



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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November 1, 2006

Mr. James P. Lowrey
Wilson-Ramseur, Inc.
238 West Millbrook Road
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Dear Mr. Lowrey:

In preparation for your November 2 meeting with staff of the North Carolina Department of Transportation (NC DOT), I am forwarding general comments and observations with respect to certain materials forwarded to me from you concerning a State of North Carolina Department of Transportation Contract Proposal for “Landscape Planting with Three-Year Establishment” in Wake County. These general comments should not be construed as specific legal advice, and I would encourage you to consult with knowledgeable local legal counsel for such advice.

General Comments

The “Instructions to Bidders” do not contain a requirement for bid security, and the “Standard Provisions” expressly state “[n]o bid bond or bid deposit will be required.” A requirement for a bid bond likely would not increase the project contract price to NC DOT, since most sureties charge little or no premium for the bid bond. Moreover, by requiring a bid bond, the NC DOT would benefit from the assurance that all landscape contractors bidding on the project would be able to deliver final bonds. Interestingly, to the extent applicable, N.C. Administrative Code, Title 19A, Chapter 2, Subchapter 2D, Section .0809 Bid Bond or Bid Deposit establishes, among other things, that each bid is to be accompanied “by a corporate bid bond or a bid deposit of a certified or cashiers check in the amount of at least five percent of the total amount bid for the contract.”

In the “Standard Provisions,” the provision titled “Contract Payment and Performance Bonds” requires the successful bidder to furnish final bonds “within thirty (30) days after notice of award.” This is different from the time requirement in N.C. Administrative Code, Title 19A, Chapter 2, Subchapter 2D, Section .0822 Contract Bonds, which states that such bonds shall be provided by the successful bidder “within 14 calendar days after notice of award.”

The project duration is for approximately 42 months. Sureties generally disfavor longer contract performance periods, as such periods make underwriting the project more difficult—e.g., underwriting factors, such as the contractor’s financial ability and work program, are more difficult to predict over a longer time period, such as three and one

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half years. The NC DOT conceivably could increase competition for these types of projects by dividing each project into two components of work (such as planting and establishment), each of a shorter duration and covered by a separate bond. Alternatively, in order to increase bidder interest in the project (or similar projects), the NC DOT could consider restructuring the bond requirement so that the entire performance bond does not have to remain in place until final completion and acceptance. To that end, the NC DOT could agree to reduce the bond amount proportionately upon the contractor achieving each intermediate completion date. Such a reduction would be more attractive to sureties and would have the added benefit to the NC DOT of not tying up the bonding capacity of qualified landscape contractors so that those contractors can bid on other similar DOT projects, thereby increasing the pool of qualified contractors competing for those projects.

The "Project Special Provisions" includes language suggesting that any contractor breach entitles the DOT to the full penal sum of the performance bond. It reads "[f]ailure of the contractor to perform at any point in the contract will be justification for...*forfeiture of performance bond* [emphasis added]". The DOT should clarify its intent in using such language. I believe that the DOT probably means that it would be justified in making a claim against the performance bond and is not seeking forfeiture of the performance bond penal sum, but that should be made clear in the contract.

There are other provisions that would benefit from further clarification or that provide some cause for concern, notably the following:

- The liquidated damages provision is assessed on a per calendar day basis, but the contractor is not entitled to work on weekends or state holidays unless approved by the Engineer. In such case, liquidated damages should be assessed on a per workday basis.
- Payment for establishment work not completed in an "acceptable manner," which is a subjective judgment by the owner, is forfeited by the contractor, and the contractor must perform the work in the next month.

I hope you find these comments helpful in your preparation for your meeting with representatives of the NC DOT. Please feel free to contact me with questions about these comments or with further information as your discussions with the NC DOT progress.

Sincerely,



Mark McCallum
General Counsel & Director of Government Relations