



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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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.*,

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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

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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