



**Flintco, LLC v Total Installation Management Specialists, Inc. et al.**

2025 OK 35

Case Number: [120110](#)

Decided: 05/28/2025

THE SUPREME COURT OF THE STATE OF OKLAHOMA

Cite as: 2025 OK 35, \_\_ P.3d \_\_

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FLINTCO, LLC, an Oklahoma limited liability company, Plaintiff/Appellee,

v.

TOTAL INSTALLATION MANAGEMENT SPECIALISTS, INC., a Kansas corporation, Defendant,

and

OKLAHOMA SURETY COMPANY, an Ohio corporation, Defendant/Appellant.

**ON CERTIORARI FROM THE COURT OF CIVIL APPEALS, DIVISION III,**

**HONORABLE WILLIAM J. MUSSEMAN,**

**TULSA COUNTY DISTRICT COURT, TRIAL JUDGE**

¶0 Contractor in a large construction project brought action against flooring subcontractor and its surety, arguing that the subcontractor breached the subcontract and that the surety was liable under the AIA-A311 performance bond. After a bench trial, the district court granted judgment in favor of the contractor and against the subcontractor and surety. The surety appealed, arguing that the contractor failed to satisfy the conditions of the performance bond requiring a declaration of default and reasonable notice to the surety before the contractor assumed control of the subcontractor's flooring work. The Court of Civil Appeals reversed the district court's judgment. This Court granted Certiorari. We hold that the performance bond's notice requirement constituted a mandatory condition precedent, and the contractor's failure to provide timely notice to the surety so it could exercise its performance options under the bond relieved the surety from liability.

**CERTIORARI PREVIOUSLY GRANTED;**

**COURT OF CIVIL APPEALS OPINION VACATED;**

**DISTRICT COURT'S JUDGMENT REVERSED;**

**CASE REMANDED WITH INSTRUCTIONS TO ENTER JUDGMENT CONSISTENT WITH OUR DECISION HEREIN.**

Robert L. Magrini, Hayley N.K. McAllister, and Cole B. Brown, Hayes Magrini & Gatewood, Oklahoma City, Oklahoma, for Appellant Oklahoma Surety Company.

James E. Weger and Patrick G. Colvin, Jones, Gotcher & Bogan, P.C., Tulsa, Oklahoma, for Appellee Flintco, LLC.

Trent A. Gudgel, Tulsa, Oklahoma, for Appellee Flintco, LLC.

David A. Walls, David A. Walls, PLLC, Oklahoma City, Oklahoma, for Amicus Curiae Oklahoma Chapter, Builders Division of Associated General Contractors of America, Inc.

**OPINION**

DARBY, J.

**I. BACKGROUND**

**A. The Project and Related Contracts**

¶1 This case involves the interpretation of a performance bond issued in conjunction with a large construction project for Oklahoma State University. In July 2013, Plaintiff/Appellee, Flintco, LLC, ("Flintco") entered into a contract with the Oklahoma State University Board of Regents, Agricultural and Mechanical Colleges, for the construction of three student housing buildings on the OSU campus in Stillwater, Oklahoma (the "Project"). The firm deadline for completion of the Project was August 5, 2015. On November 13, 2013, Flintco entered into an agreement (the "Subcontract") with Defendant, Total Installation Management Specialists, Inc. ("Total") to install all flooring for the three buildings. Total agreed to supply all labor, material, tools, and equipment necessary for the flooring work. The Subcontract required Total to secure a performance bond in an amount equal to the Subcontract price, and Total procured this bond from Defendant/Appellant, Oklahoma Surety Company ("OSC"), naming Total as principal and Flintco as obligee (the "Bond" or "Performance Bond"). The Subcontract required that the Performance Bond must be satisfactory to Flintco, in its sole discretion. Flintco accepted the Bond in the form offered by Total.

¶2 The Bond is a one-page document, dated December 26, 2013, binding OSC and Total for payment to Flintco of up to \$1,823,000.00, the total amount of the Subcontract, and laying out the options for OSC and Flintco to ensure performance of the Subcontract in the event of Total's default. The pertinent terms of the Bond state:

[A] KNOW ALL MEN BY THESE PRESENTS: That Total Installation Management Specialists, Inc. . . . hereinafter called Principal, . . . and Oklahoma Surety Company . . . hereinafter called Surety, are held and firmly bound unto Flintco, LLC . . . hereinafter Oblige . . . in the amount of One Million Eight Hundred Twenty Three Thousand Dollars and 00/00 (\$1,823,000.00) for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successor and assigns, jointly and severally, firmly by these presents.

[B] WHEREAS, Principal has . . . entered into a subcontract with Oblige for Oklahoma State University Commons . . . which subcontract is by reference made a part hereof, and is hereafter referred to as the subcontract.

NOW THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH THAT, if Principal shall promptly and faithfully perform said subcontract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

[C] Whenever Principal shall be, and declared by Oblige to be in default under the subcontract, the Oblige having performed Oblige's obligations thereunder:

1) Surety may promptly remedy the default, subject to the provisions of paragraph 3 herein, or;

2) Oblige *after reasonable notice to Surety* may, or Surety upon demand of Oblige may arrange for the performance of Principal's obligation under the subcontract subject to the provisions of Paragraph 3 herein;

3) The balance of the subcontract price, as defined below, shall be credited against the reasonable cost of completing performance of the subcontract. If completed by the Oblige, and the reasonable cost exceeds the balance of the subcontract price, the Surety shall pay to the Oblige such excess, but in no event shall the aggregate liability of the Surety exceed the amount of this bond. . . (emphasis added). 1

¶3 The other pertinent agreement is the Subcontract for the flooring work between Flintco and Total. Under the Subcontract, which the Bond incorporates by reference, Total was to begin flooring work on September 15, 2014, and complete the work by July 13, 2015. The Subcontract also provided that "time is of the essence" and required Total to perform the work in a diligent manner so that the Project will not be delayed.

¶4 Part 11 of the Subcontract is titled "Remedies for Non-Performance." The first paragraph there, Section 11.1, provides several grounds for which Flintco had the right to declare Total in default, including Total's failure to supply sufficient workers or materials and Total's failure to prosecute the work with promptness and diligence. In the event of Total's default, Section 11.2 of the Subcontract allowed Flintco to take several actions, including: perform and finish the work; terminate the Subcontract; and employ any workers, and provide labor and materials required to complete the work.

¶5 Part 12 of the Subcontract is titled "Delays." There, in the event of Total's delay in performing the work, Section 12.1 gave Flintco the right to "use other subcontractors or suppliers and to take whatever other action Flintco deems necessary to avoid delay in the completion of the work and the Project, the cost of which shall be borne by [Total]."

#### **B. The Communications Between the Parties**

¶6 The essential facts are not in dispute regarding the communications between Flintco, Total, and OSC. Beginning in March 2015, Flintco complained to Total about issues with management, manpower, materials and lack of progress of the work and the possible need for Flintco to supplement Total's labor. Flintco did not communicate any concerns to OSC at that time. In fact, the next month Flintco responded to a routine project status inquiry from OSC by giving Total a good rating (score of four out of five) for its performance on scheduling and quality.

¶7 The issues persisted, and on May 18, 2015, Flintco notified Total by email that Flintco would supplement Total's workforce with additional workers to make up for delays in Total's performance. Flintco hired additional flooring crews and began adjusting the Subcontract amount to offset Flintco's supplementation costs. At that time, Flintco did not notify OSC that Flintco had supplemented the labor or taken over any of the flooring work. Total responded via email and agreed to accept the charges for additional crews hired by Flintco to perform Total's work.

¶8 More than five weeks later, on June 26, 2015, Flintco sent a letter notifying OSC for the first time of any problems with Total's performance. In that communication, Flintco advised OSC that Total had failed to pay its suppliers and that, due to Total's delayed performance, Flintco had hired "significant supplemental forces" to perform Total's work. Flintco explained that it began supplementing the work back in May, and stated that "at that time, it had become grossly apparent that Total did not have sufficient manpower to keep up with its schedule and Flintco needed to bring in additional resources to supplement Total." Flintco advised that the approximate cost for the additional resources would exceed the balance of the Subcontract. Flintco also declared that Total's actions -- failure to pay material suppliers and lack of adequate workers -- were each considered to be "individual instances of default."

¶9 By the time Flintco sent notice to OSC, Flintco had already incurred more than \$113,000 in expenses for supplementing Total's work. At a meeting with OSC, Flintco, and Total on June 30, 2015, Flintco advised OSC that it had purchased materials and contracted with replacement crews, and that all of the flooring work had to be completed no later than July 23, 2015. At this point, Flintco had assumed control of the flooring work, and limited Total's involvement to assisting with installation of carpet and remediation work to correct some issues with the tile Total had already installed.

¶10 During this period, OSU made payments from a construction contingency fund to Flintco totaling \$492,833.30 for Flintco's expenses for past due invoices, additional materials, and manpower required to complete the flooring work. OSU and Flintco later executed a reimbursement agreement which Flintco claimed gave it the right to pursue recovery of the contingency funds on behalf of OSU.

¶11 Flintco continued to supplement the flooring work and completed the University Commons Project in August 2015. The amount Flintco paid to other contractors, workers, and suppliers exceeded the unpaid balance of the flooring Subcontract by \$618,654.23. Flintco sought reimbursement of this amount from Total and OSC for the excess costs incurred by Flintco and OSU as a result of Total's alleged failure to perform the work pursuant to the Subcontract.

#### **II. PROCEDURAL HISTORY**

¶12 After the parties were unable to agree regarding repayment to Flintco for supplementing Total's workforce and completing the flooring work, Flintco filed suit against Total and OSC on January 15, 2016. In its Amended Petition dated August 31, 2016, Flintco asserted four causes of action -- that Total breached the Subcontract, that OSC breached the Performance Bond, that Total breached its fiduciary duty to Flintco, and that OSC breached an implied covenant of good faith and fair dealing (bad faith).

¶13 Prior to trial, OSC filed summary judgment motions on Flintco's claims against it for breach of contract and bad faith. There, OSC argued that it was relieved of liability due to Flintco's breach of the performance bond. Specifically, OSC claimed that Flintco failed to declare Total in default, terminate Total's right to proceed with its work, and furnish notice of the default to OSC. OSC also asserted that it did not breach its duty of good faith and fair dealing because it undertook a reasonable investigation into the circumstances of the case. OSC also claimed that Flintco lacked standing to recover the contingency funds which were unconditionally paid by OSU, and that Flintco would receive a windfall because it had no requirement to repay those funds to OSU. In an order dated May 10, 2019, the trial court denied OSC's various summary judgment motions.

¶14 Total also filed motions for partial summary judgment. There, like OSC, Total challenged Flintco's legal standing to pursue its claim related to the contingency funds paid by OSU. Total asserted that Flintco suffered no damages because those funds were unconditionally paid by OSU as a proper use of the contingency fund, with no repayment requirement. Total also argued that the reimbursement agreement between OSU and Flintco was invalid, and that OSU had no right to recovery which could be assigned to Flintco. In a separate order dated May 10, 2019, the trial court denied Total's summary judgment motions.

¶15 The trial court (Hon. William J. Musseman, Tulsa County) conducted a seven-day bench trial, and on November 21, 2021, ruled in favor of Flintco on its breach of contract claims against Total and OSC. In its written findings of fact and conclusions of law, the trial court conducted no significant analysis of the Performance Bond's express terms, OSC's performance options under the Bond, or the fact that Flintco began supplementing Total's work more than five weeks before providing notice of Total's problems to OSC. The court awarded judgment in favor of Flintco against OSC and Total in the amount of \$618,654.23, plus pre-judgment interest in the amount of \$217,129.50 (through November 19, 2021) and post-judgment interest. The trial court rejected Flintco's bad faith claim against OSC. In a subsequent order dated March 14, 2022, the court also awarded Flintco attorney fees and costs in the total amount of \$563,090.00.

¶16 OSC appealed, and included four orders in its Second Amended Petition in Error -- the Journal Entry of Judgment dated November 19, 2021, the order denying the OSC's Motion for Summary Judgment, the order denying Total's Motion for Summary Judgment, and the order awarding attorney fees plus costs in favor of Flintco. OSC asserted that the trial court erred 1) in denying OSC's motions for summary judgment; 2) in denying Total's motions for partial summary judgment; 3) in denying OSC's motions for judgment as a matter of law (directed verdict) made during the non-jury trial based on the same grounds as the motions for summary judgment; 4) in granting judgment to Flintco on its breach of contract claims; 5) in awarding pre-judgment interest on the full principal amount of damages; and 6) in awarding attorney fees and costs to Flintco in the absence of statutory or contractual authority to do so.

¶17 On *de novo* review, the Court of Civil Appeals (COCA) reversed the trial court's judgment in favor of Flintco in the total amount of \$618,654.23, and also reversed the award to Flintco for prejudgment interest. COCA concluded that the Bond's requirement to provide reasonable notice of default to OSC constituted a mandatory condition precedent, and Flintco's breach of that condition relieved OSC of liability under the Performance Bond. COCA also determined that the issue regarding Flintco's standing and right to recover the contingency fund payments made by OSU was moot, because that amount was included in the total judgment which COCA reversed. COCA also reversed the award of attorney fees and costs, because Flintco was no longer the prevailing party. COCA further found that it was error, albeit harmless, for the trial court to deny OSC's motion for directed verdict, as no competent evidence supported Flintco's position that it did not breach the Performance Bond. Finally, COCA declined to address any of the issues regarding the trial court's denial of the summary judgment motions, on the grounds that a trial on the merits occurred after the denial of those motions. <sup>2</sup>

¶18 In its petition for writ of certiorari, Flintco argues that COCA's interpretation of the Bond decided a question of substance not previously determined by this Court, and that no published Oklahoma opinions have specifically addressed the notice provisions in the A311 Bond at issue. Flintco points to other jurisdictions that have construed similar bond language and reached an opposite conclusion from COCA -- holding that an obligee's failure to give notice before supplementing the principal's work does not excuse the surety's liability under the performance bond. Next, Flintco asserts that COCA's reading of the Bond language is not in accord with applicable decisions of this Court. Flintco points to several cases which we address separately herein. Finally, Flintco argues that COCA's decision will result in wide-ranging, impractical, and adverse consequences for the construction industry.

¶19 We granted certiorari on October 9, 2023. We determine that a separate opinion from this Court is necessary to resolve and clarify Oklahoma's law on the pertinent issues, to quell further litigation on this topic, and to distinguish conflicting decisions from other jurisdictions. We now vacate the Court of Civil Appeals' opinion and review each of these issues raised on certiorari to determine whether the trial court committed reversible error.

### **III. STANDARD OF REVIEW**

¶20 Where a legal action, such as breach of a contract, is tried to the court, the court's findings of fact are accorded the same force as those made by a jury, and if there is any competent evidence to support the findings, they will not be disturbed on appeal. *K & H Well Serv., Inc. v. Tcina, Inc.*, 2002 OK 62, ¶ 9, 51 P.3d 1219, 1223. If, however, the language of a contract is clear and free of ambiguity, the court is to interpret it as a matter of law. *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 1994 OK 20, ¶ 25, 896 P.2d 503, 514. The meaning assigned to a contract by a trial judge is a question of law which is reviewed by a *de novo* standard. *May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶ 22, 151 P.3d 132, 140. When we conduct *de novo* review of issues of law, we exercise "plenary, independent and non-differential authority to reexamine a trial court's legal rulings." *K & H Well Serv., Inc.*, 2002 OK 62, ¶ 9, 51 P.3d at 1223.

### **IV. ANALYSIS**

#### **A. The AIA-A311 Performance Bond**

¶21 In the construction industry, various types of bonds are commonly included under the heading of "performance bond" including: 1) the traditional performance bond; 2) the indemnity bond; 3) the completion bond; and 4) the manuscript bond. <sup>3</sup> Each of these bonds has as its objective the protection of the obligee against contractor default. Under an indemnity bond, the surety's performance obligation is limited to reimbursing the obligee for the costs of completion of the project, but generally does not expressly give the surety the right to cure a default by takeover and completion. <sup>4</sup> Under a completion bond, the surety's performance obligation is generally limited to the single option of taking over the work and completing the contract at the sole expense of the surety. <sup>5</sup> The manuscript bond combines performance, completion, and indemnity obligations, and is often tailored and negotiated in projects where large owners are intent on shifting to the surety and contractor as much risk as possible. <sup>6</sup>

¶22 The Bond involved in the present case is a traditional performance bond, modeled after a standardized contract form developed and published by the American Institute of Architects (AIA) -- the A311 Performance Bond. <sup>7</sup> This type of bond form provides several performance options to the surety, including remedying the default or arranging for performance. These options contemplate that the surety has a variety of choices, such as assisting the principal contractor with labor or materials or engaging a replacement contractor to complete the work. The Bond also permits the obligee, *after reasonable notice to the surety*, to arrange for performance of the work, in which case the surety is required to provide financial compensation for the cost of completing the project.

¶23 OSC argues that, contrary to the requirements of the Bond, Flintco failed to declare a default under the Subcontract and notify OSC before assuming control over Total's work. OSC maintains that Flintco's actions deprived OSC of the right to protect itself by arranging for performance under the Subcontract or by otherwise being involved in remedying Total's default. OSC claims that Flintco's decision to unilaterally undertake performance of Total's work without declaring a default and giving notice to OSC rendered the Bond null and void.

#### **B. The Notice Requirement in the Performance Bond Constitutes a Condition Precedent**

¶24 Because a bond agreement is a contract, this Court must adhere to the general laws of contracts regarding the interpretation of the written terms. "In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts." 15 O.S. 2011, § 374. Surety agreements "shall be liberally construed in accordance with the rules of the general law applicable to policies of insurance." 18 O.S. 2011, § 483; *Barbero v. Equitable Gen. Ins. Co.*, 1980 OK 23, ¶ 11, 607 P.2d 670, 673. Although liberal construction is appropriate, it is equally true, however, that a surety may not be held beyond the express terms of the contract. 15 O.S. 2011, § 373.

¶25 We have explained that the requirement for liberal construction of surety contracts does not abrogate the right of such surety to the benefit of every provision in its contract if the language of the provision is clear and unmistakable in meaning. *U.S. Fidelity & Guar. Co. v. Gray*, 1925 OK 144, ¶ 6, 233 P. 731, 732. Differing from the Bond in the present case, the performance bond in *U.S. Fidelity* contained the following language:

First, that no liability shall attach to the surety hereunder unless, in the event of any default on the part of the principal in the performance of any of the terms, covenants or conditions of the said contract, the obligee shall promptly, and in any event not later than thirty days after knowledge of such default, deliver to the surety at its office in the city of Baltimore, written notice thereof with a statement of the principal facts showing such default and the date thereof; nor unless the said obligee shall deliver written notice to the surety at its office aforesaid, and the consent of the surety thereto obtained, before making to the principal the final payment provided for under the contract herein referred to.

*Id.* ¶ 3, 233 P. at 732. We recognized that the contract was "not only clear as to the time and manner of notice, but the parties contracted that no liability should attach unless the specific notice had been given." *Id.* ¶ 9, 233 P. at 733. We held that the obligee must comply with the notice requirement before the surety can be sued on the contract. *Id.* ¶ 12, 233 P. at 733. The Court's syllabus states as follows:

Written language has the same significance and its meaning must be ascertained by the same rules of law when it is found in an indemnity bond of a surety for hire as when it appears in other agreements. *Liability cannot be enlarged beyond the scope of the terms of the contract, and, where the language is unambiguous, the question of construction does not enter.*

A provision in an indemnity bond executed by a surety to guarantee the full performance of a contract between the principal and the obligee therein, which requires the obligee to give notice of any default on part of the principal in the performance of any of the terms of the contract before any liability shall attach to the surety, must be complied with before a suit may be maintained to recover against the surety....

*Id.* ¶ 0, 233 P. at 731 (emphasis added). <sup>8</sup>

¶26 Although the bond there contained more detailed language than that in the present case, the legal principles articulated in *U.S. Fidelity* remain relevant to our analysis today. Simply put, the express terms of the contract govern the surety's liability. Notice provisions in a bond are recognized as conditions precedent to the surety's obligation. *Id.* ¶¶ 9-10, 233 P. at 733. A condition precedent is an act that must be performed on one side before an obligation arises on the other side; the obligation on one side is dependent on the performance of some act on the other side. *M.J. Lee Const. Co. v. Oklahoma Transp. Auth.*, 2005 OK 87, ¶ 27, 125 P.3d 1205, 1213; *Rollins v. Rayhill*, 1948 OK 83, ¶ 14, 191 P.2d 934, 937.

¶27 Under this legal framework, we conclude that the Performance Bond in the present case includes straightforward language that allows Flintco to arrange for performance of Total's work after declaring Total to be in default and *after reasonable notice* to OSC. The notice requirement constitutes a condition precedent, which Flintco must satisfy to trigger OSC's liability under the Bond.

### C. Decisions from Other Jurisdictions Are Split

¶28 While our Court has not construed the specific issue presented here, courts in other jurisdictions have interpreted the A311 Performance Bond and similar bonds and reached conflicting results. We consider the opinion in *Hunt Construction Group, Inc. v. National Wrecking Corp.*, 542 F. SupP.2d 87 (D.D.C. Dist. Ct. 2008), *aff'd on other grounds*, 587 F.3d 1119 (D.C. Cir. 2009), to present a fitting analysis which aligns with Oklahoma's rules of contract interpretation. In *Hunt*, the D.C. District Court considered a situation similar to the present case involving the A311 Performance Bond. There, the obligee claimed that the principal caused delays in a construction project by failing to perform mass excavation work by the deadline in the subcontract. The obligee asserted that the principal never properly staffed the project and failed to keep pace with the construction schedule. The obligee, however, did not send notice to the sureties until months after the excavation work had already been completed and the principal excavator was no longer on the job site. The sureties argued that their obligation under the performance bond was not triggered until the principal was in default and the obligee declared the default to the sureties. The sureties claimed that the obligee's failure to notify them of the principal's delays until long after they could have exercised their options under the performance bond rendered the bond null and void. The court agreed and granted summary judgment in favor of the sureties.

¶29 The opinion explains that "[c]ourts have consistently held that an obligee's action that deprives a surety of its ability to protect itself pursuant to performance options granted under a performance bond constitutes a material breach, which renders the bond null and void." *Hunt*, 542 F. SupP.2d at 92 (D.D.C. 2008), (quoting *St. Paul Fire & Marine Ins. Co. v. City of Green River, Wyoming*, 93 F. SupP.2d 1170, 1178 (D. Wyo. 2000)). The court cited with approval numerous other cases holding that failure to give a surety prior notice and an opportunity to exercise the performance options in the performance bond relieves the surety of its liability. <sup>9</sup>

¶30 In granting summary judgment in favor of the surety, the D.C. District Court stated as follows:

As soon as Hunt knew that NWC would not complete the job on time, it had an obligation to decide whether to declare NWC in default and notify the Sureties (who might have done something to aid NWC in speeding up the work, whether by hiring more trucks, more workers, more oversight, or whatever, in its judgment, would assist the obligor). . . . Under the express terms of the Performance Bond and the law, Hunt was required to give the Sureties "reasonable notice" of NWC's default in order to trigger the Sureties' liability. Hunt failed to do so and, thus, never triggered that liability.

*Hunt*, 542 F. SupP.2d at 95--96.

¶31 On appeal, the U.S. Court of Appeals, D.C. Circuit, affirmed the *Hunt* district court's grant of summary judgment in favor of the surety. *Hunt Constr. Grp., Inc. v. Nat'l Wrecking Corp.*, 587 F.3d 1119, 1121 (D.C. Cir. 2009). In line with our analysis here, the appellate court stated:

[T]he provisions of paragraph C are nonsensical without an understanding that the surety's duties depend on the obligee's declaring the principal to be in default and giving notice of the declaration to the principal and the surety. *Under Hunt's contrary reading, paragraph C's explicit grant to the surety of a right to remedy the default itself would be operative only if the obligee chose to give it notice. Such a view would render that right nearly meaningless.*

*Id.* (emphasis added).

¶32 In *Hunt*, both the district court and the appellate court declined to follow a case from the Washington State Supreme Court, *Colorado Structures, Inc. v. Insurance Company of the West*, 167 P.3d 1125 (Wash. 2007), which held that a surety's liability is not conditioned on a declaration and notice of default. Flintco urges us to adopt the reasoning in *Colorado Structures*, and offers a similar argument as was presented there. This argument hinges on the language contained in the first two paragraphs of the Performance Bond. <sup>10</sup> Flintco asserts that Paragraph A of the Bond makes OSC immediately liable to Flintco, and Paragraph B conditions that liability on only one express condition subsequent -- Total's prompt and faithful performance of the Subcontract. Flintco's explanation follows almost verbatim the following reasoning from *Colorado Structures*:

By using the word "condition" in its singular form, Paragraph B manifests that the liability created by Paragraph A is subject to only one condition -- that the principal "promptly and faithfully perform" the offsite subcontract. By using the word "otherwise," . . . Paragraph B expressly eliminates all other conditions. Read together, Paragraphs A and B state that the surety's obligation commences when it executes the bond and continues until the principal promptly and faithfully performs.

*Id.* at 1132.

¶33 In *Colorado Structures*, the court interpreted Paragraph C -- containing the surety's performance options -- as merely providing the *remedies* available when the conditions in that paragraph (that the principal has defaulted, the obligee has declared the default, and the obligee has performed its obligations) are met. *Id.* at 1132. The court also opined that, where Paragraph C's remedies are no longer feasible, then the remedies and measure of damages are provided by common law, but the liability on the bond is not extinguished. *Id.* Echoing this reasoning, Flintco contends that Paragraph C imposes express conditions precedent (that Total be "in default" and that Flintco has declared Total to be in default) on the obligee's *remedies* only, but not on the *liability* established in Paragraph A and B. Under this analysis, because Total did not promptly and faithfully perform the Subcontract, then OSC is liable on the Bond -- period -- regardless of whether OSC had the opportunity to exercise its performance options.

¶34 We do not agree with the reasoning in *Colorado Structures*, as it ignores the plain meaning of the bond terms and fails to give effect to all parts of the agreement. It also contradicts Oklahoma precedent that notice provisions in a bond are recognized as conditions precedent to the surety's obligation. *U.S. Fidelity, supra, 1925 OK 144*, ¶¶ 9-10, 233 P. at 733. We agree that Paragraphs A and B create liability for OSC. Failing prompt and faithful performance by Total, OSC was bound to fulfill the principal's performance -- *but only by one of the choices identified in Paragraph C*. The performance options in Paragraph C allow OSC to mitigate the damages and be involved in rectifying shortcomings of the principal. The unambiguous language of the Bond requires that OSC is to be notified, so that it may participate in resolving Total's performance issues.

¶35 In rejecting *Colorado Structures*, the D.C. District Court in *Hunt* aptly explained:

This Court respectfully declines to adopt the reasoning of *Colorado Structures*, as it would turn a performance surety into a commercial guarantor -- an undertaking well beyond the limits of the surety bond. Rendering a "surety" absolutely liable for all costs and expenses, without notice, under Paragraphs A and B would also read Paragraph C out of the performance bond, and allow an obligee to wait for indefinite periods before demanding "performance." . . .

. . . While paragraphs A and B are between three parties (the obligor, the obligee and the surety), paragraph C specifies the relationship between only two: the obligee and the surety. *Under A & B the surety is liable, but under C, the obligee must fulfill its obligations to access the surety's purse*. When an obligee fails to provide timely notice to a surety so it can exercise its options under paragraph C, the obligee has breached the contract and the surety is without liability.

*Hunt*, 542 F. SupP.2d at 94-95 (emphasis added).

¶36 The appellate court agreed with the lower court's rejection of *Colorado Structures*, and provided the following explanation:

Contrary to the *Colorado Structures* court, we do not attach talismanic significance to the fact that paragraph B "us[ed] the word 'condition' in its singular form," even in the singular preceded by the word "the." In reading contract provisions we take the contract's entirety into account, seeking to give all its provisions effect. *Hunt* points us to no case in the District of Columbia suggesting that a contract's labeling a particular provision as a "condition," in the singular, gives rise to an inference that no other provisions of the contract can also be conditions precedent. And in the context of the bond form before us, such an inference would gut rights specifically afforded the surety.

*Hunt*, 587 F.3d at 1121-22.

¶37 We adopt the reasoning expressed by the trial and appellate courts in *Hunt*. Under *Colorado Structures*, an obligee could intentionally disregard the bond's notice requirement, engage in self-help efforts to cure a default, wait an indefinite amount of time, and still make a belated claim for the surety to pay damages resulting from the principal's shortcomings. We disagree with this interpretation. We expressly reject the proposition in *Colorado Structures* that, after being denied the opportunity to mitigate its losses and exercise its performance options stated in the bond, the surety may remain liable for damages as provided by common law. Such a result is not in line with this Court's decisions regarding contract interpretation and violates the statutory mandate that a surety may not be held liable beyond the express terms of its agreement. 15 O.S. 2011, § 373. This is especially true if an obligee's self-help efforts do not proceed smoothly and leave the surety with more costly or unwieldy options -- the surety should not be saddled with after-the-fact liability for those results. We decline to follow the reasoning in *Colorado Structures*.

¶38 Flintco also relies on other cases from outside jurisdictions in support of its position -- *Nova Cas. Co. v. Turner Constr. Co.*, 335 S.W.3d 698 (Tex. Ct. App. 2011); *United States v. Sauer Inc.*, 1:15-CV-128-KS-RHW, 2016 WL 7156589, at \*\*1, 3 (S.D. Miss. Dec. 7, 2016) (applying MS law); *Dooley and Mack Constructors v. Developers Sur. & Indem. Co.*, 972 So. 2d 893 (Fla. Dist. Ct. App. 2007) (applying FL law); *Walter Concrete Constr. Corp. v. Lederle Labs.*, 788 N.E.2d 609 (N.Y. 2003) (applying NY law); and *Siegfried Constr., Inc. v. Gulf Ins. Co.*, 203 F.3d 822 (Table), 2000 WL 123944 at \*\*2, 5 (4th Cir. 2000) (unpublished) (applying VA law). We find none of these cases compelling.

¶39 In *Nova* and *Dooley*, both courts focused upon the language of the bonded subcontracts, rather than the language of the performance bonds. The decisions hinged upon the fact that each subcontract, which was incorporated by reference into each performance bond, expressly permitted the obligee to supplement the principal's work without first declaring a default and notifying the surety. Those courts held that the sureties were bound by the terms of the incorporated subcontracts, and the obligees were free to exercise their rights thereunder without nullifying the sureties' liability under the bonds. *Nova*, 335 S.W.3d at 705; *Dooley*, 972 So. 2d at 894-95.

¶40 We respectfully interpret these decisions to miss the mark in a fundamental aspect -- they fail to read the various contracts together as a whole, and do not give effect to all of the pertinent provisions, namely those expressed in the bond agreement. In the present case, there is nothing in the Subcontract -- which was not signed by OSC -- that supplants the notice provision in the Performance Bond. It is true that the Subcontract does permit Flintco to supplement Total's workforce *without* declaring a default. But on the other hand, under Section 11 of the Subcontract, Flintco could alternatively declare Total to be in default if Total did not prosecute the work with promptness and diligence.

¶41 When Total's performance issues developed, Flintco obviously had a decision to make -- it must determine which option was most appropriate for the situation. When faced with such a choice, a general contractor must weigh a variety of factors, such as the extent and severity of the subcontractor's deficiencies, the deadlines that are looming, and the likelihood of success resulting from remedial actions short of default. But in order to preserve coverage under a performance bond, the general contractor's actions at this juncture must ultimately follow the terms and obligations contained in the bond contract which has been agreed upon by the parties.

¶42 Flintco elected to supplement Total's workforce and attempt to remedy Total's shortcomings, as permitted under the Subcontract. The Bond did not nullify Flintco's right to take this action. But, Flintco's exercise of this right does not excuse compliance with the clear provisions of the Bond. Both agreements are at play. Here, the A311 Performance Bond required that Flintco declare a default and notify OSC if it intended for OSC to bear responsibility for performance of Total's obligations under the Subcontract. *See, e.g., Int'l Fidelity Ins. Co. supra* n. 9, 192 F. SupP.3d at 1334 (although obligee may have had a right under the subcontract to hire a replacement contractor to complete the work, it did not have the right to do so without first allowing the surety an opportunity to exercise its rights under the performance bond); and *Fidelity & Deposit Co. of Md. v. Jefferson Cty. Comm'ns*, No. 2:09-CV-247-JHH, 2010 WL 5487397, at \*8 (N.D. Ala. Nov. 17, 2010) (expressly rejecting *Dooley*, and holding the rights granted to the obligee in the incorporated subcontract do not operate to override the surety's right to exercise its options under the performance bond).

¶43 We turn next to additional cases from other jurisdictions which Flintco cites in support of its position. In *Sauer*, an unreported decision by the U.S. District Court in the Southern District of Mississippi, the obligee sent the surety copies of two letters addressed to the subcontractor -- a "cure notice" and a "notice of default" -- advising of issues with performance and that the obligee intended to supplement the work. The surety contended that this notice was insufficient under the bond because neither letter was addressed to the surety or included a specific demand that the surety "immediately commence performing under the terms of the bond." *Sauer Inc., supra*, 2016 WL 7156589, at \*2. The court rejected the surety's argument, and declined to impose extra-contractual requirements, such as a formal demand, on performance bond claimants. *Id.* at \*3.

¶44 In *Siegfried Construction*, an unpublished opinion from the Fourth Circuit, the court applied Virginia law to reach a conclusion which differs from our ruling today. There, the court held in favor of the obligee, even though it had elected to supplement the subcontractor's work two days prior to sending notice to the surety. The court specifically noted that "Virginia courts have not been overly strict in interpreting the notice requirements of construction bonds." *Siegfried Constr., Inc.*, 2000 WL 123944 , at \*6. The court further found that the obligee's communications to the surety could reasonably be interpreted as pronouncements that the principal was not fulfilling its contractual obligations and constituted reasonable notice to the surety to exercise its performance options. *Id.* The evidence showed that the obligee specifically asked the surety for help in completing the work, and that the surety had sufficient time to exercise its options under the bond. *Id.*

¶45 Neither *Sauer* nor *Seigfreid Construction* is squarely on point with the facts and applicable law in the instant case. We do not find that these cases are particularly persuasive for our purposes today.

¶46 Finally, in *Walter Concrete*, a memorandum opinion containing only three paragraphs of brief analysis, the court found that a declaration of default was not necessary in an action on the AIA-A311 bond. *Walter Concrete, supra*, 788 N.E.2d at 610. The court further stated that the surety could be held liable for damages caused by the subcontractor even if those damages could have been avoided by the surety's assumption of the subcontractor's obligation under the subcontract. *Id.* We are not swayed by this brief opinion, as the conclusion conflicts with Oklahoma law and with our analysis today. It fails to properly give effect to the plain meaning of the bond provisions and subjects the surety to liability beyond that which it expressly agreed to undertake.

¶47 We are most persuaded by the reasoning in *Hunt*, and the supporting cases cited in that decision. Prior decisions by this Court and our rules of contract interpretation demonstrate that the reasoning in *Hunt* is consistent with Oklahoma law, and coincides with many of the jurisdictions considering the A311 and similar bond forms. To the extent other courts have reached a different conclusion regarding bond terms similar to the A311, we respectfully decline to follow those opinions. <sup>11</sup>

#### **D. The Terms of the A311 Performance Bond Are Clear and Unambiguous**

¶48 Along these same lines, we also disagree with Flintco's argument that, because the Bond did not specifically state that failure to provide notice to OSC would result in forfeiture, OSC cannot avoid liability. Here, Flintco points to three Oklahoma cases: *Cont'l Cas. Co. v. Beaty*, 1969 OK 89, ¶ 16, 455 P.2d 684, 688; *Fuqua v. Tulsa Masonic Bldg. Ass'n*, 1928 OK 71, ¶ 13, 263 P. 660, 662; and *U.S. Fidelity, supra*, 1925 OK 144, ¶ 9, 233 P. at 733. None of these cases, however, hold that conditions precedent in a performance bond may be excused if the consequences of failing to comply with them are not expressly stated in the agreement.

¶49 *Continental Casualty* is distinguishable from the present case, as it did not involve a performance bond, and instead concerned an action to recover under a disability insurance policy. There, we found the policy contained an ambiguity regarding a requirement for submitting written claims within 20 days, and the rules of insurance contract interpretation required us to construe the contract against the insurer. *Cont'l Cas.*, 1969 OK 89, ¶¶ 20-21, 455 P.2d at 688-89. Because there was no showing of prejudice to the insurer, we held the plaintiff's six-day delay in submitting written notice of claim did not violate the terms and requirements of the policy. *Id.* ¶ 22, 455 P.2d at 689.

¶50 In *U.S. Fidelity*, we construed a bond contract which specifically provided that no liability would attach absent the required notice of default. <sup>12</sup> We ventured that a bond contract which failed to include such a provision *might* result in ambiguity requiring a construction more favorable to the obligee. *U.S. Fidelity*, 1925 OK 144, ¶ 3, 233 P. at 732. This statement, however, is a speculative comment in the form of dicta. Ultimately, *U.S. Fidelity* stands for the general rule that, where there is no doubt as to the meaning of the terms of the bond, there is no need for construction one way or the other -- we are bound by the meaning of the terms as they appear in the agreement.

¶51 Finally, *Fuqua* is also distinguishable. There, the performance bond required that notice of default should be given promptly and in any event within ten days after the obligee learned of the default. *Fuqua*, 1928 OK 71, ¶ 20, 263 P. at 662. More than three months before the obligee gave written notice of default to the surety, the subcontractor had a conversation with a manager for the obligee, mentioning that he was going to lose money on the building and that the contract price was not sufficient for the completion of the work. The surety claimed that, because it did not receive notice at the time of that conversation, it was excused from liability on the bond. This Court determined, however, that the notice provisions of the bond contract were not triggered by the earlier conversation, but when the subcontractor actually notified the obligee that he could not complete the building under the contract. *Id.* ¶ 21, 263 P. at 663. Within ten days of that occurrence, the obligee sent a written notification to the surety as required by the bond provisions. Accordingly, we held that the surety's claim regarding lack of notice was without merit. *Id.*

¶52 With regard to the notice requirement, *Fuqua* does not support a finding in Flintco's favor. To the contrary, in *Fuqua* we found that the obligee complied with the bond's notice requirement.

¶53 Courts should not read into a contract words or provisions it does not contain. And, we will not make a better contract than the parties themselves have seen fit to enter into, or alter it for the benefit of one party to the detriment of another. See *Dismuke v. Cseh*, 1992 OK 50, ¶ 9, 830 P.2d 188, 190. Where the language of the contract is clear and unambiguous on its face, we will give effect to the terms expressed within the four corners of the agreement. *May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶ 22, 151 P.3d 132, 140. We do not indulge in forced or constrained interpretations to create and then construe ambiguities in insurance contracts. *Max True Plastering Co. v. U.S. Fidelity & Guar. Co.*, 1996 OK 28, ¶ 20, 912 P.2d 861, 869.

¶54 Bound by these legal principles, we conclude that the Performance Bond in the present case is not ambiguous, and therefore we look to the plain meaning of the contract terms. The notice requirement constitutes a condition precedent which Flintco must satisfy before OSC is obligated under the Bond. Under the terms of the Performance Bond, OSC had several performance options in the event of Total's default on the Subcontract. To recover on the Surety contract at all, however, Flintco was required to satisfy the conditions OSC had agreed to.

#### **E. Depriving a Surety of Its Contracted-For Performance Options Constitutes Prejudice**

¶55 Flintco further argues that any failure to provide notice under the A311 Bond does not result in forfeiture, but, at most, reduces Flintco's damages. Flintco points to *Fuqua* on this point. In *Fuqua*, the bonded construction contract required that the plaintiff withhold a margin of 15 percent of the total contract costs until after completion and acceptance of the work. The surety claimed that it was exonerated from liability on the performance bond, which incorporated the construction contract by reference, because the obligee failed to retain the required 15 percent. The evidence established that the obligee's overpayments went toward actual completion of the bonded contract, and that ultimately the surety suffered no injury as a result of the obligee's failure to comply with the retainage requirement. *Fuqua*, 1928 OK 71, ¶ 14, 263 P. at 662. Applying the rule requiring liberal construction in favor of the insured, this Court held that the surety's liability under the performance bond would be exonerated only to the extent such surety had been injured by the obligee's breach of the underlying construction contract. *Fuqua*, 1928 OK 71, ¶ 15, 263 P. at 662.

¶56 Unlike the surety in *Fuqua*, OSC was prejudiced at the outset by Flintco's failure to satisfy the notice requirement prior to assuming control of Total's work. This effectively precluded OSC from exercising its performance options under the Bond. Depriving OSC of this right robbed the surety of its contractually agreed-upon opportunity to participate in the mitigation process -- this deprivation itself constitutes prejudice sufficient to excuse the surety from liability on the performance bond. *W. Sur. Co., supra*, 955 F.3d at 106; see also, *Seaboard Sur. Co.*, 370 F.3d at 219--20 (surety is discharged from liability under a performance bond when owner hired different contractor without first allowing surety opportunity to fulfill its completion options under bond; deprivation of mitigation opportunities constituted injury or prejudice); *Stonington Water St.*, 792 F. Supp.2d at 267 (obligee's failure to notify surety and unilateral decision to hire contractors to complete work deprived surety of opportunity to mitigate damages and were material breaches of performance bond); *Town of Plainfield*, 943 N.E.2d at 916 (lack of notice regarding contractor's termination was presumptively prejudicial to sureties); *Wildewood Operating Co.*, 303 A.3d at 1284 (surety was prejudiced as a matter of law when it was precluded from opportunity to elect a remedial option under the performance bond and minimize its liability). <sup>13</sup>

#### **F. Well-Established Rules of Contract Interpretation Support a Decision in Favor of OSC**

¶57 Finally, we reject the proposition<sup>14</sup> that a decision in favor of the Surety will wreak havoc in the construction industry. As we discuss in depth above, numerous other jurisdictions interpreting similar bond language have reached the conclusion which we adopt today. <sup>15</sup> Ours is not a novel approach.

¶58 Nor is the result extraordinary for Oklahoma. Our decision today is in line with the general rules of contract interpretation articulated by statute and by this Court. Further, the parties point to two prior decisions by the Court of Civil Appeals which *have* construed this issue. COCA interpreted a performance bond very similar to that in the present case in *A&M Engineering & Environmental Services, Inc. v. Town of Eldorado*, Case No. 115,691 (Okla. Civ. App. Oct. 13, 2017) (*cert. denied* Feb. 5, 2018). There, the trial court had granted summary judgment in favor of the surety, finding that the performance bond required the obligee to declare the principal in default, and to notify the surety of the default, in order to allow the surety to choose between its performance options contained in the bond form. In affirming the trial court, COCA referenced *Hunt* with approval, and determined that notice is a condition precedent to the Surety's obligation under the performance bond. *Id.* ¶ 10. In line with both *Hunt* and our conclusion today, COCA stated as follows:

The Oklahoma Supreme Court has also held, "[o]rdinarily an action will not lie on a bond until a breach of the condition of the bond occurs." *City of Norman v. Liddell*, 1979 OK 91, 596 P.2d 879, 881. ... The trial court found, in accord with the rationale presented in *Hunt*, that Mid-Continent [the surety] could not exercise its performance options under the terms of the bond unless Mid-Continent had notice of the principal's default. This is also in keeping with the Oklahoma Supreme Court's statement in *Liddell*. Each option the surety has under the terms of this bond requires "prompt" performance on the part of Mid-Continent. By the terms of this performance bond, notice is a condition precedent to Mid-Continent's obligation.

*Id.*

¶59 COCA reached a similar result in *RST Construction LLC d/b/a Petree Construction v. AWS Roofing Services, Inc. and State Automobile Mutual Insurance Company*, Case No. 118,961 (Okla. Civ. App. Nov. 12, 2021) (*cert. denied* Sept. 26, 2022). There, COCA reversed the trial court's judgment against a surety on a performance bond, finding that the evidence at trial failed to establish compliance with the bond's notice requirements. *Id.* ¶ 23. Citing *U.S. Fidelity, supra*, 1925 OK 144, ¶ 5, 233 P. 731, COCA held that notice provisions in a bond are recognized as conditions precedent to the surety's obligation, and nothing in the record demonstrated that those conditions had been satisfied. *RST Constr.*, ¶¶ 20, 23.

¶60 Although this Court has not previously ruled on the specific issue before us, our holding today is reasonably foreshadowed by Oklahoma decisional law and statutory authority. Rather than disorder or uncertainty, our conclusion will ultimately provide necessary guidance and resolve any doubt on this issue in the Oklahoma construction industry.

¶61 To access the Surety's purse, Flintco was required to fulfill its obligations under the Bond. If Flintco expected OSC to ensure performance of the Subcontract, it was required to declare Total in default and provide reasonable notice to OSC before supplementing Total's workforce. Flintco waited for more than five weeks before advising OSC about the situation. The project suffered further delay, and OSC was denied the opportunity to minimize its liability by selecting the best option at the earliest possible point in time.

¶62 While other bond forms exist, Total offered the Form A311 Performance Bond -- a one-page, straightforward document including the clear requirement of prior notice. Flintco, having the right to reject, accepted the Bond. When Flintco failed to provide timely notice to OSC so it could exercise its options under Paragraph C, Flintco breached the Bond agreement and relieved the Surety of liability.

#### **G. Ancillary Issues**

¶63 We next address several ancillary issues raised on appeal<sup>16</sup> -- the award of attorney fees and costs, the award of pre-judgment interest, and Flintco's standing to assert a claim on behalf of OSU regarding the contingency fund payments. Our reversal of the trial court's judgment in favor of Flintco and against OSC resolves these remaining issues. First, we reverse the trial court's order awarding attorney fees and costs. As a result of our decision, Flintco is no longer the prevailing party and is not entitled to an award of fees and costs on that basis. Second, because we reverse the primary judgment for Flintco, we also reverse the underlying order for pre-judgment interest. Ancillary orders that are dependent upon the viability of an underlying judgment are nullified on appeal by the reversal of the judgment on which they rest. *Reeds v. Walker*, 2006 OK 43, ¶ 33, 157 P.3d 100, 116.

¶64 Finally, we need not address the issue of Flintco's standing to pursue a claim on behalf of OSU. That question is now moot because we conclude here that the judgment in favor of Flintco -- which included the contingency fund payments -- was improper. This Court has consistently held that it will not decide moot issues or hypothetical questions when no practical relief will result. *Beach v. Oklahoma Dep't of Pub. Safety*, 2017 OK 40, ¶ 17, 398 P.3d 1, 7 (citing *Baby F. v. Okla. Cty. Dist. Court*, 2015 OK 24, ¶ 11, 348 P.3d 1080, 1084, and *In re Guardianship of Doornbos*, 2006 OK 94, ¶ 2, 151 P.3d 126, 126).

#### **V. CONCLUSION**

¶65 The Performance Bond included a mandatory condition precedent requiring Flintco to give reasonable notice to OSC prior to supplementing Total's work and assuming control of the flooring project. We hold that, when Flintco failed to provide timely notice to OSC so it could exercise its performance options under the Bond, Flintco breached the Bond agreement and the Surety is without liability. The opinion of the Court of Civil Appeals is vacated and the trial court's judgment in favor of Flintco against OSC is reversed. We remand the case to the trial court with instructions to enter judgment consistent with our decision herein.

¶66 Total did not participate in this appeal, and the trial court's judgments against Total are not affected by our decision here.

**CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT JUDGMENT REVERSED; CASE REMANDED WITH INSTRUCTIONS TO ENTER JUDGMENT CONSISTENT WITH OUR DECISION HEREIN.**

Rowe, C.J., Winchester, Edmondson, Gurich, Darby, JJ., concur  
Kuehn, V.C.J., Kane, Jett, JJ., dissent  
Combs, J., disqualified

#### **FOOTNOTES**

DARBY, J.

<sup>1</sup> We have added the designations to identify the paragraphs as "A" through "C" for ease of reference in this analysis.

<sup>2</sup> COCA properly elected not to review those issues raised on appeal related to the denial of OSC and Total's motions for summary judgment. A denial of a motion for summary judgment will not be reviewed on appeal after a trial on the merits has occurred. The appellate court's review is limited to only that process by which the actual disposition of the case was made. See *Myers v. Missouri Pac. R. Co.*, 2002 OK 60, ¶ 39, 52 P.3d 1014, 1034; and *Oil Valley Petroleum, LLC v. Moore*, 2023 OK 90, ¶ 39, 536 P.3d 556, 566, as corrected (Oct. 3, 2023).

In its petition for writ of certiorari, Flintco raises no error specifically related to the summary judgment or directed verdict determinations as issues to be reviewed by this Court, and provides no argument or authority related to those items. We mention them here only for purposes of completeness.

<sup>3</sup> 5 *Bruner & O'Connor Construction Law*, § 12:14. Types of performance bond obligations -- Generally.

<sup>4</sup> *Id.* § 12:18. Types of performance bond obligations -- "Indemnity bond."

<sup>5</sup> *Id.* § 12:20. Types of performance bond obligations -- "Completion bond."

<sup>6</sup> *Id.* § 12:21. Types of performance bond obligations -- "Manuscript bond."

<sup>7</sup> The terms of the Bond are provided *supra* at ¶ 2. In addition to the form A311-1970 Performance Bond (1970), which is still frequently used, the American Institute of Architects (AIA) has developed other bond forms with varying terms governing notice of contractor default and termination. For example, the AIA's more recent A312-1984 Performance Bond ¶ 3 (1984) requires notice of a contractor's potential default and specifies that, before declaring a contractor default, the parties may agree to allow the contractor additional time to perform the work:

If there is no Owner Default, the Surety's obligation under this Bond shall arise after the Owner has notified the Contractor and the Surety . . . that the Owner *is considering declaring a Contractor Default* and has requested and attempted to arrange a conference with the Contractor and the Surety . . . to discuss methods of performing the Construction Contract. If the Owner, the Contractor and the Surety agree, the Contractor shall be *allowed a reasonable time to perform* the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default; and

The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract. . . (emphasis added).

5 *Bruner & O'Connor Construction Law* § 12:16. Types of performance bond obligations -- Performance bond surety's options upon its principal's default -- American Institute of Architects' performance bond.

<sup>8</sup> See *infra* ¶ 50 for additional discussion regarding *U.S. Fidelity & Guar. Co. v. Gray*, 1925 OK 144, 233 P. 731.

<sup>9</sup> The district court in *Hunt* provides the following list of cases from other jurisdictions, all of which support the analysis which we adopt today:

*Elm Haven Constr. Ltd. P'ship v. Neri Constr. L.L.C.*, 281 F.Supp.2d 406 (D.Conn.2003) (summary judgment was proper where notice of default sent after general contractor hired replacement subcontractor deprived surety from exercising options under performance bond); *Balfour Beatty Constr., Inc. v. Colonial Ornamental Iron Works, Inc.*, 986 F.Supp. 82, 84 (D.Conn.1997) (obligee allowed disappointing contractor to complete work in untimely fashion before seeking recovery from surety, and denied surety the opportunity to exercise any of its options under the bond); *St. Paul Fire & Marine*, 93 F.Supp.2d at 1178 (granting surety's motion for summary judgment because obligee's actions "divest[ed] [the surety] of its ability to minimize its liability by selecting the lowest cost option and by directing the construction or participating in the contractor selection process"); *Seaboard Sur. Co. v. Town of Greenfield*, 266 F.Supp.2d 189, 198 (D.Mass.2003) (actions prohibiting surety to exercise performance options rendered performance bond null and void); *Dragon Const., Inc. v. Parkway Bank & Trust*, 287 Ill.App.3d 29, 222 Ill.Dec. 648, 678 N.E.2d 55, 58 (1st Dist.1997) (performance bond was null and void where obligee hired a replacement contractor without notice to the surety because the surety "was stripped of its contractual right to minimize its liability under the performance bond by ensuring that the lowest responsible bidder was selected to complete the job"); *Ins. Co. of N. Am. v. Metro. Dade County*, 705 So.2d 33, 34--35 (Fla.App.3 Dist.1997) (failure of obligee to comply with performance "bond's notice provisions stripped the surety of its bargained for right and relieved the surety of its liability").

*Hunt*, 542 F. SupP.2d at 92-93.

The list of cases cited in *Hunt* is not exhaustive. Persuasive decisions from other jurisdictions reach the same conclusion as we reach today. See, e.g., *W. Sur. Co. v. U.S. Eng'g Constr., LLC*, 955 F.3d 100, 105 (D.C. Cir. 2020) (timely notice, before obligee elects to remedy a principal's default on its own terms, is a condition precedent to the surety's obligations under the bond); *Wildewood Operating Co., LLC v. WRV Holdings, LLC*, 303 A.3d 1273, 1284 (Md. App. Ct. 2023) (bond required obligee to timely notify surety of the default before a third party took over remedial work); *Stonington Water St. Assoc., LLC v. Hodess Bldg. Co.*, 792 F. SupP.2d 253, 267 (D. Conn. 2011) (obligee's failure to comply with the notice procedures is a material breach of the bond and hiring successor contractors to complete the project deprived surety of the opportunity to mitigate its damages and represent material breaches of the bond); *Int'l Fidelity Ins. Co. v. Americaribe-Moriarty JV*, 192 F. SupP.3d 1326, 1334 (S.D. Fla. 2016), *aff'd*, 681 F. App'x 771 (11th Cir. 2017) (surety had a right to reasonable notice before the obligee arranged to remedy the subcontractor's default, and denial of surety's opportunity to act under performance bond relieved surety from liability).

<sup>10</sup> See full text of the Performance Bond *supra* at ¶ 2.

<sup>11</sup> We recognize that the issues before us are addressed in decisions from other jurisdictions which are not specifically analyzed in this opinion. Our conclusion, however, is in line with the majority of cases that have considered similar bond forms and is consistent with Oklahoma law. Further discussion of opinions from other jurisdictions is unnecessary and repetitive.

<sup>12</sup> See *supra* ¶¶ 25-26 for the pertinent bond language and additional discussion of *U.S. Fidelity*.

<sup>13</sup> See *supra* n. 9 for the full citations of these cases.

<sup>14</sup> In its petition for certiorari, Flintco claims that a decision in favor of OSC will cause wide-ranging, impractical, and adverse consequences for the construction industry. On June 12, 2023, this Court granted the application of *amicus curiae*, the Oklahoma Chapter, Builders Division of Associated General Contractors of America, Inc. ("AGC-OK") to file a statement in support of the petition for certiorari. There, AGC-OK contends that a decision in favor of the Surety injects uncertainty and ambiguity into construction contracts in the state of Oklahoma. Flintco and the AGC-OK assert similar arguments on this point. For purposes of this portion of our opinion, when we discuss "Flintco's" arguments and assertions, we are referencing both Flintco and AGC-OK unless otherwise noted.

<sup>15</sup> See cases cited *supra* at n. 9.

<sup>16</sup> While Flintco fails to mention these specific issues in its petition for certiorari and related briefing, they are inherently impacted by our reversal of the trial court's judgments. We address these ancillary issues here to clarify and memorialize their procedural status.

**Cite Name Level**

None Found.

**Citationizer: Table of Authority**

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<b>Cite Name</b>	<b>Level</b>	
<b>Oklahoma Supreme Court Cases</b>		
Cite	Name	Level
<a href="#">1992 OK 50, 830 P.2d 188, 63 OBJ 1289.</a>	<a href="#">Dismuke v. Cseh</a>	Discussed
<a href="#">1994 OK 20, 896 P.2d 503, 65 OBJ 535.</a>	<a href="#">Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority</a>	Discussed
<a href="#">2002 OK 62, 51 P.3d 1219.</a>	<a href="#">K &amp; H WELL SERVICE, INC. v. TCINA, INC.</a>	Discussed at Length
<a href="#">2002 OK 60, 52 P.3d 1014.</a>	<a href="#">MYERS v. MISSOURI PACIFIC RAILROAD CO.</a>	Discussed
<a href="#">1969 OK 89, 455 P.2d 684.</a>	<a href="#">CONTINENTAL CASUALTY COMPANY v. BEATY</a>	Discussed at Length
<a href="#">2005 OK 87, 125 P.3d 1205.</a>	<a href="#">M. J. LEE CONSTRUCTION CO. v. OKLA. TRANSPORTATION AUTHORITY</a>	Discussed
<a href="#">1996 OK 28, 912 P.2d 861, 67 OBJ 806.</a>	<a href="#">Max True Plastering Co. v. U.S. Fidelity and Guar. Co.</a>	Discussed
<a href="#">2006 OK 43, 157 P.3d 100.</a>	<a href="#">REEDS v. WALKER</a>	Discussed
<a href="#">2006 OK 94, 151 P.3d 126.</a>	<a href="#">IN THE MATTER OF THE GUARDIANSHIP OF DOORNBOS</a>	Discussed
<a href="#">2006 OK 100, 151 P.3d 132.</a>	<a href="#">MAY v. MID-CENTURY INSURANCE COMPANY</a>	Discussed at Length
<a href="#">1928 OK 71, 263 P. 660, 129 Okla. 106.</a>	<a href="#">FUQUA v. TULSA MASONIC BLDG. ASS'N.</a>	Discussed at Length
<a href="#">1925 OK 144, 233 P. 731, 106 Okla. 222.</a>	<a href="#">UNITED STATES FID. &amp; GUAR. CO. v. GRAY</a>	Discussed at Length
<a href="#">1980 OK 23, 607 P.2d 670.</a>	<a href="#">Barbero v. Equitable Gen. Ins. Co.</a>	Discussed
<a href="#">2015 OK 24, 348 P.3d 1080.</a>	<a href="#">BABY F. v. OKLAHOMA COUNTY DISTRICT COURT</a>	Discussed
<a href="#">2017 OK 40, 398 P.3d 1.</a>	<a href="#">BEACH v. OKLAHOMA DEPARTMENT OF PUBLIC SAFETY</a>	Discussed
<a href="#">1979 OK 91, 596 P.2d 879.</a>	<a href="#">CITY OF NORMAN v. LIDDELL</a>	Discussed
<a href="#">2023 OK 90, 536 P.3d 556.</a>	<a href="#">OIL VALLEY PETROLEUM v. MOORE</a>	Discussed
<a href="#">1948 OK 83, 191 P.2d 934, 200 Okla. 192.</a>	<a href="#">ROLLINS v. RAYHILL</a>	Discussed