



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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Sent via email to: abachman@utah.gov

Mr. Alan S. Bachman, Esq.
Utah Department of Administrative Services
Assistant Attorney General Division of Facilities Construction & Management (DFCM)
450 N. State Street
Salt Lake City, UT 84414-1201

RE: Proposed Rule Changes – R23-1-1102, Section 6

Dear Mr. Bachman:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association representing firms employing surety bond producers, including licensed resident and non-resident agents placing contract surety bonds in Utah, I am contacting you regarding proposed rule for the General Procurement Provisions specifically the Section located in R-23-1-1102, (6) “Waiver,” which allows the Director to waive bonding if the “Director finds circumstances in which the Director considers any or all of the bonds to be unnecessary to protect the state.” The proposed rule expands upon R-23-1-40 (6) “Waiver” and creates uncertainty and ambiguity as to when the Director may waive statutory bonding requirements.

As every state legislature and the federal government has recognized, surety bonds are vital in protecting taxpayer funds and the downstream businesses that supply labor and materials on public works projects. Should the prime contractor fail to pay subcontractors and suppliers due to bankruptcy or for other reasons, such subcontractors and suppliers have access to a payment bond to recover any unpaid sums. Likewise, taxpayer funds are protected by performance bond guarantees, which ensure that the performance bond surety, not taxpayers, pick up the costs to complete contracts where a bonded contractor has defaulted on its performance. It is axiomatic that construction projects are inherently risky endeavors; surety bond requirements mitigate such risk by ensuring that contractors seeking contract awards are qualified to undertake such contracts and that a knowledgeable, financially capable surety stands ready to perform should the bonded contractor fail to perform.

By enacting 63G-6-505, the Utah Legislature recognized the vital role surety bonds have on state procurement projects. Sections 1 (a) and (b) require the contractor to whom the contract is awarded “shall deliver” a performance and payment bond equal to 100% “of the price specified in the contract.” The Utah Procurement Code 63G-6-505 (3) does establish Rules that allow for the waiving of bonds “for certain circumstances in which the state considers any of all of the bonds to be unnecessary to protect the state” which were previously promulgated in R-23-1-40 (6) “Waiver.” R23-1-1102 (6) expands to require that the waiving of bonds “shall be stated in writing, explaining the circumstances why the bond(s) is not necessary to protect the procurement unit, and the waiver shall be made part of the project file.” More

importantly, the Utah Legislature deemed it necessary to enact Utah Code Title 14, Chapter 1, Section 19, “Failure of government entity to obtain payment bond—right of action—notice,” to allow a person who has furnished labor or supplied materials to a contractor to have a “direct right of action against the state or political subdivision”

Clearly, the current statutes underscore the serious nature of any waiver decision. The proposed regulations, however, do not provide further insight as to how public contracting authorities will make such decisions. Why would a public entity want to risk taxpayer funds without the benefit of surety prequalification and guarantees of performance and payment, except in the most extraordinary of circumstances? Yet, R23-1-1102(6) provides no guidance on the nature of the circumstances that would support a decision that bonds are not necessary to protect the procurement unit. We believe the consequences of such waiver decisions warrant more thorough regulatory treatment, and we respectfully ask that you amend the proposed regulation to provide such clarification, including that any such waiver of a payment bond implicates the protections of 14-1-19.

For these reasons, NASBP respectfully requests that you amend R23-1-1102(6) to provide further guidance on the narrow circumstances under which bonds are “unnecessary to protect the state” and the consequences of attendant waiver decisions.

NASBP appreciates your attention to this important matter and looks forward to your prompt response on the requested actions.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "Larry LeClair". The signature is fluid and cursive, with the first name "Larry" being more prominent than the last name "LeClair".

Larry LeClair
Director, Government Relations

cc: Mark McCallum, CEO, NASBP
Martha Perkins, General Counsel, NASBP