

TITLE 14 HOUSING AND CONSTRUCTION
CHAPTER 5 CONSTRUCTION INDUSTRIES GENERAL PROVISIONS
PART 9 CODE BOND DETERMINATIONS

14.5.9.1 ISSUING AGENCY: Construction Industries Division of the Regulation and Licensing Department.
[14.5.9.1 NMAC - N, 04/30/15]

14.5.9.2 SCOPE: This rule applies to claims against a licensee's code bond.
[14.5.9.2 NMAC - N, 04/30/15]

14.5.9.3 STATUTORY AUTHORITY: Pursuant Section 60-13-49 NMSA 1978.
[14.5.9.3 NMAC - N, 04/30/15]

14.5.9.4 DURATION: Permanent.
[14.5.9.4 NMAC - N, 04/30/15]

14.5.9.5 EFFECTIVE DATE: April 30, 2015, unless a later date is cited at the end of a section.
[14.5.9.5 NMAC - N, 04/30/15]

14.5.9.6 OBJECTIVE: To establish the process in which an indemnitee makes a claim against a licensee's code bond.
[14.5.9.6 NMAC - N, 04/30/15]

14.5.9.7 DEFINITIONS:

A. Authority having jurisdiction (AHJ): The entity with permitting authority in the political subdivision where the property is located. This may be the division or a building department of a municipality or county.

B. Code: means the statewide construction codes adopted by rule by the commission.

C. Code bond: means the construction license bond required in Section 60-13-49 NMSA 1978, for correction of code violations.

D. Certificate of uncorrected violations (CUV): means a certificate prepared by a division employee confirming that an uncorrected code violation(s) exists and that the code bond shall be used to correct the code violation(s).

E. Code violation determination report (CVD): means a report prepared by a division employee that identifies code violations that must be brought into compliance.

F. Indemnitee: means the purchaser of construction services, who is the owner or owner's agent of the improvement that is subject to the uncorrected code violation.

G. Responsible party: means the contractor that performed the work that is alleged or determined to be in violation of the code. In situations where the division is unable to determine which contractor is responsible for a code violation, the prime contractor or the contractor that pulled the permit is the responsible party.

H. Surety: means the insurance company that underwrites a contractor's license code bond and is authorized by the New Mexico department of insurance to transact business in New Mexico.

[14.5.9.7 NMAC - N, 04/30/15]

14.5.9.8 REQUIREMENTS FOR FILING A CLAIM:

A. Rights of indemnitee: The filing of a claim with the division serves to show an indemnitee established their potential right to payment on a claim within the two-year time limitation set forth in Section 60-13-49, NMSA 1978. It further serves to establish priority of claim should the licensee have more than one claim on the code bond simultaneously. Acceptance by the division of a claim does not confirm if a code violation has actually occurred, nor if the licensee was performing work within the scope of the license issued by division, does not infer any right to a payout on the claim, nor does it require a surety to hold any funds in reserve to pay a potential claim. The surety may close the claim file after a period of inactivity on the claim, but any such closure shall not serve to eliminate the right of the indemnitee to re-activate the claim upon receipt of a certificate of uncorrected code violation from the construction industries division.

B. Eligibility requirements: a request for investigation of a potential violation of a New Mexico code must meet the following minimum requirements for acceptance.

- (1) The request from the indemnitee must be on a form provided by the division.
 - (2) The request from the indemnitee must be received by the division within two years from the date the final inspection occurred or certificate of occupancy was issued, whichever is earlier.
 - (3) The work performed must have been completed by a properly licensed contractor.
 - (4) The indemnitee must agree to allow the responsible party the opportunity to correct the alleged code violation. Failure to agree to allow the licensee access for the purpose of performing corrective work shall result in dismissal of indemnitee's claim without further investigation.
- [14.5.9.8 NMAC - N, 04/30/15]

14.5.9.9 CODE VIOLATION DETERMINATIONS:

A. Determinations:

- (1) CVDs will be made by a division inspector and a chief inspector will review and approve of the CVDs made by the division inspector. The division inspector's determination may be based on a municipality's or county's building department findings.
- (2) If the division issues a CVD, the licensee must be afforded the opportunity to correct the code violations in the time allotted by the division before a request for a CUV can be filed with the division.
- (3) Damages as a result of a code violation are not included in the corrective work for a code violation except in cases of minor demolition to gain access to perform the corrective work.
- (4) Abandoned or incomplete projects are not indemnified by the code bond as these are contract issues not governed by the Construction Industries Licensing Act (CILA).

B. Appeals: A licensee may appeal one or all of the violations identified in the CVD by sending a written appeal that specifies which violation(s) is being appealed to the director within 10 calendar days of receipt of the CVD. A licensee may choose to appeal one or more violation determinations while also choosing to correct other violation determinations that the licensee does not wish to appeal. Upon the receipt of a timely written appeal, the director shall uphold or overturn the CVD within 30 calendar days. If the director upholds a CVD, the licensee may appeal the director's decision to the commission by sending a written request to the commission within 20 days of receipt of the director's decision. A timely written appeal to the commission shall be heard at the commission's next regularly scheduled meeting. The commission's decision is final and not subject to judicial review.

C. Corrected code violations: If at any time, a licensee corrects violations identified in a CVD to the satisfaction of a division inspector, the division shall administratively dismiss the code bond determination request.

[14.5.9.9 NMAC - N, 04/30/15]

14.5.9.10 CERTIFICATES OF UNCORRECTED VIOLATIONS:

A. Cause for issuance of a CUV: If a licensee refuses or fails to correct code violations listed on a CVD, whether the refusal or failure to correct occurs at the time of the initial issuance of the CVD, after multiple corrections have been attempted or after a licensee exhausts all appeal rights provided under Subsection B of 14.5.9.9 NMAC, the division shall issue a CUV to the surety as well as the indemnitee and the appropriate licensee(s).

B. Notice of CUV: The CUV shall include the following information:

- (1) name and mailing address of the surety company holding the code compliance bond at the time the licensee(s) refused to correct the code violation;
- (2) name and mailing address(es) of the licensee(s) that committed the uncorrected code violation(s);
- (3) name and mailing address of the indemnitee;
- (4) bond number for the responsible party's bond in effect at the time the licensee refused to correct the code violation(s);
- (5) all license classifications held by the licensee(s);
- (6) address of the construction project where the uncorrected code violation(s) is located;
- (7) date the certificate of occupancy was issued or the final inspection was conducted by the

AHJ;

- (8) a description of each uncorrected code violation; and
- (9) the following statement: "this notice serves to inform the surety company, the indemnitee and the licensee that the specified licensee(s) has refused or failed to correct a code violation(s) and

therefore the construction industries division, under Section 60-13-49 NMSA 1978, is informing the surety that the code bond must be released for the sole purpose of correcting the code violation(s) identified herein. The pay-out by the surety company is limited to the amount of the code bond, which is set by statute at \$10,000.00. If the actual costs to correct the code violation(s) exceeds \$10,000.00, the indemnitee is responsible for those costs. The requirements of the surety and indemnitee are listed under 14.5.9 NMAC. The indemnitee is also notified that the claim may be denied if they fail to meet the requirements listed in 14.5.9.10 NMAC.”

C. Responsibility of indemnitee: The indemnitee is responsible for meeting the following requirements; failure to do so may result in the surety denying the claim.

(1) The indemnitee shall obtain three estimates from properly licensed contractors. The estimates shall only be based on the costs to correct the code violations listed in the CUV. If the indemnitee wishes to contract for additional work, that work must be a separate agreement, the costs of which will not be included in the estimate to repair the code violations listed in the CUV. The surety company has the option to release no more than the costs listed in the lowest of the three estimates. The indemnitee can choose any of the three contractors, or a separate properly licensed contractor not included in the three estimates, however, the indemnitee will be responsible for any costs above the amount the surety company releases.

(2) The indemnitee shall provide the three estimates to the surety company as well as the division. The division will ensure that the all three contractors are licensed and have the right license classification(s) for the work required to correct the code violations listed in the CUV. The division will notify the surety company and the indemnitee if each of the three contractors is properly licensed. If a contractor other than the three used for the original estimates is selected by the indemnitee, the indemnitee must submit that contractor’s estimate to the division for verification that the contractor is licensed and possesses the necessary licensing classifications before work begins. The surety company shall release no more than the costs listed in the lowest of the three estimates.

D. Responsibility of contractor retained by indemnitee: The contractor is responsible for pulling all necessary permits and calling for inspections on the work performed.

E. Six-month time limitation to correct code violations: Once the CUV is issued, the indemnitee has a period of six months to ensure that all code violations identified in the CUV are corrected and pass inspection by the division or AHJ. Failure to meet the requirements listed in Subsection C of 14.5.9.10 NMAC in a period of six months may result in the surety denying the claim.

F. Release of the code bond: If all requirements of this section are met, the surety company shall release the amount of the bond consistent with Paragraph (1) of Subsection C of 14.5.9.10 NMAC to correct the code violations as listed in the CUV by issuing a check to the contractor that performed the corrections after the division or AHJ has confirmed that the corrections meet code. The surety company shall inform the division when the code bond is released.

[14.5.9.10 NMAC - N, 04/30/15]

14.5.9.11 Disciplinary referral: Requests for release of the code bond shall be processed before discipline when possible. After the issuance of a CUV, or if additional violations are discovered, the division will file an administrative disciplinary complaint under 14.5.8 NMAC based on the underlying code violation(s) and the matter will be submitted to the commission for consideration of disciplinary action. Within 180 calendar days, the licensee will receive a notice of investigation (NOI).

[14.5.9.11 NMAC - N, 04/30/15]

14.5.9.12 LIMITATIONS ON CODE BONDS:

A. It is possible to have multiple violations on a single project. Only one code bond can be used to indemnify a particular code violation listed in a CUV per trade bureau jurisdiction. If there are multiple violations by multiple licensees, only the code bond belonging to the responsible party can be used to indemnify the code violation.

B. Legal fees and other related costs are not collectable from the code bond disbursements. Any disputes not covered by the code bond must be resolved through civil litigation in a court of law or by means of mediation, neither of which the division or the surety can be a party.

C. Priority on claims against a code bond is established by the person that is first in time to file a completed form provided by the division requesting a code bond determination regardless of when the work occurred.

[14.5.9.12 NMAC - N, 04/30/15]

14.5.9.13 EFFECT OF PAYMENT OF A CLAIM: Upon receipt of notice from surety of payment of a claim against a bond, the division shall notify the licensee of the payment, and the licensee shall have 30 days to provide the division with proof of financial responsibility as required by Section 60-13-49 NMSA 1978.
[14.5.9.13 NMAC - N, 04/30/15]

HISTORY OF 14.5.9 NMAC: [RESERVED]