

# LEGAL SPECS

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**B**onds are back. During the boom, construction bonds often seemed like an unnecessary expense and a quaint throwback to less lucrative times. No longer. Owners are returning to bonds and to traditional procurement methods. With bonds comes the uncomfortable reality of personal indemnities to secure the bond.

What is a personal indemnity? In the bonding context, it is a contractual obligation by an individual or company to repay the bonding company for any liability or losses sustained by reason of the bonding company having provided a particular bond.

Should a contractor default on a bonded contract and, as a result, the surety is required to make payment on a claim, an indemnity agreement will give the surety the ability to obtain full restitution for all losses and expenses incurred as a result of that claim from any or all indemnitors.

While there are technical defences to claims made on indemnity agreements, most agreements are drafted in

order to facilitate expeditious enforcement by the bonding company. Accordingly, bonding companies are often able to enforce indemnity agreements on a summary basis.

In many cases, indemnitors may not actually be involved in the day-to-day business of a construction company. Courts have rejected arguments from "silent" indemnitors that bonding companies had an obligation to protect them by refusing to advance bonds in circumstances where it was not reasonable to do so. Courts have found that there is no obligation on the part of a bonding company to warn or otherwise protect indemnitors with respect to the risks that a company may be assuming.

This type of case is a sharp warning to indemnitors that they must look after their own interest with respect to personal indemnity agreements. The relationship between an indemnitor and a bonding company is strictly contractual in nature, and courts have no time for indemnitors who argue that they relied on the bonding company to keep a watchful eye on the bonded

company.

If you or your spouse are an indemnitor of a company's obligations, you should ensure that you are kept current with respect to the company's ongoing business. Most indemnity agreements will contain provisions that will allow an indemnitor to terminate his or her obligation upon appropriate notice to the bonding company. Those provisions are for the indemnitor's benefit and should be exercised immediately where an indemnitor no longer has confidence in the bonded company's ability to meet its financial obligations. Bear in mind however, that once a bond is issued and the project or tender process is underway, it may be hard to get off the hook. ♦

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