



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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December 21, 2006

Mr. Dave Simpson
Director, North Carolina Building Division
Carolinas AGC
P.O. Box 30998
Raleigh, NC 27622-0998

Dear Dave:

As I mentioned to you in my phone message, I received information that the Carolinas AGC currently is working on a legislative solution to the issue of general contractors making double payments as a result of the failure of some subcontractors to remit payments to lower-tiered subcontractors and suppliers. I also received what appears to be a copy of draft legislation amending the current North Carolina "little Miller Act."

As you are aware, this is a topic of some complexity, requiring a careful balancing of different parties' interests. It also is of considerable interest to the surety community. I want to offer some initial thoughts on the draft legislation that I received and to offer the assistance of the surety community, specifically the resources of the National Association of Surety Bond Producers along with those of the Surety and Fidelity Association of America and the American Insurance Association, to assist you in achieving your legislative goals in a way that will benefit your members and that will help ensure the continued competitive surety bond market in North Carolina.

In the current North Carolina little Miller Act, the definition and treatment of the term "subcontractor" may cause problems for two reasons. First, the Court of Appeals of North Carolina has held that a "claimant," for purposes of the statute, need only be in privity of contract with "any subcontractor" on the project. Second, the definition could be interpreted to encompass both subcontractors (those supplying labor and materials) and suppliers or materialmen (those only supplying materials) in its meaning. *Because of the indefiniteness of the language of the current little Miller Act, the surety community is supportive of your efforts to inject certainty by making clear who constitutes the class of proper claimants under the North Carolina little Miller Act.*

However, the draft legislation contains new definitions—specifically, "first tier subcontractor," "second tier subcontractor," and "third tier subcontractor"—that do not ameliorate our concerns, for these definitions repeat what is problematic in the current language of the North Carolina little Miller Act by including materialmen within each definition of tiered subcontractor and by not limiting each definition to parties in privity of contract. To that end, the draft legislation will fail to provide the certainty of meaning that you likely are seeking for general contractors and others subject to the statute. Such expansive language would broaden the class of proper claimants at each tier, leading, for example, to a result such as a supplier to a supplier to a second tier subcontractor as a proper claimant. We are not aware of any current little Miller Act that would permit such a "broad" and "deep" class of proper claimants as seemingly proposed in the draft legislation, which might make sureties reticent about writing payment

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bonds in North Carolina. We believe that you can accomplish your goals by defining materialmen separately from subcontractor and by defining each tiered subcontractor solely in terms of its privity of contract with the preceding tiered subcontractor.

We also are supportive of including provisions addressing notice procedures in the draft legislation. However, as presently drafted, we believe that the provisions can be simplified to mitigate the possibility of litigation over complex or confusing notice requirements.

Again, we would welcome the opportunity to dialogue further on your draft legislation and to work with you to craft language that meets your legislative goals. Please let me know if you have questions or if we can be of further assistance.

Sincerely,

Mark McCallum
General Counsel & Director of Government Relations