

# McGRIFF, SEIBELS & WILLIAMS CONSTRUCTION RISK SERVICES

## *OWNER DEFAULT*

Birmingham, Alabama (800) 476-2211 • Atlanta, Georgia (800) 476-2541 • Dallas, Texas (877) 624-7433

Houston, Texas (800) 877-1449 • Portland, Oregon (866) 807-2262

Philadelphia, Pennsylvania (484) 680-6520 • New Orleans, Louisiana (866) 216-7393

San Antonio, Texas (877) 254-6564 • St. Louis, Missouri (866) 377-0545



# Red Flags

- **Payment Slow Down**
- **Payment Default** – Will you please quit drooling on the dash? You are clearly asleep at the wheel!
- **Lack of Communication (Owner or Lender)**
  - Needs to be clear and open
- **Industry Taking a Dive (Condo Market)**
  - Understand the Terms of the Loan – Sellout Minimums?
- **Heavily Layered Financing without a Strong Lead**
  - Who is the lead, rating, recent results, how many attachments on the backside?
- **An Inexperienced Owner** -Naïve, will likely take a defensive posture at any sign of trouble. Need experience involved! Understand the owners financial wherewithal as well.



# *The Wheels Come Off!*

- **Implementation of Survival Plan**
- **Focus on Recoverability** – Try and maintain control of the relationships as best as possible. Immediately pull all available resources to map out plausible solutions to all conceivable outcomes
- **Contact Owner & Lender** – Try and get a firm understanding of the severity of the situation and try to come up with a solution that is consistent with recoverability for all parties.
- **Negotiate vs. Litigate** – At all cost, if possible try to keep from defensive posturing. It is usually much more beneficial for all involved to stay out of a lengthy and expensive court battle.
- **Provide Options** – Come to the table with options based on severity. Dry in, HVAC, Marketability. Focus on the lowest cost for the greatest return.
- **Communicate with Subs** – Immediately sit down with subs and communicate the situation. Try and come to an understanding as to exactly where there cost to date are vs. paid to date and include them in the solution process. It is critical that you maintain a healthy relationship with the subs not only for recoverability of the problem jobs but for future work as well.



# ***Bonding Issues***

## ■ **Performance Bond**

## ■ **Payment Bond**

- **Pay if Paid** – State law will typically govern this but if enforceable, the sub doesn't have much recourse other than to lien the job.
- **Pay when Paid** – What is reasonable time if you never get paid? Payment bond will trigger
- **Caveat Clause** – Are you contractually agreeing to pay the sub in the event of non-payment or owner default to pay the subs or suppliers monies that they have earned but have not been paid in an effort to be “fair”? Triggers the payment bond. In addition, absence of a contingent payment provision also exposes the payment bond to claim.
- Payment bond issues can create a potential for subs to run for cover under the protection of the payment bond and can impede the ability to effectively negotiate a state of recoverability.
- **SIO has published a fifty state study on PIP/PWP clauses and it is available through their website at [www.sio.org](http://www.sio.org)**



# *Insurance Issues*

- **Builder's Risk – A Ticking Time Bomb!**
  - **Who Is Responsible for Coverage Moving Forward?**
  - **Claims Handled on Interest vs. Priority** – What is the risk of settlement dollars disappearing. Is the bank an insured under the builders risk policy?
- **OCIPs – Dovetail Coverage if Possible** – DIC policy that sits over the OCIP. Need to inquire as to GL carriers willingness to endorse policy project specific to pick up any potential liability associated with contractors interest moving forward.
  - **Deduction Offsets** – This is going to be very difficult to obtain.
  - **Coverage Gaps** – If the project continues and the OCIP goes away, coverage needs to revert back to contractors coverage which will create some gap issues
  - **Minimum Premiums** – Likely a minimum premium of 90% or more. Try to address this contractually on the front end of the contract. Prorata wording on OCIP cancellation midterm.
- **CCIP's – Capacity/Exposure Issues**



# ***Completed Operations Coverage***

- **Bye Bye Ball!** – This is very likely gone. Again, you need to try and negotiate with your carrier on endorsing your GL policy to pick up specific coverage for this project for liability exposure. This will more than likely be accomplished through the OCIP exclusion. Ex. (except as it pertains to this project)
- ***Attractive Nuisance***
- **Who Is Responsible for Securing the Site**
- **Ongoing Exposure**
- ***Pollution*** – *Same issue as GL above*
- ***Professional*** – *Same issue as GL above*

GRANDPARENTS?



# *An Ounce of Prevention, A Pound of Cure*

- **Financial Specialists** – Important to have someone on staff that understands loan docs and the importance of properly confirming and reaffirming financing
- **Receivables** – Need to be consistently reviewed both at the project level as well as upper management. Address slow pays immediately!
- **Loan Docs** – Need to get a copy of them
- **Structure of Financing** – Bonds? Are they revocable? Sellout Minimums? Is an escrow agent involved? What are the default provisions. The owners ability to comply with the covenants.
- **Strength of Lender** – What is their rating? How are they performing? Experience in this type of work? Who is behind them?
- **Communicate with Lender** – It is critical to have a direct line of communication with the lender. Verify Change orders and have them sign off. Really want an open dialogue between the owner and lender.
- **Re-affirmation of Financing** – Not just on the front end but throughout the project!



# Questions?

***Good decisions are made up of experience and most of that is derived of bad decisions!  
LEARN FROM OTHERS MISTAKES!***

Resources: [www.nationallienlaw.com](http://www.nationallienlaw.com)

[www.sio.org](http://www.sio.org)

