



The National Association of Surety Bond Producers (NASBP), an international organization of professional surety bond producers and brokers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, performance, and payment bonds for the Nation's construction projects and other types of surety bonds for guaranteeing performance, such as license and permit bonds, and the Surety Association of America (SAA), a trade association consisting of companies that collectively write the majority of surety and fidelity bonds in the United States, issue the following joint statement about Missouri Senate Bill No. 1250.

Requiring Performance and Payment Bonds Furnished by Public Works Contractors to Respond to Immigration Violations Is Contrary to the Pecuniary Interests of State Taxpayers and to the Successful Completion of State Public Works Projects

The Purpose of Public Works Performance and Payment Bond Requirements

Due to sound public policy considerations, Missouri, like all other US states, the District of Columbia, and the federal government, statutorily requires contractors to furnish performance and payment bonds on public construction projects. The performance bond provides assurance to the public owner that the construction contractor will perform the public construction contract. The payment bond assures that subcontractors and suppliers, who otherwise do not have lien rights against public property, will be paid for the labor and materials that they provide on the public construction project. In the event of the contractor's default, the full amount of the performance bond, called the penal sum, which usually is set in an amount equivalent to the contract price, is available to complete the project. *Performance and payment bonds are intended to guarantee the performance of the construction contract and the payment of subcontractors and material suppliers on the construction project; they are not intended to guarantee compliance with employment, immigration or other laws.*

SB 1250 Imposes Requirements That Go Well Beyond the Intended Use of Performance and Payment Bonds

MO SB 1250, Section 34.077, prohibits construction companies and businesses employing “undocumented workers” from entering into public work contracts and penalizes such companies for employing “undocumented workers” or for contracting with subcontractors employing “undocumented workers” during the course of performance of public works contracts. It also makes a violation of the statute a material breach, entitling the public entity to terminate the contract with the contractor immediately, and *requires the contractor’s “bond contract” to guarantee compliance with the statute and to “hold the public entity harmless for any losses incurred as a direct or indirect result of the contractor’s violation” of the statute and “for any losses incurred as a direct or indirect result of the public entity’s termination of the contract” pursuant to the statute.* In situations where it is determined that the contractor “knowingly” violated the statute, the contractor would be barred from obtaining public work contracts for a period of three years. In addition, SB 1250 allows third-party enforcement actions and permits the state attorney general to enforce the statute by seeking injunctions to stop contractors from bidding, entering into, or performing public works contracts and to stop public entities from paying contractors violating the statute.

By requiring the contractor’s “bond contract” to guarantee compliance with employment and immigration laws and to cover any related costs, SB 1250 goes well beyond the intended purposes of contractor performance and payment bonds. Such a requirement, in effect, places the surety in the role of enforcing compliance with employment and immigration laws and providing the remedy for noncompliance with such laws, a role that the surety simply cannot fulfill. Although a surety can and does evaluate a contractor’s financial, technical and management capabilities to perform the public construction project, the surety has no means of evaluating or controlling the contractor’s procedures for evaluating the status of its workforce, let alone the immigration status of the workforces of all subcontractors hired by the contractor for the public construction project. *How can a surety underwrite such requirements? Such requirements will introduce uncertainties into the Missouri surety bond marketplace, a marketplace at present in which substantial competition exists to write traditional surety bonds.*

MO SB 1250 Requirements Will Create “Hair Triggers” For Termination of Construction Contracts Ensuring Claims for Immigration Violations Against the Bonds

SB 1250 imposes “hair trigger” requirements and severe consequences for statutory violations, virtually ensuring that the contractor’s “contract bonds” will be called upon to respond to immigration violations, not construction problems as intended, a result that will prove financially detrimental to taxpayers and public entities.

Any violation of the statute is deemed a material breach of the contract, justifying termination of the contract immediately. Thus a single violation of an “undocumented worker” would be grounds for a public agency to terminate a contract with a competent

contractor, who in all other respects is performing the construction work satisfactorily, even in situations where the project is being constructed on time and within budget. Further, if the public agency was reticent about terminating an otherwise well-qualified and satisfactorily-performing contractor, the state attorney general or even third parties, including competitors of the contractor, would be able to force the public entity to withhold payments or to terminate the contract under the terms of SB 1250. The public works project then would be disrupted, the time for completion would be delayed, and administrative burdens and project costs would increase. *Such “hair-trigger” termination requirements and third-party enforcement rights will lead to nonsensical outcomes and will ensure that claims unrelated to the performance of the public construction project will be made against the contractor’s “contract bonds.”*

SB 1250 Requirements Call for a Bond That Does Not Exist Or, If Such Requirements Are Deemed Included in the Performance and Payments Bonds of Contractors, Will Serve to Undermine the Assurances of Such Bonds

The bond called for in SB 1250 currently does not exist in the marketplace and likely would be difficult to underwrite or would be underwritten at a significant cost, thereby adding to the overall costs of all state and local construction projects. Further, sureties will be reticent to underwrite obligations where the scope of the contractor’s liability is open-ended and not well-defined (i.e., “*undocumented worker*” and “*any losses incurred as a direct or indirect result of the contractor’s violation*”) and where the contractor being underwritten will be penalized for risks that are beyond its purview and control, such as being responsible for the employment actions or inactions of subcontractors. *As a result, the market availability of such a bond is unknown.*

On the other hand, if the intent of SB 1250 is to include statutory violations and related costs within the coverage of the public contractor’s performance bond, such a requirement would be counterproductive to the taxpayers’ and public entity’s interests in ensuring completion of such projects. The performance bond exists to provide financial assurance to the public owner by the surety that the construction contract will be performed, limited by the penal sum contained in the bond. The surety will respond only up to that penal sum. *If additional, non-construction risks, such as employer compliance with immigration laws, are included in the performance bond coverage, the costs of such risks serve only to erode the funds available from the surety to complete the construction project. Moreover, if the bond penalty then is expended to pay for the immigration liability of public works contractors, state taxpayers will be left picking up the costs of completing terminated projects.*

Conclusion

Performance and payment bonds on public construction projects should cover the risks for which they were intended. By requiring the “contract bonds” furnished by contractors to respond to contractor immigration violations and by ensuring claims against such bonds through “hair-trigger” termination and third-party enforcement requirements, SB 1250 imposes bond requirements and contract conditions that will be impossible for

sureties to underwrite. If the bonds are provided, they likely will be provided by fewer sureties and only for the largest, best-capitalized contractors who are able to pay the losses resulting from termination of contracts and imposition of fines. Such requirements will have the effect of lowering competition for and reducing overall bidder interest in Missouri public works projects. Moreover, including SB 1250 requirements in contractor bonds may mean that bond penalties are exhausted to pay for immigration violations, not completion of state construction projects, with state taxpayers picking up “the tab” for any completion costs in excess of bond penalties. For these and other reasons, SB 1250 requirements hurt not only the interests of contractors, subcontractors and sureties but those of Missouri taxpayers.

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