



PLN NEWS

www.pln.com.au

PACIFIC LEGAL NETWORK

Whilst the baby lambs roam the fields and the horses prepare for the onslaught of the domestic racing season in Australia, PLN News for this Spring is focusing its attention on the 'American' parts of the Pacific.

Contributions in this edition have been made by members of our affiliate firms in American Samoa, Hawaii and Palau and follow hot on the heels of the PLN Banknote special release in relation to anti-money laundering laws in Papua New Guinea.



PLN has again expanded its horizons recently, with the opening of the PLN Advisory operation in Nadi, Fiji Islands. View the Information Brochure on our Legal News page www.pln.com.au/legal.jsp

October will be a big month for 'conventions' in the Pacific; there are a number of events of a business or legal nature which we are either directly or indirectly involved with, including:

- The first Australia-New Caledonia business forum on 7 October 2005 in Brisbane (go to www.apibc.org.au for details);
- The holding of the annual Fiji-Australia Business Forum from 16 to 18 October 2005 at the Shangri-La Fijian Resort (go to www.afbc.org.au for details), and
- The Hawaii State Bar 2005 Annual Bar Convention, October 20-21, Sheraton Waikiki Hawaii, Oahu, Hawaii (go to www.hsba.org/home for details).

PLN Advisory office opens in Nadi

PLN Advisory has been established in Nadi, Fiji to provide our clients with key corporate and strategic advice for their operations in the Pacific.

Our services, amongst others include: business advisory, banking and financial, corporate and commercial and insolvency.

Contact us: Suite 14, Colonial Plaza, Queens Road, Namaka, Nadi, Fiji Islands
Phone: +679 672 6060 Email: inquiry@pln.com.au

John Ridgway

Email: j.ridgway@pln.com.au

Spring 2005

INSIDE THIS ISSUE

Tax incentive certificates in AmSam	2
Pacific Personality: Jennifer Joneson	3
Strategic Alliances	4
Using Surety Bonds for Construction Contracts	5

American Samoa offers economic development incentives through tax exemption certificates

Enterprising companies should note that American Samoa permits its Governor to promote new economic development and capital investment by offering tax exemptions to qualified applicants.

Foreign companies are qualified to apply, but each must first obtain a permit to transact business in American Samoa as a foreign corporation and an American Samoa business license before doing so. Although the laws governing foreign corporation permits, business licenses, and tax exemption applications are not particularly restrictive, the application process can be cumbersome. However, if a foreign company retains the assistance of local counsel to guide its way, it should be able to minimize the time and effort that the company will need to spend in laying the legal groundwork for its new enterprise.

A tax exemption application is first submitted to the government's 5 member Tax Exemption Board, which reviews the submission and conducts a public hearing concerning the applicant's proposal. Thereafter, the Board submits its report and recommendations to the Governor, who has the ultimate authority to decide whether to grant the exemption request.

In determining whether to grant a tax exemption certificate, the Governor will require that the applicant describe its proposed business plan and take the following factors into account:

- Is a tax incentive required in order for the company's proposed business plans to proceed in American Samoa?
- What are the amounts and types of financial investment that the company plans to make in American Samoa and the minimum investment amounts that the company will commit to make over a specified time?
- What are the categories of taxes and fees for which the company requests exemption (e.g., income taxes and excise taxes)?
- What is the exemption time period (up to ten years) that the company seeks and what are the reasons why that time is necessary and

appropriate?

- Can the company comply with the statutory requirement that at least 75% of the total working force be "residents of American Samoa" (defined to be persons who have resided in American Samoa for not less than 5 years immediately prior to the date of the application for employment, or who were born in American Samoa and resided there not less than 1 year immediately prior to the date that the tax exemption application was filed)?

American Samoa's Governor, Togiola Tulafono, has expressed his support for the use of economic incentives to attract new businesses to American Samoa. Although American Samoa is a US Territory, it has its own set of minimum wage rates, which are lower than the minimum wage rate imposed in the 50 states. Other attractive features of doing business in American Samoa include a relatively high degree of English proficiency in the work force, growing computer literacy among high school and junior college graduates, and expanding communication technologies.

Jennifer J. Joneson
Rose Joneson Vargas
(PLN Affiliate firm, American Samoa)



Strategic Alliances

About 120 years ago, King David Kalakaua, who was the reigning monarch of the Kingdom of Hawaii at that time, personally undertook diplomatic missions all over the world in order to gather support for his Kingdom against any opposition faction that would seek to overthrow the Hawaiian Monarchy. One of his goals was to make strategic alliances with other independent nations. Japan was one of the countries he visited.

King Kalakaua's royal delegation arrived in Japan in 1881. The King of Hawaii thought that, because the Empire of Japan was also an island nation like the Hawaiian Islands, it would face similar problems as his Kingdom and would be a suitable ally. Like the Hawaiian Kingdom, Japan was a small Pacific island nation overshadowed by large continental powers. King Kalakaua was anxious to learn how Japan was able to exist independently from its powerful neighbors. The King was looking for friends and affiliations that would serve his country and his people in a world that was changing, in its own way, as fast as our World is changing today.

The Emperor of Japan welcomed the Hawaiian King with the traditional imperial hospitality of his court. Perhaps he, too, saw the potential for an alliance with another Pacific island nation. The Japanese Diplomatic Corps in full dress uniform were presented with all appropriate pomp and ceremony to the King and his royal entourage. As an indication of his esteem, the Emperor gifted King Kalakaua with magnificent imperial horses decorated in rich gold cloth. The welcome parade was a splendid sight as Japan's military might passed in review. Kalakaua saw an alliance with Japan as a way for Hawaii to stand up to larger nations and to partner with a sympathetic ally to compete with the great powers that were pressing their colonial interests at that time.



Court house in Hawaii

Now, what happened next is the most interesting part of this story. During his stay in Japan, King Kalakaua proposed that a royal marriage take place between the beautiful young Princess Kaiulani of Hawaii and a young Japanese Prince, Prince Komatsu. Princess Kaiulani was only 5 at the time but she was a charming young girl. Her father was Scottish and her mother a member of the Hawaiian Royal Family. Such arranged marriages were common practice in both Japan and Hawaii in those days as a way to cement strategic alliances, and the intention was not lost on the Japanese Emperor. At that time, the offer of marriage was neither accepted nor rejected. Afterwards, Prince Komatsu himself wrote to King Kalakaua, formally thanking him but, at the same time, stating that a marriage had already been arranged for him when he was very young. The Prince implied, however, that engagements sometimes could be broken.

As fate would have it, subsequent events in Hawaii and Japan did not lend themselves to a strategic alliance. Each country took its own course.

However the desire and need for strategic alliances among the people of Pacific island nations is still strong.

In October 2001, my law firm in Honolulu, Hawaii entered into an affiliation with law firms located in Guam and Saipan. The Guam law firm was headed by Michael Berman, an old friend who had worked with me while we were both members of a large Honolulu law firm in the late 1980's. The Saipan firm was run by Robert O'Connor, a new friend who had already partnered with Mike Berman for several years. Later an office in Pohnpei, under the direction of Mike Sipos, was added to our Pacific-Lawyers affiliation.

Our original concept was to establish an alliance of firms from Pacific island jurisdictions that shared American legal jurisprudence so that we could serve clients across multi-jurisdictions with seamless legal representation. Due to Michael Berman's quick thinking, we reserved the internet domain name "Pacific-Lawyers" and that is what our affiliation has come to call itself.

We hold annual retreats and are in regular internet and phone contact between face to face meetings.

Two years ago Pacific-Lawyers entered into a formal strategic alliance with Pacific Legal Network (PLN) and we are continually endeavoring to leverage this relationship to the advantage of our clients. The best way to do this is by educating our clients concerning



the existence of our relationship. Knowledge of our ability to provide fast, trusted and competent advice and counsel to clients in different Pacific jurisdictions is the key factor in developing our trans-national law firm relationships and serving our clients' multi-jurisdictional needs.

Although the emphasis of both the Pacific-Lawyers affiliation and our strategic alliance with PLN has been on transnational commercial transactions, one of the most underappreciated advantages that our multiple jurisdictional law firm interrelationships can offer clients is providing trusted litigation counsel to enforce contract rights and judgments in different jurisdictions.

The Honolulu Office of Pacific-Lawyers is often called upon to file suit on behalf of other Pacific-Lawyers firm clients in Hawaii, providing continuing litigation support and judgment collection for clients from other jurisdictions in Hawaii.

Foreigners in Hawaii are able to enforce their contract rights and the judgments of their home country against parties that can be found in the State of Hawaii in both State and Federal Courts.

The Uniform Foreign-Money Claims Act is a Hawaiian law that provides that a claimant may assert a claim in specified foreign money and pursue the claim to

judgment in Hawaiian Courts. The Foreign Money Claims Act provides for determination of the judgments in the foreign currency and conversion practices and alternatives for rendering the judgment in United States dollar amounts.

In Hawaii, enforcement of foreign judgments is governed by the Uniform Enforcement of Foreign Judgments Act, which allows for an exemplified foreign judgment to be filed in the appropriate Courts in Hawaii and enforced in the same manner as a domestic judgment.

Enforcement of rights and judgments in Hawaii is a practical aspect of the strategic alliance between Pacific-Lawyers and PLN. Many defaulting parties seem to believe that moving from one country to another will protect them from civil prosecution and defeat claims against them. This is now not the case. There are means to enforce rights and secure judgments in the State of Hawaii for claims that arise and judgments that are rendered in our sister Pacific island jurisdictions. I believe that cross-border enforcement of claims and judgments will continue to be a vital client service facilitated by strategic multi-jurisdictional law firm alliances.

Mark Shklov
Pacific-Lawyers, Hawaii

Pacific Personality: Jennifer Joneson

Name: Jennifer Joneson

Position: Partner, Rose Joneson Vargas, Nuuuli, American Samoa

Responsibilities: I am a litigator with a broad range of responsibilities within our general practice law firm.

How long have you worked in American Samoa or the Pacific Region?

I am beginning my 15th year of practicing law in American Samoa.

Do you enjoy working in American Samoa? Why?

Yes, because I have the chance to work with people from diverse backgrounds on a broad range of issues.

What is the most difficult aspect of working in the Pacific?

Having sparse local statutory and case law authorities upon which to base our advice.

What is the most useful Pacific business association you are a

member of?

The Business and Professional Women of American Samoa (BPW).

Favourite Pacific restaurant and favourite Pacific bar and why?

Favourite restaurant: Coconuts in Independent Samoa, because the atmosphere and dining are truly special.

Favourite bar: Rubbles in Nuuuli, American Samoa, because I know that I will always see a friendly face when I walk in the door.

Most memorable travel moment in the Pacific?

Getting married on the beach at Vavau, Upolu, Independent Samoa.

Travel tips for the Pacific?

Be courteous, be patient, and don't drink the water.

Most memorable Pacific sporting moment?

Watching the 2001 Manu Samoa versus All Blacks test match in Auckland, New Zealand.



Most interesting or unique feature of AmSam that most people wouldn't know?

American Samoa was connected with several US Apollo space missions during the late 1960's and early 1970's. The dramatic splash down of the Apollo 13 space capsule occurred near American Samoa, and its relieved crew were greeted by a large gathering of Samoans and government dignitaries at the Pago Pago International Airport before travelling on to Hawaii to meet President Nixon, family & friends. You can learn more at this website: http://members.tripod.com/~Tavita_Herdrich/index.html

USING SURETY BONDS FOR CONSTRUCTION CONTRACTS

A major risk for a party under a construction contract is that the Contractor fails to complete its obligations according to the terms and conditions of the contract. Such situations can arise in all types of contracts, with prime contractors as well as with subcontractors. The obligation may be either to pay or to complete construction in accordance with the construction contract. If a Contractor fails to perform, the Owner may be left with the difficulties of first protecting and making safe the site and then of finding another contractor to take over and complete the work, or of completing the work itself. The Owner will be left with the prospect of a significant financial burden and delay to the project which may jeopardize its commercial viability. Recovery from the contractor will involve legal action with further additional expense and added uncertainty that there will be full recovery. Such risk seems to be especially prevalent among the various developing nations of the Pacific islands where work is often done by companies with which public officials may have very little experience. Stories abound with regard to companies obtaining lucrative contracts yet failing to fulfill them leaving the local government or parties with little to show for the effort.

How can a party (whether a public agency or a private owner) awarding a contract on the basis of a low-bid be sure the lowest bidder is dependable and will perform? This article will address the use of surety bonds as a means of securing performance of a contract.

The creation of financial security or obligation by a Contractor in favor of the employing party (for purposes of this article referred to as "Owner") to compensate for the Contractor's failure to perform can help to assure that the work is performed in a timely manner and in compliance with the terms and conditions of the contract. The following comments may not hold true for all jurisdictions in the Pacific and specific advice on these issues should always be sought.

Early history of surety

Surety is a concept which has been used in one form or another for centuries. One of the earliest records of a suretyship agreement was recorded in a clay tablet from around the year 2750 BC found in the Mesopotamian region. According to the tablet's etchings, a farmer indebted to the king for the next harvest had contracted with another farmer to tend his fields under the condition they split the proceeds equally. A local merchant served as surety and guaranteed the second farmer's compliance with the agreement. Another example of a written surety contract was found in a Babylonian contract from 670 BC.

The first known written legal code, the Code of Hammurabi written around 1792-1750 BC, contained provisions for recognizing surety agreements. Around 150 AD, the Roman Empire developed a number of principles

still found in today's suretyship laws.

While the concept of surety has a long history, corporate surety bonds are a relatively recent feature. Such bonds were recognized in the United States late in the 19th century when the U.S. Congress passed the Heard Act in 1894. Recognizing the need to protect taxpayers from contractor failure and fraud the U.S. Congress mandated surety bonds on all federally funded projects. That requirement was later reiterated in 1935, when the Congress adopted the Miller Act (40 U.S.C. Section 270a et. seq.) mandating surety bonds on federal public works. The Miller Act, which remains current federal law, requires performance bonds for public work contracts in excess of USD\$100,000 and payment protection, with payment bonds the preferred method, for contracts in excess of USD\$250,000. Most states and territories of the United States, including many local jurisdictions, have enacted similar legislation requiring surety bonds on public works.

Forms of security

Security for the performance of a contract may be provided by several means: surety bond issued by a third-party insurer, letters of credit, escrow accounts, or other guarantees.

The form of security chosen will dictate whether the Owner indeed has security which is of any real and practical value, or whether it simply provides him with legal remedy that may prove to be expensive and time consuming. An Owner's evaluation and management of risk on construction projects leading to fiscally responsible decisions to ensure timely project completion is a key to success. Gambling on a contractor who could become bankrupt before completion of the project or whose level of commitment is not certain can be costly.

Surety bonds as a means of protection against a Contractor's default

Alternative forms of financial security, such as letters of credit and self-insurance, do not always provide the high level of performance protection and payment protection of surety bonds nor do they assure a competent contractor. A surety bond is a risk transfer mechanism where the surety company (a third party, usually an insurance company or bonding company licensed to engage in such bonding business) assures the project owner that the contractor will perform a contract in accordance with the contract documents. With surety bonds, the risks of project completion are shifted from the owner to the surety company.

Surety bonds offer assurance that the contractor is capable of completing the contract on time, within budget, and according to specifications. Surety bonds provide financial security and construction assurance by assuring



project owners that contractors will perform the work and pay specified subcontractors, laborers, and material suppliers.

Types of surety bonds

Three basic types of surety bonds are used in most public works construction contracts:

- ◆ A “bid bond” assures that the bid has been submitted in good faith and that the contractor will enter into the contract at the price bid and provide the required performance and payment bonds. Generally, such a bond will reimburse the owner for expenses incurred to compel a reluctant lower bidder to enter into a contract, or alternatively, to cover the difference in the bid price between the lowest bid and that of the next low bid.
- ◆ A “performance bond” protects the owner from financial loss should the contractor fail to perform the contract in accordance with its terms and conditions.
- ◆ A “payment bond” assures that the contractor will pay specified subcontractors, laborers, and material suppliers on the project.

Use of surety bonds in non-public works projects

Although surety bonds are mandated by law by most jurisdictions on public works projects, the use of surety bonds on privately-owned construction projects is generally at the owner’s discretion. Because of the greater assurance of contract compliance and the relative ease of enforcing a bond over other types of surety, the use of surety bonds is becoming more popular in private non-public works contracts. Many private owners now require surety bonds from their contractors to protect their company and shareholders from the enormous cost of contractor failure. To bond a project, the Owner specifies the bonding requirements in the contract documents. The responsibility of obtaining bonds and delivering them to the owner is that of the contractor, who will consult with a surety bond producer. Subcontractors are often required to obtain surety bonds on their own behalf to help the prime contractor manage risk, particularly if the subcontractor is a significant part of the job or a specialized contractor that is difficult to replace. Many surety companies are subsidiaries or divisions of insurance companies, and both surety bonds and traditional insurance policies are risk transfer mechanisms subject to regulation by state insurance departments. Thus this regulation helps to keep the surety bond market safe and secure for its customers.

Differences between insurance and bonding

Traditional insurance is designed to compensate the insured against unforeseen adverse events. The policy premium is determined based on an actuarial analysis of aggregate premiums earned versus expected losses.

Surety companies, however, operate on a different business model. Surety is designed to prevent loss. Sureties are able to accept the risk of contractor failure based on the results of a thorough, rigorous, and professional process in which sureties prequalify the contractor. This prequalification process is an in-depth look at the Contractor’s business operations. Before issuing a bond the surety company must be fully satisfied, among other criteria, that the contractor has among other things:

- ◆ good references and reputation
- ◆ the ability to meet current and future obligations
- ◆ a good history of experience matching the contract requirements
- ◆ the necessary equipment to do the work or the ability to obtain it
- ◆ the financial strength to support the desired work program; an excellent credit history
- ◆ an established bank relationship and line of credit.

Advantages of surety bonding

Before issuing a bond, the surety company must be satisfied that the contractor runs a well-managed, profitable enterprise, keeps promises, deals fairly, and performs obligations in a timely manner. A premium is then set on the basis of this prequalification. If the surety company is not adequately satisfied that the Contractor has the financial strength and construction expertise to complete the contract, a surety bond may be denied.

Since the bond is underwritten with little expectation of loss, the premium is primarily a fee for prequalification services. Surety bond premiums vary from one surety to another, but can range from one-half of one percent to two percent of the contract amount, depending on the size, type, and duration of the project and the contractor. Typically, there is no direct charge for a bid bond. In many cases, performance bonds incorporate payment bonds and maintenance bonds, so there is no additional premium charged for those services. When bonds are specified in the contract documents, it is the contractor’s responsibility to obtain them. The contractor generally includes the bond premium amount in the bid and the premium generally is payable upon execution of the bond. If the contract amount changes, the premium will be adjusted for the change in contract price. Performance and payment bonds typically are priced based on the value of the contract being bonded, not necessarily on the size of the bond.

Ken Barden
PLN, Palau

Part Two of Using Surety Bonds for Construction Contracts will be in the next edition of PLN News dealing with contract default and remedy aspects of surety bonds.