

Bonding tribal projects may require extra diligence on contractor's part

By Mark D. Iatarola,
Maloney & Associates
Insurance Services

As the economic environment changes, many contractors must pursue work with owners they may not be familiar with. If they cannot rely on the City of San Diego and other local municipalities to secure funding for construction projects, they're forced to look elsewhere. After all, you have to work where the money is....right?

In the eyes of many contractors, those with the money these days are the Native American tribes. And, it doesn't appear that they'll be running out of money anytime soon. We all hear that there's a lot of work

coming out, the tribes are easy to work with and they pay like clockwork.

But, how does the surety view tribal work? If you can bond a \$2-million job for the City of Carlsbad, you can bond a \$2-million job for the local tribe, right? Well, you have to remember that your surety company is more than a name typed on your bonds. In truth, it is your financial partner, and it wants to mitigate risk as much as you do.

Since Native American tribes aren't considered "public works" owners, the surety will consider several risk factors when considering a bid request running to them. Here are some of the more common risks that

would be explored:

Experience. How long has the contractor been in business? Has the contractor ever worked for this particular tribe, or any other tribe for that matter, in the past? Does the proposed tribal work mirror the contractor's expertise, or does the job include other work that the contractor may not have dealt with in the past? What size is the contractor's largest completed project to date? Would the contractor be pursuing his largest job ever with a tribal owner?

Tribal Sovereignty. Is the tribe willing to waive its sovereign immunity? Admittedly, most of us are unfamiliar with the inner workings of tribes and the

concept of sovereign immunity.

In short, a sovereign state is independent and possesses the power to regulate its internal matters without outside intervention. Tribes are presumably

Continued on page 33

BONDING TRIBAL PROJECTS

Continued from page 22

immune from state law. They cannot be sued unless they expressly consent to it or specifically waive their immunity. Accordingly, the bond company prefers that a tribe's sovereign immunity be waived whenever possible prior to the issuance of a bid bond.

Dispute Resolution. Does the contractor understand the extent of a potential problem with a tribe compared to any other project? Are disputes handled in a U.S. court or tribal court? Most bond companies won't bond tribal projects if disputes are handled by a tribal court, no matter how small or routine the job may be.

The Job. Who designed the project? Are the plans and specs clear? How does the contract read? Are the bond forms acceptable to the surety?

What are the tribe's expectations of the contractor? What is the condition of the jobsite? Can the work be done as outlined in the specs? Is a rock clause present? How are change orders handled? If you need to rent equipment, can you do so from a private vendor or must you rent from the tribe? The same goes for material.

Do the specs require that a certain percentage of tribal labor be used? Is the time for completion reasonable? Are liquidated damages clearly defined? Are they reasonable? What are the payment terms? Is your insurance subject to any exclusion(s) while working on tribal land?

Funding. Is the U.S. government or other public municipality providing the funding or a portion thereof? If not, has the funding been secured and verified?

Will it be set aside in an escrow account to ensure it is used for the project at hand only? Will additional funds be set aside for potential change orders?

Again, these factors are fairly common for a surety company to examine when considering a bid to a Native American tribe. Should you choose to pursue work for a tribal owner, the rule of thumb is, "The more time, the better." Give your surety agent as much lead time as possible so he or she can present your surety company with a detailed submission and discuss with you any questions or concerns they may have in a timely manner.

This article is offered for informational purposes only and is solely the product of the author. Mark Iatarola is vice president—underwriting & marketing with Maloney & Associates Insurance Services in Escondido. He has 11 years of surety experience, as an underwriter and surety agent.