National Association of Surety Bond Producers
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BY ELECTRONIC TRANSMISSION (carolyn.scholl@cvesd.org)

January 7, 2015

Carolyn Scholl, Facilities Planning Manager
Chula Vista Elementary School District
84 E. J Street
Chula Vista, CA 91910

Re: NASBP Comments on Bid Bond Form for Chula Vista Elementary School District Project

Dear Ms. Scholl:

I am contacting you on behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of companies employing licensed surety bond producers, including those resident and non-resident in the State of California. I was recently forwarded a copy of the Bid Bond (Bond) used by Chula Vista Elementary School District (District) for Site Work Preparation for One 132' x 40' Two-Story Classroom Building project (Project), with a forfeiture provision that gives NASBP cause for concern.

Specifically, the Bond requires that, if the District awards the contract to the principal and the principal fails and/or refuses to execute the contract or to furnish the required payment and performance bonds, then the surety and/or the principal "shall for forfeit and pay to the District, as Liquidated Damages, the full penal sum of this bid bond . . . ." Such an amount is a considerable penal sum and bears absolutely no relationship to the actual costs that would be incurred by the District in the event the District needed to enter into negotiations with another contractor. Typically, bid bonds are for the purpose of making the obligee whole with regard to costs or losses suffered as a result of a re-procurement. Such an extreme forfeiture amount in this Bond appears unnecessary and punitive.

The traditional language of a bid bond provides that, in the event the principal awarded the contract does not enter into the contract with the owner and furnish the required bonds, the surety on the bid bond must pay to the owner the difference, not to exceed the amount of the bid bond, between the amount specified in the bid and any larger amount the owner must pay to another party to perform the work covered by the bid. Such language is fair because there is a reasonable nexus between the amount the surety pays to the owner and the amount of loss the District suffers by reason of the re-procurement.

It is worth noting that sureties require the companies to which they extend surety credit to furnish them with indemnity agreements for any amounts paid out on their behalf. Thus, the surety expects to recoup the forfeited bond penalty from its principal. In other words, the higher the risks posed by the bond language, which is forfeiture of the entire security, the less attractive it is for a surety to extend surety credit. This means that only highly capitalized and larger contractors will be available to bid on such projects. This, of course, restricts competition and does not comport with one of the State's top priorities—to award work to small, emerging, and minority business enterprises.

We respectfully request that the District reconsider its forfeiture approach in the Bond so that it is in line with the costs that the District would incur for re-procurement and does not act as an arbitrary windfall to the District in such circumstances. We recommend that you review the American Institute of Architects AIA A310-2010, Bid Bond, well known and frequently used in the industry. The relevant condition of the AIA A310 reads as follows:

> . . . or pays to the Owner the difference, not to exceed the amount of this Bond, between the amount specified in said bid and such larger amount for which the Owner may in good faith contract with another party to perform the work covered by said bid . . . .

For your convenience, attached to this letter is a copy of the AIA A310-2010.

Please feel free to contact me should you wish to discuss this matter further. We appreciate your prompt consideration of NASBP's concerns.

Yours sincerely,

Martha L. Perkins

Martha L. Perkins
General Counsel

cc: Mark. H. McCallum, CEO

AIA Document A310™ – 2010

Bid Bond

CONTRACTOR:
(Name, legal status and address)
TBD
TBD

SURETY:
(Name, legal status and principal place of business)
TBD
TBD

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.

OWNER:
(Name, legal status and address)
TBD
TBD

BOND AMOUNT:

PROJECT:
(Name, location or address, and Project number, if any)
TBD
TBD

Project Number, if any:

The Contractor and Surety are bound to the Owner in the amount set forth above, for the payment of which the Contractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, as provided herein. The conditions of this Bond are such that if the Owner accepts the bid of the Contractor within the time specified in the bid documents, or within such time period as may be agreed to by the Owner and Contractor, and the Contractor either (1) enters into a contract with the Owner in accordance with the terms of such bid, and gives such bond or bonds as may be specified in the bidding or Contract Documents, with a surety admitted in the jurisdiction of the Project and otherwise acceptable to the Owner, for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof; or (2) pays to the Owner the difference, not to exceed the amount of this Bond, between the amount specified in said bid and such larger amount for which the Owner may in good faith contract with another party to perform the work covered by said bid, then this obligation shall be null and void, otherwise to remain in full force and effect. The Surety hereby waives any notice of an agreement between the Owner and Contractor to extend the time in which the Owner may accept the bid. Waiver of notice by the Surety shall not apply to any extension exceeding sixty (60) days in the aggregate beyond the time for acceptance of bids specified in the bid documents, and the Owner and Contractor shall obtain the Surety's consent for an extension beyond sixty (60) days.

If this Bond is issued in connection with a subcontractor's bid to a Contractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.

When this Bond has been furnished to comply with a statutory or other legal requirement in the location of the Project, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

Signed and sealed this day of

	(Principal) *(Seal)*
(Witness)	*(Title)*
	(Surety) *(Seal)*
(Witness)	*(Title)*

Init.

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