



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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February 13, 2009

Tucker Ferguson, P.E.
Director, Bureau of Construction and Materials
Pennsylvania Department of Transportation
400 North Street
Harrisburg, PA 17120

Re: Proposed PennDOT Warranty Bond Requirement Relating to Concrete Pavement

Dear Mr. Ferguson:

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. Recently, it has come to our attention that the Pennsylvania Department of Transportation (PennDOT) is considering certain contractual requirements, specifically a ten year warranty on cement concrete pavement coupled with a warranty bond covering that obligation, which, in the opinion of NASBP, are not realistic and may have the inadvertent impact of increasing the pricing of and lessening the competition for PennDOT projects significantly.

Under the proposed terms, entitled "Item 9501-1--- Plain Cement Concrete Pavement, 120 Month Warranty," the contractor is to provide "a Warranty Bond with sufficient surety or sureties, in an amount equal to 50% of the total contract amount for all mainline pavements to be constructed under the plain cement concrete pavement warranty item(s)." The warranty bond requirements also state that the bond "is to remain in effect for a period of 120 months or until completion of all remediation work identified in the final annual performance surveys, whichever is later." Such a lengthy warranty bond duration poses considerable problems from a surety underwriting perspective. Sureties usually are comfortable in covering a warranty obligation of up to two or three years. Durations longer than two or three years increase substantially the uncertainty regarding projections about the contractor's future viability. Simply put, sureties cannot gauge the soundness and financial wherewithal of a company for periods too far in the future. The present economic environment further underscores the impossibility of underwriting a guarantee obligation of such long duration. A more pragmatic approach would be to specify either a much shorter warranty bond duration, one not to exceed three years, or a one-year warranty bond that would be renewable annually by the surety.

The proposed terms present other concerns. Included in the bond scope is a requirement that the bond save PennDOT harmless "from any damages growing out of the *carelessness* of the contractor or the contractor's employees in performing remediation work." The use of the term "carelessness" would appear to include risk transfer issues more properly allocated to insurance liability coverage in bond

Letter to Tucker Ferguson, P.E.
February 13, 2009
Page 2 of 2

coverage. Such broadening of bond coverage likely will constitute another reason why sureties may be reticent to underwrite the warranty bond.

Further, the proposed terms do not adequately separate design issues outside the control of the contractor from the contractor's warranty responsibilities, placing the burden and the initial cost on the contractor to differentiate design issues from issues relating to materials and workmanship.

Please note that contracts containing long warranty obligations also reduce competition from the standpoint of eliminating from the bidder pool all but the largest contractors, since only the largest contractors can shoulder the higher risks inherent in such contracts. Small and medium-sized contractors effectively are precluded. As transportation projects use public funds, contracting considerations to maximize, not to reduce, competition should be foremost.

NASBP respectfully requests that PennDOT reconsider its approach to the plain cement concrete pavement warranty and the corresponding warranty bond obligation. Please feel free to contact me should you have questions or wish further information or assistance with this matter.

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
General Counsel & Director of Government Relations