NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS
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Mr. Mathew Blum
Associate Administrator
Office of Federal Procurement Policy
New Executive Office Building
725 17th Street, NW, Room 9013
Washington, DC 20503

Dear Mathew:

We met some years back when I worked for Federal Publications Inc. and you were assisting Federal Publications with research projects while working for the Armed Services Board of Contract Appeals. We spoke again when I was at the Associated General Contractors of America working on the issue of the procurement of construction as a commercial item, and AGC sought guidance from Office of Federal Procurement Policy on that topic. I currently serve as General Counsel & Director of Government Relations for the National Association of Surety Bond Producers (NASBP), a Washington, DC based trade association of firms engaged in producing surety bonds, including bid, payment and performance bonds, for contractors performing private and public construction work.

Several matters have arisen over the last several years which are of concern to our members and which we believe resonate with federal procurement policy and federal procurement regulations. I am contacting you in the hope of initiating a discussion on these matters with OFPP. I apologize in advance if these matters fall outside your specific area of responsibilities and, if so, would welcome your direction on who within OFPP is the proper person or persons to contact on these matters and any suggestions that you may have for moving forward to address these concerns.

More specifically, NASBP seeks a dialogue with OFPP on two matters with respect to the present surety bonding regulations and procedures governing federal construction procurement. You may be aware of a recent decision by the U.S. Court of Federal Claims, *Tip Top Construction v. United States*, 2008 WL 3153607, in which that Court of Federal Claims was confronted with a post-award bid protest from a disappointed bidder whose bid was rejected on the basis that the bid bond issued by an individual surety was backed with unacceptable assets. In denying the bid protest, the Court of Federal Claims noted that, in the opinion of the Court, some of the Federal Acquisition Regulation sections addressing use of individual or personal sureties need redrafting or clarification to avoid conflicts or ambiguities. Although we believe that the pertinent FAR provisions are clear, we believe that the Court of Federal Claims' assessment of these provisions coupled with the declining economy warrants immediate attention and a possible revision to the FAR, particularly with respect to the subject of whether the listing of "acceptable assets" pledged to back surety bonds from individual or personal sureties constitutes an exclusive or a nonexclusive list. Moreover, clear direction to contracting officers is especially compelling in a declining economy, where, as history has proven, incidences of fraudulent bonds often increases.

The second concern centers on the federal contracting officer's decision to reduce or waive Miller Act bonds, particularly with respect to overseas construction projects. NASBP believes that the language of the Miller Act (40 USCA Sec. 3131 et seq.) needs no modifications; it correctly provides the standard and the flexibility to the contracting officer to waive bonds in situations where it is impracticable for the contractor to furnish them. However, little or no regulatory guidance has been promulgated to provide contracting officers with insight into what constitutes situations or grounds where it is "impracticable" to require bonds. We understand that there have been instances where contractors have demonstrated their ability to furnish bonds on overseas embassy projects, but the bonds still were waived by contracting officers. This, in turn, meant that, on some embassy projects, the government had no recourse to make a claim on a bond when construction problems arose.

More troubling are instances where payment bonds are reduced or waived, since subcontractors' and suppliers' only payment remedy in the event of nonpayment or bankruptcy by the prime contractor is the Miller Act payment bond. Numerous courts have held that Miller Act requirements are highly remedial and should be liberally construed to protect the interests of the federal government and those of subcontractors and suppliers supplying labor and materials on federal construction projects. NASBP would welcome a discussion on ways in which a contracting officer's decision to reduce or waiver Miller Act bond requirements would be made transparent through guidance in the FAR.

NASBP is not alone in these concerns; the Associated General Contractors of America, the American Subcontractors Association, and the Surety & Fidelity Association of America all have expressed similar concerns on these topics and likely would seek to participate in any dialogue with OFPP, as may others. NASBP would be happy to inform and to coordinate with these and other organizations on any discussion with OFPP.

I appreciate your consideration of these matters and look forward to your response.

Yours sincerely,

Mark H. McCallum
General Counsel & Director of Government Relations

cc: Edward Gallagher, SFAA
Marco Giamberardino, AGC
E. Colette Nelson, ASA