



April 10, 2013

U.S. Department of Transportation
Dockets Management Facility
Room W-12-140
1200 New Jersey Avenue SE,
Washington, DC 20590

Re: Docket No. FHWA-2012-0126

The American Subcontractors Association, Inc. (ASA) is pleased to submit its recommendations of matters to be addressed in the model contracts for public-private partnerships (P3s) to be developed by the Department's Federal Highway Administration as required by Section 1534(d) of P.L. 112-141 (Moving Ahead for Progress in the 21st Century Act or MAP-21). ASA will focus its recommendations on contract provisions that will provide payment protections for subcontractors and suppliers who have performed on construction contracts awarded by an entity undertaking a P3 project.

ASA is a national trade association representing subcontractors, specialty trade contractors, and suppliers in the construction industry. ASA members work in virtually all of the construction trades and on virtually every type of horizontal and vertical construction on both public and private construction. More than 60 percent of ASA members are small businesses.

ASA would like to express its thanks to the Department for seeking recommendations from the public regarding the coverage of the model contracts required by Section 1534(d). ASA had made a request for such an opportunity for public participation in a letter dated September 7, 2012, to the Deputy Secretary and General Counsel. ASA appreciates that the request was given favorable consideration. ASA would urge that the Federal Highway Administration (FHWA) make available for public input its draft of the actual text of the proposed model contracts. ASA is certain that comments on specific draft contractual language would elicit equally detailed comments from the public.

ASA strongly urges that the proposed text of the model contracts must reflect a requirement for surety bonding on contracts for construction awarded in furtherance of the P3 project being undertaken. Such provision should provide payment protections to subcontractors and suppliers at least as effective as those provided by the 1935 Miller Act on construction undertaken directly by a Federal agency or by the so-called Little

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Miller Acts of the various States for construction projects undertaken by a state agency. Given the unpredictable diversity of public-private partnerships, subcontractors and suppliers too frequently encounter a dangerous void in essential payment protections for work performed. The severe risk inherent in the absence of reliable payment protection can only reasonably be expected to increase costs for the overall construction project being undertaken through the public-private partnership as subcontractors and suppliers seek to accommodate the increased risk or even completely deter bidding by the most-skilled subcontractors and suppliers, whose resources can be directed at projects in which solid payment protections are available.

ASA urges the drafters of the model contracts to look to the long-established precedent of OMB Circular A-102 (Grants and Cooperative Agreements with State and Local Governments) and its Attachment O (Procurement Standards), which provided unambiguous direction regarding the need for bonding on construction projects. The standards of Attachment O are now reflected in the Common Regulation as promulgated by individual departments and agencies engaged in providing Federal funding support for projects undertaken by the States and their units of local government, including special purpose districts.

The Department of Transportation's promulgation of the Common Regulation is found at 49 CFR. 18.36. DOT's regulation unequivocally states at 49 CFR 1836(b) [Procurement Standards]:

“(1) Grantees and subgrantees will use their own procurement Procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.”

Based on the foregoing, ASA believes that the model contracts should include an explicit requirement that the State's Little Miller Act shall be applicable to any construction being undertaken pursuant to the P3 project.

ASA would also call to the attention of the drafters of the model contracts the direction contained in 49 CFR 1836(h)(3)[Bonding Requirements]:

“(3) A payment bond on the part of the contractor for 100 percent of the contract price.”

Based on the foregoing, ASA believes that the model contracts should make explicit that the amount of the payment bond required shall be no less than 100 percent of the contract price, in those instances in which a State's Little Miller Act may require less

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protection of construction subcontractors and suppliers performing construction in furtherance of the P3 project.

The reality of construction contracting, whether private or public, has been for many, many years that subcontractors do the vast preponderance of the work. The use of a P3 does not change this practical reality. The successful undertaking and timely completion of a P3, with substantial contributions of public resources, including Federal financial support, will require that construction subcontractors and suppliers be fully and timely paid, in accordance with the contract, for work performed.

Respectfully submitted,

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