



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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Mr. Robert A. Gorrell
Executive Director
Interagency Commission on School Construction (Commission)
200 West Baltimore Street
2nd Floor
Baltimore, MD 21201

Comment letter submitted via email to: robert.gorrell@maryland.gov

Re: Surety Bonds on Public-Private Partnership (P3s) & RFQ No.DCP19-24

Dear Director Gorrell;

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 in Maryland, I am pleased to submit to the Commission the following comments, questions, and considerations. In this session, legislation (SB 92) was signed into law establishing P3 Pilot Programs for school construction in Harford, Prince George's and Washington Counties. The law authorized the Commission to create regulations, but it was silent on performance and payment bond requirements, which have been long-standing and essential security features of state and local construction procurements.

§17-103—Protects Maryland Businesses & Taxpayer Funds

By enacting §17-103, Maryland's Little Miller Act, the Maryland General Assembly recognized the importance of having payment and performance bonds in place to protect Maryland taxpayers and the downstream businesses that supply labor and materials on Maryland public construction projects. Often these subcontractors or suppliers are small businesses whose only viable remedy in the event of nonpayment by the prime contractor is to claim on the payment bond, as other means, such as mechanics liens, are not available.

Even though a P3 agreement is financed and managed by a private entity, the completed construction project is for the benefit and welfare of the public and invariably reverts to an asset of the government at some future point. The salient security features of bonding—prequalification of entities performing design and construction and guarantees of contract performance and of payment to entities furnishing labor and materials—are just as relevant on P3 projects. In fact, bonding requirements help ensure that the ultimate aim of the P3 arrangement, the delivery of the completed facility, will occur.

Maryland General Assembly Requires Surety Bonds on P3s

In 2013, the Maryland General Assembly and the Governor recognized the sound policy reasons for including payment and performance bonds on P3 agreements by revising its existing P3 law so that P3 agreements are subject to the security requirements of Maryland's Little Miller Act (*Title 17, subsection 1*) as follows:

"§10A-401 (a) Whenever applicable, a public-private partnership agreement shall include the following provisions:

(12) requirements for the private entity to provide performance and payment security in a form and in an amount determined by the responsible public entity, except that:

(i) requirements for the payment security for construction contracts shall be in accordance with Title 17, Subtitle 1 of this article; and

(ii) requirements for the amount of the payment security and for any performance security in the form of a performance bond for a construction contract shall be based on the value of the respective construction elements of the public-private partnership agreement and not on the total value of the public-private partnership agreement."

Observations RE: RFQ No.DCP19-24

After reviewing the May 30, 2019 Request for Qualification (RFQ No.DCP19-24) for P3 agreements for the design, construction, financing and maintenance for Prince George's County Public Schools, NASBP has specific questions pertaining to the surety requirements referenced in the RFQ. Section 5.5, "**Surety Letter and/or Letter of Credit**," requires the RFQ respondent to demonstrate its surety capacity (bonding limit). However, the RFQ is silent on whether that security ultimately will be required and, if so, is unclear as to what form of security is required e.g., letters of credit (LOCs) or a surety bond. In fact, the RFQ further states:

"The requirement to provide the Surety Letter and the bond amounts referenced above are solely for the purposes of evaluating the Respondent's financial qualifications and should not be construed as an indication of the ultimate security requirements for the Project."

In short, demonstrating surety capacity is not analogous to requiring surety bonds for P3 agreements as stated in §10A-401.

It is important to note the differences between LOCs and surety bonds. LOCs are liquid demand instruments, may be called-in at any time to secure an outstanding debt, and have a specific expiration date—usually one year. Unlike LOCs, surety bonds provide payment protection to downstream subcontractors and suppliers, protect the project owner from non-performance and financial exposure should the entity performing design and construction default, and remain in force for the duration of the contract subject to the terms and conditions of the bond.

According to Section 5.4, the respondent must demonstrate surety bonding capacity of at least \$350MM. It is unclear what relationship the specified bonding capacity of \$350MM has to the estimated value of the design and construction elements of the public-private partnership arrangement. Is it intended that the bonding capacity encompass the totality of projects including the value of maintenance work over the life of the P3 (Section 2.2.4)? If that is the case, the design and construction portions of each project should be bonded separately. Likewise, the operations and maintenance portion of the P3 should be bonded separately from the design and construction portions. Bonds for the construction portion of the P3 agreement shall be for the full, estimated value of design and construction elements, separate from the estimated value of the maintenance portion of the agreement. Maintenance bonds are structured differently from performance and payment bonds and typically are renewable and broken into consecutive 2 or 3 year terms. By correctly structuring bond requirements, the Commission can help avoid underwriting complications and maximize interest and competition for P3 arrangements.

Maryland is one of nearly 20 states that have recognized the importance of requiring bonds on P3 arrangements. We suggest that the Commission includes in its Administrative Procedures Guide existing performance and payment security for P3s as found in the Maryland State Finance and Procurement Article located at §10A-401 and that these bonding requirements be observed in the RFQ.

NASBP is a Resource

NASBP and its Maryland members stand ready to serve as a resource to ensure that the state's interests and small businesses are adequately protected, and would welcome a dialogue on how best to structure bond security for P3 projects undertaken by the Commission. Please do not hesitate to contact me at 240-200-1272 or lleclair@nasbp.org if NASBP can provide further information or otherwise be of service to the Commission.

Respectfully submitted,



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