National Association of Surety Bond Producers
1140 19th 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

March 12, 2014

Delivered via U.S. Mail and email to: sharon.carson@leg.state.nh.us

Chairwoman Sharon Carson
Executive Departments and Administration Committee
State House
Room 106
107 North Main Street
Concord, NH 03301

RE: SB 399—Section 21-V:13 Contract Performance and Payment Bonds

Dear Chairwoman Carson:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of firms employing professional surety bond producers licensed and conducting business in New Hampshire and throughout the northeast, we would like to commend the Committee for advancing legislation that sets forth an alternative construction delivery method, thus establishing Public-Private Partnership (P3) agreements. Currently, 33 states have enacted legislation permitting P3 agreements, according to the National Conference of State Legislatures. Six states in particular, including Maine (please refer to attached chart for more information), have specifically referenced their State Little Miller Act, requiring payment and performance bonds at 100% of the construction portion of the P3 agreement.

I am contacting you specifically regarding section 21-V:13 “Contract Performance and Payment Bonds” subsection II, which appears in SB 399. This provision grants discretion to public contracting authorities to reduce the amount of performance and payments to 50%. Granting the public agencies discretion to reduce the bond to 50% of the contract amount neither lessens the underwriting scrutiny of the contractor nor reduces the cost of the bond. However, the impact on public agencies and the downstream parties (subcontractors and suppliers) could be dramatic. State agencies would have 50% greater exposure, while subcontractors and suppliers would have 50% less payment protection. When a surety issues a bond for less than 100% of the contract value, they cannot determine in advance which portion of the project it is bonding, and, more importantly, it will still require the same premium on the bond, as if it were written for 100% of the contract amount.

The New Hampshire Legislature recognized there is sound public policy for the universal requirement of surety bonds on state public works projects by enacting NH RSA 447:16 requiring payment and performance for 100% of the contract amount.The payment bond guarantees that covered subcontractors, suppliers, and laborers on the job will get paid. Generally, mechanics liens cannot be asserted against public property. Subcontractors, suppliers, and laborers on public works projects must rely on the general contractor's payment bond for protection in the event of nonpayment. If no payment bond is required, these parties are left with little or no means to collect for their services and supplies if the contractor is unable or unwilling to pay them. The performance bond guarantees that the public works project will be undertaken by a qualified company and is completed according to the construction contract.

While a P3 project may be managed by a private entity, the completed construction project is a public works project and an asset of the state. Thus, the public owner, taxpayers, subcontractors, and suppliers must be protected as on any other public works project. Bonded 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 suppliers.

For these reasons, I urge you to consider amending SB 399 by requiring that bonding is mandatory on P3 projects for the 100% of the construction portion of the contract in accordance with NH RSA 447:16. Further reflection through a study should be undertaken to examine these issues and ensure the state's interests are protected. Attached for your reference is a state compendium on state P3 laws as well as an executive summary. Please feel free to contact me should you have any questions.

Sincerely,

Larry LeClair

Lawrence E. LeClair
Director, Government Relations