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Sent via U.S. mail and email (Diane.cotter@usnh.edu; Denise.smith@usnh.edu)

June 5, 2013

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RE: Concerns Regarding Consideration of Alternative to Statutorily-Required Bonds in RFQ/P No. 11039-0001, Rhodes Hall Nursing Labs, Keene State College

Dear Ms. Cotter and Ms. Smith:

The National Association of Surety Bond Producers (NASBP) is a national trade association of professional surety bond producers, representing firms employing licensed resident and nonresident producers placing surety bonds on contracts in New Hampshire and in other jurisdictions throughout the United States and its territories. A stipulation in a Request for Qualifications/Proposals, USNH RFQ/P #11039-0001, addressing construction management services in connection with Rhodes Hall Nursing Laboratory at Keene State College recently has come to our attention and has caused concern. Of specific concern is a provision, numbered 6.9.2, found on page 8 of the RFQ/P, which states that USNH will consider accepting an alternative insurance product in place of statutorily-required performance and payment bonds. Provision 6.9.2 reads: 'In lieu of "conventional" payment and performance bonds, the University will consider accepting Subguard® as provided by Zurich Insurance Company.' We find this stipulation to be problematic on a number of practical and legal bases.

First, a subcontractor default insurance product, such as Subguard®, and performance and payment bonds furnished by the prime contractor/CM are not equivalent in function or coverage. In fact, a subcontractor default insurance policy should never be considered a replacement or substitute for performance and payment bonds furnished by the prime contractor/CM to the project owner. A subcontractor default insurance (SDI) policy is an insurance product to address the prime contractor's risk, not the project owner's risk, of subcontractor failure. The prime contractor/CM is the insured party and the coverage of the policy is triggered by a subcontractor default. SDI does not provide a benefit to the project owner for the default of the prime contractor/CM, thus, in the absence of performance and

payment bonds from the prime contractor/CM, the project owner *retains the performance and payment risk of the prime contractor/CM*. SDI also does not provide payment remedies for the benefit of unpaid subcontractors and suppliers. However, these critical benefits—a performance guarantee to the project owner and payment remedies to subcontractors and suppliers—are present when the prime contractor/CM furnishes the project owner with performance and payment bonds.

Beyond this evident disparity in benefits, performance and payment bonds, not SDI policies, are statutorily required of contractors performing public construction contracts in New Hampshire. N.H. Rev. Stat. § 447:16 establishes that any public works contract that equals or exceeds $35,000.00 requires the furnishing of a surety bond or other sufficient security "conditioned upon the payment by the contractors and subcontractors for all labor performed or furnished…." A plain reading of § 447:16 clearly indicates that SDI cannot satisfy the statutory requirement.

It also is critical to note that public officials are prohibited from directing contractors to purchase a contract of insurance from a particular insurance company, broker, or agent. Under New Hampshire law, specifically, N.H. Rev. Stat. § 95:1-a, public officials are barred from such activity. The applicable statute states, in part, the following: "With respect to any public works or construction contracts of any type that are paid for by public funds of the state or by any of its political subdivisions, or of any public authority, it is unlawful for any officer or employee of the state, or of any of its political subdivisions, or of any public authority, either directly or indirectly to require the builder or the bidder to make application to or to get any surety bond or contract of insurance specified in the building or construction contract from a particular surety or insurance company, agent, or broker. It is unlawful for any officer or employee of the state, of any of its political subdivisions, or of any public authority, or for any person who purports to act for such an officer or employee to negotiate, make application for, or to get any such a surety bond or contract of insurance which can be obtained by the builder, bidder, contractor, or subcontractor on the building or construction contract."

The practice of directing contractors to purchase insurance or surety bonds from a particular source by public officials is detrimental to the welfare and business relations of construction firms. Like New Hampshire, most states and the federal government have enacted statutory prohibitions against such practices. *In Guidelines for a Successful Construction Project*, a construction industry document developed by the Associated General Contractors of America, the American Subcontractors Association, and the Associated Specialty Contractors, Inc., which is available at www.constructionguidelines.org, the guideline on surety bonding informs on the practice in relation to surety bonds. It reads:

> "Directed suretyship is the practice of forcing a contractor to use a designated surety producer or surety company unfamiliar with the contractor's needs and service requirements. It imposes a relationship not voluntarily assumed and subjects the contractor to disclose business information to persons that may not act in the best interest of the contractor.
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> Further, the practice of directed suretyship may serve to lessen competition on projects: a single surety likely will not accept all bidders and many contractors likely will be reticient to disclose confidential personal and business financial information to an unknown third party. For these reasons, most states and the federal government have enacted statutes that prohibit the practice of directed suretyship."

For all of the foregoing reasons, I respectfully request that you remove provision 6.9.2 in its entirety from RFQ/P No. 11039-0001.

NASBP appreciates your prompt consideration of our concerns and of our requested action. Please do not hesitate to contact me should you require further information or have questions regarding this letter.

Yours sincerely,

Mark H. McCallum
Chief Executive Officer

cc: Larry LeClair, NASBP
Martha Perkins, Esq., NASBP