



# NASBP State Government Affairs Representative Tool Kit



## **Role of NASBP State Government Affairs Representative**

### **Overview**

NASBP has an opportunity for bond producer members who would like to volunteer their time to further NASBP's Government Relations Agenda at the state level. For those NASBP members who want to engage in the advocacy process to protect and promote surety bonding, the volunteer role of the State Government Affairs Representatives (GAR) may be for you. Under the guidance, direction, and assistance of the NASBP national staff and the Government Relations Committee, the GAR will serve as the "eyes and ears" of the association for state and local government relations matters impacting surety.

### **Duties and Responsibilities**

- With oversight and assistance from the NASBP Executive Committee, Government Relations Committee, and national staff, the GAR will identify, strategize on, coordinate and advance solutions for local and state regulatory and legislative matters deemed relevant and important. In addition, the GAR will focus on those issues found in the NASBP Government Relations Agenda, which is recommended by the Government Relations Committee and approved annually by the NASBP Board, a copy of which will be distributed to all GARs.
  - GAR duties may include:
    - Monitoring legislation and regulations, and state and local procurement agency activity;
    - Reporting to NASBP staff in Washington concerning these issues;
    - Establishing educational components locally to introduce elected and public officials to the value of bonding requirements and assist and educate small and emerging contractors on bond readiness.
    - Identifying local issues that may proliferate and have an adverse impact in suretyship or lead to potential federal issues such as local contracting authorities eliminating bonding requirements on federally-funded projects (please see examples).
    - Identifying local organizations to join forces with to oppose selected issues and measures.

### **Support & Participate in various NASBP Government Relation's Functions**

- Representatives are expected to attend the Annual Federal Legislative Fly-in and update their congressional offices concerning state-related issues and activities that impact federal policymaking.
- Representatives are expected to provide a regular update on state activities to NASBP staff apart from and during selected GAR conference calls.
- On rare occasions the GAR may be asked by the national staff to:
  - Meet with legislators, state agency officials, and local officials on behalf of NASBP and/or;
  - Testify before select legislative committees in their respective state capitols (staff will provide assistance with crafting testimony).

## **Potential Issues Government Affairs Representatives (GAR) May Encounter**

Throughout the course of any state legislative session, the GAR may be confronted with a number of issues that could negatively or positively impact the surety profession. Furthermore, at any moment, a state or local agency official may attempt to include an onerous contract requirement in their bid solicitation documents that is beyond current industry practices or simply ignore state statutory bonding requirements.

For these reasons, it is paramount for the GAR to be actively engaged in the political process in his/her state and to be aware of the public procurement process. Over the past several years, NASBP staff has catalogued examples of various state legislative activities and has responded to state procurement officials on a number of issues, all which would have impacted the surety industry.

Below are specific examples, (see Appendix of the GAR Tool Kit for letters), which the GAR may be called upon to address with assistance from the NASBP national staff to craft a response or to develop a legislative solution.

### **For example, the GAR may face such issues in their respective state that impose policies that are either beneficial or harmful to the industry such as:**

- Legislation that either waives or increases statutory bonding requirements;
- Supporting licensing or registration of all sureties in jurisdictions in which they conduct business to protect the interests of public owners and taxpayers and;
- Advocating for the inclusion of statutory bonding requirements on public-private partnerships (P3) for public works projects.

### **For example, the GAR may be confronted with issues from local or state agencies and will be asked to coordinate efforts with NASBP staff concerning:**

- Onerous or unrealistic contract requirements, such as long-term warranties or excessive liquidated damages in public works contracts;
- Resident agent countersignature requirements where state and local procurement officials continue to require resident agents countersign documents on behalf of non-resident agents even though resident agent countersignature requirements have been eliminated in all the states and have been found to be unconstitutional;
- Owners requesting subcontractor default insurance as an alternative to traditional subcontractor bonding and;
- Requirements that are being considered by governments to enact laws and regulations that mandate green building/sustainability requirements in public and private construction, which may include surety bonding requirements that place inappropriate risks on contractors and sureties.



## National Association of Surety Bond Producers

1140 19<sup>th</sup> Street NW, Suite 800. Washington, DC 20036-5104

Phone: (202)686-3700

Fax: (202)686-3656

Web Site: <http://www.nasbp.org>

E-mail: [info@nasbp.org](mailto:info@nasbp.org)

### Local Surety Issue Report Form

Your Name: \_\_\_\_\_ Email: \_\_\_\_\_

Company Name: \_\_\_\_\_

Issue Topic: \_\_\_\_\_

Please give the overall background and history (if any) regarding this issue. Has NASBP previously engaged on this issue?

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If this issue was addressed previously, what was the final outcome? Were other groups were engaged? Would other groups be willing to join forces again?

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What actions need to be taken to address this issue? Written correspondence, in-person meeting, etc.?

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Who can NASBP contact regarding this issue? Please provide name, affiliation, and contact info:

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What follow-up (if any) is necessary after NASBP and others have engaged on this issue? Please be specific if additional information was requested.

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Please fax or email your Report Form back to Shannon Crawford at 202-686-3656 or [scrawford@nasbp.org](mailto:scrawford@nasbp.org). Thank you for your participation.

## **Appendix – Catalogued Examples of NASBP Outreach Efforts**

The following comment letters cover the issues listed below:

### **Bond Waivers and Threshold Increases**

**Page 7**

- Concerns with CA SB 616 - waives bonds for LAUSD contracts of \$1M or less
- Concerns with VA HB 1951 - increases bonding threshold to \$500k
- Adjustment of bonding thresholds for WI public works projects based on inflation
- Concerns with WY SF 107, legislation to increase surety bond threshold

### **Public-Private Partnerships**

**Page 21**

- Request to require bonding on federal P3 transportation projects
- Request to include bonding requirements in National Conference of State Legislature's P3 Toolkit
- Request to require bonds on the Illiana Corridor Project

### **Onerous Bond Form Language and Excessive Warranties**

**Page 29**

- FLDOT Contract Bond Form does not include general warranty
- Duration of roofing system—SUNY, Institute of Technology @ Utica-Rome
- Warranty Requirements in GSA Contracts Involving Photovoltaic Systems
- Duration of Contractor Warranty Requirements for US Army Corps of Engineers Roofing Project
- TXDOT Warranty Bond Requirement Relating to Polymer Overlay

### **Surety Alternatives—Subcontractor Default Insurance**

**Page 41**

- Concerns Regarding Alternative to Statutorily-Required Bonds in USNH RFQ

### **Public owners waiving statutory bonding requirements**

**Page 47**

- Problematic Terms in NKU Construction Management Services Agreement
- Decision to Waive Payment and Performance Bonds on FEMA Funded Projects

### **Green Building**

**Page 55**

- Incorrect use of Performance Bond Requirements in DC Green Building Act of 2006
- Written Testimony regarding DC Green Building Practices

### **Countersignature Requirements**

**Page 65**

- FL GSA Project
- LSU Parking Garage Project
- PA solid waste project

### **Excessive Liquidated Damages**

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- Liquidated Damages Inapposite to Subcontractor & Disadvantaged Business Participation

## **Bond Waivers and Threshold Increases**





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*Delivered via email and U.S. Mail*

April 10, 2013

Senator Roderick D. Wright  
Chairman, Senate Committee on Governmental Organization  
Capitol Office  
State Capitol, Room 2032  
Sacramento, CA 95814

### Re: Concerns with SB 616

Dear Chairman Wright:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of firms employing professional surety bond producers licensed and conducting business in California, we are very concerned about the substantial negative impact that Senate Bill Number 616 will engender. SB 616 amends § 9550 and 9550.1 of the California Civil Code by waiving payment bonds for small and micro businesses on public works contracts that are less than \$1 million for the Los Angeles Unified School District (District). In order for the payment bond to be waived, the small/microbusiness is required to participate in the District's "self-insurance program."

By enacting a statute requiring the furnishing of payment bonds by contractors performing public construction contracts, the California Legislature recognized the importance of having payment bonds in place to protect the downstream businesses that supply labor and materials on California public construction projects. Often these business entities, the project subcontractors or suppliers, are small businesses whose only viable remedy in the event of nonpayment by the prime contractor is to make a claim on the payment bond.

If the prime contractor fails to pay subcontractors and suppliers due to insolvency or for other reasons, such subcontractors and suppliers often have no alternative means to recover their wages, costs, and expenses. For example, they cannot sue the governmental entity, since they do not have a direct contract with the governmental entity. By waiving the payment bond requirement up to \$1 million for small and micro businesses on all District contracts, those acting as subcontractors to these businesses will be without invaluable payment protections. Having no recourse in the event of nonpayment is disastrous for construction firms, especially smaller firms, which go unpaid.

For those small businesses that participate in a "self-insurance program," which sunsets on

January 1, 2017, the District will establish guidelines and requirements for participants that include a business training program and completion of the District's prequalification process. Professional prequalification, as done by a surety, involves both qualitative and quantitative analyses of a construction firm in order to gain a complete picture of the contractor's qualifications. Sureties carefully scrutinize each contractor's financial soundness, experience, and qualifications to ensure that the contractor can meet its payment obligations and perform its construction contracts. Sureties maintain ongoing, long-term relationships with contractors, providing the surety with knowledge of the contractor's complete work program, including private and public work, and performance over time.

Such a depth of understanding is not one that can be approximated by a public contracting authority. Frankly, few, if any, public contracting agencies are well prepared to perform rigorous contractor prequalification. Public contracting agencies have limited resources and expertise with respect to analyzing the qualifications of contractors. Why would state and local contracting authorities want to assume this burden when it already is being done successfully and more efficiently by sureties, which are in the regular business of qualifying construction firms?

Moreover, the surety assumes the risk of nonperformance in the event that the qualified contractor defaults in its contractual obligations. If the contracting authority assumes the responsibility of qualifying contractors and no payment bond is required, any losses relating to the default of the contractor will be assumed by the public authority and, ultimately, the taxpayers.

Please recognize that sureties play an active role in ensuring that bonded contractors are taking all the necessary steps to fulfill obligations. Such assistance may include providing advice on internal controls, key management decisions, and offering professional references, such as accountants and engineers, while meeting with their contractors on a regular basis for progress reports. Such assistance is provided "behind the scenes" to keep the contractor on track in fulfilling its contractual obligations. Is the District prepared to assume such responsibilities to small businesses performing their contracts?

The State of California should not be seeking to deprive California businesses and taxpayers of protections in this difficult economic environment. If the impetus behind the bill is greater inclusion of small and minority businesses as prime contractors on District contracts, better approaches exist that do not involve stripping subcontractors and suppliers and taxpayers of needed protections. The construction and surety industries have existing programs to mentor and educate small and minority businesses, so they are positioned for long-term success as businesses, including enhancing their standing to obtain financial and surety credit. By working with the surety and construction communities, such programs could be put in place quickly.

Established federal assistance programs already exist to assist small and minority contractors with obtaining bonding and business assistance. For example, the Office of Surety Guarantees of the U.S. Small Business Administration offers a bond guarantee program aimed at providing bonds to small and emerging construction businesses. Further, the Office of Small and Disadvantaged Business Utilization of the U.S. Department of Transportation offers lending and

other programs specifically designed to benefit small and emerging contractors seeking to perform transportation contracts.

By removing needed protections and transferring the risk of losses to taxpayers, SB 616 is imprudent and fiscally dangerous. SB 616, as introduced, does not serve the best interests of the State of California, its taxpayers, or its many businesses performing as subcontractors and suppliers on public construction projects.

We appreciate your thoughtful consideration of our concerns. Please feel free to contact us if you have questions or need additional clarification with any of the points we have raised.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Larry LeClair".

Larry LeClair, Director, Government Relations  
National Association of Surety Bond Producers

cc: Members of the Senate Committee on Governmental Organization

**Associated Builders and  
Contractors – Virginia  
Chapter**

1578 A East Parham Road  
Richmond, VA 23228

**DC Metropolitan  
Subcontractors  
Association**

9105-A Owens Park Dr.,  
Suite 102  
Manassas Park, VA 20111

**National Association of  
Surety Bond Producers**

1140 19<sup>th</sup> St., NW, Suite  
800  
Washington, DC 20036

*Sent via email to: DelSlaquinto@house.virginia.gov*

February 2, 2011

Delegate Salvatore R. Iaquinto  
General Assembly Building, Room 420  
Capitol Square  
Richmond, VA 23219

Re: Concerns with VA HB 1951 and proposed substitute draft bill

Dear Chairman Iaquinto:

As trade associations representing a significant portion of the construction firms and surety bond producers conducting business in Virginia, we are very concerned about the substantial, negative impact that House Bill Number 1951 will engender. H.B. 1951 amends §§ 2.2-4336 and 2.2-4337 of the Code of Virginia, relating to the Virginia Public Procurement Act; bid, performance, and payment bonds, by substantially increasing the minimum contract amount required for bid, performance, or payment bonds. Currently the minimum contract amounts are \$100,000 for non-transportation-related construction contracts and \$250,000 for transportation-related projects partially or wholly funded by the Commonwealth. If Virginia's bonding threshold is increased, it would be among the highest in the nation. In fact, as contemplated in H.B. 1951 as introduced, the Virginia statute would become almost ten times higher than the current bonding threshold of the Federal Government. Even a \$500,000 threshold, which is being considered in a substitute draft bill, is too high, and would still place Virginia as having the highest bond threshold in the nation.

By first enacting a statute requiring the furnishing of payment bonds by contractors performing public construction contracts, the Virginia Legislature recognized the importance of having payment bonds in place to protect the downstream businesses that supply labor and materials on Virginia public construction projects. Often these business entities, the project subcontractors or suppliers, are small businesses whose only viable remedy in the event of nonpayment by the prime contractor is to claim on the payment bond.

If the prime contractor fails to pay subcontractors and suppliers due to bankruptcy or for other reasons, such subcontractors and suppliers do not have an alternative means to

recover their wages, costs, and expenses. They cannot sue the governmental entity, since they do not have a direct contract with the governmental entity, and they cannot place a mechanic's lien against the public property. In *Thomas Somerville Company v. L.R. Broyhill, et al.*, 200 Va. 358, 105 S.E.2d 824 (1958), the Virginia Supreme Court noted the inability of subcontractors and suppliers under Virginia law to place mechanic's liens against Virginia public buildings and other improvements: "Materialmen and subcontractors who furnish supplies or work for the principal who has contracted with the public agency...for the construction of the public buildings and improvements are unable to perfect mechanic's liens against the property for their protection." The Virginia Supreme Court added that the bonding statute "is remedial in character, its language broad and inclusive, and obviously it was enacted to afford protection to materialmen and subcontractors." By raising the bonding threshold to \$1 million or to \$500,000, which is considered in the substitute bill draft, on all public construction contracts, materialmen and subcontractors in Virginia will be without these invaluable payment protections. Having no recourse in the event of nonpayment will be disastrous for those firms, particularly since many of these firms already are struggling to weather the difficult economic environment for construction in the Commonwealth.

As payment bonds protect materialmen and subcontractors, performance bonds protect contracting agencies and precious taxpayer funds. In the absence of a performance bond, additional taxpayer funds will be required to complete projects when prime contractors default in their performance of such contracts. Raising the bonding threshold for contracts exceeding \$1 million or \$500,000, whichever bill is adopted, will mean that many more taxpayer-funded projects will not have performance bonds in place and taxpayers will suffer any losses.

Beyond increasing the bond threshold, H.B. 1951 substitute draft bill also contemplates establishing a qualification process for prospective contractors for contracts in excess of \$100,000 but not to exceed \$500,000. Apparently, contracting authorities would take on the task of qualifying contractors for such contracts. At present, the task of contractor prequalification is handled through the requirement of the bid bond, which would be removed as a result of the increased bond threshold. The bid bond assures that the contractor intends to enter into the contract at the price bid and will provide the required performance and payment bonds. If the contractor fails to do either, the bid bond specifies the amount to be paid as damages.

Professional prequalification, as done by a surety, involves both qualitative and quantitative analyses of a construction firm in order to gain a complete picture of the contractor's qualifications. Sureties carefully scrutinize each contractor's financial soundness, experience, and qualifications, to ensure that the contractor can meet its payment obligations and perform its construction contracts. Sureties maintain ongoing, long-term relationships with contractors, providing the surety with knowledge of the contractor's complete work program, including private and public work, and performance over time.

Such a depth of understanding is not one that can be approximated by a public contracting authority. Frankly, few, if any, public contracting agencies are well prepared to perform rigorous contractor prequalification. Public contracting agencies have limited resources and expertise with respect to analyzing the qualifications of contractors. Why would state and local contracting authorities want to assume this burden when it already is being done successfully and more efficiently by sureties, which are in the regular business of qualifying construction firms? Realistically, state and local contracting agencies will have to augment their workforces and commit additional resources to perform qualification of construction firms. *Is this the time to grow government when the same function already is being done well by responsible third-parties?*

Moreover, the surety assumes the risk of nonperformance in the event that the qualified contractor defaults in its contractual obligations. If the contracting authority assumes the responsibility of qualifying contractors and no performance and payment bond is required, any losses relating to the default of the contractor will be assumed by the taxpayer!

Further, will the contracting authority mentor and lend assistance to contractors performing public work? Sureties play an active role to ensure that bonded contractors are taking all the necessary steps to fulfill obligations. Such assistance may include providing advice on internal controls, key management decisions, and offering professional references, such as accountants and engineers, while meeting with their contractors on a regular basis for progress reports. Such assistance is provided “behind the scenes” to keep the contractor on track in fulfilling its contractual obligations. Are public contracting agencies prepared to assume such responsibilities to contractors performing their contracts?

The Commonwealth of Virginia should not be seeking to deprive Virginia businesses and taxpayers of payment and performance protections in this difficult economic environment. If the impetus behind the bill is greater inclusion of small and minority businesses as prime contractors on state contracts, better approaches exist that do not involve stripping subcontractors and suppliers and taxpayers of needed protections. The construction and surety industries have existing programs to mentor and educate small and minority businesses so they are positioned for long-term success as businesses, including enhancing their standing to obtain financial and surety credit. Such programs could be put in place quickly.

Please note that established programs exist to assist small and minority contractors with obtaining bonding and business assistance. The Office of Surety Guarantees of the U.S. Small Business Administration offers a bond guarantee program aimed at providing bonds to small and emerging construction businesses. Further, the Office of Small and Disadvantaged Business Utilization of the U.S. Department of Transportation offers lending and other programs specifically designed to benefit small and emerging contractors seeking to perform transportation contracts.

By removing needed protections and transferring the risk of losses to taxpayers, H.B. 1951 and its draft substitute bill are imprudent, if not dangerous, measures. Neither bill can be said to exhibit sound public policy, particularly in view of the nearly \$388 million budget deficit facing the Commonwealth of Virginia. Neither H.B. 1951 as introduced nor its draft substitute serve the interests of the Commonwealth of Virginia, its taxpayers, or its many businesses performing as subcontractors and suppliers on public construction projects.

We strongly request that you consider placing H.B. 1951 or its substitute bill in a study committee similar to the approach that is being considered with S.B. 1126 (Stosch). S.B. 1126 calls for the study committee to consist of representatives from the construction and surety industry appointed by the Department of Transportation's Commissioner to review performance and payment bonding requirements presently in the Code of Virginia. The Senate passed S.B. 1126 unanimously 39-0. We ask that this bill be given similar consideration.

Please feel free to contact us if you have any questions or need additional clarification with any of the points we have raised.

Yours sincerely,

Harold B. Kelly, Vice President  
Associated Builders and Contractors – VA Chapter

Mark McCallum, CEO  
National Association of Surety Bond Producers

Marla McIntyre, Executive Director  
DCMSA

CC: Members of the House General Laws Subcommittee: #2 FOIA/Procurement  
Members of the House General Laws Committee



**NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS**

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Washington, DC 20036-5104

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[www.nasbp.org](http://www.nasbp.org)

*Sent via U.S. mail, facsimile at 608-267-4592, and email at [Howard.Bernstein@dwd.wisconsin.gov](mailto:Howard.Bernstein@dwd.wisconsin.gov).*

March 30, 2010

Mr. Howard Bernstein  
Office of Legal Counsel  
Dept. of Workforce Development  
P.O. Box 7946  
Madison, WI 53707-7946

Re: DWD 293.02 -- Adjustment of Thresholds for the Application of Payment and Performance Assurance Requirements

Dear Mr. Bernstein:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade organization of professional surety bond producers and brokers, representing over 5,000 personnel, who place bid, payment, and performance bonds for the Nation's construction and infrastructure projects, including those in Wisconsin, I am contacting you to express our comments on the proposed rule to amend DWD 293.02, which would increase the bonding thresholds for public improvement or work projects undertaken by the state or local governmental units.

NASBP recognizes that Wis. Stat. § 779.14(1s) requires that the bonding thresholds be subject to indexing every two years in relation to changes in construction costs, if the adjustment to be made equals or exceeds 5%. It is our opinion that the indexing requirement is an unfortunate and contradictory statutory requirement, as it overlooks and, in fact, undermines the original, protective purposes of the statutory bonding requirements. Performance bonds provide assurance of performance of the construction contract to the contracting agency, thereby protecting precious taxpayer dollars. Payment bonds, in turn, provide an invaluable payment remedy to the many subcontractors and suppliers that furnish labor and materials on these public improvement or work projects in the event that the prime contractor fails to pay or becomes insolvent. Often these subcontractors and suppliers are small businesses whose only avenue to participate in the public procurement arena is as a subcontractor to the prime or to another subcontractor. The lack of a payment bond may portend disastrous consequences for these downstream businesses.

Wisconsin long has recognized the important protections offered by surety bonds. In fact, Wisconsin law even recognizes a cause of action against public contracting agencies that fail to require the furnishing of a payment bond (see, e.g., *Holmen Concrete Products Company v. Hardy Construction Company, Inc.*,

Letter to Mr. Bernstein  
March 31, 2010  
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686 N.W. 2d 705 (App. 2004)). In *Cowin & Co., Inc. v. City of Merrill et al.*, 233 N.W. 561 (1930), the Wisconsin Supreme Court stated about the predecessor statute to § 779.14:

“Legislative intent to afford to materialmen and laborers on public improvements a complete protection against loss is evident. The failures and insolvencies of contractors engaged in public work, together with the law denying to materialmen and laborers liens against municipalities resulting in losses, prompted the Legislature to enact this remedial legislation, its purposes being to give further protection to municipalities and to protect against loss those furnishing labor and material for the construction of public works....It insures a fairer prospect of better bids because it encourages the competition of all interested by the assurance of payment.”

Ironically, by subjecting the bonding thresholds to regular indexing every two years, each subsequent threshold increase will ensure that more state and local public construction projects will be undertaken without the benefit of payment bond protection for those businesses furnishing labor and materials on those projects. Moreover, the implementation of the proposed rule to increase bonding thresholds will cement Wisconsin’s place among a limited group of jurisdictions having the highest bonding thresholds for public works projects in the United States. As you note in the Analysis to the proposed rule, Wisconsin’s thresholds will exceed the bonding thresholds of adjacent states and that of the federal government for most public contracts, and the vast majority of jurisdictions do not index their statutory bonding thresholds.

Understanding that the Department of Workforce Development simply is carrying out its mandate with respect to the existing statutory requirement to index bonding thresholds, NASBP implores the Department accurately to assess and to explain to the Wisconsin Legislature the significant, negative impact that such an increase, occurring regularly, will have on protections to state and local contracting agencies and to the myriad subcontractors and suppliers, many of which are small businesses, which furnish labor and materials on public construction projects.

NASBP points out the cursory nature of any such discussion in the Analysis to the proposed rule. The Analysis posits that there “does not appear to be any adverse impact on small businesses” or “any adverse fiscal impact on state or local government.” With more projects falling under higher statutory bonding thresholds, how can that be? How will contracting agencies and subcontractors and suppliers be protected in circumstances where no bonds were required? In the current, strained economic climate, surety bonding requirements, which assure careful third-party assessment of the financial wherewithal of businesses receiving public contract award, not only are prudent but essential.

For the foregoing reasons, we respectfully request your consideration that the proposed rule not be implemented and that the Wisconsin Legislature be given an accurate assessment of the negative impact of increases to bonding thresholds on Wisconsin taxpayers and businesses. In short, the story of how

Letter to Mr. Bernstein  
March 31, 2010  
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indexing will erode the protections of this critical remedial statute must be explained to Wisconsin legislators.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Mark H. McCallum", with a long horizontal flourish extending to the right.

Mark H. McCallum  
CEO

cc: Larry LeClair, NASBP



## National Association of Surety Bond Producers

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March 6, 2012

Sent via email to: [rberger@wyoming.com](mailto:rberger@wyoming.com)

Representative Rosie Berger  
Chairwoman, Wyoming House Appropriations Committee  
213 State Capitol Building  
Cheyenne, WY 82002

RE: SF 107, legislation to increase surety bond threshold requirements

Dear Chairwoman Berger:

On behalf of the members of the National Association of Surety Bond Producers (NASBP) a national trade organization of professional surety bond producers, whose membership includes firms employing licensed surety bond producers placing bid, performance, and payment bonds throughout the U.S., including Wyoming, I am contacting you regarding concerns with Senate File (SF) 107. Surety bonds play a vital role in our nation's economy by providing financial security to protect project owners and taxpayers by assuring that contractors are qualified to perform their contractual obligations by providing such companies with a means to be paid should the prime contractor become insolvent or fail to pay them.

SF 107 increases the bonding threshold for state public works projects from \$100,000 to \$250,000. NASBP is concerned that this legislation will have a negative impact on businesses that supply labor and materials on Wyoming public construction projects as well as the taxpayers of Wyoming.

Small businesses often cannot compete as prime contractors on public construction contracts, so they participate at subcontractor and supplier levels. At that level, these businesses only viable remedy in the event of nonpayment by the prime contractor is to claim on the statutorily-required payment bond. If the prime contractor fails to pay subcontractors and suppliers due to bankruptcy, or for other reasons, such subcontractors and suppliers do not have an alternative means to recover their wages, costs, and expenses. They cannot sue the governmental entity, since they do not have a direct contract with the governmental entity, and they cannot place a mechanic's lien against public property.

Furthermore, taxpayer dollars are at risk when state projects are awarded without the protection of performance bond guarantees. In the absence of a performance bond, additional taxpayer funds will be required to complete projects where prime contractors default in their performance of state construction contracts. By increasing the surety bond requirements, state contracting agencies also will have to shoulder a higher burden of screening and pre-qualifying more contractors, diverting their resources and energies away from other important tasks.

Currently, over 29 states have bonding requirements below \$75,000. Furthermore, under the Federal Miller Act, the Federal Government requires payment and performance bonds **for 100% of the contract price for projects in excess of \$150,000**. As noted above, the State of Wyoming, its taxpayers, and its

many businesses performing as subcontractors and suppliers on state projects have too much at risk should bonds not be in place due to a substantial increase of the bonding threshold.

NASBP urges you to leave the bonding threshold at its present level. If you have any questions concerning the issues raised, please feel free to contact me at 202-686-3700 or [lleclair@nasbp.org](mailto:lleclair@nasbp.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Larry LeClair". The signature is fluid and cursive, with the first name "Larry" and last name "LeClair" clearly distinguishable.

Larry LeClair  
Director, Government Relations

## **P3 Comment Letters**





## National Association of Surety Bond Producers

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*Sent through the Federal eRulemaking Portal @ <http://www.regulations.gov>*

May 31, 2013

U.S. Department of Transportation  
Dockets Management Facility  
Room W-12-140  
1200 New Jersey Avenue, SE  
Washington, DC 20590

Re: Docket No. FHWA-2012-0126

To Whom It May Concern:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association whose membership includes firms employing licensed surety bond producers placing bid, performance, and payment bonds throughout the United States and its territories, I am pleased to submit the following recommendations for model contracts for public-private partnerships (P3s) being developed by the Department's Federal Highway Administration as required by Section 1534(d) of P.L. 112-141 (Moving Ahead for Progress in the 21<sup>st</sup> Century Act or MAP-21). It is of the utmost importance that these model contracts include the protection of surety bonds for the construction portion of the contract.

Corporate surety bonds are three-party contract agreements by which one party (a surety company) guarantees or promises a second party (the obligee/contracting authority) the successful performance of an obligation by a third party (the principal/contractor). At the federal level, the Miller Act requires that, before any contract exceeding \$150,000 is awarded for a federal construction contract, the prime contractor must furnish a performance bond and a payment bond to the contracting agency. The performance bond protects the project owner (in this case, the federal government) from financial loss should the contractor fail to perform the contract in accordance with its terms and conditions. The payment bond protects subcontractors and suppliers, which do not have direct contractual agreements with the public owner and which would be unable to recover lost wages and expenses should the contractor be unable to fulfill its financial obligations. The passage of the Miller Act prompted the passage of similar laws in all the states, known as Little Miller Acts, to achieve the same ends on state construction projects.

According to the National Conference of State Legislatures, thus far, 33 states have enacted P3 enabling legislation for transportation projects, but not all state laws include security requirements for the parties performing construction, creating a lack of uniformity on bonding and other related issues. This variance in state requirements mandates that the FHWA set an appropriate policy to include specific requirements for performance and payment bonds, ensuring that transportation projects undertaken for public benefit and welfare through P3 contracts offer contracting authorities proper prequalification of entities performing construction services, guarantees of performance from solvent, third-party corporate sureties, and payment remedies for unpaid subcontractors and materialmen. The policy reasons underlying bonding requirements (prequalification and guarantees of performance and of payment) on transportation projects, whether such projects are procured traditionally or through alternative financing and delivery methods, remain incontrovertible. To that end, NASBP recommends that FHWA include contract language in the model P3 contracts, so that performance and payment bonds are required of the entity performing the construction services in the amount of the total value of the construction elements of the P3 contract.

In 2010, for example, the Maine Legislature recognized the importance of requiring surety bonds on P3 projects, stipulating that bonds should be in an amount equal to the cost of the construction work and referencing its Little

Miller Act statute. More specifically, Maine's public-private partnership statute, Title 23§ 4251, states the following relating to the bonding of P3 agreements:

*The proposal must include a provision that any contractor performing construction work required by the agreement must furnish performance and payment bonds or irrevocable letters of credit in an amount equal to the cost of the construction work. Any action on such a payment bond or irrevocable letter of credit is subject to the requirements of Title 14, section 871, subsection 4<sup>1</sup>.*

A further precedent has been set by the Federal Government when the Department of Transportation issued 49 CFR Part 18, the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. This regulation addresses bonding for state level construction projects financed partly by federal grants.

*For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:*

\*\*\*

*(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.*

*(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.*

Surety bonds provide essential protections to public authorities undertaking or facilitating transportation projects as well as to subcontractors and suppliers furnishing labor or materials on such projects. P3 model contracts developed by the FHWA must include requirements stipulating performance and payment bonds in amounts commensurate to the value of the construction portion of the P3 contract.

NASBP appreciates the opportunity to comment on FHWA's proposed model contracts for P3s. If you have any questions, please do not hesitate to contact me at 202-464-1217 or [lleclair@nasbp.org](mailto:lleclair@nasbp.org).

Respectfully Submitted,



Lawrence E. LeClair

Director, Government Relations

<sup>1</sup> Maine's Littler Miller Act



National Association of  
Surety Bond Producers (NASBP)  
1140 19<sup>th</sup> Street, NW, Suite 800  
Washington, DC 20036



The Surety & Fidelity  
Association of America (SFAA)  
1101 Connecticut Ave. NW, Suite 800  
Washington, DC 20036



American Subcontractors  
Association, Inc. (ASA)  
1004 Duke St.  
Alexandria, VA 22314

*Request to Include Importance of Bonding Requirements in NCSL's Public-Private Partnerships (P3s) for  
Transportation: A Toolkit for Legislators*

Dear Natural Resources & Infrastructure Committee Members:

On behalf of the National Association of Surety Bond Producers (NASBP), the Surety & Fidelity Association of America (SFAA), and the American Subcontractors Association, Inc. (ASA), we are writing to request that the National Conference of State Legislatures address the importance of surety bonding requirements in its publication "Public-Private Partnerships for Transportation: A Toolkit for Legislators."

NASBP is a national trade association whose membership includes firms employing licensed surety bond producers placing bid, performance, and payment bonds throughout the United States and its territories. SFAA is a trade association of more than 450 insurance companies that write the vast majority of surety and fidelity bonds in the U.S., is a licensed rating or advisory organization in all states, and is designated by state insurance departments as a statistical agent for the reporting of surety and fidelity insurance. ASA is a national trade association representing subcontractors, specialty trade contractors, and suppliers in the construction industry. ASA members work in virtually all of the construction trades and on virtually every type of horizontal and vertical construction on both public and private construction and rely on the protection surety bonds provide should a general contractor become financially incapable of paying its subcontractors.

Corporate surety bonds are three-party contract agreements by which one party (a surety company) guarantees or promises a second party (the obligee/contracting authority) the successful performance of an obligation by a third party (the principal/contractor). At the federal level, the Miller Act requires that, before any contract exceeding \$150,000 is awarded for a federal construction contract, the prime contractor must furnish a performance bond and a payment bond to the contracting agency. Similar laws known as Little Miller Acts exist in all states in order to achieve the same ends on state construction projects.

There is good public policy for the universal requirement of surety bonds on federal and state public works projects. The payment bond guarantees that covered subcontractors, suppliers, and laborers on the job will get paid. Generally, mechanics liens cannot be asserted against public property. Subcontractors, suppliers, and laborers on public works projects must rely on the general contractor's payment bond for protection. If no payment bond is required, these parties are left with no means to collect for their services and supplies if the contractor is unable or unwilling to pay them. Many subcontractors and suppliers on public works projects are small contractors that have fewer resources to absorb an event of non-payment.

Experience has shown that performance bonds are a cost-effective way for a procuring entity to protect against contractor default. The performance bond guarantees that the public works project is completed according to the construction contract. If a performance bond is not provided, the federal, state, or local budget and taxpayers take on the risk should the contractor default, and thus bear the burden of re-letting work and paying any excess completion costs. When a performance bond is in place, the full amount of the bond is available to complete the project in the event of the contractor's default. Governmental entities do not have adequate resources to perform all of the tasks that the surety does either in prequalification of contractors or in the servicing of claims brought on by contractor default.

The surety's underwriting of a bond is crucial to the success of public works projects. The surety provides a bond only to contractors that, in the surety's estimation, are capable of performing the work. The surety examines the contractor's expertise in the work, character, ability to work in the region where the project is located, current work in progress, and overall management as well as its capital and record of paying its obligations. By issuing a bond, the surety provides the public contracting entity with assurance from an independent third party, backed by the surety's own funds, that the contractor is capable of performing the construction contract.

Congress, all states, and many municipalities recognize the value of these bonds and have required and relied on bonding in public works projects for over a century. The NCSL Toolkit defines many of the key issues that state legislators need to consider when addressing P3 legislation; however, the Toolkit is silent on bonding requirements for P3 projects. Thus far, according to NCSL's website, 33 states have enacted P3 enabling legislation for transportation projects, but not all state laws are specific about the security requirements for the parties performing the construction portion of the project. This variance in the state requirements strongly suggests that NCSL should consider adopting an appropriate policy on surety bonding for its Toolkit.

While a P3 project may be managed by a private entity, the completed construction project is a public works project and an asset of the state. Thus, the public owner, taxpayers, subcontractors, and suppliers must be protected as on any other public works projects. We urge that NCSL revisit the contents of its Toolkit and add a section that specifically addresses bonding the construction portion of the P3 projects to ensure that transportation projects undertaken for public benefit and welfare through P3 contracts offer contracting authorities proper prequalification of entities performing construction services; guarantees of performance from solvent, third-party corporate sureties; and payment remedies for unpaid subcontractors and suppliers. The policy reasons underlying bonding requirements (prequalification and guarantees of performance and payment) on transportation projects, whether such projects are procured traditionally or through alternative financing and delivery methods, remain incontrovertible. To that end, our associations recommend that NCSL include the importance of bonding requirements in its Toolkit, so that performance and payment bonds are required of the entity performing the construction services in the amount of the total value of the construction elements of the P3 contract.

Surety bonds provide essential protections to public authorities undertaking or facilitating transportation projects as well as to subcontractors and suppliers furnishing labor or materials on such projects. NASBP, SFAA, and ASA urge NCSL to support requirements for performance and payment bonds in amounts equal to the value of the construction portion of P3 contracts.

Yours sincerely,

National Association of Surety Bond Producers  
(NASBP)

1140 19<sup>th</sup> Street, NW Suite 800  
Washington, DC 20036  
202-686-3700

Contact: Larry LeClair, Director, Government  
Relations

The Surety & Fidelity Association of America  
(SFAA)

1101 Connecticut Avenue, NW, Suite 800  
Washington, DC 20036  
202-463-0600

Contact: Lenore Marema, Vice President—  
Government Relations

American Subcontractors Association, Inc. (ASA)

1004 Duke Street  
Alexandria, VA 22314  
703-684-3450

Contact: Colette Nelson, Chief Advocacy Officer



## National Association of Surety Bond Producers

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Sent via email to [bill.grunloh@illinois.gov](mailto:bill.grunloh@illinois.gov) and [michael.forti@illinois.gov](mailto:michael.forti@illinois.gov)

June 7, 2013

Mr. Bill Grunloh  
Chief Procurement Officer  
Executive Ethics Commission  
Illinois Department of Transportation  
2300 S. Dirksen Parkway, Room 200  
Springfield, IL 62764

Mr. Michael Forti  
Chief Counsel  
Office of Chief Counsel  
Illinois Department of Transportation  
2300 S. Dirksen Parkway  
Springfield, IL 62764

*Re: Request for Information Regarding an Innovative Project Delivery Approach for the Illiana Corridor Project*

Dear Mr. Grunloh and Mr. Forti:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association whose membership includes firms employing licensed surety bond producers placing bid, performance, and payment bonds throughout the United States and in Illinois, I am pleased to submit the following recommendations for the Illiana Corridor Project which the Department is considering delivering via public-private partnership (P3). Payment and performance security in the form of surety bonds are essential to the timely completion and execution of this project and must be included. These bonds must be set at 100% of the construction portion of the contract.

By first enacting 30 ILCS 550, "Public Construction Bond Act" requiring the furnishing of payment bonds by contractors performing public construction contracts, the Illinois Legislature recognized the importance of having payment bonds in place to protect the downstream businesses that supply labor and materials on Illinois public construction projects. Often these business entities, the project subcontractors or suppliers, are small businesses whose only viable remedy in the event of nonpayment by the prime contractor is to claim on the payment bond. Recently, the Illinois Legislature recognized the importance of requiring bonds on the Illiana Corridor Project, specifically, by enacting:

*(30 ILCS 550/1.5)*

*Sec. 1.5. Public private agreements. This Act applies to any public private agreement entered into under the Public Private Agreements for the Illiana Expressway Act.*

*(Source: P.A. 96-913, eff. 6-9-10.)*

Further, IDOT has indicated in Section 2 of the RFI that "it is anticipated that the Project will include some element of federal funding." Therefore, a further precedent has been set by the Federal Government when the Department of Transportation issued 49 CFR Part 18, the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. This regulation addresses bonding for state level construction projects financed partly by federal grants.

*For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:*

*\*\*\**

*(2) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.*

*(3) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.*

Surety bonds provide essential protections to public authorities undertaking or facilitating transportation projects as well as to subcontractors and suppliers furnishing labor or materials on such projects. P3 contracts developed by IDOT, as noted in 30 ILCS 550/1.5 must include requirements stipulating performance and payment bonds in amounts commensurate to the value of the construction portion of the P3 contract.

NASBP appreciates the opportunity to comment on IDOT’s Request for Information Regarding an Innovative Project Delivery Approach for the Illiana Corridor Project. If you have any questions, please do not hesitate to contact me at 202-464-1217 or [lleclair@nasbp.org](mailto:lleclair@nasbp.org).

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Lawrence E. LeClair". The signature is fluid and cursive, with the first name "Lawrence" being more prominent than the last name "LeClair".

Lawrence E. LeClair

Director, Government Relations

## **Onerous Bond Form Language/ Excessive Warranties**





## NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

1828 L Street, NW, Suite 720

Washington, DC 20036-5104

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Fax: 202.686.3656

[www.nasbp.org](http://www.nasbp.org)

April 14, 2011

Ms. Juanita Moore  
Manager, Contracts Administration  
FL Department of Transportation (FDOT)  
605 Suwannee Street  
Tallahassee, FL 32399-0450

Re: DOT Contract and Contract Bond Form

Dear Ms. Moore:

Thank you for our phone discussion and for your consideration of our concerns. As I related on our recent call, I am the Director of Government Relations of the National Association of Surety Bond Producers (NASBP), a national trade organization of professional surety bond producers and brokers, whose membership includes licensed resident bond agents and licensed nonresident bond agents in Florida. It has come to our attention that FDOT's Contract Form (*attached*) does not include a general warranty of workmanship and materials clause or a one-year correction of work clause like those found in many industry standardized construction contracts. Rather, FDOT includes in its contracts warranties and warranty duration periods specific to the type of services being procured.

Such warranties may be problematic from a surety underwriting standpoint if the duration of the warranty extends too far into the future. For example, a warranty that specifies a duration that exceeds one year from the Date of Substantial Completion increases the uncertainty and decreases the confidence of the surety underwriter regarding projections about the contractor's future viability. Simply put, sureties cannot gauge the soundness and financial wherewithal of a company for periods extending too far into the future. Consequently, we request your consideration to adhere to a one-year warranty on the contractors workmanship and materials with any extended warranties coming from manufacturers. Given the difficult economic climate for contractors, such a policy should assist contractors and should benefit FDOT through increased competition.

In addition, we note that FDOT's Contract Bond form (*attached*) includes language that the bond will cover, "any defects which may exist, appear, occur or result in or from said work within a period of two (2) years from the date of final acceptance of the work under the Contract..." It appears that this language is not adjusted to coordinate with any specific warranty requirements in the underlying construction contracts. As a result, a situation could arise where the contractor may be subject to a one year warranty requirement while the surety underwriting the same contract would be subject to a two year requirement.

It is our belief that warranties and warranty durations that comport with standard industry practices and which are coordinated with bond terms will benefit FDOT over the long term through increased competition.

Shorter warranty durations and coordinated terms reduce risks, permitting the participation of smaller and minority contractors which otherwise may be precluded.

Again, we appreciate your consideration of these concerns. Please feel free to contact me should you need have questions or require further information.

Sincerely,

A handwritten signature in cursive script, appearing to read "Larry LeClair".

Larry LeClair



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*Sent via electronic mail at [pdinicola@ffae.biz](mailto:pdinicola@ffae.biz)*

December 7, 2012

Philip S. DiNicola, R.A.  
Principal  
Fontanese Folts Aubrecht Ernst Architects, P.C.  
6395 West Quaker St.  
Orchard Park, New York 14127

**RE: Duration of synthetic slate roofing system, roof replacement – Donovan Hall,  
SUNY, Institute of Technology @ Utica-Rome**

Dear Mr. DiNicola:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of companies employing licensed surety bond producers, including those in New York State, I am contacting you about the duration of the warranty requirement of a synthetic slate roofing system specified for a roof replacement project at the above referenced location. Such information has come to our attention, prompting us to express our concerns to you about the impact of long-term warranties being imposed on contractors.

A lengthy warranty period, such as one of 10 years, as specified in Section 07 31 33, poses considerable problems from a surety underwriting perspective. Sureties usually are comfortable in covering a warranty obligation of one to two years. Durations longer than two years increase substantially the uncertainty regarding underwriting projections about the contractor's future viability. Simply put, sureties cannot gauge the soundness and financial wherewithal of a particular construction company for periods extending too far into the future. The vagaries of the present economic environment further underscore the difficulty, if not impossibility, of underwriting guarantee obligations of long duration. Likewise, in the present economic environment, sureties are reviewing contract requirements more closely to discern provisions that pose special underwriting difficulties or that shift risk imprudently.

Long warranty obligations, such as those of 5 or 10 or more years, also reduce competition from the standpoint of eliminating from the bidder/proposer pool all but the largest contractors, since only large contractors can shoulder the higher risks inherent in such contracts. Small contractors effectively are precluded, for they likely will not have the sophistication to adequately price such long-term warranty obligations and likely will not have a sufficient level of financial capital on hand to provide the surety with assurance of the small contractor's fiscal strength and ability over an extended time period.

I note that this project is being undertaken by a public institution, which undoubtedly seeks to maximize the inclusion of small and disadvantaged businesses. However, the 10-year warranty imposed on the contractor runs counter to achieving such a goal and, therefore, may prove problematic for the University to achieve its overall organizational small business participation goals. Shortening the duration of the contractor's warranty will better serve the purpose of small business inclusion by maximizing, not reducing, competition.

For these reasons, NASBP respectfully requests your reconsideration of imposing a 10-year warranty requirement on the contractor performing the roofing work. A warranty term of shorter duration, such as one between one to three years, is a pragmatic approach, which is regularly underwritten, with any longer warranty duration solely provided by the manufacturer, which, again, regularly assumes such longer warranty risks.

I appreciate your consideration of our concerns, and I look forward to your response.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Mark H. McCallum", with a long, sweeping horizontal line extending to the right.

Mark H. McCallum  
CEO



**NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS**

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*Sent via e-mail at kevin.kampschroer@gsa.gov and U.S. mail.*

March 11, 2010

Kevin Kampschroer  
Director, Office of Federal High-Performance Green Buildings  
U.S. General Services Administration  
1800 F Street NW. 4209  
Washington, DC 20405-0001

Re: Warranty Requirements in GSA Contracts Involving Photovoltaic Systems

Dear Mr. Kampschroer:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade organization of professional surety bond producers and brokers, representing over 5,000 personnel who specialize in surety bonding, including issuing bid, performance, and payment bonds for construction projects, I am contacting you about concerns centering on warranty requirements contained in General Services Administration contracts involving photovoltaic systems.

We have noted in multiple GSA solicitations for work involving photovoltaic systems, such as current projects in Cleveland, Ohio and in Laguna Niguel, California, that the applicable warranty provisions call for a warranty period of “20 years” and include an efficiency or performance guarantee. Furthermore, the wording of these provisions seem to indicate that the warranties are not pass-through warranties from the manufacturer, but rather are warranty obligations expected of the contractor/design-builder and, in turn, its surety. For example, the warranty for the GSA project in Laguna Niguel states:

*“Provide a minimum of a 20-year total system warranty. No module will generate less than 90% of its specified minimum power when purchased. PV modules shall have a 20-year limited warranty guarantying [sic] a minimum performance of at least 80% of the original power for at least twenty (20) years. If the performance falls below specifications during the Contractor’s warranty period, the Contractor at the Contractor’s expense shall replace / repair the defective equipment. ...”*

A lengthy warranty period poses considerable problems from a surety underwriting perspective. Sureties usually are comfortable in covering a warranty obligation of up to two years. Durations longer than two years increase substantially the uncertainty regarding projections about the contractor’s future viability. Simply put, sureties cannot gauge the

Letter to Mr. Kampschroer  
March 11, 2010  
Page 2 of 2

soundness and financial wherewithal of a company for periods extending too far into the future. The vagaries of the present economic environment further underscore the impossibility of underwriting guarantee obligations of long duration. Long warranty obligations also reduce competition from the standpoint of eliminating from the bidder pool all but the largest contractors, since only the largest contractors can shoulder the higher risks inherent in such contracts. Small and medium-sized contractors effectively are precluded. In this economic climate, contracting considerations to maximize, not to reduce, competition should be foremost.

For these reasons, we respectfully recommend that you adopt a more pragmatic approach of shorter warranty durations of one to two years to be provided by the contractor/design-builder to the awarding agency, with any longer warranty duration solely provided by the manufacturer. If the quoted warranty language is intended solely to describe the manufacturer's obligation, please understand that, in the absence of specific, clarifying language to that effect, the surety has to and will presume that its bond covers such an obligation. The best course is to be very specific on the obligations that are and are not to be covered by the bond.

You should also be aware how efficiency or performance guarantees are viewed by sureties. Sureties are comfortable underwriting warranty obligations that cover faulty workmanship or materials, but typically are less comfortable covering obligations involving performance guarantees (i.e., a warranty that certain building systems, such as photovoltaic systems, will meet performance standards). This type of warranty implicates a design responsibility of the contractor. That is, the contractor is promising to provide a system that meets certain standards. As the contractor takes on design liability, its risk increases and, therefore, the surety's risk increases. Again, such transfer of higher risks to the contractor reduces competition for the project as a whole, and only larger contractors, if any, may be afforded surety credit for such increased risks.

NASBP appreciates your prompt attention to these concerns, and we would welcome the opportunity to discuss these matters further and to answer any questions that you may have of surety practices or the surety industry. I may be reached at 202-464-1173 or at [mmccallum@nasbp.org](mailto:mmccallum@nasbp.org).

Yours sincerely,



Mark H. McCallum  
Chief Executive Officer

cc: Larry LeClair, NASBP



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***BY ELECTRONIC TRANSMISSION (gloria.r.ritter@usace.army.mil)***

October 19, 2012

Gloria R. Ritter  
U.S. Army Engineer District, Louisville  
600 Dr. Martin Luther King, Jr. Place  
Room 821  
Louisville, KY 40202-2267

**RE: Duration of Contractor Warranty Requirements in Solicitation No. W912QR-09-R-0010 for MATOC Addressing Roofing for Army Reserve Nationwide**

Dear Ms. Ritter:

On behalf of the National Association of Surety Bond Producers (NASBP), I am contacting you regarding the extended duration of contractor warranty requirements in task orders for roofing or re-roofing construction work. Such information recently has come to our attention, prompting us to express our concerns to you about the impact of long-term warranties, those exceeding one years' duration, being imposed on contractors.

A lengthy warranty period, such as one of 5 years, poses considerable problems from a surety underwriting perspective. Sureties usually are comfortable in covering a warranty obligation of one to two years. Durations longer than two years increase substantially the uncertainty regarding underwriting projections about the contractor's future viability. Simply put, sureties cannot gauge the soundness and financial wherewithal of a particular construction company for periods extending too far into the future. The vagaries of the present economic environment further underscore the difficulty, if not impossibility, of underwriting guarantee obligations of long duration.

Long warranty obligations, such as those of 5 years or more, also reduce competition from the standpoint of eliminating from the bidder/proposer pool all but the largest contractors, since only large contractors can shoulder the higher risks inherent in such contracts. Small contractors effectively are precluded, for they likely will not have the sophistication to adequately price such long-term warranty obligations and likely will not have a sufficient level of financial capital on hand to provide the surety with assurance of the small contractor's fiscal strength and ability over an extended time period.

I note that the solicitation states: "this procurement is set aside for small business contractors." The 5-year warranty imposed on the contractor runs counter to achieving that goal and, therefore, may prove problematic for USACE to achieve its organizational small business participation

Letter to Ms. Ritter  
October 19, 2012  
Page 2 of 2

goals. Shortening the duration of the contractor's warranty will better serve the purpose of small business inclusion by maximizing, not to reducing, competition.

I also note that the 5-year warranty requirements, those on workmanship and on materials (sheet metal), imposed on the contractor in the referenced solicitation are out of keeping with the original one-year workmanship warranty requirement of the MATOC. Please refer to the "Warranty of Construction" and the "General Requirements" provisions in the MATOC, which require that the contractor furnish a one-year workmanship warranty from the date of final acceptance or government possession.

For these reasons, NASBP respectfully requests your reconsideration of imposing 5-year warranty requirements on the contractor performing the roofing work. The usual warranty term of one year is a pragmatic approach, which is regularly underwritten, with any longer warranty duration solely provided by the manufacturer, which, again, regularly assumes such longer warranty risks.

I look forward to your response, and I would be happy to answer any questions you may have.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Mark H. McCallum", with a long, sweeping horizontal line extending to the right.

Mark H. McCallum  
CEO

cc: Jennifer J. Anderson, USACE



## National Association of Surety Bond Producers

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*Sent via email at [tjohnson@agctx.org](mailto:tjohnson@agctx.org).*

October 27, 2011

Thomas L. Johnson  
Executive Vice President  
AGC of Texas  
P.O. Box 2185  
Austin, Texas 78768

### **Re: TXDOT Warranty Bond Requirement Relating to Polymer Overlay**

Dear Mr. Johnson:

I am writing on behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of member companies employing professional surety bond producers who place bid, payment, performance, and maintenance bonds for construction and infrastructure projects, including projects in the State of Texas. Recently, it has come to our attention that the Texas Department of Transportation (TXDOT) has specified certain contractual requirements, specifically a fifteen year warranty on "thin polymer overlay" coupled with a warranty bond covering that obligation, which, in the opinion of NASBP, are not realistic and may have the inadvertent impact of increasing the pricing of and lessening the competition for TXDOT projects significantly. I am writing you to provide our thoughts and concerns, as your members will be impacted by this matter, particularly if such requirements are routinely specified in the future.

Of particular note are two specification sections, which raise significant concerns from a surety perspective. They are "Special Specification 3238, Thin Polymer Overlay with Performance Warranty," and "Special Specification 5983, Warranted Construction." These specification sections make clear that the contractor winning award of the contract is expected to furnish a bond or bonds of a duration extending fifteen years from the date of final acceptance of the construction phase of the project and guaranteeing the performance of the polymer overlay. The penal value of the bond is significant, being specified at \$2,000,000.00. Special Specification 3238 does indicate that the warranty bond may be furnished by the contractor or by the manufacturer, and that the warrantor will assume responsibility for compliance with all warranty requirements. However, obtaining a bond of such lengthy duration likely will prove problematic for any bond principal, whether such principal is a construction firm or a manufacturer. Manufacturers also likely have not established prior surety bonding relationships, which take time and effort to do so, since they do not furnish bonds in the regular course of their business.

A lengthy warranty bond duration, such as for fifteen years, poses considerable problems from a surety underwriting perspective. Sureties usually are comfortable in covering a warranty obligation of several years duration. Durations longer than two or three years increase substantially the uncertainty regarding projections about the contractor's future viability. Simply put, sureties cannot gauge the soundness and

financial wherewithal of a company at a single point in time for periods that extend too far into the future.

The present economic environment further underscores the difficulty of a guarantee obligation of such long duration. Even in the best economic times, a bond for fifteen years, even for five years, if available commercially, would be unavailable to most contractors or solely available to the largest and most well-capitalized companies. In this economy, many quality contractors simply do not possess the financial wherewithal they once possessed. Long guarantee and warranty obligations effectively eliminate most competition for such contracts, thereby reducing competition and elevating pricing. Small and medium-sized contractors will be precluded. As transportation projects use public funds, contracting considerations to maximize, not to reduce, competition should be foremost policy considerations.

I hope you find these thoughts and concerns informative. Please feel free to contact me should you have questions or wish further information or assistance with this matter.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Mark H. McCallum", with a long, sweeping horizontal line extending to the right.

Mark H. McCallum  
Chief Executive Officer

## **Surety Alternatives**





**National Association of Surety Bond Producers**

1140 19th Street, NW. Suite 800. Washington, DC 20036-5104

Phone: (202)686-3700

Fax: (202)686-3656

Web Site: <http://www.nasbp.org>

E-mail: [info@nasbp.org](mailto:info@nasbp.org)

*Sent via U.S. mail and email ([Diane.cotter@usnh.edu](mailto:Diane.cotter@usnh.edu); [Denise.smith@usnh.edu](mailto:Denise.smith@usnh.edu))*

June 5, 2013

Diane J. Cotter  
Sr. Contract Officer  
USNH Dunlap Center  
25 Concord Road  
Lee, NH 03861-6659

Denise M. Smith, CPM  
Director of Purchasing & Contract Services  
USNH Dunlap Center  
25 Concord Road  
Lee, NH 03861-6659

**RE: Concerns Regarding Consideration of Alternative to Statutorily-Required Bonds in  
RFQ/P No. 11039-0001, Rhodes Hall Nursing Labs, Keene State College**

Dear Ms. Cotter and Ms. Smith:

The National Association of Surety Bond Producers (NASBP) is a national trade association of professional surety bond producers, representing firms employing licensed resident and nonresident producers placing surety bonds on contracts in New Hampshire and in other jurisdictions throughout the United States and its territories. A stipulation in a Request for Qualifications/Proposals, USNH RFQ/P #11039-0001, addressing construction management services in connection with Rhodes Hall Nursing Laboratory at Keene State College recently has come to our attention and has caused concern. Of specific concern is a provision, numbered 6.9.2, found on page 8 of the RFQ/P, which states that USNH will consider accepting an alternative insurance product in place of statutorily-required performance and payment bonds. Provision 6.9.2 reads: 'In lieu of "conventional" payment and performance bonds, the University will consider accepting Subguard® as provided by Zurich Insurance Company.' We find this stipulation to be problematic on a number of practical and legal bases.

First, a subcontractor default insurance product, such as Subguard®, and performance and payment bonds furnished by the prime contractor/CM are not equivalent in function or coverage. In fact, a subcontractor default insurance policy should never be considered a replacement or substitute for performance and payment bonds furnished by the prime contractor/CM to the project owner. A subcontractor default insurance (SDI) policy is an insurance product to address the prime contractor's risk, not the project owner's risk, of subcontractor failure. The prime contractor/CM is the insured party and the coverage of the policy is triggered by a subcontractor default. SDI does not provide a benefit to the project owner for the default of the prime contractor/CM, thus, in the absence of performance and

payment bonds from the prime contractor/CM, the project owner *retains the performance and payment risk of the prime contractor/CM*. SDI also does not provide payment remedies for the benefit of unpaid subcontractors and suppliers. However, these critical benefits—a performance guarantee to the project owner and payment remedies to subcontractors and suppliers—are present when the prime contractor/CM furnishes the project owner with performance and payment bonds.

Beyond this evident disparity in benefits, performance and payment bonds, not SDI policies, are statutorily required of contractors performing public construction contracts in New Hampshire. N.H. Rev. Stat. § 447:16 establishes that any public works contract that equals or exceeds \$35,000.00 requires the furnishing of a surety bond or other sufficient security “conditioned upon the payment by the contractors and subcontractors for all labor performed or furnished....” A plain reading of § 447:16 clearly indicates that SDI cannot satisfy the statutory requirement.

It also is critical to note that public officials are prohibited from directing contractors to purchase a contract of insurance from a particular insurance company, broker, or agent. Under New Hampshire law, specifically, N.H. Rev. Stat. § 95:1-a, public officials are barred from such activity. The applicable statute states, in part, the following: “With respect to any public works or construction contracts of any type that are paid for by public funds of the state or by any of its political subdivisions, or of any public authority, it is unlawful for any officer or employee of the state, or of any of its political subdivisions, or of any public authority, either directly or indirectly to require the builder or the bidder to make application to or to get any surety bond or contract of insurance specified in the building or construction contract from a particular surety or insurance company, agent, or broker. It is unlawful for any officer or employee of the state, of any of its political subdivisions, or of any public authority, or for any person who purports to act for such an officer or employee to negotiate, make application for, or to get any such a surety bond or contract of insurance which can be obtained by the builder, bidder, contractor, or subcontractor on the building or construction contract.”

The practice of directing contractors to purchase insurance or surety bonds from a particular source by public officials is detrimental to the welfare and business relations of construction firms. Like New Hampshire, most states and the federal government have enacted statutory prohibitions against such practices. *In Guidelines for a Successful Construction Project*, a construction industry document developed by the Associated General Contractors of America, the American Subcontractors Association, and the Associated Specialty Contractors, Inc., which is available at [www.constructionguidelines.org](http://www.constructionguidelines.org), the guideline on surety bonding informs on the practice in relation to surety bonds. It reads:

“Directed suretyship is the practice of forcing a contractor to use a designated surety producer or surety company unfamiliar with the contractor’s needs and service requirements. It imposes a relationship not voluntarily assumed and subjects the contractor to disclose business information to persons that may not act in the best interest of the contractor.

Further, the practice of directed suretyship may serve to lessen competition on projects: a single surety likely will not accept all bidders and many contractors likely will be reticent to disclose confidential personal and business financial information to an unknown third party. For these reasons, most states and the federal government have enacted statutes that prohibit the practice of directed suretyship.”

For all of the foregoing reasons, I respectfully request that you remove provision 6.9.2 in its entirety from RFQ/P No. 11039-0001.

NASBP appreciates your prompt consideration of our concerns and of our requested action. Please do not hesitate to contact me should you require further information or have questions regarding this letter.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Mark H. McCallum", with a long horizontal flourish extending to the right.

Mark H. McCallum  
Chief Executive Officer

cc: Larry LeClair, NASBP  
Martha Perkins, Esq., NASBP



## **Public Owners Waiving Statutory Requirements**





**National Association of Surety Bond Producers**

1140 19th Street, NW. Suite 800. Washington, DC 20036-5104

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**BY ELECTRONIC TRANSMISSION ([schuh@nku.edu](mailto:schuh@nku.edu); [bairde1@nku.edu](mailto:bairde1@nku.edu)) AND U.S. MAIL**

May 9, 2013

Ms. Mary Paula Schuh  
Director, Office of Campus and Space Planning  
Northern Kentucky University  
Lucas Administrative Center, 726  
Nunn Drive  
Highland Heights, KY 41099

Mr. Eli Baird  
Procurement Services, Bid Specialist  
Northern Kentucky University  
Lucas Administrative Center, 617  
Nunn Drive  
Highland Heights, KY 41099

Re: Problematic Terms in NKU Construction Management Services Agreement

Dear Ms. Schuh and Mr. Baird:

The National Association of Surety Bond Producers ("NASBP") is a national trade association of professional surety bond producers, representing firms employing licensed resident and nonresident producers placing surety bonds on contracts in the Commonwealth of Kentucky and in other jurisdictions. A proposal solicitation involving construction management services for a campus recreation center project at Northern Kentucky University recently has been brought to our attention. More specifically, Article 36 – Performance and Payment Bonds of the NKU Construction Management Services General Conditions document contains problematic language addressing (1) the amount of the performance bond required on the construction manager and (2) the need for a countersignature by a "licensed resident agent." In both instances, we believe these requirements to be contrary to Kentucky law and inapposite to the best interests of Northern Kentucky University.

Kentucky Revised Statutes Chapter 45A applies to construction of capital projects, including those carried out by institutions of higher learning, undertaken with the expenditure of public funds by the Commonwealth. KRS 45A.190 provides that, when a construction contract exceeds \$40,000, a performance and payment bond equivalent to 100% of the contract price must be furnished. KRS 45A.030(6) defines the term "construction management-at-risk" and establishes that contracts utilizing that delivery method are subject to "the bonding requirements of KRS 45A.190." Clearly, a requirement of a performance bond in 100% of the contract price is the applicable law in situations involving CM-at-risk arrangements. However, the performance bond requirement in the NKU Construction Management Services General Conditions document, Article 36, states: "The Construction Manager shall furnish a Performance Bond in the form provided in the Contract Documents in the full amount of the Contract Amount less the amount bonded by the individual Trade Contractors as security for the faithful performance of the Contract." This does not comply with the dictates of KRS 45A.190. To do so, the construction manager must furnish the contracting entity with a performance bond for 100% of the

“Contract Amount.” Reducing the performance bond amount by the amounts bonded by the individual “Trade Contractors” is not equivalent to a performance bond in 100% of the contract price of the work being contractually undertaken by the construction management firm. Interestingly, and fortunately, a similar requirement is not imposed on the payment bond; the language addressing the “Payment Bond” does not require a reduction in the amount of the payment bond by the bond amounts of the individual trade contractors.

It should be noted that a performance bond from the construction manager to the contracting entity in less than 100% of the contract amount does not provide full protection to the contracting entity, even if the contracting entity has the status of a dual obligee on the performance bonds provided by the trade contractors to the construction manager. For example, when the construction manager provides a performance bond in 100% of the contract price, in the event of a default by that construction manager, the contracting entity has the ability to claim up to the full amount of the bond, which represents the original, full price of the contract, to rectify the costs of the default. The contracting entity also need only work with one surety to address its claim.

This is not the case in the situation presently described in Article 36. The performance bond furnished by the construction manager is reduced by the amounts of the bonds furnished by trade contractors. This is likely to be a substantial reduction in the amount of the bond provided by the construction manager and many times less than the amount of the original contract price of the work. In the event of a default by the construction manager, the contracting entity could only recover up to the face amount of the construction manager's bond; the performance bonds of the trade contractors would not be implicated if the material breach solely arises from the actions or inactions of the construction manager.

For example, if the contract amount to the construction manager is \$50 million and the construction manager does not self-perform any of the work, the construction manager would subcontract probably 90% of that amount or \$45 million and only have to provide a \$5 million performance bond to guarantee the performance of the construction manager's work. Assume that the construction manager starts having problems on the job, makes bad scheduling decisions, incurs delays to the work, and then closes its doors and files bankruptcy. Next, all the subcontractors walk off the job and terminate their subcontracts because they have not been paid, despite the Owner paying the construction manager. To complete the project, new subcontractors will have to be hired (at a premium price) to complete the subcontract work. Errors in the work would have to be corrected. Delay costs, acceleration costs, price escalations, extended overhead costs will have to be addressed before work restarts. Further, another construction manager will need to be retained to clean up the mess and complete the project. The costs associated with the default of the construction manager, say, are \$12 million but the construction manager's performance bond is only for \$5 million. While the Owner has the performance bonds of the subcontractors, the subcontractors did not do anything wrong and properly terminated after the construction manager quit paying them, breaching the subcontracts. So the Owner does not have access to the subcontractors' performance bonds. Consequently, the Owner will get \$5 million from the construction manager's performance bond surety company but the additional \$7 million in costs associated with the original construction manager's default will have to be paid by the Owner. Had the Owner received a performance bond from the construction manager in the amount of 100% of the contract amount, the \$12 million would be taken care of by the surety company bonding the construction manager.

It also is worth noting that, in a situation with multi-party defaults by the construction manager and trade contractors, the contracting entity faces the increased legal, administrative, and resource burden of proceeding on claims against multiple sureties. From statutory and common-sense standpoints, the current performance bond requirement is, at best, ill-advised and will leave you less protected.

The resident agent countersignature requirement also is troubling. Resident agent countersignature requirements have been eliminated throughout the United States, through acts of state legislatures or through judicial decisions declaring them unconstitutional. Such courts have found statutes mandating that only resident agents can countersign policies to discriminate unlawfully against licensed non-resident agents, violating their rights under the Privileges and Immunities Clause and the Equal Protection Clause of the U.S. Constitution. Please consult, for example, *Council of Insurance Agents & Brokers v. Tom Gallagher*, in which a federal district court declared Florida's statute unconstitutional, and *Council of Insurance Agents v. Molasky-Arman*, in which a federal district court declared Nevada's statute unconstitutional. For these reasons, we were surprised to see a resident agent countersignature requirement in the solicitation materials. However, a requirement for a countersignature from a licensed agent, whether resident or nonresident, would not violate constitutional protections.

We respectfully request your immediate review and consideration of our concerns. Please do not hesitate to contact me should you have any questions concerning this letter.

Yours sincerely,

A handwritten signature in black ink, reading "Mark H. McCallum". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Mark H. McCallum  
Chief Executive Officer



**National Association of Surety Bond Producers**

1140 19th Street, NW. Suite 800. Washington, DC 20036-5104

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***Sent via U.S. mail and email at [skillestadj@dawsoncountymail.com](mailto:skillestadj@dawsoncountymail.com).***

February 8, 2013

Mr. James Skillestad, Chairman  
Office of County Commissioners  
County of Dawson  
207 W. Bell St.  
Glendive, MT 59330

**Re: Decision to Waive Payment and Performance Bonds on FEMA Funded Projects**

Dear Mr. Skillestad:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of companies employing licensed surety bond producers, including those resident and non-resident in the State of Montana, I am contacting you regarding your failure to require performance and payment bonds on projects funded with monies from FEMA grants, which is in derogation of federal procurement requirements and Montana statutes. Such information has come to the attention of NASBP, prompting us to contact you and to request your immediate reconsideration of the decisions to waive performance and payment bonds on one or more of these projects.

FEMA grants are subject to federal regulations that address the procurement requirements that are to be met by grantees and sub-grantees. 44 CFR Part 13, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, includes requirements addressing the necessity of having performance and payment bonds in 100% of the contract price for contracts involving construction. Part 13 also establishes that a grantee in certain circumstances may follow its own procurement policies and procedures so long as those procedures meet or exceed the federal procurement standards in 44 CFR 13.36.

Under 18-2-201 of the Montana Code Annotated, the state and its political subdivisions must require that persons and entities receiving award of public contracts furnish the state or political subdivision with bonds covering the performance of the contract obligations and the payment of providers of materials and labor on the project. Montana law also makes clear that political subdivisions that fail to require performance and payment bonds as security on public contracts assume liability for amounts unpaid and owed to any persons or entities furnishing labor, materials and equipment. 18-2-202 of the Montana Code Annotated states, in pertinent part, that if "any board, council, commission...waives or fails to take the security required or authorized by 18-2-201, the state or the county...is liable to the persons mentioned in 18-2-201 to the full extent and for the full amount of all of the contract debts by any subcontractor as well as the contractor."

The purpose behind performance and payment bond requirements is to ensure the capability of the contractors undertaking publically-funded work and to provide guarantees of performance to the contracting entity and guarantees of payment to subcontractors and materials suppliers. Such guarantees are vitally important to protect precious taxpayer dollars and to ensure the completion of contracts utilizing public funding. These guarantees take on even greater significance in times, such as the present, when many construction companies have been and continue to be under financial stress.

For all of the above reasons, we urge your reconsideration of any decisions to waive bonds. We appreciate your consideration of our concerns and look forward to receiving your prompt response.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Mark H. McCallum", with a long horizontal flourish extending to the right.

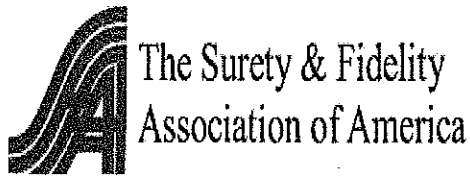
Mark H. McCallum  
Chief Executive Officer

cc: Joe Sharbono, Road Supervisor, County of Dawson ([jsharbono@dawsoncountymail.com](mailto:jsharbono@dawsoncountymail.com))  
Larry LeClair, NASBP



## **Green Building**





August 13, 2007

Linda Argo, Commissioner  
Dept. of Consumer & Regulatory Affairs  
Government of the District of Columbia  
941 North Capitol Street NE  
Washington, DC 20002

**Re: Performance Bond Requirements in DC Green Building Act of 2006**

Dear Ms. Argo:

The Surety and Fidelity Association of America ("SFAA") is a trade association of insurance companies licensed to write fidelity and surety bonds headquartered in the District of Columbia. The National Association of Surety Bond Producers ("NASBP") is a national trade association of surety bond producers and agents headquartered in the District of Columbia. SFAA and NASBP represent the sureties that write the majority of surety bonds in the United States, and the agents who represent them.

SFAA and NASBP commend the Council of the District of Columbia for enacting a law to address "green building" and sustainability requirements for public and private construction. The new law, however, includes bond requirements that, if not clarified significantly, may make sureties reticent to issue such bonds. Concerns and other issues with respect to the bond requirements in the new law include:

- The new law incorrectly uses the term "performance bond," which is likely to engender confusion and misunderstanding in the construction and bonding communities. A performance bond is one in which the surety assures one party, termed the obligee, that another party, termed the principal, will perform the contract in accordance with its terms and conditions. Performance bonds typically are written for the full contract price of the contract. If the principal fully performs the contract, the bond is null and void. However, if the principal is declared in default by the obligee, the surety will investigate the nature of the claim to ascertain

what response, if any, is warranted under the bond. In the context of construction, those options include financing the original contractor to complete the contract, finding a replacement contractor to complete, or disbursing funds to the obligee to complete the contract up to the penal sum. In short, the performance bond assures that the construction contract, and therefore, the project, will be completed.

The “performance bond” described in the new law under Section 6 does not function in the same manner described above. Rather, it seems to function more in the manner of a license or compliance bond, which typically guarantees compliance with a law or code. Thus, the required “performance bond” serves not to assure performance of the building contract but to assure compliance with the Act’s green building requirements by imposing a penalty for noncompliance. For example, where the building fails to meet verification requirements, “all or a part of the performance bond shall be forfeited to the District and deposited in the Green Building Fund”. Moreover, forfeited amounts are not for the purpose of bringing noncompliant buildings into compliance, but for such purposes as funding the costs of staffing and of technical assistance, inspections and monitoring of green buildings, outreach and educational efforts on green building practices, and incentive funding for private buildings.

- The Act does not designate which party is to furnish the “performance bond.” For example, on private projects, it is unclear whether the private owner or developer is to furnish the “performance bond”. It raises questions as to whether the private owner or developer can delegate that duty to another party, such as the architect or construction contractor. It is unclear which party is in the best position to make sure that the building meets the requirements of the Act, especially since, under the Act, verification may occur up to two years after receiving the first certificate of occupancy.

The Act specifically adopts LEED (Leadership in Energy and Environmental Design) criteria for its requirements. LEED is a rating system, not an accreditation standard. Under LEED criteria, multiple parties may have responsibilities: the building owner, the design professional, and the contractor all may have responsibilities that bear upon the fulfillment of LEED criteria. There are many choices or decisions that may be made in order to attain the number of points needed for each LEED category, and those choices or decisions may not

be categorically design or construction decisions. Thus, whether the building achieves LEED certification will depend on the collective decisions of the building owner, the retained design professional, and the construction contractor.

Only one party will furnish the bond, however. In making a decision to lend surety credit, the surety must consider the nature and extent of that party's undertaking and whether that party, through its qualifications and financial means, can carry out the undertaking successfully. From the perspective of complying with green building requirements, neither the design professional's nor the contractor's responsibilities will involve the complete undertaking. Rather, the building owner or developer, as the originator of the building project that retains the design professional and contractor, holds the ultimate responsibility for whether the building achieves compliance with the Act's requirements.

- The "performance bond" amounts set by the Act appear to bear no relation to any quantifiable loss occasioned by noncompliance with green building requirements. The Act premises the amount of the bond on some percentage of the total cost of the building based on size of the building. The Act does contain a limitation on the maximum amount of a performance bond at \$3,000,000. However, such bond amounts are excessive, especially since the purpose of the bond appears to be to penalize noncompliance with the Act's requirements and to fund staffing and other initiatives of the city department charged with oversight of the verification procedures of the green building program.

Moreover, because of the nature and amount of the "performance bond," some sureties might require collateral as an underwriting condition, which, in turn, may make obtaining the bonds more difficult for some parties.

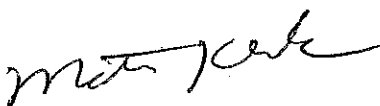
- By requiring that bond amounts forfeited to the District fund staffing, inspections, operations, and green building educational initiatives, the law creates an inherent conflict of interest in the verification process under the Act—that is, the same city department in charge of conducting or overseeing the verification procedures is funded by bond amounts collected for noncompliance with green building requirements. This will impose considerable tension on objective verification of green building requirements.

Letter to Ms. Argo  
August 13, 2007  
Page 4 of 4

- Many other important bond underwriting factors with respect to the "performance bond" are left unaddressed in the Act, such as the term of the bond or whether the bond may be cancelled by the surety by notice to the obligee.

For these and other reasons, we respectfully request an opportunity to meet with you to discuss further our concerns with this law. Without needed clarifications and modifications, sureties likely will be reticent to write these "performance bonds," leaving letters of credit or cash placed in escrow accounts as the only options available to meet the Act's requirements, both of which will be unattractive to contractors.

Respectfully submitted,



Matthew Klimczak  
Director of Underwriting  
SFAA  
1101 Conn. Avenue, NW  
Suite 800  
Washington, DC 20036



Mark McCallum  
General Counsel & Director of Gov. Relations  
NASBP  
1828 L Street, NW  
Suite 720  
Washington, DC 20036

cc: Charles Bergen  
Chair, Sustainable Design Subcommittee  
Office of Zoning, 441 4th Street, NW, Suite 220-S,  
Washington, DC 20001



The Surety & Fidelity Association of America  
1101 Connecticut Avenue, NW, Suite 800  
Washington, DC 20036



The National Association of Surety Bond Producers  
1828 L Street, NW, Suite 720  
Washington, DC 20036

March 13, 2009

Ms. Cynthia Brock-Smith  
Secretary to the Council  
John A. Wilson Building, Room 5  
1350 Pennsylvania Ave., NW  
Washington, DC 20004

Dear Ms. Brock-Smith:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association of approximately 450 insurance companies that are licensed to provide surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of surety bonds in the District of Columbia.

NASBP and SFAA submit this written testimony for inclusion in the official record at the public oversight roundtable on Green Building Practices to be conducted by Councilmember Mary M. Cheh, Chairperson of the Committee on Government Operations & the Environment, on March 18, 2009. The performance bond requirements in the Green Building Act of 2006 (the “Act”) are of particular concern to NASBP and SFAA. In fact, NASBP and SFAA have articulated their concerns in writing and in person to District of Columbia regulatory agencies previously. Attached for your reference are copies of letters sent to Linda Argo, Commissioner of the Department of Consumer & Regulatory Affairs, dated August 13, 2007, and to George Hawkins, Director of the Department of the Environment, dated January 28, 2009.

For the reasons stated in the attached letters and repeated below, NASBP and SFAA believe that the performance bond requirements of Section 6 of the Act are fundamentally flawed and that any implementing regulations are unlikely able to

rectify these faults.

A surety bond is a form of insurance by which the obligations of one party (the principal) owed to another party (the obligee) are secured by a third party (the surety). The two services provided by a surety bond are prequalification and financial protection. A surety seeks to avoid default by providing a bond only to those entities that it has determined is capable of performing the underlying obligation. In the event there is a default of the underlying obligation, the surety's obligations are triggered and it holds the obligee harmless for damages caused by the default, up to the limit of the bond. Thus, a bond is a suitable risk mitigation mechanism when the obligee is owed an obligation from a particular party and wants the assurance that the obligation will be performed. That assurance is provided through prequalification and financial protection. The bond requirements and the regulatory framework as set forth in the Act raises significant questions of whether a bond (or other security) is the appropriate risk mitigation mechanism.

- Section 6 of the Act leaves many critical matters unclear or unaddressed. Who, for example, is to furnish the bond? It is not clear from whom the District expects the obligation. Can that obligation be delegated? In addition, what is the scope and duration of the obligation, and what constitutes a default of that obligation.
- The performance bond requirement appears to serve solely as a means to impose substantial financial penalties for the purpose of appropriating funds for the "Green Building Fund," rather than a means to assure performance and protect the District from damages caused by a default of performance. As defined in the Act, the Green Building Fund "shall be used" to pay for "[s]taffing and operating costs to provide technical assistance, plan review, and inspections and monitoring of green buildings," "[e]ducation, training and outreach" and "[i]ncentive funding." Thus, forfeited bond amounts are not used for the purpose of remedying the default by bringing noncompliant buildings into compliance with green requirements. Rather, they serve as a de facto tax on those supplying the bonds and their sureties to fund government staffing and programming on green building initiatives. This funding structure also calls into question the basic fairness of the performance bond requirement, especially since the agency administering the verification process or contracting with a third-party entity to conduct the verification process stands to gain a "fatter" budget by findings that a party does not meet "verification requirements."
- The Act provides that "all or a part of the performance bond" may be forfeited to the District. How does the District determine the specific amount to be forfeited, especially since the bond serves simply as a funding mechanism and not as a means of redress for specific damages suffered?

Letter to Ms. Brock-Smith  
March 13, 2009  
Page 3 of 3

In short, these fundamental flaws will constitute a substantial barrier for many sureties to write these obligations.

NASBP and SFAA respectfully request the introduction of legislation that would amend the Green Building Act of 2006 to remove the performance bond requirement as presently written. NASBP and SFAA remain willing and able to assist the Council with crafting a surety bond requirement that is workable and satisfactory to the Counsel. However, we maintain that a revised bond requirement will require a reworking of the basic security structure envisioned by the Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark McCallum", with a long horizontal flourish extending to the right.

Mark McCallum  
NASBP

A handwritten signature in black ink, appearing to read "Robert J. Duke", with a long horizontal flourish extending to the right.

Robert J. Duke  
SFAA

Enclosures



## **Countersignature Requirements**





**NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS**

1828 L Street, NW, Suite 720  
Washington, DC 20036-5104  
Tel: 202.686.3700  
Fax: 202.686.3656  
[www.nasbp.org](http://www.nasbp.org)

Sent via Federal Express and e-mail to [rjbec@miamidade.gov](mailto:rjbec@miamidade.gov)

August 4, 2010

Mr. Richard J. Bechtold  
Construction Contracts Coordinator  
Design and Construction Division  
General Services Administration Department (GSA)  
111 NW 1<sup>st</sup> Street, Suite 2340  
Miami, FL 33128

Re: Countersignature requirements for Project/Contract Number GSA W20167

Dear Mr. Bechtold:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade organization of professional surety bond producers and brokers, representing over 5,000 personnel who specialize in surety bonding, whose membership includes licensed resident bond agents and licensed non-resident bond agents in Florida, I am writing you to respectfully request your prompt review of resident agent countersignature requirements placed in recent contract bid solicitations, including in GSA Project Number GSA W20167 (Fleet Shop 3C Additional Service Bays Metal Building Expansion, GSA Contract No. W20167).

It has come to my attention that your office required the contract bond be countersigned by the surety's "resident Florida agent." This requirement appears on page 76, located in "00120 Supplemental General Covenants and Conditions, Prepared by CAS/DCSD-Revised 3-30-10."

However, according to section §624.425 of the Florida Statutes the term "a resident of this state" was removed in 2004, when the Florida legislature removed the resident agent signature requirement. I have attached, as an exhibit to this letter, a photocopy of the applicable Florida statute, §624.425, and an annotated version, which indicates the history of amendments to this law.

Such an action by the Florida legislature properly was in keeping with the state legislative trend to repeal resident agent countersignature requirements as wholly outdated with respect to modern business practices and at odds with federal constitutional law. Judicial decisions interpreting the resident agent countersignature statutes in other states clearly established that such requirements ensure a practice of disparate treatment between licensed nonresident agents and licensed resident agents.

I am attaching also the FL Informational Bulletin (2003-004), dated November 12, 2003, informing property, casualty and surety insurers and general lines insurance agents of a court decision that affected the way nonresident general lines agents conduct business in Florida. In the *Council of Insurance Agents and Brokers v. Tom Gallagher* (Case No. 4:02cv208-RH), the United States District Court for the Northern

District of Florida ruled that Sections 624.425, 626.741 and 626.927 of Florida Statutes violated the United States Constitution to the extent that they denied the same rights and privileges to Florida licensed nonresident insurance agents that they afforded to Florida-licensed resident insurance agents. Each of these sections of law restricted the ability of nonresident general lines agents to do business in Florida. As I stated earlier, the Florida legislature acted accordingly by removing the “a resident of this state” language in 2004.

NASBP respectfully requests your immediate action to review your practices so that (1) nonresident and resident licensed agents are placed on substantially equal terms and (2) no unconstitutional countersignature preferences for licensed resident agents are included in existing or future bidding documents.

NASBP appreciates your attention to this important matter and looks forward to your prompt response on the requested actions.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Mark H. McCallum', with a long, sweeping horizontal line extending to the right.

Mark H. McCallum  
Chief Executive Officer

Attachments



**NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS**

1828 L Street, NW, Suite 720

Washington, DC 20036-5104

Tel: 202.686.3700

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[www.nasbp.org](http://www.nasbp.org)

Sent via e-mail to [jmcassoc@bellsouth.net](mailto:jmcassoc@bellsouth.net) and [john.davis@la.gov](mailto:john.davis@la.gov)

November 22, 2010

Mr. Jerry M. Campbell & Associates

802 North Blvd.

Baton Rouge, LA 70802

Mr. John L. Davis

Division of Administration

Office at Facility Planning and Control

Claiborne Office Building, 1201 North Third Street,

Conference Room 1-145

P.O. Box 94095

Baton Rouge, LA 70804-9095

Re: Countersignature requirements for Project Number: 19-601-98B-05, Part 6 (see attached)

Dear Mr. Campbell and Mr. Davis:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade organization of professional surety bond producers and brokers, whose membership includes licensed resident bond agents and licensed non-resident bond agents conducting business in Louisiana, I am writing you to respectfully request your prompt review of resident agent countersignature requirements placed in a recent contract bid solicitation for the Parking Garage and Shell Space at Louisiana State University located in Baton Rouge, LA for *Project Number 19-601-98B-05, Part 6*. It has come to my attention that the Office of Planning and Control is requiring that bid bonds be “countersigned by a person who is under Contract with a surety as a licensed agency in this State and who is residing in this State.”

You may not be aware that in 2001 the Louisiana Legislature passed and the Governor signed, effective July 1, 2001, Act No. 138 (H.B. 1032), (see attached) “Public Contracts, Works, Improvements—Public Bid Law—Deletion of Countersignature Requirements,” which repealed R.S. 38:2216(A)(2) and 2218 (B), relative to the Public Bid Law. This Act deleted countersignature requirements on bonds for the construction or doing of any public works by resident agents; and deleted the bid bond countersignature requirement from certain public contract bids.

Also, please refer to the attached Memorandum OSP02-02 dated August 15, 2001 from the Director of State Purchasing, Denise Lea, to all State Agencies and Political Subdivisions Purchasing Personnel announcing the changes to Procurement Laws/2001 Regular Legislative Session reaffirming the legislature’s intent.

You should note that resident agent policy countersignature requirements have been eliminated elsewhere in the United States through acts of state legislatures or through judicial decisions declaring them unconstitutional. Such courts have found that statutes mandating that only resident agents may countersign insurance policies discriminate unlawfully against licensed non-resident agents, violating their rights under the Privileges and Immunities Clause and the Equal Protection Clause of the U.S. Constitution. Please consult, for example, the *Council of Insurance Agents and Brokers v. Tom Gallagher*, in which a federal district court declared Florida's statute unconstitutional and the *Council of Insurance Agents v. Molasky-Arman*, in which a federal district court declared Nevada's statute unconstitutional

NASBP respectfully requests your immediate action to review your practices so that (1) nonresident and resident licensed agents are placed on substantially equal terms and (2) no unconstitutional countersignature preferences for licensed resident agents are included in existing or future bidding documents.

NASBP appreciates your immediate attention to this important matter and looks forward to your prompt response on the requested actions.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Mark H. McCallum', with a long, sweeping horizontal line extending to the right.

Mark H. McCallum  
Chief Executive Officer

Attachments



**National Association of Surety Bond Producers**

1140 19<sup>th</sup> Street NW, Suite 800. Washington, DC 20036-5104

Phone: (202)686-3700

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Web Site: <http://www.nasbp.org>

E-mail: [info@nasbp.org](mailto:info@nasbp.org)

April 11, 2012

Delivered via email to: [dcswawendy@dejazzd.com](mailto:dcswawendy@dejazzd.com)

Ms. Wendy L. Marburger, Office Manager  
Delaware County Solid Waste Authority  
583 Longview Road  
Boyertown, PA 19512

RE: Countersignature requirement for Contract No. 3-040412

Dear Ms. Marburger:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association representing firms employing surety bond producers, including licensed resident and licensed non-resident agents placing contract surety bonds in Pennsylvania, I am contacting you about a requirement stated in the "Bid for Capping for the Delaware County Solid Waste Authority," located in Earl Township, Berks County, Pennsylvania. Specifically, my concern is with Section 19.4, which requires the bid bond to be signed by a "Pennsylvania Licensed Resident Agent." There is no statute or law in Pennsylvania that provides a preference to licensed resident agents versus licensed non resident agents.

You should note that state statutes mandating resident agent countersignature requirements on insurance policies have been uniformly struck down in court decisions across the United States as such statutes impose requirements that are unconstitutional. All states having such statutes have repealed them as being wholly outdated with respect to modern business practices and at odds with federal constitutional law. On constitutional grounds, licensed nonresident agents must be given the ability to conduct business on substantially equal terms with licensed resident agents.

For these reasons, NASBP respectfully requests that you immediately amend Contract No. 3-040412, Section 19.4, to make clear that both licensed resident agents and licensed non-resident agents may sign the bid bond.

NASBP appreciates your attention to this important matter and looks forward to your prompt response on the requested actions.

Please feel free to contact me at 202-686-3700 or [lleclair@nasbp.org](mailto:lleclair@nasbp.org) if you have any further questions.

Sincerely yours,

A handwritten signature in black ink, reading "Larry LeClair". The signature is written in a cursive, flowing style.

Larry LeClair  
Director, Government Relations

## **Excessive Liquidated Damages**





**National Association of Surety Bond Producers**

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February 24, 2012

Mr. Ken Grube

Samet/Barton Mallow/SRS Spartan Village Phase 1, a JV Co.

309 Gallimore Dairy Rd.

Greensboro, NC 27409

Re: Subcontract Terms/Liquidated Damages Inapposite to Subcontractor & Disadvantaged Business Participation

Dear Mr. Grube:

I wish to make you aware of concerns that the National Association of Surety Bond Producers (NASBP), a national trade organization of professional surety bond producers, whose membership includes firms employing licensed surety bond producers placing bid, performance, and payment bonds throughout the United States, including in North Carolina, has regarding the flow down requirement of liquidated damages to subcontractors performing work on the UNC-Greensboro Spartan Village Project. In the opinion of NASBP, the liquidated damages requirements that flow down to subcontractors will stifle overall subcontractor competition for the project and, in addition, will sabotage and subvert the stated project goals of “encouraging participation of Minority or Women Owned Business Enterprises/Historically Underutilized Businesses.” Such liquidated damages requirements appear excessively high and are uncapped, constituting a substantial risk to subcontractors of all types and sizes.

It is worth noting that a surety extends surety credit to those construction firms that the surety deems to possess the requisite experience, equipment, management capabilities, and financial wherewithal to perform the undertaken contract obligation successfully. As part of its assessment, the surety evaluates the risks presented in the contract obligations and ascertains if such risks are within the control and the means of the construction firm. Those risks that are outside of the control and means of the construction firm will not be managed effectively by the firm, making the extension of surety credit highly unlikely. Unreasonable and excessive assessment of liquidated damages may outstrip the capabilities and risk tolerances of even the largest subcontracting firms. Moreover, MWBE/HUB firms will be at a particular disadvantage, as they often do not possess the capabilities and financial wherewithal to assume substantial contract risks. They cannot finance or self-insure against such risks. Excessive risks, such as the high and uncapped liquidated damages called for in the UNC-Greensboro Spartan Village Project, may negate the ability of most subcontracting firms to secure surety credit and to compete for associated subcontracts, and may virtually eliminate subcontracting opportunities for MWBE/HUB firms.

To increase subcontractor bidder interest and to attract a higher percentage of MWBE/HUB firm participation, revisions of the liquidated damages requirements are necessary. For example, consideration for limiting the assessment of liquidated damages against specific subcontractors to a set maximum percentage of the subcontract value allow subcontractors and their sureties to better quantify the risk associated with subcontract performance. Such a revision should translate into less onerous terms, reducing risks to a scale that can be better managed and assumed by subcontracting firms, including MWBE/HUB firms. Higher bidder interest and MWBE/HUB participation and enhanced reputation within the construction community will be tangible benefits of setting a reasonable and proportionate liquidated damages requirement.

Thank you for your consideration of our concerns and for your attention to these risk issues.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Mark H. McCallum", with a long, sweeping horizontal line extending to the right.

Mark H. McCallum  
Chief Executive Officer

cc: Larry LeClair, NASBP

