of two (2) years from the earlier of: (1) the date of Substantial Performance of the Contract as defined in the lien legislation where the work under the Contract is taking place, or, if no such definition exists, the date when the work is ready for use or is being used for the purpose intended, or (2) the date on which the Principal is declared in default by the Obligee.

However, it should be noted that the enforceability of the suit clause or indeed any warranty provisions can be limited by legislation in various jurisdictions which can override the provisions of any bond or contract. For example, most provinces have passed limitation legislation which can determine the time available to commence an action; notwithstanding the terms of set out in the performance bond.

Summary

The Surety Association of Canada will continue to suggest to the contract surety community that while surety bonds provide the best protection against contractor default, they are neither, priced nor designed to provide a solution to long-term warranty requirements.

Glossary of Terms

Obligee

An individual or organization in whose favour an obligation is created and to whom a bond is given.

Principal

The individual or organization that bears the primary responsibility for fulfilling the obligation under the written contract referenced in the bond and that has the duty to perform for the Obligee’s benefit.

Surety

The party to a surety bond who answers to the Obligee for the Principal’s default or failure to perform as required by the underlying contract, permit or law.

This paper is intended to serve as a general guideline to assist members and other readers in responding to the issues discussed. Nothing contained herein should be construed as legal advice and readers are cautioned to consult with legal counsel for such advice.

Second Edition

June 2021

6299 Airport Road, Suite 709, Mississauga, ON L4V 1N3 | Tel: (905) 677-1353
Email: surety@suretycanada.com | www.suretycanada.com