

**CASHIN SPINELLI & FERRETTI, LLC**  
**CONNECTICUT OFFICE QUARTERLY**

APRIL 2006

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**TRUST ACCOUNT BENEFITS CONTRACTOR AND SURETY**

Change Order issues that are not fully negotiated and paid in a timely manner can create significant cash flow challenges for general contractors, subcontractors, and equipment and material suppliers. A northeast-based mechanical general contractor performed extra work amounting to approximately 25 percent of the original contract value without getting paid from the owner. This particular project was the largest project that the contractor had in progress, and cash flow shortages affected ongoing bonded and non-bonded projects. Payment bond claims prompted the surety to review the status of all projects and prepare spreadsheets outlining contract balances, accounts payable, esti-

mated completion costs and any issues likely to affect those amounts, i.e. defective work or liquidated damages.

The surety funded a zero-balance trust account that was managed by CSF and the obligee's were directed to forward payments to CSF for deposit into the account. CSF worked with the contractor, surety and claimants to resolve payment bond claims. The contractor and owner successfully mediated the disputed change orders, and the contractor used the settlement proceeds to bring accounts payable current and satisfy its indemnity obligations.



Aerial construction progress photo, Cayo Largo Hotel & Resort, Fajardo, Puerto Rico



Western Elevation, Cayo Largo Hotel & Resort construction, Fajardo, Puerto Rico

**SPECIAL POINTS OF INTEREST:**

- Trust Accounts
- Construction Claims
- CFMA Presentation
- Re-bid Cost Savings
- Re-bid Running Track
- Meet the Team

**CONSTRUCTION CLAIMS DIVISION CREATION**

CSF announces the creation of a Construction Claims Division. This division increases the efficiency and effective management of existing affirmative claims. CSF offers services to Sureties and other entities to include: CPM Scheduling, Project Oversight, Claims Avoidance, Construction Claims

Preparation and Analysis, Dispute Resolution and Expert Testimony. Edward Fenn, P.E. manages the Construction Claims Division from the Southington, CT office. He utilizes the expertise of CSF's current staff, and plans to add personnel with the increased demand for services.



Cell pod construction at Merrimack Jail Facility, Boscawen, N.H.

## HAVE YOU ENCOUNTERED DIFFERING SITE CONDITIONS ?

Differing site conditions can put time and financial pressures on a contractor. Owners and designers typically attempt to shift the risk to the contractor through contract provisions, plan notes, specification sections, pre-construction subsurface investigations and corresponding reports. Exculpatory clauses and disclaimers create additional challenges for recovery. The owner's im-

plied warranty is that the plans and specifications are not defective, and that the project can be constructed from the furnished information.

When the owner breaches its implied warranty, a contractor can often recover damages through an affirmative claim or request for equitable adjustment. A contractor that encounters a potential differing site condition should

immediately review the contract documents, paying particular attention to the notice requirements. The contractor's claim should also establish entitlement and calculate damages. CSF is currently preparing and defending affirmative claims for our owner, surety, and contractor clients; and assisting those clients in dispute-resolution forums including mediation, arbitration and litigation.



Block retaining wall collapses after heavy rains

## CSF MEETS THE CT CFMA

John McManus, Esq. and Kevin Ouellette, P.E. from CSF's CT office made a presentation to the Connecticut Construction Financial Management Association entitled "Contractor Financing - How a Bank and a Bank's Consultant Look at a Contractor in Today's Lending Environment." CSF discussed to-

day's construction environment and statistical information demonstrating that a contractor's history is no guarantee to future success. CSF reviewed factors contributing to contractor failures, and presented methods used to uncover factors contributing to those failures. Lending institutions can use these

methods in conjunction with financial assessments when evaluating a contractor's financing request. CSF also discussed how quality contractors address organization, financing, marketing, planning and project controls to better insure long term success in the challenging construction market.

**"A quality contractor is not determined by the car he drives to the job site."**

## TENDER AGREEMENT QUIETS PUERTO RICAN NEIGHBORHOODS

The Puerto Rico Electric Power Authority ("PREPA") supplements its power generation network with ten, gas-powered turbine generators. The generators are located in four locations on the island: Mayaguez (west coast), Vega Baja (north coast), Yabacoa (south coast), and Dagua (east coast). In addition to electric power, the ten generators produce deafening sound power levels of up to

120dBA. The close proximity of residential neighborhoods has led to public health concerns causing PREPA to bid the Sound Attenuation project requiring sound reduction to 75dBA (a typical car interior measurement is 70 dBA).

The original contractor defaulted and the surety and CSF worked together to rebid this complex, design-build

project. The surety ratified the original subcontractor responsible for design and quality assurance. CSF also inventoried materials that were stored in numerous unprotected locations throughout the island, and arranged for those materials to be relocated to secure and insured warehouses. PREPA and the surety recently executed a final agreement with a full release.



Partial Steel Framing, Gas Turbine at Dagua, Puerto Rico



Partial Steel Framing, Gas Turbine Generators at Vega Baja, Puerto Rico

## RE-BIDDING MADE EASY

Re-bidding unit-price contracts is sometimes complicated by math errors contained within the completion proposals. CSF was retained to rebid several Puerto Rico Highway Authority projects. Each project consisted of over 180 line items!! CSF prepared a spreadsheet that served as the unit-price proposal form, and locked out bidder's access to all cells except for those in the proposed unit price column. The spreadsheet was provided to bidders via a compact disk and electronic mail.

CSF received the completion bids by electronic mail and sorted the bids to allow for side-by-side analysis and, in particular, review of line items that accounted for a significant percentage of the total cost. This review process allowed CSF to identify price discrepancies within particular line items, and prompted discussions with bidders to clarify work scope, resulting in reduced costs and lower completion prices.

Contractors will sometimes express an interest in bidding

a project, but change their minds as the bid date approaches. In order to save copy and delivery costs, the surety provided the bidders with plans and specifications scanned onto a compact disk in lieu of hard copies. Most bidders have in-house printing capabilities, but CSF also provided bidders with contact information for local print shops. Using disks instead of hard copy plans and specifications resulted in significant savings in time as well as copy and postage costs.



PR-115, Guayabo River Bridge, Aguada, Puerto Rico, looking east



PR-115, Guayabo River Bridge, Aguada, Puerto Rico, looking north

## MITIGATION OF LIQUIDATED DAMAGES

CSF has had the opportunity to work with sureties on numerous contractor defaults and terminations. Of course, each default has a unique set of facts and circumstances; but sureties can often negotiate a significant reduction or complete waiver of liquidated damages. Sometimes, obligee's will

reduce liquidated damages when the surety arranges for construction to resume in a short period of time. In one case, the surety agreed to complete the project by a date certain in exchange for a significant reduction in liquidated damages. CSF assisted the surety with rebidding the project and the take-

over agreement provided that the surety meet the required completion date. CSF managed the subcontractors, and the project was completed on time. The obligee released the contract balance to the surety including the amount it had retained for liquidated damages.

**“A quick response may reduce owner's costs and their assessment of liquidated damages.”**

## RACE TO THE FINISH

CSF was retained to assist a surety with completing a running track at a Connecticut university. The contractor had successfully installed the turf for the football field, but was defaulted for failure to construct the track in accordance with the specifications. The track was required to meet NCAA guidelines and

only a few area contractors had the requisite experience and familiarity with the specialized track materials. With the track season approaching, CSF and the surety quickly located qualified contractors, prepared rebid documents, held a prebid meeting and accepted bids.

The rebid package contained a very specific time frame for completing the work. Also, the contractor had to carefully schedule the work due to material lead and curing-times. The track was completed just in time for the starter's gun.



The track (shown above) was removed and re-installed.

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## CSF SOUTHLINGTON, CT AND PUERTO RICO TEAMS

**John McManus, Esq.**, Office Manager ... surety consulting, performance and payment bond claim evaluation, construction management and claims, litigation support, funds control

**Michael Anderson, P.E.**, Senior Project Manager ... surety consulting, construction management, expert reports, construction claims, civil and environmental engineering

**Beverly Farler**, Administrative Manager ... claims administration, document control, bookkeeping, funds control

**Edward Fenn, P.E.**, Construction Claims Division Manager ... claims analysis and preparation, litigation support, scheduling, construction management

**Steve Major**, Puerto Rico Office Manager ... surety consulting, construction management, project re-bids, estimating, scheduling

**Kevin Ouellette, P.E.**, Senior Project Manager... surety consulting, construction management, project re-bids, estimating, scheduling

**James A. Thompson III, P.E.**, Senior Project Manager ... surety consulting, construction management, project re-bids, estimating, scheduling, claim evaluation, civil design

**Dane Wigfall, P.E.**, Puerto Rico Office, Senior Project Manager ... surety consulting, construction management, estimating, claim evaluation



(from left to right) Steve, Dane, Kevin, Bev, Mike, Ed, John and Jim in front of the Southington, CT Office Building