



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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Mr. Bernie Arseneau
Assistant Commissioner
MN/DOT MS 140
395 John Ireland Blvd.
St. Paul, MN 55155

Re: Second Correspondence —Revised Draft Disadvantaged Business Enterprise (DBE) Provisions & Forfeiture of Bid Security

Dear Mr. Arseneau:

I am writing to you as a follow up to a letter (*see attachment*) sent to you on May 18 on behalf of the National Association of Surety Bond Producers (NASBP). It has come to our attention that the Minnesota Department of Transportation (MNDOT) has revised the DBE Special Provisions. Still of concern to NASBP is language which appears in the revised draft to allow the MNDOT to reject the apparent low bidder's bid and forfeit the bid or proposal guaranty.

NASBP believes that such language appears in multiple places in the revised draft document, and includes the following statement: "All bidders should make every reasonable effort to subcontract work to DBEs through good faith negotiations and solicitations in advance of the dates specified for submitting and opening of bids. Failure to submit required information within the 5-day business day period, or any allowed extension, will result in the rejection of the bid and the forfeiture of the proposal guaranty." NASBP still believes that such requirements are inapposite to the long-term interests of MNDOT, as they will be of significant concern to contractors and sureties and, consequently, likely will lessen the competition for and increase the costs of MNDOT projects, if implemented.

Furthermore, a bidding requirement that seeks forfeiture of all or a portion of the penal sum of a bid bond in the absence of bid acceptance is not appropriate and ill-advised. Simply put, such a requirement completely misconstrues the purpose and function of a bid bond and is not a fitting way to enforce good faith efforts to reach DBE goals.

The DBE Special Provisions revised draft document contains a number of references to the Code of Federal Regulations (CFR), Department of Transportation, Title 49, Part 26. NASBP reviewed Title 49, Part 26 to determine if the U.S. DOT contemplates forfeiture of the bid bond as the penalty for lack of good faith compliance with DBE requirements. Unlike MNDOT DBE Special Provisions, without doing a thorough legal analysis, our research determined that such a requirement does not exist in Title 49, Part 26.

However, NASBP did discover that Title 49, §26.47(a), contemplates penalties for DBEs who fail to meet overall goals. According to this provision, a DBE cannot be penalized, or treated by the Department [DOT] as being in noncompliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith. This provision, however, does not contemplate forfeiture of the bid bond if DBE goals are not met.

In our previous correspondence (*see attachment*), we detailed several sections in the Minnesota Statute that were inconsistent with the language proposed in the DBE Special Provisions document as it relates to the bid or guarantee proposal. We believe those inconsistencies still exist throughout the revised draft as well.

We would also like to raise additional concerns contained in the revised draft. For example, the section titled, "Under the Evaluation of a Good Faith Efforts," specifically, item (7) which calls for "Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by Mn/DOT or the bidder." This requirement seems to be a daunting task imposed upon the Apparent Low Bidder (ALB). Given the current state of the economy, bank lines of credit can be very difficult if not impossible to obtain. The newspapers are filled with stories about banks that have pulled lines of credit for no apparent reason. Moreover, even for financially sound construction firms, surety credit may be challenging. Given the probability that most DBEs have not taken the necessary steps to qualify for surety credit, how is an ALB supposed to assist with these efforts given this current economic climate? This may seem like an insurmountable task for the ALB and we request that you reconsider this requirement.

Throughout the revised draft document, the term "reasonable" is used quite frequently. It appears, for example, in the section titled "Soliciting DBE's" which contains the language that "All bidders should make every reasonable effort to subcontract work to DBEs." It is unclear what is meant by reasonable. Is MNDOT planning to issue guidelines as to what they consider to be reasonable? We raise this issue as to provide clarification for ALBs so they may comply with the regulations.

For the foregoing reasons, NASBP respectfully requests your immediate consideration to amend the draft document(s) to eliminate or clarify these concerns. Please contact me should you have questions, require additional information or wish to speak further about this matter.

Yours sincerely,



Mark H. McCallum
Chief Executive Officer

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