



National Association of Surety Bond Producers

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Mr. Charles A. Zelle
Commissioner
Minnesota Department of Transportation
Transportation Building
395 John Ireland Blvd.
Mailstop 100
St. Paul, MN 55155-1899

Re: NASBP Comments Regarding Changes in the MnDOT Standard Specifications for Construction

Dear Commissioner Zelle:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association representing professional surety bond producers, including licensed resident and non-resident agents doing business in Minnesota, I am contacting you concerning the surety bond requirements contained in the MnDOT Standard Specifications for Construction ("Standard Specifications"). It has come to our attention that the revised edition includes definitional changes to performance and payment bonds, which do not comport with current Minnesota law. Furthermore, the Standard Specifications include several revisions that do not comport with current surety industry practices.

Two of the new definitions are of particular concern to NASBP. Section 1103 (Definitions) defines Payment Bond as "[t]he **Contract Bond** that guarantees the payment of all legal obligations pertaining to the performance of the **Contract** requirements." Section 1103 defines Performance Bond as "[t]he **Contract Bond** that guarantees performance of the **Contract** requirements."

The statutory definitions of performance bonds and payment bonds are, however, quite different than those included in the Standard Specifications. In Minn. Stat. § 574.26 subd. 2, performance bonds and payment bonds are defined as follows:

[A] contract with a public body for the doing of any public work is not valid unless the contractor gives (1) a performance bond to the public body with whom the contractor entered into the contract, for the use and benefit of the public body to complete the contract according to its terms, and conditioned on saving the public body harmless from all costs and charges that may accrue on account of completing the specified work, and (2) a payment bond for the use and benefit of all persons furnishing labor and materials engaged under, or to perform the contract, conditioned for the payment, as they become due, of all just claims for the labor and materials.

The scope of payment bonds in the Standard Specifications is much broader than the requirements for payment bonds in Minn. Stat. § 574.26 subd. 2.

Moreover, the statutory definition of "labor and materials" is not as broad as what MnDOT now attempts to require a payment bond to cover. Subdivision 1 of the statute defines "labor and materials" as "work, skill, tools, machinery, materials, insurance premiums, equipment or supplies, or taxes incurred under section 290.92, chapter 268, or 297A" MnDOT's revised definition of payment bond is silent on the term "labor" and other key important terms that the legislature recognized when enacting section 574.26. MnDOT's definition, however, is broader and less clear: "the payment of all legal obligations pertaining to the performance of the **Contract** requirements." The obligations imposed on a payment bond surety under the Standard Specifications are much broader than the obligations imposed on the surety under the statute.

Furthermore, the definition of performance bond in the Standard Specifications is also different from, and potentially broader than, the new MnDOT definition of performance bond. These new definitions will expose contractors and sureties to broader claims and will likely give sureties underwriting concerns. NASBP strongly urges MnDOT to consider amending its definition of payment bonds and performance bonds to align with the statutory definitions.

Other issues of concern to NASBP include section 1512.1 (Unacceptable and Unauthorized Work), by which MnDOT requires the contractor to remove and replace unacceptable work, or requires the surety to perform and complete the work without a proper notice of default. This requirement to perform without a proper notice of default does not comply with bond requirements and is not good public policy.

Another section of particular concern to NASBP is section 1512.3 (Con-Compliance), which provides MnDOT the authority to withhold funds from a contractor to cover damages not only on the bonded contract in question but also on other contracts with MnDOT as well. This provision for set-off between different contracts could result in the contractor defaulting on other bonded contracts, forcing its subcontractors and suppliers to file payment bond claims. Sureties are uncomfortable issuing bonds on contracts that have such set-off provisions, as it is more difficult for them to assess its risk.

These types of onerous provisions might force surety companies to carefully scrutinize their underwriting practices and provide surety credit only to those well-established contractors who have a strong surety credit history. Such a situation could prohibit small and emerging contractors that do not have a solid financial surety credit history from participating on MnDOT projects.

Thank you for your time and consideration concerning these issues. If you have any questions, please do not hesitate to contact me at 202-464-1217 or at lleclair@nasbp.org.

Respectfully submitted,



Lawrence E. LeClair
Director, Government Relations

cc: Mark McCallum, CEO, NASBP
Martha Perkins, Esq., NASBP