



National Association of Surety Bond Producers

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August 25, 2011

Mr. Bill Grunloh,
Chief Procurement Officer
Executive Ethics Commission
Illinois Department of Transportation
2300 S. Dirksen Parkway, Room 200
Springfield, IL 62764

Re: Proposed Rules 44 IL ADC 6.290, "Requirement of Contract Bond for Construction Contracts"

Dear Mr. Grunloh:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association representing professional surety bond producers, including licensed resident and non-resident agents doing business in Illinois, I am contacting you concerning the Illinois Department of Transportation's proposal to amend its procurement regulations specifically, 44 IL ADC 6.290, "Requirement of Contract Bond for Construction Contracts."

By first enacting a statute requiring the furnishing of payment bonds by contractors performing public construction contracts, the Illinois Legislature recognized the importance of having payment bonds in place to protect the downstream businesses that supply labor and materials on Illinois public construction projects. Often these business entities, the project subcontractors or suppliers, are small businesses whose only viable remedy in the event of nonpayment by the prime contractor is to claim on the payment bond.

The statute (30 ILCS 550, "Public Construction Bond Act") and proposed rules allow for state officials, boards, commissions, or agents to accept bonds in the amount less than the contract amount. Unless there is a compelling reason, such as bonds are not available in the amount of the contract, performance and payment bonds should be set in 100% of the contract amount. By receiving performance and payment bonds in the total contract amount, the Illinois contracting agency receives assurance that, in the event of a default, it has the necessary funds available to cover the total cost of the project and to cover payment for those who supply labor and materials on the project. Given the current state of the nation's economy, it would seem to make little sense to lessen or reduce statutory bonding requirements that protect Illinois taxpayer's funds from the losses that may arise from construction defaults.

Additionally, without a full payment bond in place, project subcontractors and suppliers, which may be small businesses, are at significant risk for nonpayment. Subcontractors and suppliers

cannot sue the state in the event of nonpayment since they do not have lien rights on state construction projects. They may have, in some states, lien rights against certain contract proceeds,

such as unpaid amounts, but such a remedy typically is limited and likely will be inadequate to address their situation in the absence of a payment bond remedy. The payment bond is their sole payment remedy in the event that the prime contractor becomes insolvent or fails to pay them. Reducing the amount of the payment bond may mean that bond funds are available for only some, but not for all claimants.

As payment bonds protect materialmen and subcontractors, performance bonds protect contracting agencies and precious taxpayer funds. In the absence of a performance bond, additional taxpayer funds will be required to complete projects when prime contractors default in their performance of such contracts. Reducing the bonding threshold for contracts exceeding \$50,000, will mean that many more taxpayer-funded projects will not have performance bonds in place and taxpayers will suffer any losses.

The intent of the proposed regulation was apparently to comport with recent changes made to the Illinois Procurement code. However, the proposed regulation in 44 IL ADC 6.290 differs a great deal from the Procurement Code (30 ILCS 550) most notably by not taking into consideration construction costs associated with apparatus, fixtures, machinery and leased equipment. These costs are all associated with a construction project and should be covered under the payment bond. If they are excluded, as contemplated in the proposed regulations, vendors, many of whom may be small business owners, would have no other recourse to address their situation except through a private lawsuit, requiring significant resources that likely they would not have. The procuring agency could not help them, since these would be private contract matters.

Finally, the Department should not be seeking to deprive Illinois businesses and taxpayers of payment and performance protections in this difficult economic environment. If the impetus behind the proposed regulation is greater inclusion of small and minority businesses as prime contractors on state contracts, better approaches exist that do not involve stripping subcontractors and suppliers, many of them being small and minority businesses, and taxpayers of needed protections. The construction and surety industries have existing programs to mentor and educate small and minority businesses so they are positioned for long-term success as businesses, including enhancing their standing to obtain financial and surety credit.

Please note that established programs exist to assist small and minority contractors with obtaining bonding and business assistance such as the Office of Surety Guarantees of the U.S. Small Business Administration that offers a bond guarantee program aimed at providing bonds to small and emerging construction businesses. Further, the Office of Small and Disadvantaged Business Utilization of the U.S. Department of Transportation offers lending as well as other programs, one of which occurred last year in Chicago, designed to benefit small and emerging contractors seeking to perform transportation contracts.

For these reasons we request that state officials, boards, commissions, or agents not permit bonds in any amount other than 100% of the contract amount. Reducing the penal sum will neither save costs nor facilitate bonding to those businesses which otherwise would not qualify for surety credit

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for that contract. Reducing the penal sum, however, will reduce significantly the coverage under the performance bond to Department and the payment bond to claimants.

I would be happy to discuss these concerns with you in further detail. Please feel free to contact me at 202-686-3700 or lleclair@nasbp.org

Yours sincerely,

A handwritten signature in black ink, appearing to read "Lawrence E. LeClair". The signature is written in a cursive style with a large initial "L".

Lawrence E. LeClair
Director, Government Relations
National Association of Surety Bond Producers