



National Association of Surety Bond Producers

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Sent by e-mail to: Richard.tetreault@state.vt.us

Mr. Richard Tetreault
Director of Program Development
Vermont Agency of Transportation (AOT)
Office of Contract Administration
1 National Life Drive
Montpelier, Vermont 05633-5001

Re: Incentive/Disincentive (I/D) Period and Liquidated Damages, Rochester, VT Bridge Projects

Dear Mr. Tetreault:

I wish to make you aware of concerns of the National Association of Surety Bond Producers (NASBP), a national trade organization of professional surety bond producers, whose membership includes firms employing licensed surety bond producers placing bid, performance, and payment bonds throughout the United States, including Vermont, regarding incentive/disincentive (I/D) periods and liquidated damages that appear in the Bid Solicitation for the Rochester Bridges Project (Project). In the opinion of NASBP, the excessive liquidated damages are overreaching and will stifle competition for small and midsize Vermont general contractors. It has been brought to our attention that several other Vermont AOT bridge projects, such as Waterbury (IM 0892) scheduled to bid on October 18th and Middlebury (RS 0174-8) have similar disincentive penalties. Middlebury which was bid on October 4th had just three bidders and only the high bidder was from Vermont. Might there be a correlation between excessive disincentive penalties and the ability of local contractors to bid on and be awarded the work for such projects?

For example, Rochester Bridge 15 sets forth a daily disincentive penalty of \$1,000 per hour per day with no maximum penalty, not including liquidated damages of \$2,700 times .20 per day (\$540 per day), as set forth by AOT's daily schedule for contracts ranging from \$5 million to \$10 million. Bridge 13 calls for a disincentive penalty of \$15,000 per day, plus liquidated damages of \$2,700 per day times .30 (\$810 per day). While Bridge 16 sets forth a daily disincentive penalty of \$1,000 per hour per day with no maximum penalty, not including liquidated damages of \$2,700 times .30 per day (\$810 per day). The combined daily penalties for just these three projects alone would be \$ 65,160 (\$24,540 for bridge 15 + \$15,810 for bridge 13 and \$24,810 for bridge 16). Please keep in mind that this calculation does not consider the four other bridges where the general contractor may face disincentive penalties plus liquidated damages. These daily

disincentive penalties appear excessively high and are uncapped, constituting a substantial risk to general contractors of all types and sizes.

It is worth noting that a surety extends surety credit to those construction firms that the surety deems to possess the requisite experience, equipment, management capabilities, and financial wherewithal to perform the undertaken contract obligation successfully. As part of its assessment, the surety evaluates the risks presented in the contract obligations and ascertains if such risks are within the control and the means of the construction firm. Those risks that are outside of the control and means of the construction firm will not be managed effectively by the firm, making the extension of surety credit highly unlikely. Unreasonable and excessive assessment of disincentive penalties combined with liquidated damages may outstrip the capabilities and risk tolerances of even the largest general contractors.

Moreover, MWBE/MBE firms will be at particularly disadvantaged by these excessive daily disincentive penalties, as they often do not possess the capabilities and financial wherewithal to assume substantial contract risks. They cannot finance or self-insure against such risks. Excessive risks, such as the high and uncapped disincentive penalties and liquidated damages, may negate the ability of most small businesses to secure surety credit and to compete, and may virtually eliminate opportunities for MWBE/MBE firms on the Project. It is worth noting that Executive Order No. 3-20 (3 V.S.A. App. § 3-20) calls upon Vermont Agencies and Departments to “afford all businesses equal access and opportunity to compete for state contracts for good and services.” Excessive disincentive penalties coupled with liquidated damages may hamstring Vermont agencies in abiding by this Executive Order.

In order to attract small and mid-sized Vermont contractors, it is necessary for AOT to revise the disincentive penalties/liquidated damages requirements. For example, consideration for limiting the assessment of disincentive penalties/ liquidated damages at a maximum percentage of the contract value allows contractors and their sureties to better quantify the risk associated with performance. Such a revision should translate into less onerous terms, reducing risks to a scale that can be better managed and assumed by small business firms, including MWBE firms. Higher bidder interest and MWBE/MBE participation and enhanced reputation within the construction community will be tangible benefits of setting a reasonable and proportionate liquidated damages requirement.

Also of concern to NASBP is the clause that appears in the Bid Solicitation on page 4, section 13(b) “Dates,” which triggers disincentive penalties/liquidated damages. According to this clause, the I/D period is “absolutely fixed and will not be changed for any Act of God, omission, etc.” While discretion is given to the Secretary to amend the I/D period under “extreme” conditions,” the term “extreme conditions” is not defined. Moreover, Acts of God are widely recognized as excusable delays because they are beyond the control of the contractor. This clause improperly shifts this risk onto the contractor, who gets no relief from Acts of God. The contractor is thus severely penalized with respect to the disincentive penalties/liquidated damages by events over which it has absolutely no control. This type of uncertainty and ambiguity gives sureties a great deal of apprehension and discomfort when deciding whether or not to issue surety credit, particularly for a small or mid-sized general contractor. NASBP suggests that this language be amended to allow greater flexibility to both parties in order to

accommodate for unforeseen events such as inclement weather, which is a frequent occurrence in Vermont.

Thank you for your consideration of our concerns and for your attention to these risk-management issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence LeClair". The signature is fluid and cursive, with the first name "Lawrence" written in a larger, more prominent script than the last name "LeClair".

Lawrence LeClair, Director, Government Relations

cc: Mr. Kevin Marshia Kevin.marshia@state.vt.us
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