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Paper Title: Meeting Different Expectations: A Consensus Approach to Bonding

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Session Title: Meeting Different Expectations: A Consensus Approach to Bonding

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Robert J. Duke has joined Markel Surety as Vice President, Contractor Support for the National Account Group. Prior to joining Markel, Rob was Surety Legal Counsel for Euler Hermes North America. Previously, he was General Counsel for The Surety & Fidelity Association of America. Mr. Duke was in the surety and fidelity industry as a company underwriter and broker for eight years before joining SFAA in 1999. Mr. Duke spent two years working in private law practice.

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Meeting Different Expectations: A Consensus Approach to Bonding

3. Surety - The surety is the entity that guarantees that the principal's

the declaration of default and, in certain circumstances, help facilitate completion of the contract by the principal prior to any termination notice. If the principal fails to cure its default, and the obligee terminates the principal, then the oblige expects the surety to promptly make an election under the bond to complete the

so.

Principal

With respect to the principal, it expects that a claim will not be made against its performance bond unless it is in default of its contractual obligations. Similarly, it expects that the obligee will comply with its obligations pursuant to the terms and conditions of the contract (and the bond) and that in the event a claim is made against the performance bond, the surety will thoroughly investigate the claim and make a determination as to its validity before taking action. As an extension of that concept, the principal also expects that if it has valid legal defenses to any claim asserted against the performance or the payment bond, the surety will assert those defenses in response to the claim. Specifically, as primary obligor, the principal is the party that will ultimately be liable for any loss caused by a default based on the fact that under common law and in accordance with the indemnity agreement it executes for the benefit of the surety, it is obligated to reimburse the surety for any losses incurred by the surety under the bond. Consequently, the principal is motivated to exert defenses to challenge any perceived wrongful declaration of default or termination. The surety must be disciplined and thorough when the principal exerts defenses, as the surety must consider its obligations to the obligee.

Surety

expects to underwrite a clear and definable risk, both in terms of the scope and nature of the contractual obligations and the size of the risk (bond amount and contract price). In this way, the surety is able to determine if the contractor has the capabilities and financial resources necessary to perform the contract

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while the current contractor remains in place creates significant ambiguities regarding the rights and obligations of the parties, thus highlighting the importance that a performance bond contain a provision requiring the obligee to terminate the principal before the surety has an obligation to perform To that end, it has been noted that

B. Reconciling
obligations under bond.

Typically, a construction contract affords the obligee certain remedies in the event the contractor defaults. For example, under ConsensusDocs Form 200, in the event of an uncured default, the obligee the resources necessary to maintain the projec . To that end, the subcontractor performance bond form (Form 706) appropriate remedy. As noted above, the provision also recognizes the importance of timely involvement by the surety, requiring the investigation to begin withing a certain number of days. Note that the form does not provide a set time to begin completion, as the time needed to investigate a claim may vary from claim to claim.

The performance bond forms balance the expectation that the bond to a have a definitive penal sum. The forms state that the penal sum increases automatically with change orders, but such automatic increases are capped when the aggregate amount of increases total 25% of the original penal sum. After the cap is reached, surety consent is required.

The payment bond forms similarly state that the penal sum increases automatically with change orders, but such automatic increases are capped when the aggregate amount of increases total 25% of the original penal sum. After the cap is reached, surety consent is required.

interests and expectations. The newly revised ConsensusDocs bond forms are consistent with the mission and philosophy of ConsensusDocs - to develop forms that represent fairly the interest of all stakeholders and the shared desire for a completed project as the common denominator.