



National Association of Surety Bond Producers

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BY ELECTRONIC TRANSMISSION (mvillegas@kitchell.com)

May 20, 2014

Mr. Michael Villegas, Project Manager
San Bernardino Valley College Kitchell/BRj Construction Management Office
701 South Mount Vernon
San Bernardino, CA 92410

**RE: Comments on Consequential Damages for San Bernardino Valley College
Gymnasium Project in Section 00 40 01 – Supplemental Conditions**

Dear Mr. Villegas:

I am contacting you on behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of companies employing licensed surety bond producers, including those in California, about the requirements for consequential damages in Section 00 40 01 – Supplemental Conditions for the San Bernardino Valley College Gymnasium Project (Project). NASBP has just become aware of this consequential damages provision through our members, and we are also aware that San Bernardino Community College District (SBCCD) has responded to a question about capping the consequential damages, through Addendum 1, that it will not provide a consequential damages cap value. NASBP offers the following comments in support of capping the consequential damages on the Project.

In assessing its financial risk and preparing a bid for any project, a contractor will review, among other things, the consequential damages exposure on that specific project. When the contractor is faced with a very broad consequential damages provision, such as the one in the Project Supplemental Conditions, the contractor will insert contingencies into the bid to account for the uncapped consequential damages, for which the contractor is unable to assess its risk. The effect of this contingency inserted into the bid is, of course, that the project owner will receive higher bids for the project. Thus, the taxpayer will pay more for public works projects. There will also be less interest in bidding on a project where the consequential damages exposure is so great. As always, less competition means higher project cost to the public entity—and the taxpayers.

In addition, uncapped consequential damages pose considerable problems from a surety underwriting perspective. Sureties are usually not comfortable in issuing bonds for projects where the contractor/principal has very broad consequential damages exposure. Unlimited consequential damages exposure increases substantially the uncertainty regarding underwriting projections about the contractor's future viability. Simply put, sureties cannot gauge the

soundness and financial wherewithal of a particular construction company engaged on projects with such unlimited exposure. In the present economic environment, sureties are reviewing contract requirements more closely to discern provisions that pose special underwriting difficulties.

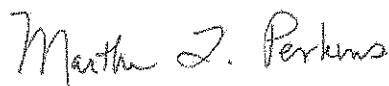
Uncapped consequential damages also reduce competition from the standpoint of eliminating from the bidder/proposal pool all but the largest contractors, since only large contractors can shoulder the higher risks inherent in such contracts. Small contractors effectively are precluded from bidding such projects, for they likely will not have the sophistication to adequately price such uncapped exposure and likely will not have a sufficient level of financial capital on hand to provide the surety with assurance of the small contractor's fiscal strength.

The San Bernardino Valley College Gymnasium Project is a project undertaken by a public entity, which undoubtedly seeks to maximize the inclusion of small and disadvantaged businesses. The broad and uncapped consequential damages provision runs counter to achieving such a goal. Including a cap on the consequential damages will better serve the purposes of small business inclusion by maximizing, not reducing, competition.

We respectfully request that SBCCD reconsider the uncapped consequential damages provision and provide for a cap certain for consequential damages on the Project. Pragmatic, viable options include capping the consequential damages exposure to a sum certain per month (e.g., \$50,000 or \$100,000) or providing that the consequential damages shall not exceed a certain percentage (e.g., 25%) of the general contractor's bid day fee.

We appreciate your prompt consideration of our concern. Please feel free to contact me at 202-464-1214 or mperkins@nasbp.org should you wish to discuss this matter.

Yours sincerely,

A handwritten signature in cursive script that reads "Martha L. Perkins".

Martha L. Perkins
General Counsel

cc: Mark H. McCallum, CEO