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June 27, 2014

Chairman John Duncan
Special Panel Public-Private Partnerships (P3s)
Transportation & Infrastructure Committee
2207 Rayburn House Office Building
Washington, DC 20515

Ranking Member Michael Capuano
Special Panel Public-Private Partnerships (P3s)
Transportation & Infrastructure Committee
1414 Longworth House Office Building
Washington, DC 20515

RE: Recommendations for Surety Bond Requirements in P3 Arrangements Involving Federal Resources

Dear Chairman Duncan and Ranking Member Capuano:

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 concerning surety bonds for public-private partnerships (P3s). NASBP appreciates all of the hard work undertaken by the Special P3 Panel with the goal of improving the country's ability to fully utilize all its resources to improve and strengthen the nation's infrastructure.

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. Similar laws known as Little Miller Acts exist in all states in order to achieve the same ends on state construction projects.

There is compelling public policy for the universal requirement of surety bonds on federal and state public works projects. 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. If no payment bond is required, these parties are left with 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 is completed according to the construction contract. If a performance bond is not provided, federal, state, or local budgets and taxpayers take on the risk should the contractor default, and thus bear the substantial financial burden of re-letting work and paying excess completion costs.

While a P3 infrastructure project may be managed by a private entity, the completed project is for the benefit and welfare of the public and will revert to an asset of the government at some future point. Bonding requirements on projects undertaken for public benefit and welfare through P3 arrangements ensure proper prequalification of entities performing construction services; guarantees of performance from solvent, third-party corporate sureties; and payment remedies for certain unpaid subcontractors and suppliers.

The federal government long has recognized the importance of surety bonding requirements for its direct public works procurements. The Miller Act, mentioned above, was enacted in 1935. The federal government also understands the importance of surety bond requirements for public works projects involving some level of federal resources or grant funds. For example, 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. It states in part:

> *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.*
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> *(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.*

Congress has authorized public-private partnerships to address needed construction projects. In 1996, an initiative for privatization of military housing was authorized to address a significant inventory of inadequate or substandard military housing units. The Military Housing Privatization Initiative (MHPI) leveraged private-sector capital coupled with the private sector's expertise in construction and management to reverse this military housing deficiency. Although viewed as a success, the MHPI did experience situations involving significant performance and quality issues. Several situations in 2007 prompted U.S. Senators, led by Senators Saxby Chambliss and Bill Nelson, to express to the Secretary of Navy the need for better accountability on military housing privatization projects, including the need for better diligence in vetting project bidders.

Subsequently, in 2008, Congress included in the National Defense Authorization Act for Fiscal Year 2009, which is now codified at 10 U.S.C. § 2885, "Oversight and accountability for privatization projects," mandating surety bonding levels for military housing privatization projects. Specifically subsection (c) states:

> *The Secretary concerned shall ensure that the project owner, developer, or general contractor responsible for a military housing privatization initiative project has sufficient payment and performance bonds or suitable instruments in place for each phase of a construction or renovation portion of the project to ensure successful completion of the work in amounts as agreed to in the project's legal documents, but in no case less than 50 percent of the total value of the active phases of the project, prior to the commencement of work for that phase.*

Performance and payment bonds provide essential protections to entities undertaking or facilitating public works projects as well as to the many subcontractors and suppliers furnishing labor and materials on such projects. It should not be overlooked that, when Congress turned to a solution in 2008 to increase accountability and to address performance problems on military housing privatization projects, Congress selected a mechanism—surety bond requirements—that it well understood had a long record of value to the federal government and to taxpayers. NASBP strongly encourages the Special P3 Panel to consider and to include bonding requirements among its written policy recommendations with respect to the use of P3 arrangements for infrastructure and transportation projects.

Thank you for your leadership on this important subject.

Respectfully,

Larry LeClair
Director, Government Relations

cc: Members of the Special P3 Panel
Clare Doherty, Chief Counsel Committee on Transportation & Infrastructure
David Connolly, Professional Staff, House Subcommittee on Railroads, Pipelines and Hazardous Materials
Don Walker, Deputy Chief of Staff, Congressman John Duncan
Steve Carlson, Legislative Director, Congressman Michael Capuano