



## **National Association of Surety Bond Producers**

1140 19<sup>th</sup> Street NW, Suite 800. Washington, DC 20036-5104

Phone: (202)686-3700

Fax: (202)686-3656

Web Site: <http://www.nasbp.org>

E-mail: [info@nasbp.org](mailto:info@nasbp.org)

June 8, 2017

Senator Walter Timilty  
Chair, Senate State Administration & Regulatory  
Oversight  
State House  
Room 213-B  
Boston, MA 02133

Representative Peter V. Kocot  
Chair, House State Administration & Regulatory  
Oversight  
State House  
Room 22  
Boston, MA 02133

### **RE: Strong Opposition to H.1656, An Act creating the state guarantee fund for default on public construction surety bond payments.**

Dear Chairmen Timilty and Kocot:

On behalf of the National Association of Surety Bond Producers (NASBP) a national trade association representing firms employing surety bond producers, including licensed resident and non-resident agents placing contract surety bonds in the Commonwealth of Massachusetts, we strongly oppose H.1656, which creates a state guaranty fund for default on public construction surety bond projects.

#### **The Role of the Surety**

Surety bonding is a special and unique form of insurance because the underwriting inherently relies on credit principles. In deciding to grant surety credit, professional prequalification, as done by a licensed and regulated surety, involves both qualitative and quantitative analyses of a construction firm in order to gain a complete picture of the contractor's qualifications. Thus, a surety does not expect to suffer losses because it expects the bonded contractor to perform its contractual obligations. Additionally, the surety has a signed indemnity agreement from the contractor to protect it from any losses it suffers as a result of having issued the bonds. The objective of surety bonding is not only to provide indemnity, but also to prequalify the bond applicant and by so doing reduce the possibility of loss to the general public. Thus, the underwriting and pricing is in the context of the exposure presented by the specific bonded contractor and not a general undefined exposure of unpaid claims existing in the industry.

#### **Legislative Intent of H.1656**

It is our understanding that the impetus behind H.1656 may be the result of a subcontractor or supplier not receiving payment for work performed on a project at the UMass-Lowell campus. While Section 5 of Chapter 149A states, the bonds must be provided "by a surety company licensed to do business in the Commonwealth and whose name appears on the United States Treasury Department Circular 570," it is unclear if the surety that provided the bonds for the UMass-Lowell project was licensed in the Commonwealth or listed on the U.S. Treasury Circular 570. Are the bill sponsors concerned with an unpaid judgement assessed against a non-admitted insurer? Additionally, the industry is not aware of an instance in which an admitted insurer has failed to pay a court judgement in the Commonwealth. This legislation would penalize companies already subject to Massachusetts regulatory purview, not those who are non-admitted and caused the loss.

#### **Reasons Why the Public Construction Fund (fund) is not sound public policy**

The role of the Massachusetts Division of Insurance is to protect consumers, monitor claims handling, and to regulate those sureties/insurers that wish to write bonds in the Commonwealth. Those sureties/insurers are subject to financial strength and surplus requirements. The Division of Insurance provides comprehensive oversight of sureties conducting business in the Commonwealth.

This fund simply is not needed and, in fact, undermines the regulatory authority of the Division of Insurance. Furthermore, the existence of a financial backstop might encourage project owners and construction managers at risk (CM@R) to accept bonds required under 149A from non-admitted insurers, some of whom may have evaded surplus and reserve requirements, knowing that the fund exists to pay for their mistake in taking a bond from an illegitimate insurer. Should this occur, why should admitted sureties be asked to contribute to a fund to pay claims against non-admitted insurers that were not scrutinized and vetted by the Division of Insurance?

As introduced, H.1656 is retroactive to January 1, 2012. This provision seems inequitable to those sureties who have been in good standing with the Department of Insurance. This potentially unfair practice, to hold sureties retroactively liable for the practice of a nonperforming actor, when they have protected subcontractors, suppliers and the state by ensuring contractors are qualified to perform on state projects.

Furthermore, if enacted, H.1656 may constitute a significant deterrent to those mid and small sureties currently writing bonds in the Commonwealth because of the \$10,000 annual registration fee and for the retroactive provision noted above. The loss of mid and small sureties may have a direct impact on those small businesses bidding on state projects, which rely on smaller sureties for surety credit, making for a less competitive marketplace.

#### **H.1656 Creates Unanswered Questions**

According to the bill, the fund is established “to make payments to a qualifying purchaser.” Under what conditions, why and when are these payments made? Furthermore, it is unclear what the term “qualifying purchaser” means as it is undefined.

For these reasons, NASBP recommends that you cast an “unfavorable” vote on H.1656. This legislation seems to create an unnecessary and inequitable fund, increases financial burdens on responsible sureties, and may impact small business participation.

Please feel free to contact me should you have further questions.

Respectively submitted for your consideration,



Larry LeClair  
Director, Government Relations

cc: Members of the Joint Committee on State Administration & Regulatory Oversight  
Michael Regan, NASBP Past Regional Director, Regan Clearly Insurance LLC, Boston, MA  
William Delaney, Delaney Legislative Services, Inc., Boston, MA