



## National Association of Surety Bond Producers

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May 31, 2013

U.S. Department of Transportation  
Dockets Management Facility  
Room W-12-140  
1200 New Jersey Avenue, SE  
Washington, DC 20590

Re: Docket No. FHWA-2012-0126

To Whom It May Concern:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association whose membership includes firms employing licensed surety bond producers placing bid, performance, and payment bonds throughout the United States and its territories, I am pleased to submit the following recommendations for model contracts for public-private partnerships (P3s) being developed by the Department's Federal Highway Administration as required by Section 1534(d) of P.L. 112-141 (Moving Ahead for Progress in the 21<sup>st</sup> Century Act or MAP-21). It is of the utmost importance that these model contracts include the protection of surety bonds for the construction portion of the contract.

Corporate surety bonds are three-party contract agreements by which one party (a surety company) guarantees or promises a second party (the obligee/contracting authority) the successful performance of an obligation by a third party (the principal/contractor). At the federal level, the Miller Act requires that, before any contract exceeding \$150,000 is awarded for a federal construction contract, the prime contractor must furnish a performance bond and a payment bond to the contracting agency. The performance bond protects the project owner (in this case, the federal government) from financial loss should the contractor fail to perform the contract in accordance with its terms and conditions. The payment bond protects subcontractors and suppliers, which do not have direct contractual agreements with the public owner and which would be unable to recover lost wages and expenses should the contractor be unable to fulfill its financial obligations. The passage of the Miller Act prompted the passage of similar laws in all the states, known as Little Miller Acts, to achieve the same ends on state construction projects.

According to the National Conference of State Legislatures, thus far, 33 states have enacted P3 enabling legislation for transportation projects, but not all state laws include security requirements for the parties performing construction, creating a lack of uniformity on bonding and other related issues. This variance in state requirements mandates that the FHWA set an appropriate policy to include specific requirements for performance and payment bonds, ensuring that transportation projects undertaken for public benefit and welfare through P3 contracts offer contracting authorities proper prequalification of entities performing construction services, guarantees of performance from solvent, third-party corporate sureties, and payment remedies for unpaid subcontractors and materialmen. The policy reasons underlying bonding requirements (prequalification and guarantees of performance and of payment) on transportation projects, whether such projects are procured traditionally or through alternative financing and delivery methods, remain incontrovertible. To that end, NASBP recommends that FHWA include contract language in the model P3 contracts, so that performance and payment bonds are required of the entity performing the construction services in the amount of the total value of the construction elements of the P3 contract.

In 2010, for example, the Maine Legislature recognized the importance of requiring surety bonds on P3 projects, stipulating that bonds should be in an amount equal to the cost of the construction work and referencing its Little

Miller Act statute. More specifically, Maine's public-private partnership statute, Title 23§ 4251, states the following relating to the bonding of P3 agreements:

*The proposal must include a provision that any contractor performing construction work required by the agreement must furnish performance and payment bonds or irrevocable letters of credit in an amount equal to the cost of the construction work. Any action on such a payment bond or irrevocable letter of credit is subject to the requirements of Title 14, section 871, subsection 4<sup>1</sup>.*

A further precedent has been set by the Federal Government when the Department of Transportation issued 49 CFR Part 18, the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. This regulation addresses bonding for state level construction projects financed partly by federal grants.

*For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:*

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*(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.*

*(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.*

Surety bonds provide essential protections to public authorities undertaking or facilitating transportation projects as well as to subcontractors and suppliers furnishing labor or materials on such projects. P3 model contracts developed by the FHWA must include requirements stipulating performance and payment bonds in amounts commensurate to the value of the construction portion of the P3 contract.

NASBP appreciates the opportunity to comment on FHWA's proposed model contracts for P3s. If you have any questions, please do not hesitate to contact me at 202-464-1217 or [lleclair@nasbp.org](mailto:lleclair@nasbp.org).

Respectfully Submitted,



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<sup>1</sup> Maine's Littler Miller Act