



National Association of Surety Bond Producers

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BY ELECTRONIC TRANSMISSION (salazad3@email.laccd)

November 14, 2018

Mr. David Salazar, Chief Facilities Executive
Los Angeles Community College District
770 Wilshire Blvd.
Los Angeles, CA 90017-3896

Re: NASBP Comments on Task Order Bid Bond for Los Angeles Community College District

Dear Mr. Salazar:

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 producers licensed by the State of California. I was recently forwarded a copy of the Task Order Bid Bond (Bond) used on public projects by the Los Angeles Community College District (District), with two provisions that give NASBP cause for concern.

First, the Bond requires that, if the District accepts the bid and the principal fails or refuses to execute and deliver the signed Task Order contract and the required performance and payment bonds to the District, then the surety "shall forfeit one hundred percent of the amount of this bond to the District" 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 agreement 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 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 owner 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 District'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:

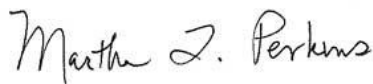
. . . or pays to the Owner the difference, not to exceed the amount of this Bond, between the amount specified in said bid and such larger amount for which the Owner may in good faith contract with another party to perform the work covered by said bid

Second, the Bond provides that, if the District recovers a judgment, the surety “shall pay all costs and fees incurred by the District in such suit and/or proceeding, including without limitation, attorneys’ fees to be fixed by the court, even if such fees exceed the penal sum of the bond.” Typically, the American Rule, which states that each party pays its own legal fees (including attorneys’ fees), applies. Where it does not, the language in such bond typically provides that attorneys’ fees within the penal sum limitation might be awarded.

NASBP respectfully requests that the District consider eliminating this “costs and fees” provision from the Bond or, at the very least, provide that this provision must be within the penal sum limitation.

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,

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

Martha L. Perkins
General Counsel