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*Sent via U.S. mail and through the Federal eRulemaking Portal @* http://www.regulations.gov

May 13, 2011

Ms. Rose Miller
Manager, Surety Bond Branch
Financial Management Services
U.S. General Services Administration
3700 East-West Highway, Room 6F01
Hyattsville, MD 20782

Re: Comments on Financial Management Service (FMS) docket number FISCAL-FMS-2010-0001

Dear Ms. Miller:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade organization of professional surety bond producers, representing firms employing over 5,000 personnel who specialize in surety bonding, including issuing bid, performance, and payment bonds for construction projects and other commercial purposes, I am contacting you to express concerns with proposed rules impacting the administration of the corporate surety program by FMS. Specifically, FMS seeks to amend current regulations to clarify circumstances when a federal agency bonding approving official can decline to accept a bond underwritten by a U.S. Department of Treasury certified surety and to amend existing procedures used by the U.S. Department of Treasury in adjudicating complaints by federal agencies against such sureties regarding their certificates.

NASBP questions the wisdom and the need to make these “clarifications.” The proposed rules are significant in scope and impact and are not mere “clarifications.” They should be carefully reviewed and the commenting period should be extended to ensure a sufficient number of responses are received. NASBP believes that the proposed rules could have negative and unintended consequences for the federal procurement environment, even lessening procurement competition in certain circumstances.

We respectfully point out that the notice of proposed rule making provided little or no insight into the facts and circumstances giving rise to the clarifications. The notice merely states that “Treasury finds it necessary to clarify” and that “agencies have sometimes continued to accept bonds….” No other reasons are articulated for this dramatic change in direction and policy. We believe that the current statutes and regulations are more than adequate to oversee, administer, and address issues within the certified corporate surety program.

We agree that bond-approving officials possess discretion to accept or reject bonds if such bonds are deficient, such as the bond is issued by a surety which is not listed on Circular 570. However, apart from the sufficiency of the bond, we do not believe the agency official should be given the discretion to prohibit a

particular surety from providing bonds to the agency simply because the surety is  in a justifiable dispute with the contracting agency. FMS evaluates surety companies to determine whether such companies qualify for certificates of authority to conduct business with the federal government. This authority should be left solely to FMS. Otherwise, a government-wide situation may be engendered in which the same surety encounters disparate treatment among the various federal agencies. Consistency of treatment and policy in the oversight of certified surety companies should by the objective of FMS. Such an approach will encourage participation by surety companies and maximize the pool of qualified contractors competing for federal contract awards.

We are troubled that the proposed rules would permit a rejection to be predicated on the ground that the surety has an unsatisfied bond obligation that is “administratively final.” This standard would suggest that the agency could reject bonds from a surety despite the fact that the surety has legally justifiable reasons for its failure to satisfy its bond obligation. In fact, a bond would still be subject to rejection even where the surety has raised valid legal defenses in a judicial hearing. The surety would be forced to seek and obtain a court order enjoining the agency from declining its bonds. Why should the agency be able to reject a bond from an alleged delinquent surety when the matter in dispute has not been fully adjudicated? The notice appears to provide the rationale: “to better facilitate the prompt resolution of bond disputes between Federal agencies and sureties.” Such facilitation, however, compromises the legal rights and position of the surety.

We are troubled further that FMS has altered the standard by which it addresses agency complaints against sureties. Again, the proposed rule makes for unequal ground between the federal agencies and sureties. The proposed rule clearly places the onus on the surety to “prove its innocence.”  Under the proposed rules, the surety is afforded notice of an agency complaint to revoke its certificate of authority, which states that the certificate “will” (not “may” as in the current rules) be revoked in the absence of a satisfactory explanation. Moreover, the reviewing and deciding officials will not conduct a new review of the alleged circumstance of the complaint; rather, they will simply determine whether the agency determination “was reasonable.”

What will happen to a contractor’s business if its surety, to which it has a long-term, established relationship, no longer is able to issue bonds on federal construction projects? The revocation of the certificate certainly will have a financial impact on the surety, but also on the contractor who has relied on access to credit from that surety to pursue federal work. Establishing a new surety credit relationship may not be accomplished within the time for that contractor to pursue contract award. Surety credit relationships, in fact, take time to establish and to evolve, and the contractors of a surety whose certificate is revoked will suffer business disruption and other adverse consequences. This could cause the contractor to fail and may have the effect of lessening competition on agency contracts. In such situations, the most severe impacts likely will be experienced by small and emerging contractors, which may have a more difficult time securing a new surety credit relationship.

For these reasons, NASBP respectfully requests that FMS reconsider the necessity and timing of the proposed rules. NASBP appreciates your consideration of our concerns and comments.

Yours sincerely,

Larry LeClair

Director, Government Relations