

lost or destroyed prior to installation on the project. For state public works projects, materials stored at a construction site are insured under Risk Management Division “Builder’s Risk” policy. Materials stored off the construction site are not insured under that policy.

The NMDOT expresses concern that SB 683 would basically require the NMDOT to finance the contractor’s materials operation by having to deal directly with the supplier rather than the contractor.

SIGNIFICANT ISSUES

GSD indicates that the “materialman” defined in the bill is allowed to “accept” the materials as having been delivered to a location other than the construction site. This is a conflict of interest in that the supplier would be accepting, and in effect certifying for payment, his own delivery of goods.

GSD’s Property Control Division (PCD) construction contract contains general conditions that cover payment for materials stored off site. The owner has no interest in where materials are stored until there is a request for payment. Upon payment, the risk of loss of materials shifts from the contractor to the owner. Payment for materials stored off site can be addressed adequately in contract documents.

EMNRD reports that SB 683 will require state agencies to pay for materials that have not been delivered to the agency, but instead are delivered somewhere else. Assuming the materials are ultimately received by the agency there are still several concerns. One issue of note in this legislation is to clarify that the owner shall not pay any additional charges (above and beyond the original agreed upon price) for shipping from an off site location or storage fees at the off site location.

Additional issues noted include the liability for damage to equipment/materials stored off site (that the owner has purchased) and that the owner should have the right of inspection at the off-site location to verify quantity and quality of goods.

The NMDOT indicates that SB 683 conflicts with NMDOT Specification Section 109.8 and NMDOT practice for many years. Specification Section 109.8 (“Material on Hand”), states that, in order to be paid up to 95% of delivered materials, whether onsite or off-site, the contractor must submit paid invoices which are certified by the supplier or manufacturer as having been paid by the contractor. Specification Section 109.8 also requires lower percentage payments for instances where the Project Manager determines that it is not practical to determine the delivered cost of materials. SB 683 would require the NMDOT to pay 100% for materials delivered to an off-site location on the strength of a bill of lading (list of items delivered and location) and not a paid invoice certified by the supplier or manufacturer as having been paid by the contractor.

Additionally, SB 683 deletes the existing requirement that the contractor pays the materials supplier and passes the paid invoice on to the NMDOT pursuant to their contract. Further, NMDOT argues that SB 683 prevents the NMDOT from even asking the amount that was actually paid for the materials.

SB 683 requires the NMDOT to pay a contractor, subcontractor or supplier directly rather than having such payments go through the contractor who has a contractual relationship with the

NMDOT. NMDOT argues that SB 683 would open the department to challenge during an internal or FHWA audit for paying unsupported amounts to a party without a contract with the NMDOT.

SB 683 creates a statutory right to direct payment to a subcontractor or supplier without a contract between the parties. Current New Mexico statutory (NMSA 1978 Section 37-1-23) and Supreme Court case law (Hydro Conduit Corporation, 110 NM 173, 793 P.2d 855 (1990)), however, grant immunity to the NMDOT from contract and contract-related actions by a party without a valid written contract.

Further, under NMDOT Specification Section 105.19, only a contractor can make an administrative claim to the NMDOT and, in order to do so, must include “references to relevant portions of the contract,” which neither a subcontractor or supplier could do because neither has a contract with the NMDOT. Thus, a subcontractor or supplier who has been granted a statutory right to direct payment from the NMDOT has no legal method for enforcing this right. Unfortunately, though, this may not stop such subcontractors and suppliers from asking for a claims board and complicating the NMDOT’s administrative claims procedure with legally unrecognized claims.

PERFORMANCE IMPLICATIONS

SB 683 conflicts with the exiting contractual relationships sites especially with the NMDOT. NMDOT for example enters into contracts with the contractor who, in turn, has entered into contracts with its subcontractors and suppliers. In order to ensure that the contractor has the requisite control over the jobsite, all communications go through the contractor, and the NMDOT does not communicate directly with the contractor’s subs or suppliers. This bill would tend to blur these lines of communication because the owner would be directly liable for payment not just to the contractor but also to a subcontractor or supplier.

TECHNICAL ISSUES

GSD points out that Section 1 of the SB 683 defines “public works project” and would create a conflict with the definition of a “state public works project” in 13-1-91, NMSA 1978.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Conflicts with NMDOT Specification Section 109.8, NMAC 18.27.2.

OTHER SUBSTANTIVE ISSUES

GSD points out that the bill introduces and defines “materialman” in the procurement code as a person who furnishes material or supplies to a subcontractor or contractor. In addition, the bill allows the materialman to determine the necessity to deliver materials to a location other than the construction site. This provision elevates suppliers as equal to contractors in determining the means and methods of completing the work by allowing them to make deliveries to locations other than the work site at their discretion, and could subvert contractual relationships on a public works project.

The PCD construction contract requires:

- Approval to store off site in advance and in writing, by the owner prior to payment for off site materials
- Payment is conditioned on a bill of sale or proof of title to the owner for the materials
- Applicable insurance for the materials. Acceptable insurance is a standard insurance certificate or a surety bond in an amount equal to the invoice value of the materials.
- It is up to the contractor to assure the owner that his interest in the paid materials is protected.

AMENDMENTS

EMNRD recommend the following amendments:

Recommend adding language to the bill stating that the Owner shall not be responsible for any freight or shipping costs for moving the material from the off site storage location to the job site. Additionally, it is recommended that the bill state that any fees associated with storing the material at an off site location shall be the responsibility of the contractor, subcontractor, or materialman unless agreed upon under the original procurement.

Additionally, this agency suggests language be added saying that the contractor shall remain responsible for any damage to the equipment while stored and shall provide adequate insurance to cover any liability for storing the equipment.

Finally, some provision for the inspection of the quantity and quality of goods by the owner at the off-site location should be made.

GM/nt:csd