



The Surety & Fidelity Association of America
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Washington, DC 20036



National Association of Surety Bond Producers
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American Insurance Association
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November 16, 2006

Mr. Vincent Maniscalco
Assistant Commissioner for HIQA/Street Assessments
Department of Transportation
40 Worth Street, 9th floor
New York, NY 10013

Re: Proposed Amendments to the Rules Regarding Permit Bond Requirements and the Guarantee Period for Street Excavations and Restorations & Draft Permit Bond

Dear Mr. Maniscalco:

The American Insurance Association, National Association of Surety Bond Producers and Surety & Fidelity Association of America represent the sureties and agents that place and write the vast majority of surety bonds in the United States. A number of our respective member sureties and agents have advised us of their concerns about the proposed *Amendments to the Rules Regarding Permit Bond Requirements and the Guarantee Period for Street Excavations and Restorations* and the draft permit bond form that will be required by the City's Department of Transportation.

Second Conditions Clause

The main concerns we have relate to the second conditions clause in the new bond form proposed to support these permits. This clause adds to the obligation that the surety can be required "*at the sole option of the City, to either pay up to the full penal sum of this bond or to fully complete the work and/or obligations....*" If the City elects to have the surety complete the work, the surety must commence work within 25 business days after the written notice from the City and complete the work in the time the City specifies. Finally, "*the surety and the City reserve all rights and defenses each may have against the other, provided, however, that the Surety expressly agrees that its reservation of rights will not provide a basis for non-performance of its obligation to commence and complete all work as provided....*" We believe that any or all of these provisions may restrict the ability of sureties to underwrite these bonds, as well as make it difficult for contractors to qualify and obtain these bonds.

For example, the addition of the above wording in the newly inserted second conditions clause would reduce the surety's ability to investigate and accomplish the essence of its guarantee to have this work properly completed in correct and timely fashion. While payment of up to the bond penal sum may be one viable option, our members know that they have a close financial relationship with their contractor clients. They know they may be able to remedy concerns more promptly and economically with other

options such as funding the contractor, hiring a replacement contractor, or utilizing their relationship to prioritize the City's needs for the contractor. Eliminating these fundamental opportunities for the surety to resolve or mitigate problems could preclude many sureties from providing these bonds.

A further problem with this clause is that it could be misread to convert the permit bond into a forfeiture bond under which the surety pays the full penal sum or completes the work. We do not think that is the intent and recommend eliminating this second conditions clause that gives the City the sole option to choose the remedy in case of a default.

Surety Commencement and Completion

The time periods specified in the draft permit bond form create concerns. The bond form provides that the surety must "commence and diligently perform the Work specified" within 25 business days of receiving notice from the City. Typically, the standard for the surety to commence its investigation and remediation is one of reasonableness. The surety needs a reasonable opportunity to secure the proper completion contractors or engineers to properly complete the work at issue. In such circumstances, 25 days may prove to be too short a timeframe. This is particularly true if the contractor has multiple locations, permits, and jobs on-going. The surety should be given a reasonable time within which to cure the default. The draft bond form states that the surety must "complete all Work within such time as the City may fix." Both timeframes should specify a reasonable standard. Again, it is the desire and in the best interests of all involved, for the surety to be able to utilize its expertise and resources to resolve and mitigate problems. Being held to a timeframe could work to offset these abilities. We again recommend eliminating this second conditions clause that provides these new time frames, which, incidentally, are effective even if the Surety reserves its rights and defenses by the terms of this clause. We think that the entire secondary clause should be rewritten as follows:

The Surety, for value received, hereby stipulates and agrees, if requested by the City, to either pay to complete the work and/or obligations, up to the penal sum of this bond, or to complete the work and/or the obligations, including repair and maintenance thereof, as specified herein to be performed under the Principal's permits, pursuant to their terms, conditions, and covenants, if the City determines that the Principal, for any cause, has failed to or neglected to fully perform and complete such work. The Surety further agrees to commence and diligently perform the Work specified in the permits and this bond, including physical work specified herein, within a reasonable time.

Finally, we believe that utilizing the term "the Work" for the first time in this clause to define the obligations can be expansive. Inserting this defining term after the definition of "permitted work" in the previous paragraph would more clearly define "the Work" to mean only that which pertains to the permit obligation.

Annual Bond

The draft permit bond form specifies that the penal sum of the bond shall be the full amount for every year the bond is effective. Although this is not different from other bond forms used by the City, it is important for the DOT to understand that requiring bonds to be provided in this manner makes it

harder for contractors to qualify for the bonds. This language at least should be modified to make clear that the surety's liability for all permits issued during the bond's effective dates, no matter how many years, is continuous and that the penal sum is non-cumulative.

Additional Comments on Proposed Changes to the Rule

Guarantee Period – The proposed rule changes the guarantee period of three years for unprotected streets and five years for protected streets to five years for all streets. Lengthening the current guarantee period is inconsistent with most bonded obligations of this kind. The longer the guarantee period, the more restrictive underwriting will be thereby making it more difficult for contractors to qualify for the bond. The underwriting of contractors by sureties entails assessment of each contractor's ability to fulfill its responsibilities for a reasonable time into the future; usually two to three years. Sureties become much more restrictive in issuing their bonds when asked to extend their commitments to these longer terms.

Surety Bond Cancellation--The proposed Rule would increase, from 30 to 60 days, the written notice the surety is required to provide to the City before the surety can cancel the bond. The proper cancellation period is the shortest time that the City needs to cancel the permit and stop any damage or violations underway. If the contractor is causing damage for which the City is making claim, the City does not want the contractor to have the ability to continue to fail in its obligations, which is what the extended notice does. A 30-day notice is preferable since it could help to mitigate future non-performance.

Bond Amounts—The changes to the proposed rules also increase the amount of the permit bond. In particular, the bond for fewer than 100 locations is increased from \$25,000 to \$100,000. The DOT needs to be mindful that it may be more difficult for some contractors in this category to qualify for the bond. The DOT may want to consider one or two other increments before reaching the \$100,000 and \$250,000 levels.

We appreciate the opportunity to express our thoughts and concerns, and we respectfully request consideration of the points and suggestions made herein. We look forward to the opportunity to work with the DOT on these bonding issues. The Surety & Fidelity Association of America and the National Association of Surety Bond Producers will appear at the Department hearing on November 20, 2006, and will be prepared to answer any questions of the Department or provide additional input.

Sincerely,

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