



National Association of Surety Bond Producers

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**BY ELECTRONIC TRANSMISSION (kerry.bates@VDOT.Virginia.gov;
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December 2, 2014

Kerry A. Bates, P.E.
State Construction Engineer
VDOT—Construction Division
1401 East Broad Street
Richmond, VA 23219

E. Alan Saunders, P.E., CCM
Assistant State Construction Engineer
VDOT—Construction Division
1401 East Broad Street
Richmond, VA 23219

**Re: Comment on Proposed Section 105.20 of VDOT Construction Division R&B
Specifications Book (Draft)**

Dear Mr. Bates and Mr. Saunders:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of surety bond producers, including licensed resident and nonresident producers placing bid, performance, and payment bonds in the Commonwealth of Virginia and all other jurisdictions, I am contacting you regarding the proposed new Section 105.20, Department's Recovery Rights After Final Payment, in the Construction Division Road and Bridge Specification Book 2014 (R&B Spec Book). NASBP has concerns about Section 105.20, as there appears to provide no time limitations on the ability of the Virginia Department of Transportation (VDOT) making a claim against a contractor or its surety. Section 105.20 provides, in relevant part, as follows:

After making final payment, if the Department discovers that the contractor performed unacceptable or unauthorized work, used unacceptable or unauthorized materials, or the work is in any way defective due to the Contractor's fault, breach of contract, or neglect, the Department can demand that the Contractor, his surety, or both remove and replace the unacceptable, unauthorized, or defective work or materials.

With this provision, with no limitations period for discovery, VDOT could potentially pursue lawsuits--indefinitely--against any contractor and its surety doing business with VDOT. This

violates a basic notion of fairness and equity. Virginia law places a five-year statute of limitations on contractual claims (including construction contracts). Statutes of Limitations are prescribed at Virginia Code § 8.01-228, Limitation of Actions. Such statutes are predicated on the legal principal that a potential defendant in a lawsuit should not be required to defend itself against "stale" claims. Allowing senescent lawsuits to move forward where faded memories, lost evidence, and absent witnesses are the order of the day smacks of unfairness and inequity and subverts the interest of justice.

Because of the application of the doctrine of sovereign immunity, the Commonwealth itself is exempt from the statute of limitations. Therefore, limitations periods do not generally apply to actions brought in the name or for the benefit of the Commonwealth in the same manner as actions brought by private parties unless expressly excluded in the limitations statute.

Virtually all states have enacted or have recognized statutes of limitations and repose for limiting the time in which the state (or the commonwealth) and its political subdivisions can seek legal redress. The Commonwealth of Virginia should not be an exception. NASBP is aware that representatives from the Associated General Contractors of America (AGC) have met with officials at the Department of General Services, as well as a representative from the Attorney General's office, to discuss specific situations where Virginia public institutions have sued or threatened to sue a contractor years after the completion of a project, long after the traditional five-year statute of limitations would have permitted such a lawsuit. This limitations issue in the Commonwealth is widely recognized in the construction and surety industries.

Construction firms and their sureties working on public projects should have a definite point in time by which they are certain that their liability has been extinguished. Such firms should not be subject to indefinite liability, especially where other factors, well outside the contractor's control, caused, in whole or in part, the problem.

Certainty provides the greatest assurance to the business environment. It stimulates maximum competition, benefitting the public contracting authority, and ensures that business markets remain strong in those jurisdictions. When there is less certainty, the public contracting marketplace becomes less competitive, as businesses are unable to price indefinite risks and, therefore, may remove themselves from the market.

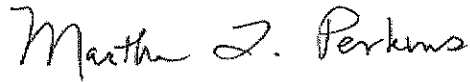
Certainty is especially important to surety companies, which are in the regular business of prequalifying construction firms and furnishing guarantees on their behalf. Surety companies examine the qualifications of construction firms to fulfill their obligations successfully, looking at their credit history and financial strength, experience, equipment, management capability, risk management practices, and other factors to decide whether or not to issue surety credit in the form of performance and payment bonds. Risks that are impossible for the construction firm to manage or to price pose a special concern to surety underwriters. Sureties can have no certainty regarding their underwriting analysis about a construction firm's future viability and ability to meet its obligations that extend too far into the future. The surety does not expect to be a permanent guarantor for the bonded contract. With potentially unending bond durations, the surety may only issue, if at all, bonds for the largest, most well-capitalized companies. Such market uncertainty restricts competition in many ways, including negatively impacting the ability of small and

disadvantaged businesses to pursue award of VDOT contracts as a result of the higher risks entailed in VDOT contracts.

For these reasons, NASBP respectfully requests VDOT's reconsideration of this provision in the R&B Spec Book. We recommend that VDOT establish a definite point in time after which VDOT cannot pursue contractors or their sureties for stale claims. Such a provision would promote certainty of risk and encourage a more vibrant and competitive business environment.

I appreciate your consideration of NASBP's concerns, and I would be happy to discuss our concerns more fully with you.

Yours sincerely,

A handwritten signature in cursive script that reads "Martha L. Perkins".

Martha L. Perkins
General Counsel

cc: Mark H. McCallum, CEO, NASBP
Larry LeClair, Director of Government Relations, NASBP