2026 SURETY BONDING & CONSTRUCTION RISK MANAGEMENT CONFERENCE

Hosted by: AGC THE CONSTRUCTION ASSOCIATION

10 Surety Maxims For Managing Risks and Avoiding Exposure

By: Christopher J. Brasco; Matthew D. Baker; & David Gabbay

THIS PAPER WAS WRITTEN IN CONJUNCTION WITH A BREAKOUT SESSION AT AGC'S 2026 SURETY BONDING AND CONSTRUCTION RISK MANAGEMENT CONFERENCE

10 Surety Maxims For Managing Risks and Avoiding Exposure[1]

By: Christopher J. Brasco; Matthew D. Baker; & David Gabbay[2]

Complex construction projects are rife with risks which obligees, sureties, and principals must navigate. However, these risks can also present opportunities for innovative solutions. This paper seeks to provide industry stakeholders with experienced-based principles for assessing and managing risks arising on projects facing imminent termination. As always, the legal and regulatory framework remains important, but the ten maxims set forth herein can provide important insight for stakeholders when trying to effectively manage risk, avoid exposure, and build a project rather than a lawsuit.

1. One Head But Many Hats

The tripartite relationship among the surety, the principal, and the obligee[3] becomes essential when navigating a potential declaration of default under the bond. As the new participant in the project team and the link between the project participants, the surety can work to reestablish positive communication in a relationship which has invariably become strained at this juncture. When parachuting into a troubled project, the surety's representative becomes a jack-of-all-trades. The surety's representative faces the challenges of attempting to quickly understand often complex technical issues; assessing the current progress of the work and related impasse issues; troubleshooting communication issues between the parties; analyzing legal challenges; and identifying and assessing mitigation opportunities for completing the work. Having gained credibility through its investigation, the surety representative may find itself able to help the parties navigate and resolve issues hindering successful completion of the project.

2. Trust is King

This surety risk maxim is closely related to and builds upon the prior relationship-based concept. Trust is key to building cooperation and effectively managing risk. In the surety industry, broken relationships are a near constant in conflicts between principals and obligees. A common denominator leading to broken relationships between principals and obligees is lack of trust. Parties generally terminate a contract as a last resort and only after the parties have exhausted their ability to work together. Consequently, a key objective for minimizing exposure for all concerned is to rebuild trust among the project team.

---

[1] Disclaimer: The information in this paper is of a general nature, for informational purposes only, and does not constitute legal or professional advice. The information in this paper may not apply to your specific situation and may be incomplete or outdated. You should not rely on the information in this paper without first consulting a licensed attorney familiar with your specific facts and legal issues. Any opinions expressed herein are solely those of the individual authors.

[2] Joel Sciascia and Neil Sinclair provided important contributions to this paper submitted in connection with a panel featuring Chris Brasco, Matthew Baker, Joel Sciascia, Neil Sinclair, and Leslie Alvarado-Lliteras.

[3] *Cates Constr., Inc. v. Talbot Partners*, 980 P.2d 407 (Cal. 1999) ("…the surety relationship is a tripartite one implicating the separate legal interests of the principal, the obligee and the surety."); Conn. Prac., Construction Law § 11:5 (December 2025 Update) ("[T]he performance bond is a tripartite relationship between principal on the bond, the surety and the bond obligee.")

Rebuilding trust starts with being a person who can be trusted. Something as simple as providing a status report to an obligee within the time promised is an opportunity to build trust. When a surety representative shows the project participants that they are consistent and can be relied upon to do what they say, they can start the process of re-building an environment where trust can grow. Another way to foster trust is to maintain and insist upon open lines of communication. When practicable, including all necessary parties in the communication loop allows all stakeholders to be on the same page, limits misunderstandings, and creates the opportunity for the parties to be transparent regarding their intentions. Yet another trust building practice is the development and implementation of an action plan informing mitigation opportunities. Developing a joint action plan may also provide the surety representative with insight into reasons the obligee and principal previously lacked success in cooperative problem solving and how to resolve it. Another potential benefit of this exercise is that it can also provide an opportunity for the surety representative to identify potential hurdles in the path towards project completion. Effective follow-through on the action plan also begins the process of successful collaboration which is the furnace that can forge relationships built on trust.

3. Not All Bonds are Created Equal

The terms and conditions of every bond, as well as the laws and regulations interpreting the bond form, must be carefully reviewed so that the surety's rights can be understood by all concerned. A comparison of two well-recognized bond forms, the American Institute of Architects ("AIA") A312 Performance Bond ("AIA A312") and the General Services Administration ("GSA") Standard Form 25 Performance Bond ("GSA SF 25") highlights the differences in bond forms and also the importance of common law and regulatory interpretations. The AIA A312 is frequently utilized on private projects while the GSA SF 25 is a mainstay of federal contracting. The AIA A312 bond generally provides detailed specificity regarding the surety's rights including regarding the procedure for default and notice to the surety. However, the GSA SF 25 bond, while comparatively lacking in particulars, must be read in light of applicable Federal Acquisition Regulation ("FAR") provisions and cases interpreting these bonds to appreciate the surety's rights.[4]

A key trend in the surety industry is the proliferation of custom, manuscript bond forms. It is not uncommon for owners to insist on a custom bond form or a modified version of the AIA A312 with unique provisions. Consequently, it is important that surety representatives carefully read applicable bond forms and appreciate when standard industry-forms such as the AIA A312 have been modified or customized.

4. Obtaining Collateral You Can Trust

Obtaining collateral is a key consideration for sureties to mitigate their risks in the event that claims arise and/or concerns exist that a principal may be under-capitalized. Collateral can come in many forms, from deeds of trusts to irrevocable trusts. However, it is critical to obtain collateral that is trustworthy (*i.e.,* secured and transferable). Obtaining collateral that is available when needed will help manage risk if the worst-case scenario arises. Doctrines such as equitable

[4] *See, e.g.,* 48 CFR 49.404 ("Surety Takeover Agreements").

subrogation may help the surety to reach certain types of assets and establish its priority over other creditors.[5]

5. New Regions = New Challenges

The successful transfer of operational success from one region to another region cannot and should not be assumed. Every region involves its own unique operating environment including potential key differences in law, culture, climate, and workforce. These differences can be particularly pronounced when operating in different countries or global regions. For example, common law and civil law countries may take different approaches in connection with certain legal concepts. Moreover, key differences in labor force availability and training, supporting infrastructure, supply chains, design standards, and climate may complicate operations across different regions.

Even within the United States, state-specific differences in law, environmental regulations, and local markets, can create challenges for firms seeking to enter new regions. For instance, state-specific differences and nuances exist in connection with the law regarding the enforceability of no damages for delay clauses.[6] In addition, climate and infrastructure differences exist across different states and parts of states. Consequently, sureties must independently assess each project and cannot presume a principal's repeated success when taking on new types of work in unfamiliar territories.

6. Separating Fact From Fiction

When approaching a troubled project or when faced with exposure, it is critical that the surety representative separate fact from fiction. On complex performance claims, oftentimes, consultants are necessary to get a handle on design and scheduling issues. Accountants may also be required to consider project finances and the need for additional funding. Unapproved change orders may also require analysis to discern the likelihood of recovery on these affirmative claims.

---

[5] *Pearlman v. Reliance Ins. Co.,* 371 U.S. 132, 137 (1962) (recognizing a surety's right to equitable subrogation and noting "there are few doctrines better established than that a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed.").

[6] *Compare* Ohio Rev. Code Ann. § 4113.62(C)(1) ("Any provision of a construction contract, agreement, or understanding, or specification or other documentation that is made a part of a construction contract, agreement, or understanding, that waives or precludes liability for delay during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, is void and unenforceable as against public policy") and Wash. Rev. Code § 4.24.360 ("Any clause in a construction contract, as defined in RCW 4.24.370, which purports to waive, release, or extinguish the rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment arising out of unreasonable delay in performance which delay is caused by the acts or omissions of the contractee or persons acting for the contractee is against public policy and is void and unenforceable.") *with Blake Const. Co. v. C. J. Coakley Co.*, 431 A.2d 569, 578-79 (D.C. 1981) (citations and quotations omitted) (noting that no damages for delay clauses are generally enforceable unless the delay is "(1) not contemplated by the parties under the (no damage for delay) provision, (2) amounting to an abandonment of the contract, (3) caused by bad faith, or (4) amounting to active interference.").

Appreciating the risks for each party on the core issues may allow the surety to chart a path forward where a compromise is reached or rights are reserved on an agreed-upon approach.

7. Building A Project or Building a Lawsuit

Stakeholders must work together to respond to changing circumstances to achieve project success. Hoping to capture the need for cooperation among project participants, one court has noted:

> [E]xcept in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project such as the building of this 100 million dollar hospital. Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick and ad hoc sort, analogous to ever-changing commands on the battlefield.[7]

On every project, unexpected circumstances will arise. Examples may include scheduling issues, technical issues, delays in shipping critical materials and components, unforeseen delays, and much more. A project team's ability to effectively accommodate changes will determine project success. Each stakeholder's response to unforeseen circumstances will determine or at least significantly influence the outcome. Project success is either shared or forfeited and the ability to work together to overcome obstacles as they arise is key to survival on troubled projects. A project teetering on termination is at an inflection point demanding a decision to either cooperate or litigate - building a project or a lawsuit.

8. Reboot to Avoid Getting the Boot

If the parties are considering a cooperative path forward following default, impasse issues should be identified and addressed so that past problems don't become new failures. When faced with the potential default of a principal, it is critical to take time to intentionally consider how lessons learned from past problems can inform a new course for project completion. A completion agreement should be more of a reboot than a simple do-over. For example, would a reshuffling or refacing of the project team improve the parties' working relationship and increase the potential for project success? How can impasse issues on the horizon be handled to permit the project to move forward? Are all anticipated issues negotiated or at least subject to an agreement for proceeding with a reservation of rights? The new project team should not shy away from attempting to diagnose and explore creative solutions aimed at keeping the project on track.

9. Hold Me Tender

When a termination cannot be averted, the surety must carefully consider its performance options based on the applicable bond terms, as well as caselaw and regulations informing the same. When a surety is considering project completion, this often involves deciding whether to tender a new contractor, along with excess completion costs, to the obligee or takeover of the completion effort with its principal or a new completion contractor. Generally speaking, tendering a new

[7] *Blake Const. Co.*, 431 A.2d at 575.

contractor is viewed as the less risky but more expensive option for the surety. A tender allows the surety to cap or at least define its exposure under the bond. Alternatively, takeovers can drag on for years and rack up unforeseen costs. Although the surety may pay a premium to tender, it avoids the risks associated with assuming responsibility for significant and escalating costs beyond its control on a troubled project.

A surety's right to tender a completion contractor is universally recognized as a performance option for sureties under an AIA A312 bond[8] and implicitly in the FAR.[9] Indeed, courts have further recognized a surety's right to tender when dealing with GSA SF 25 bonds[10] even though such bonds do not include express language permitting the surety to tender.

10. Be the GOAT and Not the Goat!

Consideration of the maxims set forth herein has the potential to be transformative. From leveraging the relationships originating from wearing multiple hats to the perspective of building a project instead of a lawsuit, these maxims provide stakeholders with a roadmap for managing risk and improving project delivery. Exercising informed and committed leadership aimed at cooperation may allow the parties to resuscitate a project on the brink of termination. In so doing, the project team can avoid finger pointing at a scapegoat and celebrate a team that is truly the Greatest Of All Time.

---

[8] *See* AIA A312-2010 Performance Bond § 5.2 ("[The Surety may u]ndertake to perform and complete the Construction Contract itself, through its agents or independent contractors;").

[9] *See* 48 CFR 49.404(c) ("Surety Takeover Agreements") (emphasis added) ("The contracting officer should permit surety offers to complete the contract, unless the contracting officer believes that *the persons or firms proposed by the surety to complete the work are not competent and qualified or the proposal is not in the best interest of the Government.");* 48 CFR 49.405 ("Completion by another contractor") (emphasis added) ("*If the surety does not arrange for completion of the contract*, the contracting officer normally will arrange for completion of the work by awarding a new contract based on the same plans and specifications.")

[10] *See Aetna Cas. & Sur. Co. v. United States*, 845 F.2d 971, 975 (Fed. Cir. 1988) ("[A] performing surety may satisfy its obligation in various ways. For example, the surety may formally take over the project and contract for its completion, or it may allow the project to be defaulted and let the government complete or contract for the completion of the project, in which case the surety is responsible for costs in excess of the contract price. A performing surety may also satisfy its obligation by providing funds to an insolvent contractor to complete performance").