



National Association of Surety Bond Producers

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2014 Government Relations Agenda of the National Association of Surety Bond Producers (NASBP)

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NASBP, located in Washington, D.C., is a national trade association whose membership includes firms employing licensed surety bond producers and brokers placing bid, performance, and payments bonds throughout the United States and its territories for the Nation's construction projects.

NASBP is the only association focused solely on the bond producer—the agent or broker who stands as the “bridge” between the construction contractor and the surety. As professionals deeply invested in the health of the construction industry and its many contracting firms, bond producers apply their insight and knowledge of contractors' business opportunities and challenges with that of the surety market, the surety credit process and surety underwriting fundamentals so that contracting firms and surety companies understand what each seeks in successful surety relationships.

This Agenda describes important government relations activities and initiatives, grouping them in three categories: (1) top priorities, (2) emerging issues, and (3) “watch list” issues.

Government Relations Top Priorities

Priority: Advocate for the preservation and, where possible, expansion of existing federal, state, and local statutory bonding requirements:

- Educate public officials and legislators regarding the crucial public policy reasons underlying bid, performance, and payment bond requirements in relation to private/public works and infrastructure projects.
- Monitor legislative and regulatory efforts to increase statutory bonding thresholds and oppose those that represent material increases.
- Oppose legislative and regulatory efforts to weaken or waive statutory bonding requirements.
- Oppose efforts to substitute alternative products for statutorily-required bonds.
- Monitor legislative and regulatory measures authorizing alternative project delivery methods to ensure incorporation of, or reference, to statutory bonding requirements.
- Advocate for reforms in the Federal Acquisition Regulation (FAR) to ensure sufficient oversight and transparency of any contracting officer's decision to reduce or waive surety bonds on federal construction projects.

Priority: Advocate for legislation, such as H.R. 776, the “Security in Bonding Act,” that amends Title 31 USCA §9304 to ensure that assets pledged to back individual surety bonds on federal construction projects can be liquidated quickly and easily to pay valid claims.

- H.R. 776 is similar to its predecessor H.R. 3534 which passed the House in 2012 only to stall in the Senate.
- Under 31 USCA § 9303 a contractor is permitted to pledge collateral directly to the government by posting an “eligible obligation” as security in lieu of a surety bond. An “eligible obligation” is defined as “any security designated as acceptable in lieu of a surety bond by the Secretary of the Treasury,” which most notably includes U.S. government backed securities.
- FAR 28.203 also permits federal contracting officers to accept bonds from individual sureties if the bond is secured by an “acceptable asset,” which are defined as stocks, bonds and real property owned in fee simple without any form of concurrent asset. This is a much broader category than what is required under § 9303.
- Stocks, bonds, and real estate should not be considered “acceptable assets,” to secure bonds due to the likelihood of their misrepresentation, volatility, and the difficulty of liquidating them in a timely manner to pay a valid bond claim. NASBP believes that assets pledged by an individual should be the same as required under § 9303, which permits persons and companies to submit “eligible obligations” in lieu of a surety bond.
- H.R. 776, unlike H.R. 3534, includes a provision to increase the guarantee offered to surety companies participating in the Small Business Administration’s Surety Bond Guarantee Preferred Program from a 70% to a 90% guarantee.

Legislative Solution:

- Amend Title 31, USCA § 9304, to ensure that assets pledged to back bid, payment, and performance bonds on federal construction projects be an “eligible obligation” and be placed in the custody and control of the federal government, in order for it to be easily converted to liquid assets to pay valid bond claims.
- This statutory change would ease the current administrative burden placed on federal contracting officers in determining whether assets posted on federal construction projects are sufficient to protect subcontractors and suppliers who rely on the payment bond for their payment remedy in the event of a contractor default.
- Increasing the guarantee to surety companies that participate in the Program to 90% will permit more surety companies to make the internal business decision to underwrite small and emerging contractors in the Program.
- Increasing the guarantee will likely stimulate greater corporate surety participation in the Program who will in turn provide greater access to regulated surety markets to small businesses, which otherwise may not qualify for surety credit in the standard market.

Priority: Advocate for legislation to exempt the Federal Miller Act from periodic threshold increases based on inflation under Title 41:

- Seek a champion to introduce legislation to amend Title 41 (Public Contracts) to exempt the Federal Miller Act from threshold increases every 5 years based upon inflation;
- A similar exemption is provided to the Davis Bacon Act, which protects the payment of wages for laborers on federal projects;
- Educate members of Congress that similar to the Davis Bacon Act, the Federal Miller Act is also a protective statute and should be exempted from threshold increases under Title 41;

- Educate members of Congress about the important protection the Miller Act offers and remind them that each adjustment increases the payment bond threshold so more small construction businesses acting as subcontractors and suppliers will not have payment bond protection on federal construction projects.

Priority: Advocate for legislation to amend the Assignment of Claims Act or Anti-Assignment Act in Title 31 USC §3727 and Title 41 USC §15 to permit an assignment of claims to the contractor's surety:

- Congress made an exception to Titles 31 and 41 during WWII to financing institutions to help contractors obtain financing; thus sureties are seeking a similar exception;
- Courts have held that the Miller Act surety is not a financing institution eligible to receive a valid assignment or claim against the federal government;
- This exception places the surety in a difficult position, if a contractor encounters financial difficulties; it will often look to its surety for financing;
- The surety has an incentive to avoid a default and will help the contractor complete the work, but it will also want assurance the advances will be repaid;
- Unless the contract states otherwise, the exceptions permit an assignment of all payments remaining under the contract to a single assignee.

Priority: Advocate for legislation/regulations, that encourage qualified small, disadvantaged, and minority contractors to participate in public construction markets:

- Support legislation that provides education and resource opportunities to small, women, minority, and veteran-owned construction companies to better position them to qualify for surety credit.
- Support bond guarantee programs that have been reviewed and analyzed for practicality and adhere to current industry practices.
- Support legislation such as H.R. 1873, which passed the U.S. House in the 110th Congress that amended the definition of contract bundling in the Small Business Act to specifically include procurements for new construction so that small construction businesses can more fully participate as prime contractors on federal construction projects.

Priority: Continue to advocate for legislative changes to the Small Business Administration's (SBA) Surety Bond Guarantee Program to make it more efficient and attractive:

- Significant enhancements have been made to the Program through the passage of statutory reforms which will attract greater surety bond producers and small contractor participation such as:
 - Increasing the contract size guaranteed by the SBA up to \$6.5 million and vesting discretion in the Administrator to determine the Program's liabilities;
- Additional enhancements still needed include:
 - Increasing the guarantee offered to surety companies participating in the SBA Surety Bond Guarantee Preferred Program from 70% to 90% guarantee as contemplated in H.R. 776, the Security in Bonding Act of 2013.
 - Reducing fees paid by contractors and sureties in the Bond Guarantee Program.

Priority: Advocate for legislation, regulations, and policies that create an equitable risk environment for construction contractors and subcontractors:

- Educate public officials and legislators about the cost and performance benefits of equitable contract terms and conditions.
- Oppose inclusion of onerous or unrealistic contract requirements, such as long-term warranties, or excessive liquidated damages in public works contracts.
- Oppose legislative and regulatory efforts to impose contract performance penalties on contractors and subcontractors for compliance with immigration laws.
- Support legislation that reduces lengthy statutes of repose.
- Support legislation, H.R. 2751, which prohibits the practice of procuring contracts for design and construction services through electronic reverse auctions.
- Oppose legislative and regulatory efforts to treat construction services as commodities for purposes of procurement methods and contract terms.

Priority: Advocate for legislation and regulations that preserve governmental oversight of surety insurers:

- Advocate licensing or registration of all sureties in jurisdictions in which they conduct business to protect the interests of public owners and taxpayers.
- Provide adequate oversight and scrutiny of all sureties furnishing bonds on federal construction projects.
- Encourage adherence to bond requirements on federal overseas projects.

Government Relations “Emerging Issues List”

- **Sustainability & “Green Building” Requirements in Public Construction.** Federal, State and municipal governments increasingly have or are considering enacting laws and regulations mandating green building/sustainability requirements in public and private construction. Such legislation may include surety bonding requirements that place inappropriate risks on contractors and sureties. NASBP will continue to monitor this evolving issue and will become actively involved with legislative or regulatory proposals that negatively impact the surety industry.
- **Unlicensed Surety.** Legislation was introduced in Maryland in 2011 and 2012 that would have expanded the 2006 law to permit an unlicensed individual to write bonds on private subcontracts without having to obtain a certificate of authority issued by the Maryland Insurance Commissioner. This bill was ultimately defeated. The 2006 law, which is set to sunset in 2014, allows unlicensed individuals to write bonds on public works projects at the prime level without a certificate of authority. NASBP’s number one priority is to ensure that this law is not extended beyond the sunset. NASBP has retained a contract lobbyist with the purpose of educating legislators concerning the issues and business practices of individual sureties. The Maryland Insurance Administration is in the process of examining individual sureties and is set to release a report of its findings soon.
- **Public-Private Partnerships.** Advocate that the use of public-private partnerships must include bond requirements for public works projects. There has been a great deal of activity at both the state and most recently the federal level where lawmakers are considering legislation to create an infrastructure bank that creates a government agency to help arrange financing for infrastructure projects using investments from private

sources. NASBP along with the American Subcontractors Association (ASA) and SFAA have compiled a comprehensive document which details the state P3 laws and determines bonding requirements.

Government Relations “Watch List”

- **Resident Agent Countersignature Requirements.** State and local procurement officials continue to require resident agents countersign bidding documents on behalf of non-resident agents even though resident agent countersignature requirements have been eliminated in all the states and have found to be unconstitutional because they unfairly discriminate between licensed non-resident agents and licensed resident agents. NASBP will address such instances as they arise or are discovered.

Implementation Strategy

Five components are key to the successful execution of this government relations program: **a grassroots network, strategic alliances, industry partners, leveraging our SuretyPAC resources and the annual Legislative Fly-in.**

Grassroots Network. NASBP’s primary vehicle for advocacy is its grassroots network of activist members. To further enhance our effectiveness and reinvigorate this important area, we are in the process of creating an informational toolkit for our grassroots advocates. Moreover, NASBP’s grassroots advocates will now be formally recognized as NASBP Government Affairs Representatives (GAR). The GAR, under the guidance and direction of the NASBP Washington staff will serve as the “eyes and ears” of the association on state and local government relations matters. This is an opportunity for bond producer members who would like to volunteer their time to further NASBP’s Government Relations Agenda. The toolkit will include such information as the duties and responsibilities of the GAR, a formal roster of GARs throughout the country and specific examples of issues, which NASBP has encountered at the state and local levels. By formally recognizing the GAR and placing vital information and a formal network in place, NASBP believes that our grassroots network will be stronger than ever.

Strategic Alliances. To bolster the work of the NASBP grassroots network and to gain “the ear” of federal, state and local legislators and officials, NASBP has entered into and will continue to enter into strategic alliances with key contractor and subcontractor constituency organizations, such as the American Subcontractors Association, the Associated Specialty Contractors, Inc., the Mechanical Contractors Association of America, the Sheet Metal and Air Conditioning Contractors’ National Association, the Associated General Contractors of America, the National Hispanic Contractors Association and the Native American Contractors Association to partner on government relations issues of mutual interest and concern. NASBP’s government relations efforts will be complimented and supported by efforts and initiatives undertaken in NASBP’s industry relations area. NASBP will continue to identify other opportunities with whom to partner.

For example, in 2012, NASBP created a coalition of 14 organizations whose mission was to enact federal legislation, H.R. 3534, the “Security in Bonding Act,” to protect small businesses

and the federal government from fraudulent bonds being proffered on federal construction projects. Similar outreach efforts are underway in support of H.R. 776, which currently enjoys the support of all of the major national construction organizations.

Industry Partners. NASBP has enjoyed and will continue to enjoy close working relationships with its historic industry partners—the Surety & Fidelity Association of America and the American Insurance Association—to advocate and to seek progress on issues of critical importance to the surety industry. In 2012, NASBP and SFAA jointly lobbied for H.R. 3534 and for legislation to address Title 41 to prohibit periodic threshold increases to the Federal Miller Act. In 2014, similar joint lobbying efforts are anticipated.

SuretyPAC. In 2013, NASBP undertook a SuretyPAC solicitation campaign to increase the funds available to the SuretyPAC and to facilitate a better understanding of SuretyPAC, its purpose, and its operation, by creating a first-ever [NASBP SuretyPAC website](#). The site will be available to anyone who has supplied NASBP with prior written authorization for PAC solicitations (advanced prior approval is required by law). Members now can furnish such authorizations online with our electronic Prior Approval Form available on this [site](#). The web site contains much information on SuretyPAC, including: a list of the current SuretyPAC officers; a list of SuretyPAC contributions to federal candidates for past elections cycles and the current election cycle; the SuretyPAC Bylaws and Contribution Criteria Documents; recent PAC Fundraising events attended by NASBP; a direct link to NASBP's Grassroots Center, and a ticker on the latest Political News.

Annual Legislative Fly-in. In 2009, NASBP hosted its first Legislative Fly-in after nearly a decade. Since 2009 momentum continues to build for the nearly event. In 2013, over 60 Congressional offices were visited by Fly-in attendees. Plans are underway for the 2014 Fly-in, to be held on Thursday, June 12 at the Hyatt Regency located on Capitol Hill. The Legislative Fly-in plays an important advocacy role in NASBP's Government Relations Program, because it allows NASBP staff to engage in policy discussions with Congressional offices that may otherwise not be possible without its member's active involvement.

For Further Information

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