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CCDC 2024 BOND FORMS

Webinar Session for Contractors & Subcontractors

June 25, 2024

WHAT THEY MEAN, WHAT TO EXPECT

Presenter



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President &
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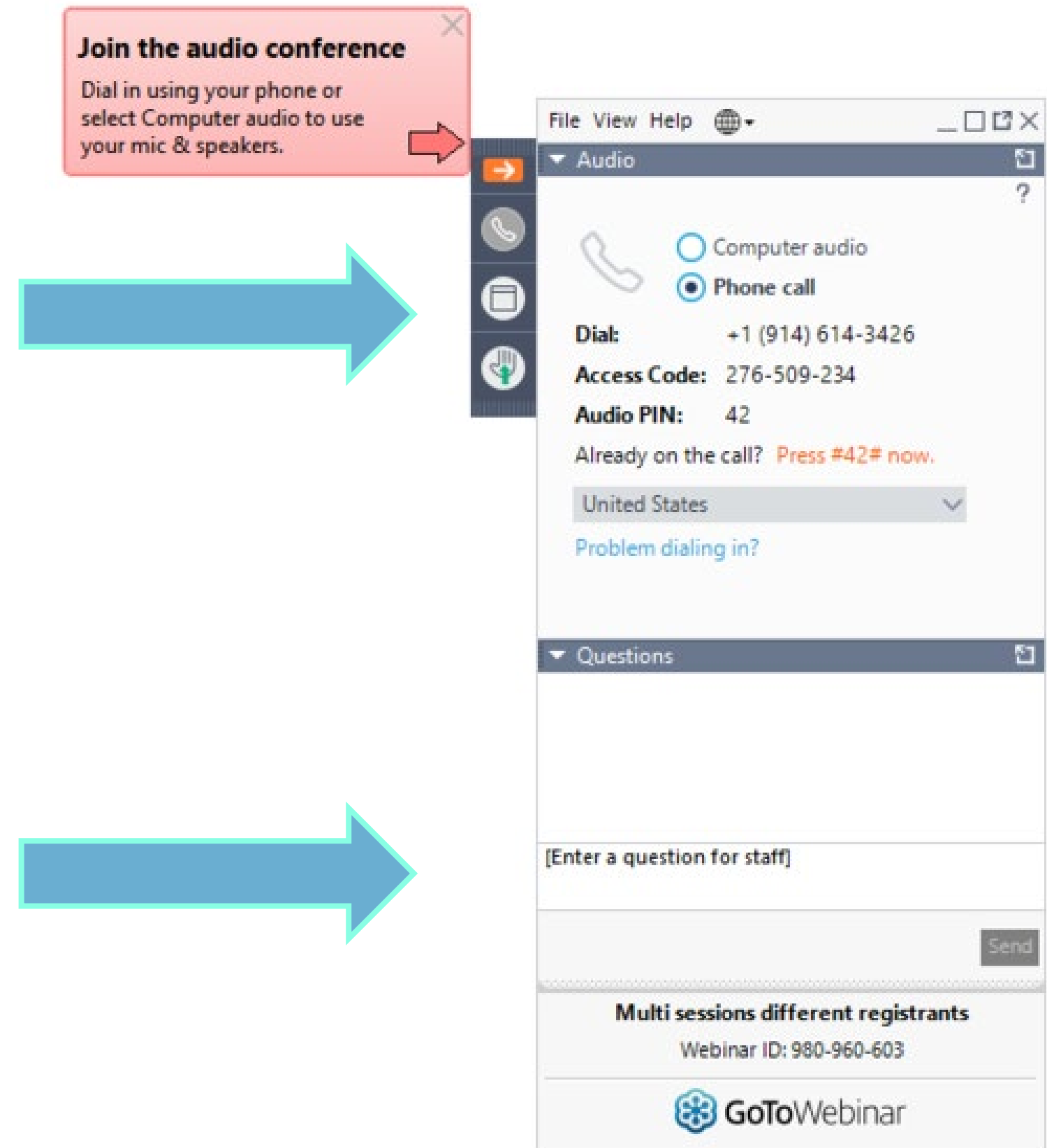
Moderator



Sharon Clark-Koufis
Vice President,
Operations

Housekeeping Tips

- ★ Please ensure that you have selected either audio or call-in to listen to the session.
- ★ Type questions in the “Questions” panel and click “Send”.
- ★ Q&A will take place at the end.



Disclaimer

- ★ The information presented in this session is not legal advice and should not be relied upon as such.
- ★ Those requiring legal advice should consult with an attorney.
- ★ The views and opinions expressed may not necessarily reflect the official policy or position of the Surety Association of Canada or any other agency, organization or employer.
- ★ This session is for information purposes only.



Background

- ★ Group charged with creating and publishing standard construction industry documents.
- ★ Four industry participant groups:
 - Contractor (CCA)
 - Engineers (ACEC)
 - Spec Writers (CSC)
 - Architects (RAIC)
- ★ Input from other stakeholder groups; e.g., SAC, Public Owners (all three levels), Private Owners.
- ★ SAC's Role is advisory/consultation only.
- ★ Published 3 bond forms: Bid, Performance and L&M Payment.
- ★ First update since 2002.



The CCDC220 Bid Bond

The CCDC220 Bid Bond

- ★ Provide assurance that contractor will provide the **required security** and **enter into the contract**.
- ★ Typically required in the amount of **10%** of tender.
- ★ If contractor defaults, surety pays the **difference between successful bid and second bidder**.
- ★ Tender must be **accepted** within time frame set out in tender documents.

The CCDC220 Bid Bond



- ★ Based upon 2002 version of CCDC 220 template.
- ★ Confusion around Tender/Bid/Closing Date.
 - Eliminate any reference to date within the bond; U.S. approach.
 - More comprehensive job description.
- ★ Validity Period – defined in bond.
 - As per tender documents or 60 days from closing.
 - Can be extended by additional 60 days.
 - Extended beyond 60 days with Surety's consent.

The CCDC220 Bid Bond



- ★ Provide required Bonds vs Security
 - Sureties are not in a position to guarantee other forms of security.
- ★ Contact Information
 - For use in the event of a claim.
 - Consistent with similar provisions in performance and payment bonds.
- ★ Quebec Clause
 - “Coverage Period” of one year; *Quebec Civil Code*.



Performance & Payment Bonds

Performance & Payment Bonds

- ★ Based on Ontario Forms 31 and 32 templates.
 - Removal of Ontario-specific references.
 - Quebec language for “Coverage Period”.
- ★ More detailed (7 and 13 pages respectively).
 - Additional Clarity and Responsiveness.
- ★ Built-in Claims Protocol.
 - Schedules for consistency and less delay.
 - Timelines to Acknowledge and Respond.
 - Undisputed amounts paid promptly.

The CCDC221 Performance Bond

- ★ Guarantees Contractor will **perform contract** in accordance with its terms & conditions.
- ★ Contractor must be **in default** and the **default must be declared** in order to file a claim.
- ★ **Owner must perform their obligations.**
- ★ **4 options** available to Surety:
 - Remedy the default
 - Complete the contract
 - Arrange for new contractor to complete
 - Tender payment

The CCDC221 Performance Bond

- ★ Better Communication/Collaboration:
 - Pre-Notice Meeting (Section 2); prevent default. At Obligee's discretion.
 - Post-Notice Conference (Section 5); address continuity issues during investigation.
- ★ More flexibility for Obligees:
 - Necessary Interim Work (Section 4); address emergency issues.
 - Mitigation Work (Section 5); Critical Path issues.

The CCDC221 Performance Bond

- ★ Timelines for Surety Response:
 - 4 days to acknowledge receipt of Notice (Section 3.2).
 - 20 days to provide “Surety’s Position” (Section 3.3).
- ★ More clarity around protection (Section 7).
- ★ Features to expedite and streamline claim processing (Schedules A, B and C).
 - Standardized Claim Notice, Acknowledgement and Response.

The CCDC221 Performance Bond



HOOPP vs The Guarantee

- ★ November 2019 Alberta Court of Appeal
 - Surety's liability is no longer secondary; arising from liability of its Principal.
- ★ Section 10.2; language added to reinforce principle that surety's liability is secondary.

The CCDC221 Performance Bond



HOOPP vs The Guarantee

- 10.2 *The Surety's responsibility to the Obligee under this Bond in respect of any Surety Option or Obligee's Direct Expenses shall be secondary to, and not greater than, that of the Principal under the Contract. The Surety shall not be obligated to pay any sums which the Principal is not obligated to pay the Obligee...*

The CCDC221 Performance Bond



Ready-for-Takeover (RfT)

- ★ Introduced in the 2020 version of CCDC 2 Contract as a substitute for “Substantial Performance”.
- ★ Is achieved when eight specified conditions (including Substantial Performance) have been met.
- ★ CCDC proposed that RfT be substituted for SP in suit limitation clause of performance bond.
- ★ SAC concerned that this could significantly prolong suit limitation period; 2 years from NEVER.

The CCDC221 Performance Bond

NEW

FEATURE

Ready-for-Takeover (RfT)

- ★ Following lengthy discussion, SAC and CCDC reached accommodation:
 - ★ Section 12.1; three separate triggers. Earlier of:
 - Where CCDC contract is used, earlier of RfT and 2 years + 180 days from SP.
 - ❖ Obligee must inform surety w/in 10 days when RfT is achieved.
 - For non-CCDC contract, 2 years from SP.
 - 2 years from Notice of Default.

The CCDC221 Performance Bond

NEW

FEATURE

Ready-for-Takeover (RfT)

- 12.1 *It is a condition of this Bond that any suit or action must be commenced before the expiration of two (2) years from the earlier of (a), (b) or (c) below:*
- (a) *If the Contract contains “Ready-For-Takeover” requirements as that term is defined in a CCDC contract: the earlier of the date of Ready-for-Takeover and 180 days after substantial performance of the work, as defined in lien legislation where the work under the Contract is taking place, provided that the Obligee shall have provided the Surety with a copy of the written confirmation of Ready-for-Takeover within ten (10) business days after such written confirmation was issued under the Contract;*
 - (b) *If the Contract does not contain “Ready-For-Takeover” requirements, as defined in a CCDC contract, or if the written confirmation required by subparagraph (a) above is not provided to the Surety within the time prescribed in subparagraph (a): the date of substantial performance of the Contract as defined in the lien legislation where the work under the Contract is taking place; and*
 - (c) *The date on which the Notice as defined in Section 1.1 in respect of the default that is the subject of such suit or action is received by the Surety under this Bond.*



Labour & Material Payment Bond

The CCDC222 L&M Payment Bond

- ★ Guarantee that the contractor (Principal) will pay all direct subcontractors/suppliers for materials and services provided to the bonded project.
- ★ Claimants may only claim for goods and services **supplied to the bonded job.**
- ★ Claimant must be able to **document their claim.**
- ★ Claim must be filed within **120 days** of the last day worked or the date material shipped.
- ★ **One year** to file suit.

The CCDC222 L&M Payment Bond

- ★ Timelines for Surety Response:
 - 3 days to acknowledge receipt of Notice and request Information (Paragraph 8 a.).
 - 25 days to provide “Surety’s Position”; 10 days from receipt of Information (Paragraph 8 b.).
 - Position must specify amounts in dispute and reasons for dispute.
 - 10 days from delivery of Surety’s Position to pay any undisputed amounts.
- ★ Features to expedite and streamline claim processing (Schedules A, B and C).

The CCDC222 L&M Payment Bond



Trustee vs Non-Trustee

- ★ Privity of Contract / 3rd Party Beneficiary Rule; need for “Trustee” form of bond.
- ★ Several Provinces (e.g., Ontario) allow for direct claims from 3rd party Claimants.
- ★ Paragraph 3; Obligee is trustee only in jurisdictions where 3rd Party Beneficiary Rule applies.

The CCDC222 L&M Payment Bond



Trustee vs Non-Trustee

- 3. In respect of any jurisdiction in which a Claimant is prohibited by law to commence any suit or action to enforce payment under this Bond, the Principal and the Surety hereby jointly and severally agree with the Obligee, as trustee, that the Obligee holds this Bond in trust for the purpose of allowing a Claimant to commence such suit or action.*

The CCDC222 L&M Payment Bond



Vallard vs Bird Construction

- ★ “Trustee” provision not intended to impose hard trust obligations on Obligee.
- ★ February 2018; SCC rules that Bird as Obligee was liable for full range of trust obligations.
- ★ Paragraph 4 explicitly limits trust obligation to those under a “bare trust”.

The CCDC222 L&M Payment Bond



Vallard vs Bird Construction

4. *The Bond or the trust under Section 3 does not impose on the Obligee any legal, equitable or other obligations or duties to any Claimant, including but not limited to any obligation to notify any Claimant of the existence of the Bond or the trust.*

So..
What does it mean?

BUSINESS
~~**AS**~~
UNUSUAL

Delay is NOT an option

Performance Bond
Notice of Claim from Owner



Acknowledge

4 Business days



**Post Notice
Conference**

5 Business days



**Surety's
Position**

20 Business days

Delay is NOT an option

Labour & Material Payment Bond

Notice of Claim from Claimant



Acknowledge

3 Business days



Surety's Position

10 - 25 Business days



Pay Undisputed Amounts

10 Business days

Timely and Responsive



Performance Bond:

- Must provide reasons for declination or for inability to determine liability.
- Meet with Owner; pre-notice, post-notice or to provide status of investigation.
- Necessary Interim Work; Mitigation Work.



Payment Bond:

- Must provide reasons for disputed amounts.
- Pay undisputed amounts within 10 business days.

A few Tips...

Read the Bonds – Understand the Terms

- ★ Ensure key staff is familiar with the response requirements of both surety and contractors.
- ★ Systems in place to ensure quick turnaround:
 - Dedicated email address.
 - Clearly delineated responsibilities for key staff.

A few Tips...

Consult with your Broker and/or Surety

- ★ Bonded Contractor's input is critical when evaluating a claim.
- ★ Disputed default (performance bond) or disputed claim (payment bond).
- ★ Surety cannot consider client's position if not informed and provided documentation.

A few Tips...

Work with the Surety in the Event of a Claim

- ★ **Promptly** provide surety with any and all information / documentation and access to knowledgeable staff.
- ★ A surety can't consider your position without appropriate understanding or documentation.
- ★ Becomes crucial if a surety's position is challenged.
- ★ Becomes more crucial in Payment Bond disputes which may be subject to adjudication.

Frequently Asked Questions

Will the CCDC bonds be the new industry standards and replace the SAC created forms?

As of May 21st, the new 2024 bonds became the recognized CCDC standard replacing prior versions. While the SAC bonds will still be available when required, these will no longer be actively promoted by SAC as the association's advocacy efforts will be focused on the CCDC bonds. Indeed, several owners (e.g., NS Public Works) will likely continue to call for the SAC created bond forms.



Frequently Asked Questions

Is it permissible to make minor changes to the template wording?

The three bond forms are the copyrighted property of CCDC. Formatting/presentation changes to the documents (e.g., logos, signature lines) can be made provided that the text is not altered. Any such alteration runs the risk of the document being deemed noncompliant.



Frequently Asked Questions

Does CCDC publish other standard surety instruments such as a Consent of Surety?

The three forms discussed are the only bond documents published under the CCDC banner. SAC had proposed creating a standard Consent of Surety template, but this was rejected by the Committee.

The only other surety-related document is CCDC 22 - *The Guide to Construction Surety Bonds*. SAC is currently working with CCDC to update this document which should be ready for publication in Fall 2024.



Frequently Asked Questions

What are the additional risks faced by sureties and contractors under the new forms?

The underlying risk-profile under the CCDC bond forms has not expanded beyond that found under the existing 2002 CCDC forms. The bonds are still conditional instruments with set remedies. That said, the new bonds do introduce several process enhancements (e.g., timelines for action, response standards) that impose more stringent performance requirements on a responding surety and by extension, the bonded contractor.



Frequently Asked Questions

Will sureties tighten their underwriting requirements or raise premiums as a result of these new changes?

Each individual surety will make its own determination as to any changes to underwriting / pricing / administrative requirements. Contractors should contact their Broker and/or Surety for further information. That said, most sureties have indicated that they don't anticipate any changes to current practices.



Need more Information? Visit the SAC Website

SURETY BONDS

>> Surety Bonds

▼ Contract Surety

Bonds for Tendering

Labour and Material Bonds

Performance Bonds

▶ SAC Bond Forms

▼ Standard Bond Forms

CCDC Bond Forms 2024

<https://suretycanada.com/SAC/Surety-Bonds/CCDC-Bond-Forms-2024.aspx>



Less Frequently Asked Questions



THANK YOU!

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