



National Association of Surety Bond Producers
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BY ELECTRONIC TRANSMISSION (cordozier@PA.gov)

December 22, 2015

Ms. Corelle L. Dozier
Project Schedules, Specifications and Constructability Section
Bureau of Project Delivery, Highway Delivery Division
Pennsylvania Department of Transportation
400 North Street
Harrisburg, PA 17120

Re: Proposed PennDOT Warranty Bond Requirement Relating to Concrete Pavement

Dear Ms. Dozier:

I am writing on behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of member companies employing surety bond producers, including licensed resident and nonresident producers placing bonds for construction and infrastructure projects in the Commonwealth of Pennsylvania and all other jurisdictions. It has recently come to our attention that the Pennsylvania Department of Transportation (PennDOT) is considering certain contractual requirements, specifically a ten-year warranty on plain cement concrete pavement and a warranty bond covering that obligation. This proposed long-term warranty requirement has prompted us to express our concerns to you that the impact of the long-term warranty will likely lessen the competition and increase the pricing of PennDOT projects significantly.

You may recall that NASBP sent to a letter concerning this same issue to the Director of the Bureau of Construction and Materials on February 13, 2009. For your convenience, I attach that letter; and for the sake of brevity, I will not repeat the information and comments, which are still highly relevant, in that letter; but I will address new matters and concerns.

PennDOT's optional approach of a combination of multi-year bonds (with retainage) for shorter periods is a decided improvement from a contractor's and surety's perspective; however, there are still critical matters that need clarification. From a surety underwriting perspective, it is highly problematic to posit nonrenewal of a bond as grounds for default. For longer-term, multiple-year bonds, sureties are reluctant to issue such bonds if nonrenewal is listed as a ground for default. More sureties likely would be more willing to issue bonds for PennDOT projects if the contract/bond included language that clarifies that nonrenewal is not an event of default. Such language was included in the standard form Warranty Bond for Design-Build Projects, Document No. 615, released in 2015 by the Design-Build Institute of America (DBIA), with input from the surety industry. The DBIA Warranty Bond includes the following language:

7.1.C. The failure of the Surety to renew this Bond, and/or the failure of the Design-Builder to provide a replacement bond, or other acceptable security, shall not be considered a breach or default by the Surety or Design-Builder on this Bond, within the effective period of this Bond, nor serve as a basis for a claim or demand on this Bond.

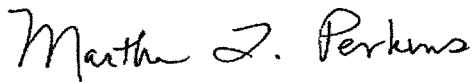
7.1.D. The Owner's sole recourse for warranty obligations in the event of a failure by the Surety to renew this Bond shall be against the Design-Builder and any other guarantor, or against other security provided by the Design-Builder, if any.

Likewise, we believe that it is important to clarify that there is a single penal sum with the issuance of each subsequent warranty bond. DBIA addresses this issue in its Warranty Bond, as follows:

7.2 If this Bond is renewed by the Surety, it shall be considered one continuous bond and in no event shall the total amount of the Surety's liability exceed the penal sum set forth herein. Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Surety under this Bond shall with respect any Claim or Claims shall not be cumulative in amounts from year to year or from period to period.

NASBP respectfully requests that PennDOT reconsider its approach to the concrete pavement warranty and the corresponding warranty bond obligation to reflect out comments. By structuring multi-year bonds of three years or less and by clarifying nonrenewal and penal sum issues as set forth above, NASBP believes that a broader swath of contractors will be able to qualify for surety credit and bid on PennDOT projects. I appreciate your consideration of NASBP's concerns, and I would be happy to answer any questions you may have or provide any assistance with this matter.

Yours sincerely,



Martha L. Perkins
General Counsel

Attachment

cc: Mark H. McCallum, CEO



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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February 13, 2009

Tucker Ferguson, P.E.
Director, Bureau of Construction and Materials
Pennsylvania Department of Transportation
400 North Street
Harrisburg, PA 17120

Re: Proposed PennDOT Warranty Bond Requirement Relating to Concrete Pavement

Dear Mr. Ferguson:

I am writing on behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of member companies employing professional surety bond producers who place bid, payment, performance, and maintenance bonds for the Nation's construction and infrastructure projects. Recently, it has come to our attention that the Pennsylvania Department of Transportation (PennDOT) is considering certain contractual requirements, specifically a ten year warranty on cement concrete pavement coupled with a warranty bond covering that obligation, which, in the opinion of NASBP, are not realistic and may have the inadvertent impact of increasing the pricing of and lessening the competition for PennDOT projects significantly.

Under the proposed terms, entitled "Item 9501-1--- Plain Cement Concrete Pavement, 120 Month Warranty," the contractor is to provide "a Warranty Bond with sufficient surety or sureties, in an amount equal to 50% of the total contract amount for all mainline pavements to be constructed under the plain cement concrete pavement warranty item(s)." The warranty bond requirements also state that the bond "is to remain in effect for a period of 120 months or until completion of all remediation work identified in the final annual performance surveys, whichever is later." Such a lengthy warranty bond duration poses considerable problems from a surety underwriting perspective. Sureties usually are comfortable in covering a warranty obligation of up to two or three years. Durations longer than two or three years increase substantially the uncertainty regarding projections about the contractor's future viability. Simply put, sureties cannot gauge the soundness and financial wherewithal of a company for periods too far in the future. The present economic environment further underscores the impossibility of underwriting a guarantee obligation of such long duration. A more pragmatic approach would be to specify either a much shorter warranty bond duration, one not to exceed three years, or a one-year warranty bond that would be renewable annually by the surety.

The proposed terms present other concerns. Included in the bond scope is a requirement that the bond save PennDOT harmless "from any damages growing out of the *carelessness* of the contractor or the contractor's employees in performing remediation work." The use of the term "carelessness" would appear to include risk transfer issues more properly allocated to insurance liability coverage in bond

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coverage. Such broadening of bond coverage likely will constitute another reason why sureties may be reticent to underwrite the warranty bond.

Further, the proposed terms do not adequately separate design issues outside the control of the contractor from the contractor's warranty responsibilities, placing the burden and the initial cost on the contractor to differentiate design issues from issues relating to materials and workmanship.

Please note that contracts containing long warranty obligations also reduce competition from the standpoint of eliminating from the bidder pool all but the largest contractors, since only the largest contractors can shoulder the higher risks inherent in such contracts. Small and medium-sized contractors effectively are precluded. As transportation projects use public funds, contracting considerations to maximize, not to reduce, competition should be foremost.

NASBP respectfully requests that PennDOT reconsider its approach to the plain cement concrete pavement warranty and the corresponding warranty bond obligation. Please feel free to contact me should you have questions or wish further information or assistance with this matter.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Mark H. McCallum", with a long horizontal flourish extending to the right.

Mark H. McCallum
General Counsel & Director of Government Relations