



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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June 7, 2010

Sent via e-mail at emscmagts@mail.nysed.gov and U.S. Mail

Ms. Deborah Cunningham
NYS Education Department
Office of Educational Management Services
Room 876 EBA
Albany, NY 12234

Re: Deletion of bond requirements on Coxsackie-Athens Central School District; District Wide Renovations – Phase 1; SED Project Control Numbers: 19-05-01-04-0-001-013, 19-05-01-04-0-006-011, 19-5-01-04-0-007-011.

Dear Ms. Cunningham:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association which serves a membership of firms with personnel of over 5,000 surety agents and brokers, including those resident and serving businesses in New York State, I am writing to express our considerable alarm about and concerns over a recent procurement for improvements to Coxsackie-Athens High School, Coxsackie Elementary School, and Arthur Elementary School. More specifically, Addendum Number 2, dated May 24, 2010, to the bidding documents for those improvements provided that the Coxsackie-Athens Central School District would not require performance and payment bonds from the bidder receiving award. It is not clear on what grounds that decision was made; however, **NASBP firmly believes that that decision is contrary to applicable statutory requirements and not in the best interests of the school district.** Such a decision, in fact, places project risks unnecessarily on the shoulders of taxpayers, who, in the absence of performance and payment bonds, will shoulder the costs of any contractor default.

As I am sure you are aware, the New York legislature has mandated payment bonds for school district construction projects. Section 137 of the State Finance Law clearly states “the [state] comptroller may or the other appropriate official, respectively, shall nevertheless require prior to the approval of any such contract a bond guaranteeing prompt payment of moneys due to all persons furnishing labor or materials...” Moreover, the actions of the Coxsackie-Athens Central School District seem in clear contravention of your department’s policies (*attached*) regarding capital construction projects, which state that both a payment bond and a performance bond are required for school construction contracts. Why would the school district want to place itself in such a politically, legally, and financially precarious position during this period of tight and even deficit budgets? Can the school district really afford to ignore the clear dictates for surety bonds and forego such protection?

Letter to Ms. Deborah Cunningham
June 7, 2010
Page 2 of 2

I can assure you that the surety industry is strong and competitive, providing available and affordable bonding capacity to qualified small, medium, and large contractors performing public and private construction work. The current economic climate makes the observance of and adherence to bonding requirements, in the form of bid, performance and payment bonds, imperative. The bond producer and the surety underwriter ensure that construction companies that merit surety credit go through rigorous underwriting processes, demonstrating those companies' qualifications for and ability to undertake and to fulfill their contractual commitments. In the event that a default does occur, the surety company stands ready to fulfill the contractor's contractual commitment. However, often times, a default is avoided, because the surety team provides monitoring and assistance to the contractor as the project progresses, addressing problems that may hinder the contractor's performance. The rendering of such assistance by the surety may not even be known by the public owner.

Please bear in mind that, without a payment bond in place, subcontractors and suppliers, which may be small and local businesses, are at significant risk for nonpayment. Subcontractors and suppliers do not have direct contractual relationships to the contracting agency and cannot recover amounts unpaid by the prime contractor in the event that the prime contractor fails to pay or goes bankrupt. The payment bond is their payment remedy, and the waiver of that bond denies them that remedy, possibly costing them their businesses in the event of payment default by the prime contractor.

I hope that you will address this situation immediately with the Coxsackie-Athens Central School District, so it will take steps to come in compliance with statutory and administrative requirements. I respectfully request the courtesy of your acknowledgement of this letter and being informed of your intended course of action.

Yours sincerely,



Mark McCallum
CEO

cc: Kathryn McCary, McCary & Huff, LLP e-mail at kathrynmccary@mccaryhufflaw.com
Dan Woodside, CSArch e-mail at dwoodside@csarchpc.com

Attachment