



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