



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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November 19, 2009

Mr. Pete Rahn

Director

Missouri Department of Transportation

Central Office

105 W. Capitol Ave

Jefferson City, MO 65102

Re: New Mississippi River Bridge Disadvantaged Business Enterprise Job Special Provisions

Dear Mr. Rahn:

I am writing on behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of member companies employing professional surety bond producers who place bid, payment, performance, and maintenance bonds for the Nation's construction and infrastructure projects, including those in the State of Missouri. Recently, it has come to our attention that the Missouri Department of Transportation (MoDOT) has incorporated certain requirements in bidding documents which are entirely out of keeping with the purpose and function of bid bonds. It is the opinion of NASBP that such requirements are inapposite to the long-term interests of MoDOT, as they will be of significant concern to sureties and, consequently, may lessen the competition for MoDOT projects.

Of particular concern to NASBP is the following language which appears in bidding documents for the New Mississippi River Bridge Project:

"The failure of either the apparent low bidder or the second low bidder to identify actual, committed DBE participation equal to or greater than the DBE goal established by MoDOT, or the failure of either the apparent low bidder or the second low bidder to sufficiently evidence good faith efforts to reach the DBE goal to the satisfaction of MoDOT or its Administrative Reconsideration Committee, shall result in rejection of that bid as non-responsive and forfeiture of 10 percent of the bid surety bond or bid guaranty for seizure of the penal sum specified therein"

A bid bond furnishes security to the project owner that the contractor receiving contract award will enter into the construction contract and furnish the required performance and payment bonds. Should the contractor receiving contract award fail to execute the construction contract, the owner may make a claim against the bid bond for damages up to the penal sum of the bid bond, typically the costs incurred by the owner in reletting the project to another contractor.

Such a purpose of the bid bond expressly is recognized by the Missouri legislature. See, for example, Missouri Revised Statute § 229.050, which addresses, among other things, bid security for contracts for the construction of roads and bridges, and states that “a bidder's bond executed by some surety company authorized to do business in this state ... as a guarantee on the part of the bidder that if his bid be accepted he will, within ten days after receipt of notice of such acceptance, enter into contract and bond to do the work advertised...”

As recognized in the quoted statutory language, the purpose and function of a bid bond is to remedy defaults where the **successful bidder**—that is, the bidder receiving contract award from the contracting agency—fails to enter into the construction contract. It is nonsensical for the bid bond to be seen as a remedy in situations where a bidder is not successful and does not receive contract award. In short, the bid bond is only effective if the contract is awarded to the particular bidder, and, in the absence of an award, the obligee may not claim against the bid bond.

Your bidding documents expressly state that the “failure of the apparent low bidder or the second low bidder” to identify DBE goal participation sufficiently “shall result in rejection of that bid as non-responsive and forfeiture of 10% the bid surety bond.” In such a situation, neither bidder has received award, as each bid has been rejected. The courts in Missouri clearly recognize that a public contracting entity cannot require forfeiture of a bid bond where a contractor has no legal obligation to fulfill its bid. A bidding requirement that requires forfeiture of all or a portion of the penal sum of a bid bond in the absence of bid acceptance is not appropriate and ill-advised. Simply put, forfeiture of all or a portion of the bid security is not a fitting way to address good faith efforts to reach DBE goals.

We also are concerned about the contract specification that imposes liability on the contractor “and surety” for “river traffic delays” caused by the contractor’s negligence. It must be recognized that the surety’s obligation is secondary to that of its principal, the contractor. The owner first must establish the liability of the contractor as a precondition for seeking recovery against the surety bond. If the surety is also to be liable for such delay damages, then that liability should be addressed in the bond itself, not in the contract specifications.

For the foregoing reasons, NASBP respectfully requests your immediate consideration to amend the bidding documents to eliminate these concerns. Please contact me should you have questions or require further information.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Mark H. McCallum", with a long horizontal flourish extending to the right.

Mark H. McCallum
Chief Executive Officer