

**NEW JERSEY
PUBLIC SECTOR
BONDING**

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PRESENTED BY:

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Gary Kohan has operated exclusively within the surety industry for over 30 years holding positions with two major national surety carriers in contract surety claims, contract surety underwriting and as an agency owner for over 20 years. Having participated in numerous NJ legislative matters resulting in amendments to the NJ Public Works Bond Act and other laws requiring bonds from contractors and developers, he has an in-depth, practical knowledge of the NJ statutory bid, performance and payment bond requirements. Clients represented include general building, heavy highway/bridge, underground, marine, hazardous waste remediation and municipal waste contractors as well as commercial/residential developers.

The comments and information that follow are based on years of practical experience. Gary is not an attorney and the information is not intended to be construed as legal advice. The material is provided for informational purposes only. Gary Kohan assumes no liability for the use of the information contained herein.

SURETY DEFINED

A person who has made himself responsible for another.

A person who is legally responsible for the debt, default or delinquency of another.

One who has contracted to be responsible for another, especially one who assumes responsibilities or debts in the event of default.

Surety dates back to biblical times.

SURETY VS. INSURANCE THE FUNDAMENTAL DIFFERENCES

SURETY

Surety is credit. It is essentially the "renting" of the surety carrier's capital to stand behind the contractor in the event of the contractor's failure be that failure to perform or failure to pay. In surety claims, sureties are sometimes referred to as a "lender of last resort". Contract surety performance and payment bonds are not cancellable.

All surety bonds are a three party contract; contractor known as principal, project owner known as obligee and surety.

Surety underwriting does not anticipate loss. A surety will not write bonds for a contractor that it expects to fail.

Bond premium is not designed to fund loss. The premium is more likened to a prequalification fee. Bond costs generally range from less than 1% to about 2.5% of contract amount depending on quality of contractor and size of bond. Premium is based on contract amount.

In the event of a loss the surety will attempt to recover from the contractor. Most middle market and smaller contractors personally guarantee the performance and payment bonds. Surety recovery can entail not only liquidation of the business assets but also personal assets including personal residences.

INSURANCE

Two party contract; policyholder, insurance company.

Insurance underwriting anticipates that losses will occur and the premium is calculated to cover the losses in accordance with the risk.

Insurance is based on the law of large numbers- many are insured but not all will experience a loss. The many pay for the few.

Insurance company does not recover its loss from the policyholder.

COMMON SURETY RELATED TERMS

ATTORNEY-IN-FACT

The holder of a Power of Attorney granted by a surety company empowering the execution of a surety bond on behalf of the company.

BID BOND

A bond given by a bidder for a supply or construction contract to guarantee that the bidder, if awarded the contract within the time stipulated, will enter into the contract and furnish the prescribed performance and/or payment bonds.

CONSENT OF SURETY

A formal commitment by the surety to provide the bond or bonds as required by the contract documents to the contractor upon award of the contract.

CONTRACT BOND

A bond given to secure the performance of a contract. Frequently two bonds are required – one to cover performance and the other to cover payment of certain labor and material bills – the former is commonly known as a performance bond, and the latter as a labor and material or payment bond.

LABOR AND MATERIAL BOND

A bond given by a contractor to guarantee payment to certain laborers and suppliers for the labor and material used in the work performed under the contract. This liability may be contained in the performance bond, in which case a separate labor and material bond (payment bond) is not given.

LETTERS OF CREDIT

The type used to guarantee a contractor's performance of contracts is a "standby" letter of credit. It is normally issued by banks and runs to the owner of the construction project. The letter is callable by the owner upon demand. A letter of credit is not issued as an instrument of qualification. It is the product of a pure credit analysis.

MAINTENANCE BOND

The normal coverage provided by a maintenance bond guarantees against defective workmanship or materials.

OBLIGEE

The party to whom a bond is given. The party protected by the bond against loss. An Obligee may be a person, firm, corporation, government or a government agency.

OBLIGOR

Usually called the principal, or one bound by the obligation.

PERFORMANCE BOND

The surety guarantees to the owner, the cost of completing the project in the event the contractor fails to do so. In an ideal situation, the owner is assured that it will obtain a completed project for the amount it agreed to pay. The amount of a performance bond on many projects equals the full contract amount. (See Contract Bond).

PERSONAL SURETY

An individual who acts as surety for another, who may or may not charge a fee for his or her guarantee. Unlike corporate sureties, which are closely regulated and licensed, personal sureties are generally subject to limited, if any, government regulation or licensing requirements.

POWER OF ATTORNEY

The authority given to a person or corporation to act for and obligate another, to the extent set forth in the instrument creating the power.

PRINCIPAL

The one who is primarily bound on a bond furnished by a surety company. For example, in a contract bond, the principal is the contractor; in a public official bond, the principal is the administrator, executor, or guardian; in a license bond, the principal is the one to whom the license is issued. Sometimes the principal is called the obligor.

SUBCONTRACT BOND

A bond required by a general contractor of a subcontractor, guaranteeing that the subcontractor will fully perform the subcontract in accordance with its terms and will pay for certain labor and material incurred in the prosecution of the subcontracted work.

SUPPLY BOND

A bond which guarantees performance of a contract to furnish supplies or materials. In the event of a default by the supplier, the surety must indemnify the purchaser of the supplies against the loss occasioned thereby.

SURETY BOND

A written agreement providing for monetary compensation to be paid by the surety should there be a failure by the person bonded to perform specific acts within a stated period.

NEW JERSEY PUBLIC WORKS LAWS

PUBLIC WORKS BOND ACT- this is an umbrella statute that is coextensive with all other laws. The requirement of a performance bond and statutory form of performance and payment bond is found here along with definition of payment bond beneficiary, time for suit and notice requirements among other things.

LOCAL PUBLIC CONTRACTS LAW- this applies to municipal and county level contracting units along with MUA's. Relative to bonding, bid bond and consent of surety requirements are established here.

PUBLIC SCHOOLS CONTRACTS LAW- this applies to local Boards of Education. Reconciled with the Local Public Contracts Law for consistency, bid bond and consent of surety requirements are established here.

STATE COLLEGE CONTRACTS LAW- this applies to all State Colleges. Bid bond requirements are established here.

COUNTY COLLEGE CONTRACTS LAW- this applies to all County Colleges. Bid bond requirements are established here.

NEW JERSEY PUBLIC WORKS BOND ACT

NJSA 2A:44-143-147

2A:44-147; Performance and Payment Bond form.

“The bond required by this article shall be in substantially the following form:”

The Bond Act establishes the requirement of bonding for public works.

The Bond Act comes over the LPCL.

The statutory form of bond applies at all levels of government, i.e. State, County, BOE, Municipal, Authorities, etc.

Bond is 100% of contract amount.

Statutory form is a combined performance and payment bond but this is commonly separated into a 100% performance bond and 100% payment bond.

Bid Bond

The bid bond provides the owner security that the contractor will not withdraw its bid and will enter into a contract. Bid bonds can be set as a percentage of the amount bid, i.e. 10% of the amount bid or a fixed amount, i.e. \$20,000 or a combination, i.e. 10% not to exceed \$20,000.

Consent of Surety

NJ at the Local Public Contracts level requires an additional guarantee that is irrevocable and unconditional that the surety will provide the contractor the bond or bonds as required by the contract upon award.

Performance Bond

Guarantees the contractors performance of all aspects of the construction contract. If it is in the contract , it is covered by the performance bond.

Payment Bond

Guarantees the contractors payment of subcontractors and suppliers as defined by statute for labor and/or materials used or consumed in the construction of the bonded project.

BID BOND ISSUES

There is widespread inconsistency of bid bond forms within bid specifications at all levels other than the State Agency level.

The Local Public Contract Law states "The guarantee shall be in the amount of 10% of the bid, but not in excess of \$20,000". On contracts of \$200,000 and up this equates to a \$20,000 bid bond. The only exception to the amount is in the event a funding agency, i.e. a Federal agency requires a different amount. In that case the amount required by the funding agency is utilized.

Bid bonds qualified as to the amount of bond vs. difference to another bidder raise a question if bid guarantee is in conformance with the law. The commonly used prior edition of the AIA A310 Bid Bond qualifies the amount of the bid bond to the difference between low bidder and another bidder not to exceed \$20,000. This qualification has resulted in frequent bid protests. The most recent revised edition of the A310-2010 Bid Bond has added language to address this inconsistency and to bring the bid bond into statutory compliance.

The Local Public Contracts Law allows for a cashier's check or certified check in lieu of bid bond. However, the requirement of a certificate of surety (consent of surety) to accompany the bid guarantee effectively negates this option. If a surety is providing a bid bond it will provide the certificate of surety to accompany. Submission of a check and certificate of surety would raise a serious question as to the validity of the certificate.

CONSENT OF SURETY ISSUES

The Local Public Contracts Law requires a surety company certificate. A certificate of surety may be referred to as a consent of surety, letter of surety, surety agreement or surety proposal with consent of surety the most common.

Inconsistencies of certificate of surety forms specified by the public contracting units give rise to frequent bid protests. The law requires “a certificate from a surety company stating that it will provide the contractor with a bond”.

The intent of a certificate of surety is to provide an unqualified and irrevocable commitment from the surety to issue the bond or bonds as required by the contract specifications on behalf of the bidder upon contract award. There is no provision in the law for the consent of surety to respond monetarily.

Courts have held that a non-responsive consent of surety is a material defect not subject to cure.

The consent of surety becomes operable upon award of the contract to the contractor.

The requirement of a consent of surety as a practical matter eliminates the certified or cashier’s check options in lieu of bid bond. If a surety is issuing the consent of surety it will also issue the bid bond.

PERFORMANCE AND PAYMENT BOND ISSUES WHEN BOND FORMS ARE UTILIZED THAT DO NOT CONFORM WITH THE STATUTE

The contractor and surety will take the position that the bond is a statutory bond governed by the law while the governmental contracting unit will argue the term and conditions of the form of bond control. This can result in unnecessary delays in resolving a claim and potential litigation with the Court left to decide the application and coverage of the bond.

Non-conforming performance bonds routinely incorporate coverage for negligence/liability claims for bodily injury and property damage. The Bond Act within 2A:44-143 states that "a surety's obligation shall not extend to any claim for damages based upon alleged negligence" and "no bond shall in any way be construed as a liability insurance policy".

Non-conforming payment bonds routinely eliminate any limitation to the extent of the contractual remoteness of a payment bond beneficiary. The Bond Act within 2A:44-143 clearly defines payment bond beneficiaries and in other sections the notice requirements and time for suit limitations.

The statutory bond form required under the Bond Act has been in place since the early 1900's with only two revisions of any significance becoming effective in 1996

to more clearly define payment bond beneficiaries and to establish the requirement of a Surety Disclosure Statement and Certification. Case law has been established based on this form of bond. Attempting to utilize a non-conforming bond is not beneficial and will in all likelihood result in delays in project completion and added litigation in the event of contactor default and surety involvement. It is in the best interest of all the parties to utilize the bond form as required by statute.

While the vast majority of performance and payment bonds utilized at the local level are in conformance with the statutory requirement, when non-conforming performance and payment bonds do arise it is always at the local level. All State Agencies including NJ DOT, NJ Highway Authority, etc. utilize the statutory form of bond found at 2A:44-147.

**Statutory Performance and Payment
Bond Forms**

**NEW JERSEY STATUTORY
PERFORMANCE BOND**

Bond No.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned

as Principal, and

a corporation organized and existing under the laws of the State of _____ and duly authorized to do business in the State of New Jersey,
as Surety, are held and bound unto _____
as Obligee, in the penal sum of _____ (\$

for the payment of which, well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors,
administrators, successors and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the above named Principal did on the _____ day of _____
enter into a contract with _____

for _____
which contract is made part of this bond and the same as though set forth herein.

NOW, if the said _____
shall well and faithfully do and perform the things agreed by them
to be done and performed according to the terms of said contract, then this obligation shall be null and void; otherwise the same shall
remain in full force and effect; it being expressly understood and agreed that the liability of the Surety for any and all claims hereunder
shall in no event exceed the penal amount of this obligation as herein stated.

The said Surety hereby stipulates and agrees that no modifications, omissions or additions in or to the terms of the said contract; or in
or to the plans or specifications therefore, shall, in anyway affect the obligations of said Surety on its bonds.

This bond is given in compliance with the requirements of the Statutes of the State of New Jersey in respect to bonds of the contractors
on public works. Revised Statutes of New Jersey, 1937, Sections 2A; 44-143-147, and amendments thereof, and liability hereunder is
limited as in said statutes provided.

Signed, sealed and dated this _____ day of _____

ATTEST:

Witness

Principal

Witness

Surety

**NEW JERSEY STATUTORY
PAYMENT BOND**

Bond No.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned

as Principal, and

a corporation organized and existing under the laws of the State of _____ and duly authorized to do business in the State of New Jersey,
as Surety, are held and bound unto
as Obligees, in the penal sum of _____ (\$

for the payment of which, well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors,
administrators, successors and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the above named Principal did on the _____ day of _____
enter into a contract with _____
for _____
which contract is made part of this bond and the same as though set forth herein.

NOW, if the said
shall pay all lawful claims of beneficiaries as defined by N.J.S.2A:44-143 for labor performed or materials, provisions, provender or
other supplies or teams, fuels, oils, implements, or machinery furnished, used or consumed in the carrying forward, performing or
completing of said contract, we agreeing and assenting that this undertaking shall be for the benefit of any beneficiary as defined by
N.J.S.2A:44-143 having a just claim, as well as for the Obligees herein; then this obligation shall be void; otherwise the same shall
remain in full force and effect; it being expressly understood and agreed that the liability of the Surety for any and all claims hereunder
shall in no event exceed the penal amount of this obligation as herein stated.

The said Surety hereby stipulates and agrees that no modifications, omissions or additions in or to the terms of the said contract; or in
or to the plans or specifications therefore, shall, in anyway affect the obligations of said Surety on its bonds.

This bond is given in compliance with the requirements of the Statutes of the State of New Jersey in respect to bonds of the contractors
on public works. Revised Statutes of New Jersey, 1937, Sections 2A:44-143-147, and amendments thereof, and liability hereunder is
limited as in said statutes provided.

Signed, sealed and dated this _____ day of _____

ATTEST:

Witness

Principal

Witness

Surety

**Statutorily Conforming Bid Bond and
Consent of Surety Under The
Local Public Contracts Law**

BID BOND

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, _____ as
Principal, and _____ as Surety, is _____ as

hereby held and firmly bound unto _____ as Owner,

in the Penal Sum of _____ (\$ _____) for the payment of which, well and
truly to be made, we hereby jointly and severally bind ourselves, successors and assigns.

Signed this _____ day of _____ 20 _____ .

The condition of the above obligation is such that whereas the Principal has submitted to
a certain bid, attached hereto and hereby made a part of hereof, to enter into a contract in writing for the

NOW THEREFORE,

- A) If said bid shall be rejected or in the alternative,
- B) If said bid shall be accepted and the Principal shall execute and deliver a contract properly completed in accordance with said bid and shall furnish a bond for his faithful performance of said contract, and for the payment of all persons performing labor or furnishing materials in the connection therewith, and shall in all other respects perform the agreement created by the acceptance of said bid,

Then this obligation shall be void, otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall, in no event, exceed the penal amount of this obligation as herein stated.

The Surety, for value received, hereby stipulates and agrees that the obligations of said Surety and its bond shall be in no way impaired or affected by any extension of the time within which the Owner may accept such bid; and Surety does hereby waive notice of any such extension.

IN WITNESS WHEREOF, the Principal and the Surety have hereunto set their hands and seals, and such of them as are corporations have caused their corporate seals to be hereto affixed and these presents to be signed by their proper officers, the day and year first set forth above.

Principal

BY: _____
Witness

Surety

BY: _____
Witness

Attorney-in-Fact

CONSENT OF SURETY

IT IS HEREBY UNDERSTOOD AND AGREED THAT _____

_____ organized and existing under

the laws of the State of _____ and licensed to do

business in the State of _____ certifies and agrees,

that if contract for : _____ for

_____ is awarded to: _____

the undersigned Corporation will execute the bond or bonds as required by the contract documents and will become Surety in the full amount set forth in the contract documents for the faithful performance of all obligations of the Contractor.

Signed and sealed this _____ day of _____, 20

Attorney-in Fact

**Standardized Form of
Maintenance Bond for use under the
Local Public Contracts Law**

MAINTENANCE BOND

Bond No. _____

KNOW ALL PERSONS BY THESE PRESENTS, That we _____ of
_____, hereinafter referred to as the Principal, and _____
_____ as Surety, are held and firmly bound unto _____
_____ hereinafter referred to as the Oblige, in the sum of _____

for the payment of which we bind ourselves, our legal representatives, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the said Principal entered into a contract with the _____ dated,
_____, for _____.

WHEREAS, said contract provides that the Principal will furnish a bond conditioned to guarantee for the period of **Two Years (2)** years after approval of the final estimate on said job, by the owner, against all defects in workmanship and materials which may become apparent during said period, and

WHEREAS, the said contract has been completed, and was approved on _____.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH that, if the Principal shall indemnify the Oblige for all loss that the Oblige may sustain by reason of any defective materials or workmanship which become apparent during the period of **Year(s)** () year(s) from and after _____ then this obligation shall be void, otherwise to remain in full force and effect.

SIGNED, SEALED AND DATED this _____ day of _____.

(Principal)

BY: _____ (Seal)

(Surety)

BY: _____ (Seal)
_____, Attorney-in-Fact

TYPES OF FRAUD

Patent; **Outright fabrication of carrier name,
power of attorney, corporate seal**

Latent; **Utilization of actual valid or formerly
valid power of attorney, active surety
carrier, corporate seal**

AVOIDING FRAUD

Examine the documents;

**Legitimate surety carrier
Carrier qualification satisfied
Power of Attorney attached
Documents sealed with appropriate seal**

Review Circular 570;

**Located at <http://www.fms.treas.gov/c570/>
Go to quick link to Treasury's Listing of
Approved Sureties (Department of Circular 570)**

**Circular provides single bond underwriting
limitation, carrier address and telephone number**

Confirm bond validity;

**Contact surety carrier to confirm bond is
authorized and authentic. Do not contact the power
of attorney holder that executed the bond.**