



National Association of Surety Bond Producers  
1140 19th Street, NW, Suite 800, Washington, DC 20036-5104  
Phone: 202.686.3700  
Fax: 202.686.3656  
www.nasbp.org

BY ELECTRONIC TRANSMISSION (nancy.garcia@pur.hctx.net)

June 29, 2017

Ms. Nancy Garcia  
Harris County Purchasing Agent  
1001 Preston, Suite 670  
Houston, Texas 77002

**Re: Harris County Toll Road Authority—Tollway Ship Channel Bridge Replacement  
Project: Contract No. 345; Job No. 17/0028**

Dear Ms. Garcia:

I am contacting you on behalf of the National Association of Surety Bond Producers (NASBP), a national trade association of companies employing licensed resident and nonresident surety bond producers placing bid, performance, and payment bonds in the State of Texas and all other jurisdictions. NASBP recently became aware of the contract documents and bond forms for the Harris County Toll Road Authority (County)—Tollway Ship Channel Bridge Replacement project (Project). NASBP has significant concerns about some of the terms and conditions of these documents and believes that such provisions will likely decrease the number of contractors that submit proposals for the Project and, in addition, will likely increase the cost of the Project.

Addendum 4 provides for substantial liquidated damages at the daily rate depending on the specific milestone, such as \$46,500 per calendar day for failure to meet milestone 1 and \$14,500 per calendar day for failure to meet milestone 2 or 4. The liquidated damages do not appear to be capped, and such a requirement of substantial damages and no cap constitutes a significant risk to both contractors and their sureties. Unreasonable and excessive liquidated damages make the extension of surety credit less likely. NASBP urges the County to revise the liquidated damages provision to reduce the risk to a better manageable scale and to cap the liability at a specific amount for each milestone.

NASBP has significant concerns with the provision set forth in the General Notes to Addendum 4 as referenced in Addendum 5 under Article 18 "Indemnification and Hold Harmless for Telecommunications" as an unfair, uncapped, one-way waiver of consequential damages. The General Notes in Addendum 4 states, in relevant part, as follows:

In addition the Contractor will be liable for the extent of Harris County's actual damages (including loss of revenue, loss of use of data, costs of mitigation, etc.) resulting from the damaged fiber optic lines.

Article 18 of Addendum 5 states, in relevant part, as follows:

The Contractor shall indemnify and hold harmless Harris County, and the Authority from and against all costs, liability, and expense whatsoever (including, without limitation, attorney's fees, court costs and expenses) arising out of any act or omission of the Contractor, its agents and/or employees, that causes or contributes to (1) any damage to or destruction of any telecommunications system on Harris County and/or the State's property . . . . The Contractor shall not have or seek recourse against Harris County or the Authority for any claim of action for alleged loss of profits or revenue or loss of service or other consequential damage to a telecommunications company using Harris County and/or the State's property . . . .

What makes this broad and one-sided consequential damages provision so onerous is that the contractor is also responsible for liquidated damages. In addition, there is no provision for any cap on the consequential damages, for which the contractor—and the surety—could be liable.

When a contractor is faced with a very broad consequential damages provision, such as the one above, 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 and, likely fewer bids for the project. Thus, the taxpayers will carry an unnecessary burden.

In addition, uncapped consequential damages pose considerable problems from a surety underwriting perspective. Sureties are not usually comfortable issuing bonds for projects where the contractor/principal has very broad consequential damages exposure. Notably, this provision will certainly make it more difficult for project participation by subcontractors, especially small businesses.

Sureties often advise their principals/contractors to limit the consequential damages exposure by incorporating a "mutual waiver" of consequential damages clause in their contracts. A well-known example of such a clause is found in AIA Document A201-2017, General Conditions, at section 15.1.7, Waiver of Claims for Consequential Damages:

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit, except anticipated profit arising directly from the Work.

This is a standard mutual waiver of consequential damage clause, and this or a similar version of it is often incorporated into construction contracts. NASBP urges the County to consider including such a mutual waiver in its contract documents.

As set forth above, Article 18 of Addendum 5 requires the contractor to fully indemnify and hold harmless the County for a very broad spectrum of damages. NASBP proposes that the County limit the contractor's obligations to indemnify and hold harmless the County only to the extent the claim was caused by the Contractor's negligence.

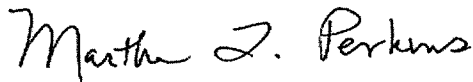
NASBP has particular concerns about the performance bond. While NASBP understands that the bond form has been used by the County for a number of years, the terms and conditions of

the performance bond form are problematic for the Project, with its substantial scope and complexity. The language that obligates the contractor and the surety to "comply strictly with each and every provision contained in said contract and agreement, and further agree, bind and obligate themselves to save and keep harmless the County of Harris from any and all damages expense and claims of every kind and character which the County of Harris may suffer directly or indirectly, as a result of the execution of the contract herein secured" is overbroad and quite onerous. Such language is not typical or traditional in the industry. And sureties are reluctant to issue bonds with such problematic language.

For bond forms that are often used on large projects and clearly define the rights and obligations of the parties, NASBP recommends the AIA A312 bond forms, which would be appropriate for the Project.

NASBP appreciates your consideration of our concerns. If you have any questions, please feel free to contact me concerning this matter.

Yours sincerely,

A handwritten signature in black ink that reads "Martha L. Perkins". The signature is written in a cursive, flowing style.

Martha L. Perkins  
General Counsel