

## SURETY

By: Keith Langley



The surety scored the winning goal. The case involving a large soccer stadium where (as always) safety was a large concern, here including the lifting of the heavy scoreboard for the soccer stadium. *Schuff Steel Co. v. Bosworth Steel Erectors*, 2022 U.S. Dist. LEXIS 176417 (D.D.C. Sep. 28, 2022). Based upon a perceived violation of the lifting protocol by the principal, the obligee terminated the principal.

Obligee self-performed without allowing the surety the contractually provided reasonable period of time to elect an option. Under D.C. law, failure to comply with a notice provision releases the surety of liability, (citing *National Wrecking Corp.*). Despite timely notice of default to the Surety, the obligee immediately elected to self-perform, giving the surety a choice between something or nothing - which is no true choice at all. By immediately self-performing, the obligee not only reduced the surety's reasonable period of time it had to elect a remedial option, the obligee provided no election whatsoever to the surety. Accordingly, as a matter of law the Court found that the surety did not breach the performance bond.



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To "Go Green", our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

We hope that these changes make big differences in the future.

*Well done is better than well said.*

- Benjamin Franklin



## Decisions, Decisions

The language of the bond provides the pragmatic issue of allowing the surety to mitigate by choosing a performance option. This pragmatism was removed and that removal led to a consequence which was a discharge legally of the surety on the bond. The D.C. Circuit has great caselaw on the issues including the *National Wrecking Corp.* opinion at both the District Court and the Circuit Court level. Those cases and the *Schuff Steel* case are prime opportunities for the surety to cite to the pragmatic realities in the bond (and which makes great sense for the project).

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