

**NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS**

7735 Old Georgetown Road, Suite 900

Bethesda, MD 20814

Tel: 240.200.1270

Fax: 240.200.1295

[www.nasbp.org](http://www.nasbp.org)

February 7, 2022

**BY ELECTRONIC TRANSMISSION ([weigel@ci.wilsonville.or.us](mailto:weigel@ci.wilsonville.or.us); [palmer@ci.wilsonville.or.us](mailto:palmer@ci.wilsonville.or.us); [jacobson@ci.wilsonville.or.us](mailto:jacobson@ci.wilsonville.or.us))**

Zach Weigel, City Engineer  
City of Wilsonville  
City Hall—1<sup>st</sup> Floor  
29799 SW Town Center Loop E  
Wilsonville, OR 97070

Matt Palmer, Civil Engineer  
City of Wilsonville  
City Hall—1<sup>st</sup> Floor  
29799 SW Town Center Loop E.  
Wilsonville, OR 97070

Barbara Jacobson, City Attorney  
City of Wilsonville  
City Hall—2<sup>nd</sup> Floor  
29799 SW Town Center Loop E.  
Wilsonville, OR 97070

**Re: City of Wilsonville Bond Forms**

Dear Mr. Weigel, Mr. Palmer, and Ms. Jacobson:

I am contacting you on behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of agencies employing licensed surety bond producers who place bid, performance, and payment bonds in the State of Oregon and across the United States. NASBP was recently forwarded a copy of the Bid Bond, Performance Bond, and Payment Bond Forms (collectively, Bonds) required for a City of Wilsonville (City) project (specifically, the 95<sup>th</sup> Avenue Storm Line Repairs, Project #7062). We have reviewed these documents, and the terms and conditions of these forms give NASBP great concern. In particular, these bond terms and conditions are counter to prevailing surety and construction industry practices and to the market reputation of the City as a desirable procurer of construction services. Such onerous terms and conditions will restrict competition for City projects and ensure the City pays more for the work.

A number of the terms and conditions in the Bonds substantially increase the risks to both the contractor and the surety. This increased risk will almost certainly effect the number of contractors that are able to submit bids for City projects. These documents are drafted so broadly and ambiguously that they will act as a

significant deterrent to sureties wishing to write bonds for City projects. Below I provide general commentary and comments on some specific terms and conditions that will elucidate NASBP's concerns and that I hope will be beneficial to the City's interests.

First, I note that the Performance Bond and the Bid Bond prescribed are forfeiture bonds. The Bid Bond form provides that, in the event the winning bidder fails to enter into a contract with the City and provide the final bonds, the surety shall "pay and forfeit to Owner the penal amount of the deposit specified in the call for bids . . . ." Such an amount of forfeiture of a Bid Bond is a considerable penal sum and bears absolutely no relationship to the actual costs that would be incurred by the City in the event the City needed to enter into negotiations with another contractor. The City's prescribed Performance Bond is a forfeiture bond with the following language: "If the Principal shall be declared to be in default in the performance of any part of the Agreement, the Surety must, within the same time frame allowed to the Principal, cure or cause to be cured the default or must otherwise immediately pay the entire penal sum of the Bond to the Obligor." This language does not allow a surety to assess its risk prior to issuing the bond, as forfeiture of the entire penal sum could occur when the project is nearing completion, so that there is no relation between the costs to complete and the penal amount.

The Performance Bond obligation is so broad that it essentially turns the Bond into a project insurance policy, a role and purpose for which the Bonds was never intended. The Performance Bond provides that "[t]his obligation also includes the obligation to promptly pay, as due, payment to any person, co-partnership, association, or corporation furnishing medical, surgical, and hospital care or other needed care and attention incidental to sickness or injury to employees of said Principal . . . ." Such an obligation is not contemplated pursuant to a performance bond. Sureties issuing contract bonds are guaranteeing the contractor's ability to perform the contract and to pay subcontractors and suppliers—and are not acting as insurers for the project.

The Performance Bonds is deficient in other ways. It provides that the surety's obligation, in addition to the penal sum, shall include "all reasonable costs, expenses, and fees . . . , including reasonable attorney fees, incurred by the Obligor in enforcing the obligations described herein . . . ." This provision would allow the City to recover from the surety an unspecified amount above the penal sum of the Bond. If performance bonds do allow recovery of attorneys' fees and costs from a surety, those costs are generally included within and limited by the penal sum of the bond.

Additionally, it is unreasonable to mandate that the surety is not entitled to assert any of its principal's defenses to performance. It is black-letter surety law that a surety is entitled to assert any of the defenses that its principal could assert. The Bond provides as follows: "The Surety acknowledges that the Surety shall not be entitled to assert any defense for the failure of performance that the Principal might have been operation of law." Elimination of these potential defenses is both unreasonable and increases the risk to the surety.

Furthermore, the Performance Bond—and the Payment Bond—provide that the surety "stipulates and agrees that no change, extension of time, alteration, or addition to the terms of said Agreement or the specifications accompanying the same shall in any manner affect its obligations under this Bond and it does hereby waive notice of any such change, extension, alteration, or addition to the terms of the Agreement or to the work or to the specifications." Widely accepted bond language provides for automatic increases—but with a specific limit for automatic increases (for example, 20% aggregate of the penal sum), after which the surety is given notice and must consent. The risk underlying the original obligation is materially altered when the original

contract amount increases by more than 20%, thereby fundamentally changing the nature of the surety's risk on the bond.

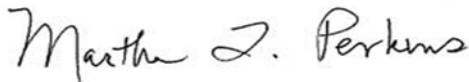
A surety assesses its risk and bases its decision to bond a project on, among other things, the terms and conditions of the contract at the time the bond is issued, among them the amount of the bonded obligation. Allowing for automatic and unlimited increases of the bond amount, with no opportunity for notice or consent, creates an unreasonable risk for the surety, as it is agreeing to bond a contract with potentially unlimited and unknown obligation.

These overly broad and onerous terms and conditions place undue risks on sureties and contractors alike. When contractors seek surety credit for bonds with onerous terms and conditions, sureties are much less likely to extend surety credit. The sureties will not issue such bonds, except perhaps to the very largest, most highly capitalized contractors. By including such onerous terms, the City is restricting competition and burdening taxpayers unnecessarily. In addition, such policy does not comport with one of the State's top priorities—to award work to small, emerging, and minority business enterprises. And such problematic language, as in the Bonds, increases the chances of acrimonious disputes and litigation. None of this fallout is in the best interests of the City or any City project.

For these reasons, and others, NASBP respectfully requests your reconsideration of imposing such onerous bonds terms and conditions on contractors and sureties for City projects, as competition will be restricted and the City will unnecessarily burden its taxpayers. We recommend that the City revise the Bonds to accord more with industry practices and standards. Alternatively, the City may wish to consider adopting the well-known standard bond forms developed by industry organizations, which could be amended appropriately to address specific concerns. These include the American Institute of Architects (AIA A312 Performance and Payment Bonds), ConsensusDocs (ConsensusDocs 260 Performance Bond and 261 Payment Bond), Engineers Joint Contract Documents Committee (EJCDC C-610 Performance Bond and C-615 Payment Bond). Among the benefits of these forms is that they are well known in the industry and have been well tested in the court system.

I appreciate the City's consideration of NASBP's concerns, and I would be happy to answer any questions or discuss the bond form language with you.

Yours sincerely,

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

Martha L. Perkins, General Counsel

cc: Mark H. McCallum, CEO  
Lawrence LeClair, Director of Government Relations