NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS
1828 L Street, NW, Suite 720
Washington, DC 20036-5104
Tel: 202.686.3700
Fax: 202.686.3656
www.nasbp.org

*Sent via e-mail at kevin.kampschroer@gsa.gov and U.S. mail.*

March 11, 2010

Kevin Kampschroer
Director, Office of Federal High-Performance Green Buildings
U.S. General Services Administration
1800 F Street NW. 4209
Washington, DC 20405-0001

Re: Warranty Requirements in GSA Contracts Involving Photovoltaic Systems

Dear Mr. Kampschroer:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade organization of professional surety bond producers and brokers, representing over 5,000 personnel who specialize in surety bonding, including issuing bid, performance, and payment bonds for construction projects, I am contacting you about concerns centering on warranty requirements contained in General Services Administration contracts involving photovoltaic systems.

We have noted in multiple GSA solicitations for work involving photovoltaic systems, such as current projects in Cleveland, Ohio and in Laguna Niguel, California, that the applicable warranty provisions call for a warranty period of “20 years” and include an efficiency or performance guarantee. Furthermore, the wording of these provisions seem to indicate that the warranties are not pass-through warranties from the manufacturer, but rather are warranty obligations expected of the contractor/design-builder and, in turn, its surety. For example, the warranty for the GSA project in Laguna Niguel states:

*“Provide a minimum of a 20-year total system warranty. No module will generate less than 90% of its specified minimum power when purchased. PV modules shall have a 20-year limited warranty guarantying [sic] a minimum performance of at least 80% of the original power for at least twenty (20) years. If the performance falls below specifications during the Contractor’s warranty period, the Contractor at the Contractor’s expense shall replace / repair the defective equipment. …”*

A lengthy warranty period poses considerable problems from a surety underwriting perspective. Sureties usually are comfortable in covering a warranty obligation of up to two years. Durations longer than two years increase substantially the uncertainty regarding projections about the contractor’s future viability. Simply put, sureties cannot gauge the soundness and financial wherewithal of a company for periods extending too far into the future. The vagaries of the present economic environment further underscore the impossibility of underwriting guarantee obligations of long duration. Long warranty obligations also reduce competition from the standpoint of eliminating from the bidder pool all but the largest contractors, since only the largest contractors can shoulder the higher risks inherent in such contracts. Small and medium-sized contractors effectively are precluded. In this economic climate, contracting considerations to maximize, not to reduce, competition should be foremost.

For these reasons, we respectfully recommend that you adopt a more pragmatic approach of shorter warranty durations of one to two years to be provided by the contractor/design-builder to the awarding agency, with any longer warranty duration solely provided by the manufacturer. If the quoted warranty language is intended solely to describe the manufacturer's obligation, please understand that, in the absence of specific, clarifying language to that effect, the surety has to and will presume that its bond covers such an obligation. The best course is to be very specific on the obligations that are and are not to be covered by the bond.

You should also be aware how efficiency or performance guarantees are viewed by sureties. Sureties are comfortable underwriting warranty obligations that cover faulty workmanship or materials, but typically are less comfortable covering obligations involving performance guarantees (i.e., a warranty that certain building systems, such as photovoltaic systems, will meet performance standards). This type of warranty implicates a design responsibility of the contractor. That is, the contractor is promising to provide a system that meets certain standards. As the contractor takes on design liability, its risk increases and, therefore, the surety's risk increases. Again, such transfer of higher risks to the contractor reduces competition for the project as a whole, and only larger contractors, if any, may be afforded surety credit for such increased risks.

NASBP appreciates your prompt attention to these concerns, and we would welcome the opportunity to discuss these matters further and to answer any questions that you may have of surety practices or the surety industry.  I may be reached at 202-464-1173 or at mmccallum@nasbp.org.

Yours sincerely,

Mark H McCallum

Mark H. McCallum
Chief Executive Officer

cc: Larry LeClair, NASBP