Ensuring the Certainty and Timeliness of Payment in the Ontario Construction Industry

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Submitted to: The Expert Review of Ontario's Construction Lien Act

Submitted by: The Surety Association of Canada

I. Introduction / Executive Summary

Thank you for inviting the Surety Association of Canada (SAC) to participate in the Expert Review of Ontario's Construction Lien Act (the "Review") as a Stakeholder, and thank you for providing the Review's Information Package for Stakeholders ("Information Package") earlier this year.

The Surety Association of Canada is the national voice for the Canadian surety industry. Our members include surety companies, surety brokers, reinsurers and other firms who are stakeholders in the non-residential construction industry in Ontario and across Canada. Our head office is located in Mississauga, Ontario.

The member companies of SAC are privileged to enjoy the confidence of construction organizations across the province, both as clients and as beneficiaries of the surety bonds underwritten by the industry. Most construction organizations are familiar with the process of maintaining a surety credit facility, providing bonds on some or all of their contracts, and relying on bonds provided by others when problems arise. We are proud to observe that suretyship is part of the construction culture in Ontario and across Canada.

Surety companies have a clear line of sight to the impact on construction organizations when cash flow is interrupted on contracts. In the moment, it matters little whether the interruption is being caused by genuine disputes, aggressive business practices, insolvency, or causes beyond the control of stakeholders. The Ontario Construction Lien Act (the "Act") operates within the context of many tools available to the construction industry and its stakeholders realize opportunities and manage risk in their businesses. We strongly support the broad mandate of the Review and the opportunity it presents to consider improvements in the overall legal and commercial framework within which construction companies operate in Ontario.

Perhaps most importantly, the health and success of the surety industry, and its ongoing ability to provide surety credit capacity into the Ontario market depends on the health of the construction organizations. A robust, clear, accessible and cost efficient legal framework is essential to enable construction organizations to plan, execute, and create infrastructure, jobs and prosperity for Ontario.

In preparation for our scheduled meeting with you on December 7, 2015 we offer this submission to supplement our discussion. While we invite the Review to consider all of our commentary, we would offer the following highlights:

- SAC would support a recommendation to reduce the holdback amount on contracts where labour and material payment bonds have been provided.
- SAC would support a recommendation that parties immediately resume payment based on contractual payment terms whenever holdback requirements of the Act have been satisfied or expired.

- SAC would support a recommendation by the Review for the continuation of provisions allowing for the posting of bonds or other forms of security to vacate liens.
- SAC would support recommendations involving a modest abridgment of freedom to contract that leads directly to a significant improvement in prompt cash flow throughout the construction payment chain, and that do not unduly preclude parties from agreeing and enforcing meaningful commercial terms.
- SAC would support recommendations for prompt payment provisions, especially where the recommendation avoids merely reallocating the burden of delayed payment to other parties in the payment chain.
- SAC would strongly support a recommendation preserving the trust provisions of the Act such that funds committed for construction stay within the construction payment chain.
- SAC would strongly support a recommendation to establish a dispute resolution process for the construction industry in Ontario that is binding on an interim basis, integrates all relevant stakeholders, reflects the common monthly payment cycle, and allows parties to mutually agree move favourable terms.
- SAC would generally support a recommendation that undisputed amounts under a payment bond should be paid promptly.
- SAC would support a recommendation in favour of mandatory payment bonds and performance bonds on publicly funded projects.

Again we thank the Review for the opportunity to provide our thoughts and suggestions and look forward to meeting with you on December 7th.

II. Overview of Surety Bonds in the Construction Industry

The expertise and experience of the Review, especially in the area of suretyship, is acknowledged and, we believe, will allow the Review to take a truly industry wide perspective in meeting its mandate. Given the potential for other stakeholders to review this submission we offer the following brief summary of suretyship to provide context for our comments.

Surety bonds have been in use since the late 19th century to bring accountability and stability to the construction industry. A bond is a financial instrument that protects construction purchasers, subcontractors and suppliers from the risks arising from a project contractor's default by transferring these risks to a third party; the bonding company. Surety bonds provide two essential assurances to construction stakeholders:

1. **Prequalification** – Surety companies undertake a thorough, comprehensive and ongoing review all bonded contractors to ensure that the contractor is capable of fulfilling the obligations under its contract; both financial and performance.

2. **Financial Security** – A surety company protects an owner from financial loss in the event of a contractor default by funding any additional completion costs that exceed the original contracted value. Subcontractors and suppliers of a defaulted project contractor are also protected against the risk of financial loss arising from the inability or unwillingness of the bonded contractor to pay for labour and materials supplied.

This protection is provided through two separate but interdependent instruments:

1. **Performance Bond** - An instrument which protects the construction project owner from financial loss should the contractor default on the contract. A performance bond guarantees that the contractor will perform the obligations under the construction contract in accordance with its terms and conditions. In the event that a project contractor defaults, a surety company will remedy the default by either completing the contract or arranging for the completion of the contract.

2. **Labour & Material Payment Bond** - An instrument which guarantees that the bonded general contractor will pay subcontractors and suppliers in full for materials and services supplied to the bonded job. Should the contractor fail to do so, the unpaid subcontractor can claim under the bond for payment of the amounts due.

To restate, performance and payment bonds are separate but co-dependent instruments that complement each other in the protections they provide. Both bonds are needed to ensure that the stakeholders are fully protected from the performance and financial risks of prime contractor default.

In the context of any discussion surrounding prompt payment and improvements to the Construction Lien Act, surety bonds can be an invaluable tool for furthering the objectives of both. By leveraging the balance sheets of a licensed surety firm, stakeholders can be assured that sufficient resources will be made available to see a defaulted project through to completion and ensure monies will continue to flow to unpaid subcontractors and suppliers.

III. Discussion of Issues for Consideration

Having carefully considered the Information Package and the broad range of issues and questions offered by the Review for comment by Stakeholders, we offer our comments on the following issues, referring to the numbering in the Information Package:

2(a) Consider changing the amount of holdback (from the current 10%)

On balance SAC would support a reduction in the amount of the holdback, and further would recommend that in formulating such a recommendation the Review consider the following issues:

- A reduced holdback would allow more of the amounts earned, and that are otherwise due and payable under agreed contract terms but for the requirements of the Act, to be paid down through the construction payment chain. This would provide an obvious improvement in cash flow throughout the construction industry.

- A reduced holdback would mean less security in the holdback for unpaid lien claimants, which may cause concern for some in the construction industry. We would respectfully observe that wide use of labour and material payment bonds ("payment bonds") securing payment under contracts at each major payment level in the chain would:

    - make up for any reduction in the amount of holdback as security for payment of lien claims;
    - provide a much larger dedicated and project-specific security for payment;
    - be available to payees regardless of whether a claim for lien had been preserved, perfected and proven; and,
    - be easier to access for claimants, without the need to comply with the strict statutory requirements of a claim for lien.

SAC and its members are prepared to consider expanding the definition of "claimant" in standard payment bonds to include those further along the payment chain than first-tier subcontractors and suppliers as currently defined. An example of this expanded definition can be found in Appendix II.

SAC would support a recommendation by the Review for a reduction in the amount of the holdback on contracts where payment bonds are provided, while holdback would remain at 10% where payment bonds are not provided.

2(c) Part 1; Consider making the release of holdback mandatory/automatic after expiration of lien rights, unless there has been early release of holdback

Historically the obligation to pay for work performed under construction contracts arises from contractual payment terms freely agreed to by the parties, and this principle should generally be preserved. Except where contractual payment terms come into conflict with any minimum prompt payment requirements that may be recommended by the Review, the obligation to pay should in the first instance be governed by a contract.

From this perspective, SAC would favour a recommendation by the Review that when the requirements under the Act to withhold holdback and other funds is satisfied or expires, then parties should be required to resume payment under agreed contractual terms.

2(c) Part 2; Consider allowing or expressly not allowing the early release of holdback upon posting a holdback release bond or some other defined form of security

SAC would support a recommendation in favour of securing holdback with a form of bond or other security that would enable all (or more) funds to flow through the payment chain while ensuring the holdback is funded and its value as partial security for payment and protection for a property owner are preserved.

3 (c); Consider the effect of posting security and vacating liens on lien claimants

In considering this issue we believe the Review should attempt to balance:

- The actual or perceived loss of economic leverage in favour of a lien claimant that arises when the overall flow of money on a construction project is threatened by registration of a lien; with

- The benefit of a mechanism for securing and vacating liens allowing funds to flow to other parties in the payment chain who have not contributed to the claim for lien and who may be unfairly penalized by even a temporary interruption of the flow of money on a construction project.

To the extent that the Act is amended to accelerate the process for resolving or determining the validity of a claim for lien and reduce expense incurred by all parties in engaging in the lien process, the actual leverage and the need for leverage would be significantly reduced.

SAC would support a recommendation by the Review for the continuation of provisions allowing for the posting of bonds or other forms of security to vacate liens.

4 (a) Consider the causes of payment delays and how they can be addressed in the Act or other legislation, including the potential effect of prompt payment provisions on the principle of "freedom of contract"

We would invite the Review to consider that payment delays can arise from both (a) an inability of a party to pay (due to insolvency, for example), and (b) an unwillingness of a party to pay (due to a genuine contractual dispute, for example). While it is not clear how prompt payment provisions in themselves could address the inability of a party to pay (due to insolvency, for example), we believe that prompt payment provisions that reinforce the legal requirement to pay undisputed amounts when due and payable under the agreed terms of construction and related contracts would have a positive influence on decisions within the construction payment chain around timely payment.

With respect to disputed amounts, SAC is in favour of preserving the rights of parties to pursue their contractual and commercial interests, and to have full access to both (a) agreed contractual provisions for resolution of payment disputes, and, if recommended by the Review, (b) an accelerated dispute resolution or fast-track adjudication process for resolution of payment disputes that would be binding on an interim basis subject to appeal or review at some future milestone or contractual event (substantial performance, for example).

With respect to the inability of a party to pay undisputed amounts when due and payable, we are not confident that prompt payment provisions in themselves could improve such a circumstance, and we would recommend the Review focus on improving the amount of, and access to, security for payment of undisputed amounts that are not paid when due and payable.

SAC takes no issue with a modest abridgment of freedom to contract that leads directly to a significant improvement in prompt cash flow throughout the construction payment chain, and does not unduly restrict parties from agreeing and enforcing meaningful commercial terms.

4 (a) 3rd bullet point; Consider the possibility of providing for a form of security or protection mechanism for owners/lenders and contractors as payers when legitimate disputes arise related to the deficient work, delays and excessive change orders of payee contractors, subcontractors and suppliers

Contract provisions at all levels in the construction payment chain often reflect agreement among the parties that an owner or other payer may withhold certain amounts, either as security or as an incentive for resolution of disputes over deficient work, delays, change orders and many other issues. There would appear to be benefits in a mechanism that allows parties to resolve these disputes quickly, and an industry wide, cost effective and rapid process for resolving disputes would have the support of SAC (please refer to our comments on 12(b) below).

Similarly, we believe there is benefit in ensuring that contracting parties who use any recommended or mandatory rapid dispute resolution process are not forced to forfeit access to a contractual process that had been negotiated between the parties. This would argue for a rapid dispute resolution process in which awards or decisions are considered binding but interim, and subject ultimately to review or appeal by the parties based on any provisions that had been agreed as part of the contract itself (please refer to our comments on 12(b) below).

Under any dispute resolution process that is subject to an ultimate review or appeal, the potential for a reversal in the outcome of the dispute on review or appeal represents a potential payment and/or performance risk for both parties. Examples of this risk include:

1. Where a general contractor disputes a finding of defective work and in the first instance, under a rapid dispute resolution process, the decision is in favour of the general contractor, the project owner may be required to continue to make payments to the general contractor in the normal course under the terms of the contract – i.e. without withholding funds for the disputed defects. In this scenario the project owner assumes some measure of risk that the general contractor at a later time may not be able or willing to perform corrective work or pay for the cost of corrective work done by the project owner if the work is ultimately determined to have been defective on review or appeal.

   1(a) - A general contractor would assume a similar risk where a subcontractor in the first instance may be relieved from performing remedial work on disputed defects and is, on review or appeal, found to be responsible for performing or paying for remedial work arranged by the general contractor;

2. Where a subcontractor claims to have been delayed and claims additional costs from a general contractor under its subcontract, an interim decision under a fast track dispute resolution process may find in favour of the general contractor in the first instance. In this scenario the subcontractor may be required to carry on performing under the subcontract without compensation in the first instance, and assumes a measure of risk that the general contractor at a later time may not be willing or able to pay amounts that might ultimately be found due to the subcontractor on review or appeal;

3. A subcontractor who may be required in the first instance to perform disputed work without compensation (under a so-called 'change directive, for example) assumes some measure of risk that the general contractor at a later time may be unable or unwilling to pay for that work should it turn out, on review or appeal, that the subcontractor's claim was, in fact, justifiable under the agreed contract terms;

4. Where a project owner disputes a general contractor's request for additional compensation under a change order, for example, a fast track dispute resolution process may find in the contractor's favour in the first instance and the owner may be required to pay additional amounts. In this scenario the owner assumes a measure of risk that if on review or appeal it is ultimately determined that the work in question was within the general contractor's scope and that the claim for additional compensation was not, in fact, justified, then at a later time the general contractor may be unwilling or unable to reimburse some or all of the additional compensation paid by the owner in the first instance.

A standard performance bond provided by a general contractor in example 1 above, or by a subcontractor in example 1(a) above, would provide security for the performance risk assumed by the owner and the general contractor in those examples. A payment bond provided by the general contractor in example 2 would provide security for the payment risk assumed by the subcontractor in that example.

Concerns have occasionally be expressed about whether, in addition to the contractor's obligation to perform work, a performance bond "covers" a contractor's liability to pay an owner (for the costs of correcting deficient work, delay or the expense of defending invalid change order claims, for example). This would be an important concern in example 4 above if the project owner were relying on a performance bond as security for potential reimbursement of the additional amount paid. SAC is confident that in the context of dialogue with industry around the recommendations of the Review, the terms of standard performance bonds (for general contractors, trades and subcontractors) can be easily clarified as necessary to afford project owners (and payers at other levels) certainty that a contractor's obligation to pay amounts that it may owe as a result of the ultimate resolution of a dispute can be secured by the performance bond.

As this outcome would require only minimal impact on the surety industry, SAC would support a recommendation by the Review for the mandatory use of performance bonds (with payment bonds) on some basis in the province.

As to whether, in addition to performance (and payment) bonds, other security should be mandatory for disputes of the kind identified by the Review, we are not convinced that additional security should be necessary. At present there is no consensus within the surety industry that security for disputes beyond performance and payment bonds is necessary or within the appetite of the industry.

4 (c) Consider the potential effects of prompt payment provisions and their alignment with the Act on industry lenders and sureties

In the construction context, surety bonds are conditional instruments, where the condition is defined with reference to a specific underlying contract. Provided that prompt payment provisions that govern over contracts reflect reasonable commercial terms within the tolerance of stakeholders in the construction market, SAC would take no issue with the creation of prompt payment provisions, with the following caveats:

- Where the terms of a contract conflict with any prompt payment provisions and the contract is deemed amended to comply, the provisions should acknowledge that the surety under a performance and payment bond must have no greater liability under the bond than does its principal under the contract.

- Prompt payment provisions should accommodate the market realities of reasonable alternative payment processes and provisions (milestone payments, advance and mobilization payments, for example), and not unduly restrict the ability of stakeholders at all levels to pursue innovation in the procurement of construction and related services (for example, public-private partnership and integrated project delivery).

- While holdback under the CLA is required for contracts under which liens arise (generally where work, materials and services constitute an improvement to land), holdback is not required for other contracts under which liens do not arise (generally those contracts further along the payment chain and farther from the land.) For example, a manufacturer pays fully and without holdback for materials, equipment, parts, labour, machinery and a host of other elements that are necessary for it to create the manufactured item. Yet, under the manufacturer's contract to supply the manufactured article to a construction site (i.e. land) a lien arises and a holdback is retained. Similarly, a subcontractor will not retain holdback on its purchase of sheet metal or electrical cabling, but will be paid only 90% of its invoice to the general contractor. The burden of financing is not balanced and is borne more by some in the payment chain than others. When payment is delayed, this financing risk becomes extremely problematic.

  We would characterize this as a structural 'flaw' in the current framework.

  SAC would support recommendations by the Review for prompt payment recommendations that might fully address this structural flaw. At the same time, SAC would urge the Review to be cautious of potential unintended consequences of provisions that may merely reallocate the financing burden and the impact of delayed payment to other parties in the payment chain.

5 (a) Consider introducing access to proof of financing rights for owners, contractors and subcontractors;

- **Consider whether financial pre-qualification may address certain issues with contractors being under financed and being unable to adequately pay their sub- contractors;**
- **Consider whether such pre-qualification may be overly onerous on certain contractors and subcontractors;**
- **Consider whether the surety bonding process may eliminate the need for financial pre-qualification; and,**
- **Consider whether contractors should be entitled to proof of financing from owners.**

For private enterprises, which comprise the largest share of the construction industry in Ontario, the questions of capital structure and liquidity are among the most confidential and proprietary. We would suggest that amendments to the Act or other measures that force mandatory disclosure of this sort of information to others inside the construction payment chain may disrupt the ability of private companies to manage capital according to their interests, and would not be in the public interest. Further, mandatory disclosure to parties within the payment chain of other confidential commercial information, payment track record for example, could be seen as unnecessarily intrusive and onerous for any private enterprise.

On the other hand, a company entering into a contract without any line of sight into the financial resources and track record of the other party (the payer) may be unable to reasonably assess the credit risk it is taking and may, therefore, be expected to take reasonable measures to mitigate the credit risk, including for example increased pricing for credit risk and accelerated billing.

We would ask the Review to consider that performance and payment bonds are issued for contractors who have satisfied a licensed and regulated surety company that they (a) are adequately financed to undertake a contract, and (b) maintain reasonable business practices such that the surety is not likely to incur loss. In this sense we would argue that performance and payment bonds are very good proxies for financial pre-qualification in the construction industry.

It will also be noted where performance and payment bonds are used, parties can achieve the purpose of pre-qualification without disclosing sensitive information to others in the payment chain, and can manage the disclosure on reasonable commercial terms with a licensed and regulated surety company, including terms around confidentiality and non-disclosure.

The surety industry is subject to strict Federal and Provincial regulation and licensing requirements, however is also highly competitive. The range of appetites and underwriting approaches taken by various surety companies means the industry is capable of prequalifying and issuing bonds for contractors of all sizes and capital structures.

SAC would support a recommendation by the Review in favour of payment and performance bonds as a means of pre-qualifying contractors and subcontractors with respect to their ability to pay and their ability to perform.

With respect to proof of financing from project owners, we would suggest the Review consider this issue in two scenarios;

- The ability of a general contractor to evaluate the credit risk (risk of non-payment) of a project owner based on the original bargain (original contract price or budget); and
- The ability of a general contractor to evaluate the credit risk of a project owner in scenarios in which the contractor is required by the terms of the contract to perform (and finance) disputed work or acceleration (to avoid disputed delay) and wait for the outcome of a dispute resolution process before receiving payment. Often this scenario arises under a Change Directive or similar provision that requires the contractor to continue performing in the face of a genuine dispute.

For the same reason that disclosure of general capital structure and liquidity may be considered onerous for a privately held construction company, similar disclosure by a privately held project owner to a general contractor may be considered onerous. Given the inherent risk, the surety market has not developed a product that would provide a general contractor with assurance of the financial capacity of a private owner, and apart from common demand credit instruments, the market has developed practical techniques for prequalifying and evaluating the credit risks associated with contracting with a private project owner.

Generally, as a matter of practice, where sureties are asked to provide performance and payment bonds to a private project owner on behalf of a general contractor, the surety may require satisfactory evidence that the private owner has arranged and has access to sufficient financing to meet its payment obligations under the contract, at least based on the original price or budget.

6 (a) Review and consider either eliminating or clarifying and strengthening the requirements of the trust provisions in the Act

SAC strongly supports a framework that ensures that funds committed for construction stay within the construction payment chain, and that construction funds be used to satisfy the claims of a payee at each contractual level before the claims of a payer. To the extent that the trust provisions of the Act preserve this framework SAC supports continuing the trust provisions of the Act.

In evaluating the credit risk of non-payment in construction contracts, a payee considers, either explicitly or implicitly, the range of rights available under the Act, including trust rights. The potential for conflicting priority claims between payees in construction contracts and secured and other creditors under federal insolvency legislation creates uncertainty and risk for the construction payee.

We would support amendments to the Act that clarify the priority of contractors to construction trust funds over other creditors whose claims are not directly related to construction work and services performed. Such amendments toward a framework that ensures that construction funds constitute a common law trust will promote certainty and predictability for everyone in the construction payment chain, reduce credit risk, and strengthen the industry.

Some jurisdictions have implemented measures to ensure that trust funds remain 'identifiable' and segregated as a means of maintaining a scheme or priorities (B.C. for example requires that holdback funds be paid into a dedicated trust account.) SAC would generally support legislative and/or regulatory mechanisms that improve the priority of contractors, subcontractors and others in the construction payment chain to construction trust funds. We would urge the Review, when forming recommendations on this point, to consider the practical effects of such provisions on contractors, owners, and lenders, including potential additional administrative cost to segregate funds. We would urge the Review to balance the benefits of protecting the priority of construction payees to construction trust funds with the costs to the industry of the administrative apparatus necessary to achieve this outcome.

12 (a) 8th bullet point; consider enhancing harmonizing dispute resolution mechanisms with the domestic surety bonding and insurance industries (particularly as the methods espoused b y such entities add further contractual rights and remedies that overlap the judicial process of the Act)

and,

12 (b) Consider introducing an adjudication mechanism for construction disputes in Ontario;

- **Consider providing for adjudication of set-offs;**
- **Consider providing for adjudication of progress payment claims;**
- **Consider providing for adjudication of performance bond claims**

Dispute resolution provisions may come in many forms. A contract may include provisions for dispute resolution negotiated between contracting parties, for example, or a bond guaranteeing the performance of one party under a contract may include provisions for resolving disputed claims under the bond, or a legislative or regulatory process recommended by the Review may set out a voluntary or mandatory dispute resolution process governing the contract, or the bond, or both.

In addition, where a dispute involves parties at two or more levels in the construction payment chain (i.e. a dispute involving a project owner, a general contractor, a mechanical subcontractor and an equipment manufacturer/supplier), the contract, the subcontract

and supply contract at each level may each contain agreed dispute resolution provisions, and may be bonded on terms that include dispute resolution. And these too may be subject to legislative or regulatory dispute resolution process recommended by the Review.

Further, insurance contracts insuring various risks and issued to various parties in a project payment chain, and necessary to fund some or all of a construction dispute, may name multiple parties and involve overlapping parties and/or coverage, and may include dispute resolution provisions.

SAC would strongly support a recommendation by the Review to establish a dispute resolution process for the construction industry in Ontario, and would offer the Review the following guidance:

- A recommended dispute resolution process should be binding on all parties on an interim basis, with the ability to seek a review or appeal at a later date or contractual milestone based on agreed contractual provisions. We believe it is in the interests of the industry that any recommendation preserves access by the parties to the negotiated and agreed dispute resolution processes or litigation, even as parties have access to a fast and economical interim process.

- We believe there would be benefit in a dispute resolution process that allows a determination of facts, contractual entitlement and quantum that are common across any of the scenarios described above. A model that permits conflicting interim outcomes on these issues on different payment levels would not, in our view, be productive.

- Any dispute resolution process should include fast-track timelines for commencement, appointment of an adjudicator, arbiter or other authority, and delivery of an interim award. These timelines should reflect the practical reality of a monthly payment cycle (on most but not all contracts).

- A dispute resolution process should accommodate agreed contractual terms that create shorter timelines.

- Consideration should be given to requiring full or partial security for a review or appeal of an interim award.

14 (a) Consider requiring labour and material payment bond sureties to promptly pay undisputed amounts

In many situations, the elements of a claim under a payment bond can be evaluated separately, and if there is a dispute over a particular element or amount claimed then that element can be isolated from the balance of the amount(s) claimed. For example, where a payment bond claim is made for itemized materials delivered to a work site, if there is a dispute over whether specific items were, in fact, delivered, or disputes over the quality of specific items, then the claimant (payee), the principal (payer) and the surety may be able to isolate the amounts related to these items and agree on an "undisputed" amount that is due and payable under the subcontract (and under the payment bond, if the conditions of the bond have been satisfied).

In other situations, the elements of a claim may be closely related and not capable of being separated and evaluated independently. For example there may be counter claims or set offs asserted by the payer that must be considered when determining whether amounts that have been earned for work performed by the payee are due and payable. In these situations, when a claim is made under a payment bond it may be very difficult to isolate an "undisputed" amount that is due and payable without resolving the disputed counter claim or set off.

SAC would generally support a recommendation by the Review that undisputed amounts under a payment bond should be paid promptly, provided the recommendation:

- avoids creating a scenario in which a surety under a payment bond would be required to pay more than the amount its principal would ultimately be required to pay under the subcontract, and

- ensures that prompt payment under a payment bond does not prejudice the ability of the payer or of the surety to seek a proper resolution of disputed issues and amounts.

This issue has been addressed by the surety industry in the United States as discussed in Appendix A. We would invite the Review to consider the attachments in Appendix A (ii) to this submission, which reflect recent efforts by the Canadian surety industry to improve the responsiveness of the payment bond and address the issue of prompt payment of undisputed amounts.

14 (b) Consider the potential for requiring labour and material payment bond payees to complete their subcontracts if in the best interests of the project

Generally, SAC would not be in favour of a recommendation by the Review making payment of an otherwise valid claim under a payment bond conditional upon the claimant agreeing to complete its subcontract. Such a condition is not currently found in any standard form payment bond.

Our primary objection is based on the uncertainty, at the moment of settlement of the payment bond claim, about what party may have custody of a construction site and about the contractual structure of any completion work. It would seem onerous, as a condition of payment under the payment bond, to require a claimant to agree to an uncertain contractual arrangement with a party with whom the claimant did not negotiate.

It should be noted however that, as a matter of practice, surety companies having issued both a payment and performance bond for a contractor will have an agreement of indemnity running in favour of the surety, and that this indemnity often includes an assignment of the rights of its principal under any subcontracts and supply contracts. For a surety that is responding to claims under both a payment bond and a performance bond, and where the surety is involved in arrangements for completion of the work, it would be normal for that surety to exercise this assignment in parallel with settlement of payment bond claims and attempt to negotiate a suitable completion arrangement with claimants.

We would suggest that this current model is the most appropriate approach and should be preserved.

14 (c) Consider mandatory labour and material payment bonding of public projects

A Labour and Material Payment Bond is a project-specific guarantee of payment for subcontractors, suppliers and other claimants on a project. Amounts due and payable to claimants are paid in full under the bond (up to the bond limit). The payment bond is dedicated to the sole purpose of paying claimants. The bond cannot be diverted for other purposes by the company that posted the bond, and cannot be used by a project owner to fund completion or pay other costs. Claimants are able to make claims directly with the surety without complex legal filings and without going through intermediaries. Unlike insurance products, a bond cannot be cancelled and remains in force until one year after the person posting the bond leaves the project (on the industry standard form wording). Under section 39 of the current CLA (which we recommend be preserved), anyone with a lien or trust interest is entitled to receive a copy of any payment bond posted on a project.

We would respectfully observe that the Labour and Material Payment Bond is designed to address timeliness of payment and to provide security for payment on construction projects.

SAC would support a recommendation by the Review requiring the mandatory use of payment bonds and performance bonds on publicly funded projects, with the following guidance:

- Consideration should be given to whether payment bonds should be mandatory on general or prime contracts only, protecting a GC's trades, subcontractors, suppliers and labourers, or also mandatory on subcontracts and trade contracts to protect payees further along the payment chain.

- Consideration should also be given to whether payment bonds should be mandatory regardless of the value of a contract or subcontract, or whether value threshold should be established such that payment bonds would be mandatory only on contracts and subcontracts with an initial value over the threshold. In this regard, it would be recommended that the input of industry be sought on this issue, and consideration be given to the merits of either an absolute value threshold, or for subcontracts a threshold based on the value of a subcontract in proportion to the overall project value, or both.

- Consideration should be given to standard forms of performance and payment bonds that include practical provisions for the claim process, timelines for payment, and dispute resolution provisions consistent with any recommendation for general dispute resolution provisions applicable across the construction industry.

- Unlike insurance products that can be made universally available, given adequate actuarial modeling and pricing, surety products are credit products that are available and priced based on the credit and performance capacity of individual contractors.

  The surety market is highly competitive, as is the secondary reinsurance market that supports primary market capacity in Ontario. SAC would not support any recommendation that would compel a surety to provide credit for unqualified contractors. History has shown that, with the highly skilled and well managed construction organizations in the Ontario market, combined with the licensed, regulated and highly competitive surety market, Ontario will not suffer from a shortage of qualified bidders or surety capacity if payment bonds (and performance bonds) were to be made mandatory..

- Finally, we would respectfully ask that the Review give consideration to the current structure of the surety market place, surety products, underwriting processes and approaches to pricing. In particular the fact that the surety and construction industry in Ontario and throughout North America have found it effective to have payment bonds issued only in conjunction with performance bonds. At every level in the construction payment chain parties are both payers and payees.

SAC members would have grave concerns over a recommendation for mandatory stand-alone payment bonds without a companion recommendation that payment bonds and performance bonds be considered together in any legislative action.

14 (d) Consider requirements in respect of the adjusting of bond claims

To the extent that the Review may make a recommendation in favour of mandatory performance and payment bonds on publicly funded work, our guidance would include standard performance and payment bond forms that include practical provisions for the claim process, timelines for payment, and dispute resolution provisions consistent with any recommendation for general dispute resolution provisions applicable across the construction industry.

We invite the Review to consider the form of performance bond attached in Appendix B, which reflects recent improvements in the responsiveness of the surety and a number of other provisions designed to avoid delay and mitigate cost. SAC and the surety industry would be willing to work with the Review or the Province to design further amendments as may be considered necessary in both standard performance bonds and payment bonds to ensure that these instruments meet the recommendations of the Review.

14 (e) Consider providing for the electronic delivery of surety bonds

SAC generally supports a move to electronic delivery of bonds, and has a well-developed position on this issue, available at

http://www.surety-canada.com/en/ebonding/index.html.

14 (h) Consider whether the Act requires any revisions in light of the existence of contractor and subcontractor default insurance

While SAC has no direct interest in this product, we would offer two comments:

1. Subcontractor default insurance (SDI) is designed, generally, to protect a general contractor from costs associated with the default of a subcontractor.

2. SDI is not designed to and does not provide any security or payment protection for unpaid subcontractors, suppliers other others in the construction payment chain.

Given these comments, it would not appear necessary to make changes in the Act related to the product.

IV. Summary/Conclusion

The Surety Association of Canada believes that the protocol for flow of funds in the construction industry, both legislatively and commercially, is in dire need of a complete overhaul that addresses the certainty and timeliness of payment. In that regard our industry pledges to continue working with other key stakeholders and the Review in a flexible manner to adjust our products and processes and arrive at responsive solutions that will benefit all parties.

The surety product has evolved significantly over the last several years and will continue to move forward in response to the needs of our end-users and other industry stakeholders. On the product side, we have developed innovative bond language and modifications to standard documents which address key issues identified by the review. Also, the use of existing surety products in several of the identified subject areas will help to streamline the process and expedite the overall objective of putting money into the hands of those to whom it rightfully belongs.

Again, SAC continues to be a staunch supporter of a legislated solution to the prompt payment dilemma and compliments the Review for taking a broad consultative approach which we believe will avoid many of the problems that plagued the ill-fated Bill 69. We are delighted as well that the Review is seriously considering the use of ADR and adjudication to resolve complex disputes in an expeditious and equitable manner.

The Surety Association of Canada and its member organizations extend their appreciation to Mr. Reynolds and the Review for their commitment and efforts. We invite the staff and other stakeholders to contact us for any additional discussion or clarification.

Appendices

Appendix A – form of payment bond that addresses payment of undisputed amounts.

Appendix B – SAC Enhanced Performance Bond

SURETY ASSOCIATION OF CANADA
YOUR BONDING RESOURCE

Appendix A (i)

Enhanced / Broad Form Payment Bond

SAC is currently engaged in discussions with the Canadian Construction Documents Committee (CCDC) in an effort to update its standard performance and payment bond wordings and is contemplating major changes to the labour and material payment bond.

In addition to modernizing the archaic language, SAC is proposing an optional expansion of the scope of protection which will address this very issue. This enhanced protection will be added to the bond by way of a "Broad Form Rider", a sample copy of which is included as Appendix II (b). The rider expands the scope of the standard CCDC 222 payment bond by including:

- An extension of coverage to the second tier subcontractors and suppliers.
- A requirement for accelerated payment of undisputed amounts.
- Timelines for the surety's acknowledgement of a notice of a claim, response to the claim itself and for payment of amounts due.

We should point out that this approach mirrors the current practice in the United States as set out in the standard American Institute of Architects (AIA) 312 Payment Bond Form (copy attached as Appendix A (iii). We refer to Clauses 7.1 and 7.2 which require the surety to pay any undisputed amount within 60 days of receipt of a claim.

In fact, this requirement is also found in the statutes of numerous states across the country which call for bonds on all publicly funded construction work and regulate the manner in which they're used. These statutes are collectively referred to as "Little Miller Acts" as they are derived from the federal legislation of the same name. An example of such a requirement is found in Connecticut General Statute 49, Chapter 847 which includes the following provision:

> *"Not later than ninety days after service of the notice of claim, the surety shall make payment under the bond and satisfy the claim, or any portion of the claim which is not subject to a good faith dispute, and shall serve a notice on the claimant denying liability for any unpaid portion of the claim."*

It's noteworthy that one of the key differences between the proposed SAC approach and the American standards discussed above, relates to the clock starter that determines the deadline for the surety's response. Under the terms of the proposed Broad Form Rider, the surety is required to advise the claimant of its position within 21 days of ***receipt of the required Information***. This stands in stark contrast to the equivalent provision in the AIA payment bond which calls for the surety to pay undisputed amounts within 60 days of ***the receipt of the claim*** (90 days under the Connecticut Little Miller Act).

As an interesting aside, this very issue came to the forefront in the December 2014 decision of the Connecticut Supreme Court in ECI *vs Insurance Company of Pennsylvania.* In ECI, the Plaintiff argued that the Surety had forfeited its defences by neither responding nor denying within the allotted time. In finding for the surety, the court observed that "*,,, the claimant may be in a position to stymie the ability of the surety to investigate its claim expeditiously. In the present case, for instance, the defendant contends that the plaintiff repeatedly failed to provide full documentation of its allegations*".

Starting the clock at the time the information is received rightfully places the onus on the Claimant to provide the requisite documentation that would establish the validity of its claim. Indeed, if the ECI claim had been submitted under the terms of the Broad Form Rider, no such argument could have been advanced.

Appendix A (ii)

Broad Form Rider

To be attached to and form part of Labour & Material Payment Bond No. _____(Hereinafter, the "Bond")

Issued on the _____ day of _____, 20 _____

Section I a) of the Bond is hereby deleted to be replaced by the following:

a) <u>Definition of Claimant</u>

A Claimant for the purpose of this Bond is defined as one having a direct contract with the Principal, or any subcontractor of the Principal for labour, material, or both, used or reasonably required for use in the performance of the Contract, labour and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment directly applicable to the Contract provided that a person, firm or corporation who rents equipment to the Principal to be used in the performance of the Contract under a contract which provides that all or any part of the rent is to be applied towards the purchase price thereof, shall only be a Claimant to the extent of the prevailing industrial rental value of such equipment for the period during which the equipment was used in the performance of the Contract. The prevailing industrial rental value of equipment shall be determined, insofar as it is practical to do so, by the prevailing rates in the equipment marketplace in which the work is taking place.

Section II i) of the Bond is hereby deleted to be replaced by the following:

i) <u>Surety's Actions Upon Receipt of a Claim</u>

Upon receipt of a Claim submitted in accordance with Section I b), d) and e) above, the Surety shall:

i. During the five (5) business days following receipt of a Claim, acknowledge receipt of the Claim in writing and request from the Claimant the information and documentation the Surety shall require to verify and confirm the validity and extent of the Claim (the Information).
ii. During the twenty-one (21) business days following the receipt of the Information, advise the Claimant, in writing, of its position on liability pursuant to the Bond.
    a) In the event that the Surety accepts liability in whole or in part pursuant to the bond, it shall advise the claimant in writing as to the amounts that are undisputed and explain the basis for challenging any amounts that are disputed.
    b) In the event that the Surety denies that it has any liability pursuant to this Bond, the Surety shall explain its reasons therefor to the Claimant in writing.
iii. During the fourteen (14) business days following such written advice to the Claimant as described in ii above, make payment for the undisputed amount of its liability.

All other terms and conditions of the Bond remain the same.

Dated this _____ Day of _____, 20 _____

SIGNED and SEALED

_____

in the presence of

Principal

_____

Surety

Specimen

Appendix A (iii)

AIA 312 PAYMENT BOND

Bond No.:

CONTRACTOR:
(Name, legal status and address)

SURETY:
(Name, legal status and principal place of business)

OWNER:
(Name, legal status and address)

CONSTRUCTION CONTRACT
Date:
Amount:
Description:
(Name and location)

BOND
Date:
(Not earlier than Construction Contract Date)
Amount:
Modifications to this Bond: ☐ None ☐ See Section 18

CONTRACTOR AS PRINCIPAL
Company: *(Corporate Seal)*

Signature: _____
Name and Title:

SURETY
Company: *(Corporate Seal)*

Signature: _____
Name and Title:

(Any additional signatures appear on the last page of this Payment Bond.)

(FOR INFORMATION ONLY — Name, address and telephone)

AGENT or **BROKER:**

OWNER'S REPRESENTATIVE:
(Architect, Engineer or other party:)

§ 1 The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract, which is incorporated herein by reference, subject to the following terms.

§ 2 If the Contractor promptly makes payment of all sums due to Claimants, and defends, indemnifies and holds harmless the Owner from claims, demands, liens or suits by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract, then the Surety and the Contractor shall have no obligation under this bond.

Specimen

§ 3 If there is no Owner Default under the Construction Contract, the Surety's obligation to the Owner under this Bond shall arise after the Owner has promptly notified the Contractor and the Surety (at the address described in Section 13) of claims, demands, liens or suits against the Owner or the Owner's property by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract and tendered defense of such claims, demands, liens or suits to the Contractor and the Surety.

§ 4 When the Owner has satisfied the conditions in Section 3, the Surety shall promptly and at the Surety's expense defend, indemnify and hold harmless the Owner against a duly tendered claim, demand, lien or suit.

§ 5 The Surety's obligations to a Claimant under this Bond shall arise after the following:

§ 5.1 Claimants, who do not have a direct contract with the Contractor,

- **.1** have furnished a written notice of non-payment to the Contractor, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were, or equipment was, furnished or supplied or for whom the labor was done or performed, within ninety (90) days after having last performed labor or last furnished materials or equipment included in the Claim; and
- **.2** have sent a Claim to the Surety (at the address described in Section 13).

§ 5.2 Claimants, who are employed by or have a direct contract with the Contractor, have sent a Claim to the Surety (at the address described in Section 13).

§ 6 If a notice of non-payment required by Section 5.1.1 is given by the Owner to the Contractor, that is sufficient to satisfy a Claimant's obligation to furnish a written notice of non-payment under Section 5.1.1.

§ 7 When a Claimant has satisfied the conditions of Sections 5.1 or 5.2, whichever is applicable, the Surety shall promptly and at the Surety's expense take the following actions:

§ 7.1 Send an answer to the Claimant, with a copy to the Owner, within sixty (60) days after receipt of the Claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed; and

§ 7.2 Pay or arrange for payment of any undisputed amounts.

§ 7.3 The Surety's failure to discharge its obligations under Section 7.1 or Section 7.2 shall not be deemed to constitute a waiver of defenses the Surety or Contractor may have or acquire as to a Claim, except as to undisputed amounts for which the Surety and Claimant have reached agreement. If, however, the Surety fails to discharge its obligations under Section 7.1 or Section 7.2, the Surety shall indemnify the Claimant for the reasonable attorney's fees the Claimant incurs thereafter to recover any sums found to be due and owing to the Claimant.

§ 8 The Surety's total obligation shall not exceed the amount of this Bond, plus the amount of reasonable attorney's fees provided under Section 7.3, and the amount of this Bond shall be credited for any payments made in good faith by the Surety.

§ 9 Amounts owed by the Owner to the Contractor under the Construction Contract shall be used for the performance of the Construction Contract and to satisfy claims, if any, under any construction performance bond. By the Contractor furnishing and the Owner accepting this Bond, they agree that all funds earned by the Contractor in the performance of the Construction Contract are dedicated to satisfy obligations of the Contractor and Surety under this Bond, subject to the Owner's priority to use the funds for the completion of the work.

§ 10 The Surety shall not be liable to the Owner, Claimants or others for obligations of the Contractor that are unrelated to the Construction Contract. The Owner shall not be liable for the payment of any costs or expenses of any Claimant under this Bond, and shall have under this Bond no obligation to make payments to, or give notice on behalf of, Claimants or otherwise have any obligations to Claimants under this Bond.

§ 11 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.

Specimen

§ 12 No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the state in which the project that is the subject of the Construction Contract is located or after the expiration of one year from the date (1) on which the Claimant sent a Claim to the Surety pursuant to Section 5.1.2 or 5.2, or (2) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

§ 13 Notice and Claims to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears. Actual receipt of notice or Claims, however accomplished, shall be sufficient compliance as of the date received.

§ 14 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

§ 15 Upon request by any person or entity appearing to be a potential beneficiary of this Bond, the Contractor and Owner shall promptly furnish a copy of this Bond or shall permit a copy to be made.

§ 16 Definitions

§ 16.1 Claim. A written statement by the Claimant including at a minimum:

- **.1** the name of the Claimant;
- **.2** the name of the person for whom the labor was done, or materials or equipment furnished;
- **.3** a copy of the agreement or purchase order pursuant to which labor, materials or equipment was furnished for use in the performance of the Construction Contract;
- **.4** a brief description of the labor, materials or equipment furnished;
- **.5** the date on which the Claimant last performed labor or last furnished materials or equipment for use in the performance of the Construction Contract;
- **.6** the total amount earned by the Claimant for labor, materials or equipment furnished as of the date of the Claim;
- **.7** the total amount of previous payments received by the Claimant; and
- **.8** the total amount due and unpaid to the Claimant for labor, materials or equipment furnished as of the date of the Claim.

§ 16.2 Claimant. An individual or entity having a direct contract with the Contractor or with a subcontractor of the Contractor to furnish labor, materials or equipment for use in the performance of the Construction Contract. The term Claimant also includes any individual or entity that has rightfully asserted a claim under an applicable mechanic's lien or similar statute against the real property upon which the Project is located. The intent of this Bond shall be to include without limitation in the terms "labor, materials or equipment" that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment used in the Construction Contract, architectural and engineering services required for performance of the work of the Contractor and the Contractor's subcontractors, and all other items for which a mechanic's lien may be asserted in the jurisdiction where the labor, materials or equipment were furnished.

§ 16.3 Construction Contract. The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and all changes made to the agreement and the Contract Documents.

§ 16.4 Owner Default. Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.

§ 16.5 Contract Documents. All the documents that comprise the agreement between the Owner and Contractor.

§ 17 If this Bond is issued for an agreement between a Contractor and subcontractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.

§ 18 Modifications to this bond are as follows:

Specimen

(Space is provided below for additional signatures of added parties, other than those appearing on the cover page.)

CONTRACTOR AS PRINCIPAL		**SURETY**	
Company:	*(Corporate Seal)*	Company:	*(Corporate Seal)*
Signature: _____		Signature: _____	
Name and Title:		Name and Title:	
Address:		Address:	

Specimen

Appendix A (iv)

ELECTRICAL CONTRACTORS INC v. INSURANCE COMPANY OF STATE OF PENNSYLVANIA

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Supreme Court of Connecticut.

ELECTRICAL CONTRACTORS, INC., v. INSURANCE COMPANY OF the State of Pennsylvania.

No.19105.

Decided: December 16, 2014

PALMER, ZARELLA, EVELEIGH, McDONALD, ESPINOSA and ROBINSON, Js. Steven B. Kaplan, with whom was Paul R. Fitzgerald, for the appellant (plaintiff). Todd R. Regan, for the appellee (defendant). Matthew M. Horowitz and Susan Evan Jones filed a brief for the Surety and Fidelity Association of America as runicus curiae.

Under General Statutes §§ 49-41 through 49-43, popularly known as the "Little Miller Act" (act),, a general contractor on a public works construction project must provide a payment bond with surety to the state or governmental subdivision guaranteeing payment to those who supply labor and materials to the project , and any person who has performed work or supplied materials for the project, but has not been paid for such materials or work, may enforce his right to payment under the payment bond.The dispositive issue in this case, which comes to us upon our acceptance of certified questions from the United States District Court for the District of Connecticut pursuant to General Statutes§ 51-199b (d),2 is whether a surety on a public construction project, which fails either to pay or to deny a notice of claim within ninety days, as required by General Statutes § 49-42(a),3 thereby waives any substantive defenses and becomes automatically liable for the full amount of the claim. We answer that question in the negative.

The record certified by the District Court contains the following undisputed facts and procedural history. The Morganti Group, Inc., was the general contractor on the Newtown High School renovations and expansion project . Morganti entered into a subcontract with the plaintiff, Electrical Contractors, Inc., for the latter to provide labor, equipment, and materials relating to the electrical work for the project . In July, 2009, pursuant to § 49-41(a),4 Morganti, as principal, obtained from the defendant, Insurance Company of the State of Pennsylvania, a $33.7 million labor and materials payment surety bond on the project.

In April, 2011, the plaintiff submitted to Morganti a request for equitable adjustment to the subcontract price in the amount of $751,190.63 to recoup additional costs allegedly incurred as a result of Morganti's deficient performance . In May, 2011, the plaintiff updated and adjusted its claim to $746,300.25. Morganti did not respond substantively to these claims.

On June 3, 2011, the plaintiff sent the defendant notice of its claim via certified mail, pursuant to § 49-42(a). The defendant received the notice of claim on June 10, 2011. On June 13, 2011, the defendant wrote to the plaintiff acknowledging receipt of the claim and requesting additional information to substantiate the claim. By letter dated July 1, 2011, the plaintiff responded to this request and provided the requested documentation, notwithstanding its stated belief that it had already fully complied with the statutory notice requirements of § 49-42. Toe defendant responded by letter dated July 6, 2011, acknowledging receipt of the plaintiff's further documentation . In that letter, the defendant indicated that it was inlmediately taking the matter up with Morganti to ascertain the latter's position on the claim, and that it would be in contact with the plaintiff in due course.

On September 16, 2011, the plaintiff commenced an action in the United States District Court for the District of Connecticut, claiming, inter alia, that: (1) the defendant was obligated to pay the full sum of $746,300.25 allegedly due under the payment bond; and (2) the defendant, acting in bad faith and without legal basis, had

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failed to (a) make any payment under the surety bond, (b) assert a good faith dispute, or (c) serve notice on the plaintiff denying liability for the unpaid portions of the claim. The parties subsequently filed cross motions for summary judgment. In its motion, the plaintiff alleged that because the defendant bad failed to make payment, dispute the claim in good faith, or deny liability on the claim within the ninety day notice period provided by § 49-42(a), the defendant had waived any substantive defenses and the plaintiff was therefore entitled to judgment in the full amount of the claim. The defendant disagreed with this interpretation of the statute, contending instead that a surety's failure to satisfy the ninety day deadline imposed by § 49-42(a) should merely be deemed an exhaustion of remedies entitling a claimant to bring an action on its claim.,

The District Court determined that the proper resolution of the parties' claims turns on the correct interpretation of § 49-42(a). The District Court further observed that the question oflaw presented by the parties' motions involves a matter of public interest for which there is no controlling appellate decision, constitutional provision, or state statute. Accordingly, the District Court certified the following two questions oflaw to this court, which we accepted : "(1)(a) Is a surety's failure to meet the [ninety] day deadline under [§] 4942 deemed to be an exhaustion of remedies entitling claimants to bring suit for an adjudication of their claim or (b) [d]oes the failure to meet the [ninety] day deadline operate as a waiver of a surety's defenses directing the [c]ourt to enter judgment for the claimant in the full amount of the claim?" and "(2) Does a surety's request for further information to substantiate a claim constitute: (a) a 'denial' of the claim under [§] 49-42, or (b) a 'good faith dispute' of the claim under [§] 49-42?" The parties suggest, and we agree, that our analysis should begin with part (1)(b) of the certified question, because the crux of their dispute is whether a surety's failure to satisfy its notice requirements under § 49-42(a) constitutes a waiver of its substantive defenses and a forfeiture of its right to contest a surety bond claim.o We conclude that a surety's failure to make payment on or serve notice denying liability on a claim under § 4942(a), within that provision's ninety day deadline, is tantamount to a denial of the claim and does not constitute a waiver of the surety's right to defend the claim on the merits. We therefore answer part (b) of the first question in the negative and, accordingly, need not address the remaining questions certified by the District Court, except insofar as those matters bear on our resolution of question (1)(b).

Resolution of this question involves an issue of statutory interpretation over which we exercise plenary review. Parrot v. Guardian Life Ins. Co. of America, 273 Conn. 12, 18, 866 A.2d 1273 (2005). We therefore begin our analysis with the language of § 49-42(a); see id., at 19, 866 A.2d 1273; General Statutes § 1-2z;, whicli provides in relevant part: "Any person who performed work or supplied materials for which a requisition was submitted to . the awarding authority and who does not receive full payment for such work or materials within sixty days of the applicable payment date provided for in subsection (a) of section 49-41a . may enforce such person's right to payment under the bond by serving a notice of claim on the surety that issued the bond and a copy of such notice to the contractor named as principal in the bond not later than one hundred eighty days after the last date any such materials were supplied or any such work was performed by the claimant. Not later than ninety days after service of the notice of claim, the surety shall make payment under the bond and satisfy the claim, or any portion of the claim whicli is not subject to a good faith dispute, and shall serve a notice on the claimant denying liability for any unpaid portion of the claim. . Ifthe surety denies liability on the claim, or any portion thereof, the claimant may bring action upon the payment bond in the Superior Court for sucli sums and prosecute the action to final execution and judgment." (Emphasis added.) General Statutes § 49-42 (a).

On its face, the statute contains no default provision and nowhere provides that a surety waives its right to raise substantive defenses or is subject to automatic forfeiture ifit fails to satisfy the ninety day response requirement. Indeed, § 49-42(a) does not expressly impose any penalty in the event of a surety's noncompliance . Nevertheless, the plaintiff maintains that the legislature's repeated use of the term "shall" indicates that the duty of the surety to timely pay or deny a claim is mandatory in nature, and hence that failure to do so necessarily renders a subsequent denial null and void. The defendant, by contrast, asserts that the relevant statutory language is merely directory,• and therefore that failure to deny a claim within ninety days does not automatically result in waiver or forfeiture. The defendant further contends that it would be inappropriate for the courts to read into the act a penalty provision that the legislature declined to impose expressly. See Ghent v. Planning Commission, 219 Conn. 511, 515, 594 A.2d 5 (1991) (court may not "read into clearly expressed legislation provisions whicli do not find expression in its words" [internal quotation marks omitted]). We agree with the defendant's construction of the statute.

Although "we generally will not look for interpretative guidance b_eyond the language of the statute when the words of that statute are plain and unambiguous . our past decisions have indicated that the use of the word shall, though significant, does not invariably create a mandatory duty."9 (Internal quotation marks omitted.) State v. Tra!ian, 45 Conn.App. 722, 730, 697 A.2d 1153, cert. denied, 243 Conn. 924, 701 A.2d 660 (1997). Indeed, we frequently have found statutory duties to be directory, notwithstanding the legislature's use of facially obligatory language such as "shall" or "must." See, e.g., Weems v. Citigroup, Inc., 289 Conn. 769, 788 -94, 961 A.2d 349 (2008) (employer's use of improper form did not invalidate wage deductions); United UIUillinating Co. v. New Haven, 240 Conn . 422, 462-67, 692 A.2d 742 (1997) (assessor's failure to provide notice within thirty days of hearing did not invalidate assessment); Metropolitan District Commission v. AFSCME, Council 4, Local 184, 237 Conn. 114, 122, 676 A.2d 825 (1996) (failure to hold executive session did not require that arbitrators' award be vacated); Katz v. Commissioner of Revenue Services, 234 Conn. 614, 617,

662 A.2d 762 (1995) (commissioner's failure to act on refund claim within ninety days did not preclude denial of claim); Leo Fedus & Sons Construction Co. v. Zoning Board of Appeals, 225 Conn. 432, 446, 623 A.2d 1007 (1993) (zoning board of appeals not subject to automatic approval doctrine on basis of its failure to hold public hearing within statutory time limit); Jones v. Mansfield Training School, 220 Conn. 721, 726-28, 601 A.2d 507 (1992) (use of word "shall" was directory and did not create exclusive remedy for injured worker); Ghent v. Planning Commission, supra, 219 Conn. at 516 and n. 4, 594 A.2d 5 (commission's failure to file transcript of hearing with court did not invalidate appeal); Tramontano v. Dilieto, 192 Conn. 426, 433, 472 A.2d 768 (1984) (acts of public official performed at time beyond limit prescribed are nonetheless effective); Broadriver, Inc. v. Stamford, 158 Conn. 522, 529-30, 265 A.2d 75 (1969) (redevelopment agency's failure to file return within ninety days of notice to property owner did not invalidate statutory taking), cert. denied, 398 U.S. 938, 90 S.Ct. 1841, 26 L.Ed.2d 270 (1970); Gallup v. Smith, 59 Conn. 354, 356-58, 22 A. 334 (1890) (that judge of adjoining district was cited in by disqualified judge, rather than by clerk, did not invalidate subsequent appointment of trustee); see also J. Evans, "Mandatory and Directory Rules," 1Legal Stud. 227, 252-53 (1981) (arguing for presumption in favor of treating ambiguous rules as directory because legislature always has option to expressly identify rules as mandatory and holding rules directory provides courts greater flexibility in deciding consequences of breach). We therefore look to other relevant considerations, beyond the legislature's use of the term "shall,"to ascertain the meaning of the statute.

Our prior cases have looked to a number of factors in determining whether such requirements are mandatory or directory. These include: (1) whether the statute expressly invalidates actions that fail to comply with its requirements or, in the alternative, whether the statute by its terms imposes a different penalty; (2) whether the requirement is stated in affirmative temis, unaccompanied by negative language; (3) whether the requirement at issue relates to a matter of substance or one of convenience; (4) whether the legislative history, the circumstances surrounding the statute's enactment and amendment, and the full legislative scheme evince an intent to impose a mandatory requirement; (5) whether holding the requirement to be mandatory would result in an unjust windfall for the party seeking to enforce the duty or, in the alternative, whether holding it to be directory would deprive that party of any legal recourse; and (6) whether compliance is reasonably within the control of the party that bears the obligation, or whether the opposing party can stymie such compliance.10 See, e.g., Weems v. Citigroup, Inc., supra, 289 Conn. at 790-91, 961 A.2d 349; Teresa T. v. Ragaglia, 272 Conn. 734, 744, 746, 865 A.2d 428 (2005); Katz v. Commissioner ofRevenue Services, supra, 234 Conn. at 617-19, 662 A.2d 762; Broadriver, Inc. v. Stamford, supra, 158 Conn. at 529-31, 265 A.2d 75; Kindl v. Dept. of Social Services, 69 Conn.App. 563, 568, 795 A.2d 622 (2002). Each of these factors supports the defendant's interpretation of the statute.

The first two factors are addressed to the statutory text. "A reliable guide in determining whether a statutory provision is . mandatory is whether the provision is accompanied by language that expressly invalidates any action taken after noncompliance with the provision ." Katz v. Commissioner of Revenue Services, supra, 234 Conn. at 617, 662 A.2d 762. By contrast, where a statute by its terms imposes some other specific penalty, it is reasonable to assume that the legislature contemplated that there would be instances of noncompliance and did not intend to invalidate such actions. Id., at 618, 662 A.2d 762; Ghent v. Planning Commission, supra, 219 Conn. at 515-16, 594 A.2d 5. "Furthermore, a requirement stated in affirmative terms unaccompanied by negative words . generally is not viewed as mandatory." Teresa T. v. Ragaglia, supra, 272 Conn. at 744, 865 A.2d 428.

In the present case, the statute does not provide any express penalty for a surety that fails to comply with the ninety day response requirement. This '1ack of a penalty provision or invalidation of an action as a consequence for failure to comply with the statutory directive is a significant indication that the statute is directory." Weems v. Citigroup, Inc., supra, 289 Conn. at 791, 961A.2d 349. That conclusion is bolstered here by the fact that § 49-42(a), which imposes the ninety day response requirement, does include several express penalty provisions . The statute (1) awards costs to the prevailing party in a legal action, (2) allows interest upon any amount recovered, and (3) permits the court to award attorney's fees if it appears that any claim, denial, or defense is without substantial basis in fact or law. General Statutes § 4942(a).The fact that the legislature provided for such penalties, but did not elect to impose any express penalty on a surety that fails to comply with the ninety day response requirement, counsels against reading such a draconian penalty as a judicial default provision into the statute. Moreover, althougli the language in § 49-42 establishing the surety's response requirement begins with the phrase "[n]ot later than ninety days after service of the notice of claim," the duty of the surety to pay or to deny a claim prior to the statutory deadline is otherwise framed solely in affirmative temis, with no language expressly prohibiting a surety from denying a claim after ninety days have passed. The text and structure of the statute, then, strongly suggest that the legislature intended the response requirement to be directory.

The next factor we consider "in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance [as opposed to] a matter of convenience. !f it is a matter of substance, the statutory provision is [generally held to be] mandatory. If,however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory." (Internal quotation marks omitted.) Metropolitan District Commission v. AFSCME, Council 4, Local 184, supra, 237 Conn. at 120, 676 A.2d 825. In the present case, the defendant contends that the purpose of the ninety day response period is

simply to create order and facilitate the claim process by providing a brief opportunity for a surety to evaluate and potentially resolve a claim prior to the initiation of litigation. The plaintiff, on the other hand, maintains that the ninety day response deadline is substantive, and hence mandatory, because, in its view, an essential purpose of the act is to guarantee that subcontractors who perform work on public construction projects in Connecticut receive prompt payment for their labor and materials. We agree with the defendant.

We acknowledge that where the legislature has imposed a statutory deadline we may assume that it intends for the action in question to be accomplished expeditiously. Nevertheless, the inclusion of a relatively brief deadline does not necessarily imply that expediency is an essential purpose of the statute. Indeed, in a number of cases, both this court and the Appellate Court have concluded that such statutory deadlines are directory where there is no express legislative guidance to the contrary and no indication that the legislature intended the deadline to be jurisdictional . Compare United llluminating Co. v. New Haven, supra, 240 Conn. at 463, 692 A.2d 742 (requirement that assessor provide notice of assessment within thirty days of hearing held directory), Katz v. Commissioner of Revenue Services, supra, 234 Conn. at 617, 662 A.2d 762 (requirement that commissioner act on tax refund claim within ninety days held directory), Leo Fedus & Sons Construction Co. v. Zoning Board of Appeals, supra, 225 Conn. 446 (zoning board of appeals not subject to automatic approval doctrine on basis of its failure to hold public hearing within statutory time limit), Broadriver, Inc. v. Staniford, supra, 158 Conn. at 529-30, 265 A.2d 75 (requirement that redevelopment agency return notice of proposed taking to clerk of Superior Court within ninety days held directory), and In re Adrien C., 9 Conn.App. 506, 509, 512, 519 A.2d 1241 (requirement that commissioner file petition to terminate parental rights at least ninety days prior to expiration of child's commitment held directory), cert. denied, 203 Conn. 802, 522 A.2d 292 (1987), with Vartuli v. Sotire, 192 Conn. 353, 359, 472 A.2d 336 (1984) (compliance with sixty-five day decision requirement held mandatory where statute provided that approval would be presumed in absence of timely commission decision to contrary).

The legislative history of the act is instructive in this regard . Prior to 1987, § 49-42(a) provided in relevant part: "Every person who has furnished labor or material in the prosecution of the work provided for in such contract . and who has not been paid in full therefor before the expiration of a period of ninety days after the day on whicli the last of the labor was done or performed by him or material was furnished or supplied by him for whicli the claim is made, has the right to sue on the payment bond [required under § 49-41] for the amount . unpaid . and to prosecute the action to final execution and judgment for the sum or sums justly due him." (Emphasis added.) General Statutes (Rev. to 1985) § 49-42(a). The essential purpose of the act, then, was to provide a remedy at law for subcontractors and suppliers on public construction contracts who cannot avail themselves of mechanic's liens to obtain payments improperly withheld. Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc., 239 Conn. 708, 714, 687 A.2d 506 (1997); R. Robinson, "Connecticut's Little Miller Act: A Primer," Connecticut Lawyer, Vol. 13, No. 5 (February 2003), p. 22.

The 1987 amendments to the act did nothing to alter this legal remedy. See Public Acts 1987, No. 87-345 (P.A. 87-345). The amendments merely extended the prematurity period during which the parties may resolve the dispute among themselves prior to the commencement of litigation, and imposed a formal structure for this process: adding the requirement that the claimant provide the surety with notice of the claim and a detailed description of the project, and that the surety in turn notify the claimant of its response. Notliing in !lie legislative history suggests that !lie legislature viewed !lie new ninety day response requirement as an essential, substantive component of the act, as amended, or that it intended to impose tliereby a judicial default provision. u Ifanytliing, !lie 1987 amendments support !lie opposite conclusion, as the legislature at tliat time elected to impose various oilier penalty provisions designed to encourage parties to resolve tlieir disputes promptly, without the need for litigation, but did not impose the penalty that the plaintiff seeks. In fact, in 2006, the legislature rejected proposed language that would have amended § 49-42 to provide expressly that "[f]ailure of the surety to eitlier pay or identify the portion of the claim that is subject to a good faith dispute within such ninety-day period shall operate as a waiver of such surety's defenses to tlie entire claim." Raised Senate Bill No. 493, 2006 Sess. That !lie "compromise" amendment !lielegislature ultimately adopted omitted the proposed penalty provision; see 49 H.R. Proc., Pt. 15, 2006 Sess., p. 4680, remarks of Representative Christopher R. Stone; provides further support for !lie defendant's contention that the legislature has never viewed the surety's duty to respond within ninety days as an essential component of !lie act.

We next consider whether holding a requirement to be mandatory would result in an unjust windfall for the party seeking to enforce !lieduty or, in !lie alternative, whetlier holding it to be directory would deprive tliat party of any legal recourse . Compare Weems v. Citi-group, Inc., supra, 289 Conn. at 794, 961A.2d 349 (treating rule requiring use of authorized forms for payroll deductions as mandatory would result in unwarranted windfall for employees), with Angelsea Productions, Inc. v. Commission on Human Rights & Opportunities, 236 Conn. 681, 692-93, 674 A.2d 1300 (1996) (time limits held mandatory where neither party could take further legal action until commission had made finding ofreasonable cause or no reasonable cause); see also J. Evans, supra, 1Legal Stud. 245 (purpose of mandatory/directory distinction is to avoid injustice and honor purposes of statute while not imposing unreasonably harsh consequences for trivial breaches). In the present case, we agree witli !lie defendant and !lie amicus supporting !lie defendant's position tliat this balancing weighs heavily in favor of treating the ninety day response period as directory.

At oral argument, the plaintiff conceded tliat when a surety first receives notice of a claim under a payment bond, the surety may have little, if any, familiarity with !liespecifics of !lie project, and in particular is likely to

be ignorant as to the details and history of the dispute between its principal and the claimant. Moreover, the statute itself requires only that the claimant provide the surety with a "notice of claim [stating] with substantial accuracy the amount claimed and the name of the party for whom the work was performed or to whom the materials were supplied, and [providing] a detailed description of the bonded project for which the work or materials were provided." General Statutes § 49-42(a). There is no requirement, for example, that the claimant provide with its notice of claim any relevant bids, quotes, estimates, project specifications, take-off sheets, labor records, purchase orders, invoices, job diaries, cost reports, or other documentation of the dispute.

Accordingly, upon receiving notice, the surety has just ninety days to educate itself as to the particulars of the project, investigate the claim, collect all relevant documentation , and then determine which portions of the claim to pay and which to deny. To accomplish these tasks, the surety is heavily dependent on the expeditious cooperation of its principal and the claimant, who will typically possess most, if not all, of the relevant information and documentation. Furthermore, ifa surety were to prematurely deny a claim without having completed a thorough and adequate investigation, it could be found to have acted "without substantial basis in fact or law," thereby incurring liability for the claim-ant's attorney's fees. General Statutes§ 49-42(a). Under these circumstances, it would be unreasonable to hold that a surety that engages in a good faith investigation, but is unable to reach an educated conclusion before ninety days have elapsed, necessarily waives any substantive defenses to the claim and becomes obligated to pay it in full, regardless of how exaggerated, baseless, or even fraudulent it may be. We perceive no legislative intent to afford claimants that sort of undeserved windfall.

On the other side of the scale, we also perceive no prejudice to a claimant who, at the end of the ninety day response period, receives neither a yea nor a nay from the surety. As we have noted, the notice procedure that the legislature created in the 1987 amendments to the act; P.A. 87-34s; did not replace or supplant the primary remedy available to the claimant, which is the right to "bring action upon the payment bond in the Superior Court . and prosecute the action to final execution and judgment." General Statutes § 49-42(a). Rather, the ninety days simply provide a brief window during which the parties have an opportunity and are encouraged to try to resolve the claim without the need for litigation. Ifthe surety has not agreed to pay the claim within that time period-whether the surety expressly denies the claim or, as in the present case, simply does not respond substantively to the claim-this window of opportunity has closed, and the position of the claimant is exactly the same in either case:it is free to proceed with litigation in order to enforce its rights. 1,

Finally, our conclusion that the equities favor treating the response requirement in § 49-42(a) as directory rather than mandatory is bolstered by the fact that prompt compliance may not be within the complete control of the surety. As the amicus explains, the surety is caught in the middle between the claimant and the principal; it cannot compel either party to provide the information and documentation it needs to deternline the relevant facts, resolve the dispute, and evaluate the validity of the claim. Moreover, the surety may need to solicit additional information from third parties such as the project owner, the architect, or other contractors and vendors associated with a project. Their cooperation also may not be timely forthcoming.

At the same time, the claimant may be in a position to stymie the ability of the surety to investigate its claim expeditiously. In the present case, for instance, the defendant contends that the plaintiff repeatedly failed to provide full documentation of its allegations. That factual dispute is not before us, and, in any event it is not material to the purely legal questions the District Court has certified. As a general matter, however, a claimant subcontractor will often be the party best positioned to document the work and materials that it contributed to a project, as well as any losses it allegedly suffered as a result of the principal's misconduct. Accordingly, to hold that a claimant is automatically entitled to full payment on all of its bond claims whenever a surety is unable to fully assess those claims within ninety days would create a strong incentive for claimants to withhold key information and otherwise fail to cooperate with the surety. We do not believe that the legislature intended to open the door to that sort of miscliief. See Broadriver, Inc. v. Stamford, supra, 158 Conn. at 530-31, 265 A. 2d 75 (reasoning that treating ninety day deadline for statutory taking as mandatory would allow property owner to defeat taking through dilatory legal tactics).

Considering all of the relevant factors, then, including the text, legislative history, and purpose of the act, we conclude that the ninety day response requirement contained in § 49-42(a) is directory, rather than mandatory, and that the legislature did not intend that a surety that fails to pay or to deny a claim by the statutory deadline thereby waives any substantive defenses and forfeits its right to contest the merits of the claim. We next consider the three additional arguments the plaintiff makes in support of its interpretation of § 49-42(a), none of which we find persuasive.1:1

First, the plaintiff contends that it would be unfair to hold that a surety's duty to respond to a claim under § 49 -42 is merely directory when the claimant's corresponding obligations under that statute, to provide notice of a claim and to file an action in a timely manner, have been held to be mandatory. See Millgard Corp. v. White Oak Corp., 224 F.Supp.2d 425, 429-32 (D.Conn.2002) (granting sUinn1ary judgment for surety on basis of claimant's failure to comply with 180day notice requirement of § 49-42[a]); 14 American Masons' Supply Co. v. F.W. Brown Co., 174 Conn. 219, 224, 384 A.2d 378 (1978) (action brought after one year limitations period established by § 49-42[b] was time barred); Wickes Mfg. Co. v. Currier Electric Co., 25 Conn.App. 751, 759, 596 A.2d 1331 (1991) (same). Although the plaintiffs suggestion that claimants and sureties should be treated

alike with regard to their respective statutory deadlines is facially appealing, it overlooks the significant distinction between statutes oflimitations, which govern when a legal action may be brought, and deadlines of other sorts. See Federal Deposit Ins. Corp. v. Hillcrest Associates, 233 Conn. 153, 172-73, 659 A.2d 138 (1995). The purpose of a statute oflimitations is to prevent stale clainls and unnecessary delays in the presentation of issues. Austin-Casares v. Safeco Ins. Co. of America, 310 Conn. 640, 658, 81A.3d 200 (2013). A plaintiffs timely filed action provides notice to the defendant and ensures that the defendant does not find itself "in a situation where, because of the lapse of time, [the defendant] is unable to gather facts, evidence, and witnesses necessary to afford . a fair defense." (Internal quotation marks omitted.) Nichols v. Light-house Restaurant, Inc., 246 Conn. 156, 166, 716 A.2d 71 (1998); see also Russell v. Mystic Seaport Museum, Inc., 252 Conn. 596, 616, 748 A.2d 278 (2000) (purpose of notice requirement is to allow defendant to conduct timely investigation of claim). Statutes oflinlitations also allow persons, "after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, free from the disruptive burden of protracted and unknown potential liability." (Internal quotation marks omitted.) St. Paul Travelers Cos. v. Kuehl, 299 Conn. 800, 809-10, 12 A.3d 852 (2011). The one year statute oflimitations set forth in the act also has a distinct inlportance, as insurance policies issued pursuant to an owner-controlled insurance program nnder the statute must provide coverage for work performed and materials furnished from the completion of the work until the date that all causes of action are barred under any applicable statute oflimitations. General Statutes § 49-41(e)(3)(A). None of these rationales applies to the duty of a surety to either pay or deny a bond claim within ninety days.

The plaintiffs argument also overlooks a number of relevant distinctions between the surety's response requirement and the claimant's duty to provide timely notice. The clainlant, which has 180 days to serve notice of a claim, need only present its own version of the dispute in order to comply with the statutory deadline. It will presumably already be intimately familiar with the project, as well as the history and nature of its dispute with the principal, and will have access to many of the relevant documents. Indeed, the clainlant may have begun to prepare and document a potential claim long before the statutory notice period ever begins to nm. Under those circumstances, we are hard pressed to imagine why nearly one half of a year would not afford adequate time for a claimant, acting diligently, to prepare and present such a clainl.

As we have described previously herein, the surety, by contrast, may have little familiarity with the details of the project and no knowledge of the dispute giving rise to the claim prior to receiving notice from the claimant. At that point, the surety has just ninety days-one half of the time allotted to the clainlant-to educate itself about the project, obtain all relevant documents and accounts of the dispute from the claimant, the principal, and various third parties (all of whose timely assistance may not be forthcoming), and make a determination as to which portions of the clainl, if any, are properly payable. However it decides, the surety must anticipate that it may ultimately be drawn into litigation involving one or more parties to the dispute. Ifit is later found to have denied a claim in bad faith, the surety also will be liable for the claimant's attorney's fees. Under those circumstances, it does not strike us as unreasonable to conclude that a surety, acting diligently, may not always be able to determine fully the merits of a claim, in good faith, within ninety days of notice. Accordingly, because the claimant and the surety are not sinlilarly situated with regard to their statutory obligations, we do not believe it nnreasonable or unfair that the legislature would have imposed a mandatory duty on the one and a directory duty on the other.

The plaintiffs second argument is that because the act is a remedial statute; Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc., supra, 239 Conn. at 716, 687 A.2d 506; it should be construed broadly in favor of protecting the interests of claimants. We have indicated that the act is to be liberally construed with regard to whether a particular class of subcontractors or suppliers is eligible for statutory protection. Okee Industries, Inc.v. National Grange Mutual Ins. Co., 225 Conn. 367, 373-74, 623 A.2d 483 (1993). We do not, however, construe remedial statutes so liberally as to provide windfalls for teclrnical violations. Weems v. Citigroup, Inc., supra, 289 Conn. at 794, 961 A.2d 349. The purpose of the act is to ensure that subcontractors and suppliers on state projects have an adequate remedy at law should the principal contractor fail to pay them moneys properly due. There is no indication that the legislature, in protecting the legitimate interest of these groups in being paid for their work, intended that they would automatically prevail on any clainl, no matter how lacking in merit, sinlply because of a surety's nonprejudicial delay in evaluating such claim.

The plaintiffs third argument is that ifthe ninety day response requirement is deemed to be merely directory, there will be no penalty for noncompliance and sureties will have no incentive to satisfy their statutory obligations. We disagree. Section 49-42(a) provides that a court may award reasonable attorney's fees to the claimant if the surety's denial ofliability or the defense interposed to the claim is fonnd to be "without substantial basis in fact or law." As we have indicated, a surety that fails to respond substantively to a notice of claim within ninety days has effectively denied the clainl; see Fisher Skylights, Inc. v. CFC Construction Ltd. Partnership, 79 F.3d 9, 11 (2d Cir. 1996) (claimant must treat surety's silence as denial of clainl and file action prior to running of statute oflimitations); sucll that the claimant may bring an action at that time. Id. Ifthe surety is later determined to have demonstrated bad faith in failing to respond within ninety days, it may be liable for the claimant's resulting attorney's fees.,, We believe that this provision of the act provides sufficient incentive for a surety to promptly and diligently investigate any claims against its principal.

For the foregoing reasons, we conclude that the answer to part (b) of the first certified question is: No. With regard to part (a) of the first certified question, we hold that, assuming, without deciding, that § 49-42 establishes an "exhaustion requirement" by whlcll a clainlant may not file an action unless and until a surety

has denied part or all of its claim, the surety's failure to pay or to deny the claim by the ninety day response deadline is to be treated as a denial for that purpose.,<> Because we answer part (b) of the first certified question in the negative, we need not address in depth the second certified question, which asks, in essence, whether a surety's request for further information satisfies its obligations under the act's response requirement. We simply observe that where a surety fails to pay or to deny a claim within ninety days and the claimant later prevails on the merits, whether the surety made a timely, sincere, and warranted request for adclitional information during the response period is one factor to be considered by the court in assessing whether to hold the surety liable for the claimant's attorney's fees.

Part (b) of the first certified question is answered in the negative. Guidance is provided as to the remaining certified questions.

In this opinion the otherjustices concurred.

FOOTNOTES

1. The act was patterned after the federal Miller Act, 40 U.S.C. § 3131 et seq. (2012) (formerly 40 U.S.C. § 27oa et seq.). See Blakeslee Arpaia Chapman, Inc.v. EI Constructors, Inc., 239 Conn. 708, 716, 687 A.2d 506 (1997).

2. General Statutes § 51-199b (d) provides in relevant part: "The Supreme Court may answer a question oflaw certified to it by a court of the Urtlted States . if the answer may be deterntlnative of an issue in pencling litigation in the certifying court and ifthere is no controlling appellate decision, constitutional provision or statute of this state."

3. General Statutes § 49-42(a) provides in relevant part: "Any person who performed work or supplied materials for whlch a requisition was subntltted to, or for whlch an estimate was prepared by, the awarding authority and who does not receive full payment for such work or materials withln sixty days of the applicable payment date provided for in subsection (a) of section 49-41a, or any person who supplied materials or performed subcontracting work not included on a requisition or estimate who has not received full payment for such materials or work within sixty days after the date such materials were supplied or such work was performed, may enforce such person's right to payment under the bond by serving a notice of claim on the surety that issued the bond and a copy of such notice to the contractor named as principal in the bond not later than one hundred eighty days after the last date any such materials were supplied or any such work was performed by the claimant. The notice of claim shall state with substantial accuracy the amount claimed and the name of the party for whom the work was performed or to whom the materials were supplied, and shall provide a detailed description of the bonded project for which the work or materials were provided. Not later than ninety days after service of the notice of claim, the surety shall make payment under the bond and satisfy the claim, or any portion of the claim which is not subject to a good faith dispute, and shall serve a notice on the claimant denying liability for any unpaid portion of the claim. Ifthe surety denies liability on the claim, or any portion thereof, the claimant may bring action upon the payment bond in the Superior Court for such sums and prosecute the action to final execution and judgment. An action to recover on a payment bond under this section shall be privileged with respect to assignment for trial. In any such proceeding, the court judgment shall award the prevailing party the costs for bringing such proceeding and allow interest at the rate of interest specified in the labor or materials contract under whlch the claim arises or, ifno such interest rate is specified, at the rate of interest as provided in section 37-3a upon the amount recovered, computed from the date of service of the notice of claim, provided, for any portion of the claim which the court finds was due and payable after the date of service of the notice of claim, such interest shall be computed from the date such portion became due and payable . The court judgment may award reasonable attorneys fees to either party ifupon reviewing the entire record, it appears that either the original claim, the surety's denial of liability, or the defense interposed to the claim is without substantial basis in fact or law."

4. General Statutes§ 49-41(a) provides in relevant part: "Each contract exceeding one hundred thousand dollars in amount for the construction, alteration or repair of any public builcling or public work of the state or a municipality shall include a provision that the person to perform the contract shall furnish to the state or municipality on or before the award date, a bond in the amount of the contract whlch shall be binding upon the award of the contract to that person, with a surety or sureties satisfactory to the officer awarcling the contract, for the protection of persons supplying labor or materials in the prosecution of the work provided for in the contract for the use of each such person. Any such bond furnished shall have as principal the name of the person awarded the contract."

5. Insupport of its motion for summary judgment, the defendant claimed that it is entitled to judgment as a matter oflaw because § 49-42(a) contains no penalty provision.

6. The amicus, Surety and Fidelity Association of America, similarly restricts its argument to part (b) of the first certified question.

7. General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If,after exantlning such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

8. "A statutory provision that is directory prescribes what shall be done but does not automatically invalidate action upon a failure to comply." (Internal quotation marks omitted.) Hall Manor Owner's Assn . v. West Haven, 212 Conn. 147, 153, 561 A.2d 1373 (1989).

9. See footnote 7 of this opinion.

10. Although we have referred to some of these considerations as "tests," we generally have not treated any one consideration as dispositive, and in most cases we have evaluated the relevant language, structure, history, and purpose of the statute in determining whether the duty at issue was mandatory or directory. See, e.g., United illuminating Co. v. New Haven, supra, 240 Conn. at 465-66, 692 A.2d 742; Katz v. Commissioner of Revenue Services, supra, 234 Conn. at 618-19, 662 A.2d 762. Accordingly, such considerations are more accurately identified as factors.

11. See 30 S. Proc., Pt.4, 1987 Sess., p. 1468, remarks of Senator James Maloney ("The amendment [to § 49 -42] revises the procedures for claims under materialmen's bonds. What it does is in effect require that non-disputed claims be paid, and only the contested portion of a claim would go to litigation. This will . eliminate a number of cases that otherwise might be brought . [a]nd will generally inlprove the orderliness of the material-men's bonds procedure.") .

12. The present case is, thus, readily distinguishable from Angelsea Productions, Inc. v. Commission on Human Rights & Opportunities, supra, 236 Conn. at 681, 674 A.2d 1300.In that case, neither party could take further action on the employee's complaint until the Commission on Human Rights and Opportunities complied with its statutory obligations to complete an investigation within nine months, make a written finding of reasonable cause or no reasonable cause, and hold a hearing not later than ninety days after finding reasonable cause. Id., at 689, 697, 674 A.2d 1300.

13. The plaintiff also directs our attention to several Superior Court decisions concluding that the relevant statutory language is mandatory. See Barreira Landscaping & Masonryv. Frontier Ins. Co., 47 Conn.Supp. 99, 110, 779 A.2d 244 (2000); Acoustics, Inc. v. Travelers Ins. Co., Superior Court, judicial district of New Britain, Docket No. CV-03-0519565-S (January 13, 2004) (36 Conn. L. Rptr. 476, 479); Elwell v. United States Fidelity & Guaranty Co., Docket No. 99527, 1993 WL 407974, *1(Conn.Super. October 1, 1993). For the reasons discussed herein, we are not persuaded by the reasoning of those decisions.

14. We express no view on the determination of the federal District Court in Millgard Corp. that the requirement in § 49-42(a) that a claimant notify the surety of any potential claims within 180 days is mandatory rather than directory.

15. That is not to say that a surety's failure to resolve a claim within ninety days necessarily subjects the surety to liability for a bad faith denial of the claim. Even if it ultimately becomes clear that there was no substantial basis in law or fact for denying a claim, a surety does not subject itself to liability for the clainlant's attorney's fees if, after a diligent and good faith effort to document and evaluate the clainls, ninety days do not prove sufficient time for the surety to draw an informed conclusion. A surety's failure to promptly and diligently investigate a claim, however, may justify an award of fees should the clainlant ultimately prevail on the merits.In addition, we do not foreclose the possibility that judicial default could be an appropriate remedy in a situation in which the surety's failure to meet the ninety day response deadline results in substantial prejudice to the clainlant. See United illuminating Co. v. New Haven, supra, 240 Conn. at 467, 692 A.2d 742 (assessor's failure to comply with statutory notice requirement did not entitle taxpayer to relief in absence of showing of prejudice); J. Evans, supra, 1Legal Stud. 254-55 (actions taken pursuant to breach of directory duties may be voidable upon demonstration of prejudice). As we have noted, however, in most cases it will be difficult, if not impossible, for a claimant to establish that a surety's failure to respond within ninety days placed it in any worse position than the claimant would have found itself had the surety sinlply denied the clainl on the ninetieth day.

16. The dispute between the parties does not require that we resolve the question whether there is in fact such an exhaustion requirement, and whether, for example, a clainlant may file an action under § 49-42 during the ninety day response period, without first waiting for the surety's response. See Fisher Skylights, Inc. v. CFC Construction Ltd. Partnership, supra, 79 F.3d 11.?

PALMER, J.

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Appendix B

SAC Performance Bond

Bond No.: **** (the "Bond")
Bond Amount: $ (the "Bond Amount")

**** as Principal (the "Principal") and **** a corporation created and existing under the laws of **** and duly authorized to transact the business of Suretyship in ****as Surety (the "Surety") are held and firmly bound unto **** as Obligee (the "Obligee") in the amount of **** Dollars ($****) lawful money of Canada for the payment of which sum the Principal and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally.

WHEREAS, the Principal entered into a written contract (the "Contract") with the Obligee, dated **** for **[Insert the description of the project as it is set out in the Contract].**

The condition of this obligation is such that if the Principal shall promptly and faithfully perform the Contract then this obligation shall be null and void; otherwise it shall remain in full force and effect.

I - Pre-Demand Conference

Prior to a Demand (as defined in Section II 3) below) under this Bond, the Obligee may notify the Surety and the Principal in writing that it is considering declaring the Principal to be in default under the Contract and request a pre-demand conference (the "Pre-Demand Conference"). Upon receipt of such request the Surety and Principal shall participate in a Pre-Demand Conference meeting or telephone conference call, on a without prejudice basis, with the Obligee which shall be arranged by the Surety and held at a mutually agreeable time and place not later than fifteen (15) calendar days after receipt of such notice, unless otherwise mutually agreed to by each of the Obligee, Surety and Principal.

The purpose of the Pre-Demand Conference is to allow the Obligee to express its concerns about the Principal's performance pursuant to the Contract and to allow the Principal to respond to such concerns prior to the Obligee exercising its rights under the Contract or this Bond. It should not be construed as an alternative to any dispute resolution provisions which may appear in the Contract. Neither the participation by any party in the Pre-Demand Conference, nor any statement or position taken by any party during the Pre-Demand Conference or any follow-up Pre-Demand Conference, may be relied on by any other party as a waiver or compromise of the rights or duties of the Obligee, the Surety or the Principal under the Contract**,** this Bond or applicable law.

II - Conditions Precedent to Liability

The Surety shall have no liability under this Bond unless all of the following conditions precedent (the "Conditions Precedent") have been satisfied:

1. The Principal is, and is declared by the Obligee to be, in default under the Contract; and
2. The Obligee has performed the Obligee's obligations under the Contract; and
3. The Obligee has made a Demand under the Bond. In this Bond, "Demand" means a clear and unequivocal written statement by the Obligee, delivered to the Surety in accordance with Section XI below, that the Principal is in default of its obligations under the Contract and requesting that the Surety fulfill its obligations under this Bond; and
4. The Obligee has agreed to make available the Balance of the Contract Price to the Surety in accordance with the terms and conditions of the Contract. In this Bond, "Balance of the Contract Price" means the total amount payable by the Obligee to the Principal under the Contract less the amount properly paid by the Obligee to the Principal.

III - Surety's Investigation and Response

Upon receipt of a Demand from the Obligee, the Surety shall be entitled to a reasonable time within which to conduct an investigation of the Demand and determine its liability under the Bond, if any. Within five (5) business days of receipt of the Demand the Surety shall acknowledge receipt of the Demand in writing and request from the Obligee the information and documentation the Surety shall require to complete its investigation (the "Information") and access to the site where the work is being performed, if necessary. Upon receipt of the Surety's acknowledgement, the Obligee shall promptly provide the requested Information and site access to the Surety.

Upon receipt of all the Information**,** and completion of the site visit, if required, the Surety shall have twenty-one (21) calendar days to complete its investigation and advise the Obligee, in writing, of its position on liability pursuant to the Bond and to choose an option for discharging its obligation hereunder, if appropriate. In the event that the Surety is unable to complete its investigation and take a position on liability within such twenty-one (21) calendar days it shall write to the Obligee prior to the expiration of such twenty-one (21) calendar days and provide the Obligee with an update which sets out the status of the Surety's investigation and the Surety's estimate of when the investigation will be completed and its position delivered to the Obligee. In the event that the Surety denies that it has any liability pursuant to this Bond, the Surety shall explain its reasons therefor to the Obligee in writing.

IV - Emergency Remedial Action by the Obligee

If during the time the Surety is investigating a Demand, circumstances dictate that the Obligee must undertake emergency remedial work which is necessary to:

a) ensure public safety; or
b) preserve or protect the work under the Contract from deterioration or damage,

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the Obligee may, acting with due diligence and upon giving written notice to the Surety, undertake such emergency remedial work provided that:

1. reasonable costs incurred by the Obligee in undertaking such emergency remedial work shall be reimbursed by the Surety in accordance with the terms and conditions of this Bond and subject to the Principal's default and the Surety's liability being subsequently established. Any payments made by the Surety in respect of such work shall form part of its obligation under this Bond and shall reduce the Bond Amount by the amount of any such payments; and
2. any such emergency remedial work shall be limited to work which is within the scope of the Contract and which is reasonably required to mitigate the potential costs or damages of the Obligee in the circumstances; and
3. any such emergency remedial work shall be undertaken without prejudice to the rights of the Obligee, the Principal or the Surety under the Contract**,** this Bond or applicable law**.**

V - Post-Demand Conference

Following a Demand, the Surety and the Principal shall participate in a meeting or telephone conference call (the "Post Demand Conference") with the Obligee, on a without prejudice basis, which shall be arranged by the Surety and held at a mutually agreeable time and place not later than ten (10) calendar days after receipt of the Demand, unless otherwise mutually agreed to by the Obligee and the Surety.

The purpose of the Post Demand Conference shall be to determine what remedial action, if any, the Obligee believes must be taken while the Surety is conducting its investigation. If the Obligee reasonably believes that the work of the Contract must proceed for the benefit/protection of the Project overall and in mitigation of any damages the Obligee intends to seek from the Surety hereunder, while the Surety is conducting its investigation and provides reasonable evidence thereof to the Surety, the Obligee may engage an appropriate contractor(s) to continue the work of the Contract (the "Remedial Work") subject to the following conditions:

1. the Obligee shall pay the costs of the Remedial Work on terms the same as or similar to those of the Contract;
2. the Obligee shall keep separate records of all amounts related to the Remedial Work it intends to seek as damages from the Surety hereunder; and
3. the Obligee shall allow the Surety and/or its consultant(s) access to the Project during the course of the Remedial Work for the purpose of preserving evidence and monitoring the progress of the Remedial Work.

If the Surety objects to any part of the Remedial Work, including without limitation the Obligee's proposed completion contractor(s), it shall immediately advise the Obligee in writing of its objections and the reasons therefor. The Obligee may still proceed with the Remedial Work and the Surety's objections will be addressed through negotiation with the Obligee or at the trial of any action brought pursuant to this Bond.

The reasonable costs incurred by the Obligee in undertaking the Remedial Work shall be reimbursed by the Surety in accordance with the terms and conditions of this Bond subject to the Principal's default and the Surety's liability being subsequently established. Any payments made by the Surety in respect of the Remedial Work shall form part of its obligation under this Bond and shall reduce the Bond Amount by the amount of any such payments.

So long as the Obligee has attended a Post Demand Conference and otherwise complied with all of the conditions of this Bond the Obligee may proceed with the Remedial Work and the Surety shall not raise the mere fact that the Remedial Work proceeded as a defence to any claim by the Obligee hereunder.

Neither the participation in the Post-Demand Conference, nor any statement or position taken by either party during the Post-Demand Conference or any follow-up Post-Demand Conference, shall be relied on by any other party as a waiver or compromise of the rights or duties of any the Obligee, the Surety or the Principal under the Contract or this Bond.

VI- Surety's Options

Following the completion of the Surety's investigation, if the Conditions Precedent have been satisfied by the Obligee and the Surety has accepted liability pursuant to this Bond, subject to Sections VII and VIII below, the Surety shall promptly:

1. remedy the default; or
2. complete the Contract in accordance with its terms and conditions; or
3. obtain a bid or bids for submission to the Obligee for completing the Contract in accordance with its terms and conditions and upon determination by the Obligee and the Surety of the lowest responsible bidder, arrange for a contract between such bidder and the Obligee and make available as work progresses (even though there should be a default, or a succession of defaults, under the contract or contracts of completion, arranged under this paragraph) sufficient funds to complete the Principal's obligations in accordance with the terms and condition of the Contract and to pay those expenses incurred by the Obligee as a result of the Principal's default relating directly to the performance of the work under the Contract , less the Balance of the Contract Price; or
4. pay the Obligee the lesser of **:** (1) the Bond Amount**,** or (2) the Obligee's proposed cost of completion less the Balance of Contract Price.

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VII - Limitation on the Surety's Liability

Notwithstanding anything to the contrary contained in this Bond or in the Contract, the Surety shall not be liable for a greater sum than the Bond Amount under any circumstances.

In the province of Québec, the coverage period of this Bond begins at the date of commencement of the Contract work and ends two (2) years following acceptance of such work pursuant to Article 2110 of the Civil Code. Only defaults declared by the Obligee in writing to the Principal during such period shall be subject to coverage under this Bond.

VIII- Commencement of Action

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 **:** (1) the date of Substantial Performance of the Contract as defined in the lien legislation where the work under the Contract is taking place, or, if no such definition exists, the date when the work is ready for use or is being used for the purpose intended, or (2) the date on which the Principal is declared in default by the Obligee.

IX- Right of Action

No right of action shall accrue on this Bond to or for the use of any person or corporation other than the Obligee named herein, or the heirs, executors, administrators or successors of the Obligee.

X- Headings for Reference Only

The headings and references to them in this Bond are for convenience only, shall not constitute a part of this Bond, and shall not be taken into consideration in the interpretation of this Bond.

XI- Notices

All Demands and notices under this Bond shall be delivered by facsimile and registered mail at the addresses set out below. All other correspondence may be delivered by any of facsimile, regular mail, registered mail, email or courier at the addresses set out below.

The Surety:

[Surety corporate name]
[address]
[fax]
[email]

The Obligee:

[Obligee proper name]
[address]
[fax]
[email]

The Principal:

[Principal corporate name]
[address]
[fax]
[email]

IN WITNESS WHEREOF, the Principal and the Surety have Signed and Sealed this Bond this **** day of **** in the year ****.

[**Principal corporate name]**

By:_____
Name:
Title:
I have authority to bind the corporation.

Witnessed by:

_____
Name of Witness:
Address of Witness:

[Surety corporate name]

By:_____
Name:
Attorney-in-Fact

By:_____
Name:
Attorney-in-Fact

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