

Quigg Golden

Construction Law | Dispute Resolution | Procurement | Training

Carillion & Performance Bonds

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About Me



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The Question

- Performance bonds
 - Given the increase in contractor failures, is it time to veer away from on-demand performance bonds?
 - What are the options?



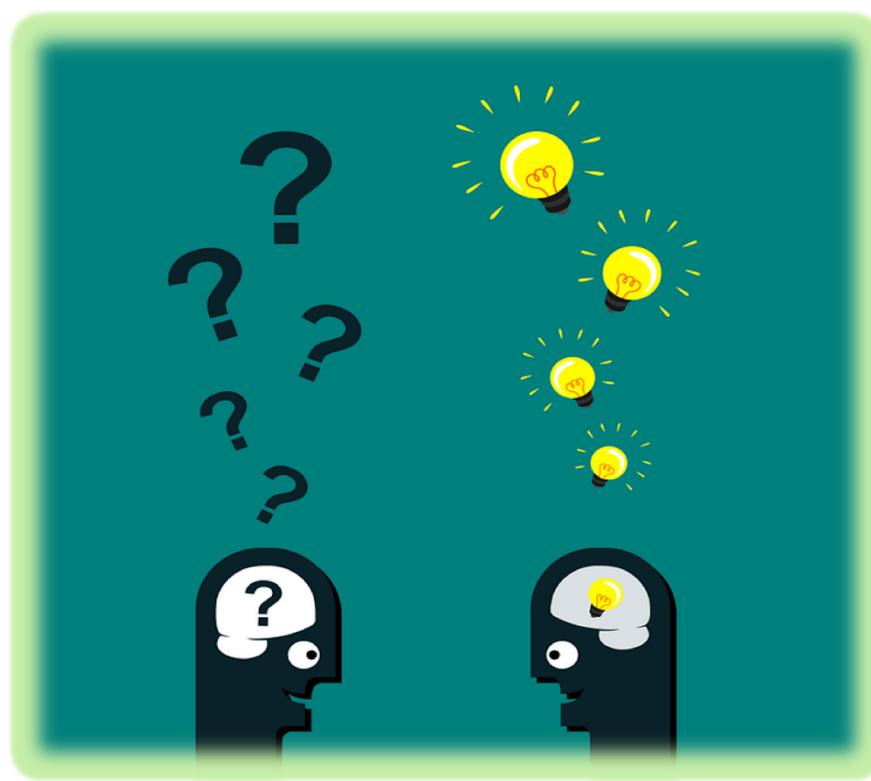
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What is the Problem?

The Problem



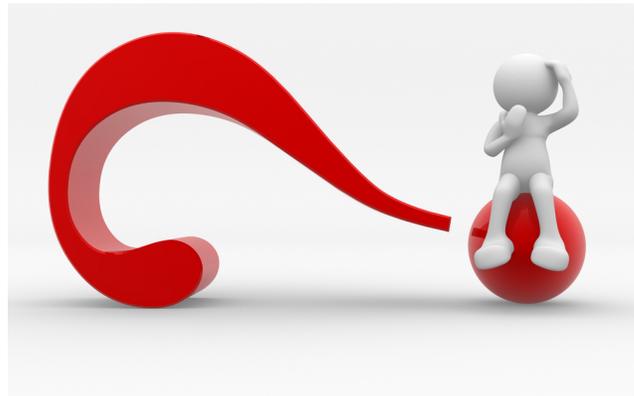
- If a tier one contractor fails:
 - Project in delay
 - Sub-contractors fail
 - Problem of finding a replacement contractor
 - Liability



What is the Solution?

The Solution

- Only appoint tier one contractors that are financially sound and able to absorb the project risks and that will not fail
- Is this possible?
 - What is permitted under Procurement rules?



Procurement Rules

- Reg 57 - allows exclusion when bidder is already in an insolvency situation
- Reg 58 - allows economic and financial standing to be tested:
 - Turnover and ratios
 - Proportionate, transparent, objective and non-discriminatory
- Reg 60 - means of proof:
 - “proof ... may, as a general rule, be provided by one or more of the references listed in Annex XII Part I”*
 - If EO unable to provide document then may prove by any other document...
- Statements from banks, financial statements required by law, statement of last 3 years turnover in contract area

The age of accounts

- Accounts for the period 1 Jan to 31 Dec '16 must be filed with CRO by 30 September 2017
- No new accounts need be filed until 30 September '18
- So when we ask of accounts in September '18 we are looking at what the company *reported* about 2016
- And...
 - ARD can be extended by months
 - Unlimited companies (loophole closed)
 - Accuracy of reporting





How to mitigate the Problem?

Details of what Topic 1 is all about

Mitigation options

- Live with the risk
- Retention
- Parent Company Guarantees
- Project Bank Accounts / monitor sub-contract payments
- Vesting
- Step in rights in collateral warranties
- IP and access to design data
- Bonds



Bonds

- On-demand bonds
 - Banks require 100% cash collateral for bond amount
 - Risk of improper call on bond - may prejudice solvency of contractor
- Performance bonds
 - Limited (usually) to 10% of contract value
 - Time-limited – cannot last throughout limitation period
 - Cost?
 - When is breach, allow on-account payments of termination account



Conclusion?

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- Performance bonds have their place





Questions

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Thank you
Please keep in touch

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