



The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Ann Melton
County Judge Executive
424 Public Sq., Suite 1
Columbia, KY 42728

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Melton:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

Questionable practices recently have been brought to our attention about a number of county courthouse construction projects throughout the Commonwealth of Kentucky. These practices center on discrepancies between statutory and contractual bond requirements and the actual bonds furnished by construction managers at risk which have received awards to build these projects. More specifically, the contracts for a number of county courthouse projects properly have required that the construction manager at risk furnish the county with performance and payment bonds to insure the “faithful performance of the Contract and payment of obligations arising thereunder” in amounts equal to “100% of the Contract Sum.” The term “Contract Sum” is a defined term in the contract and represents the sum of the construction manager at risk’s fee *and* the “Cost of the Work.” The “Cost of the Work” includes all material, equipment, labor, subcontracts, etc. to build the courthouse project. Yet, the amount of the performance and payment bonds actually being furnished by the construction managers at risk hired by the counties

for these courthouse projects are in the range of five to six percent of the estimated Cost of the Work, seemingly providing bonded protections solely for the amount of the fee being paid to the construction manager at risk, a considerable departure from the required “100% of the Contract Sum.” Interestingly, on the face of the performance bonds for these projects are descriptions of the projects that include the estimate of the Project Cost, which, in every instance, is considerably more than the face amount of the bond.

The requirement for the construction manager at risk to furnish bonds equal to “100% of the Contract Sum” on these courthouse projects mirrors Kentucky Revised Statute § 45A.190, which establishes a statutory requirement that on public works projects exceeding \$40,000, performance bonds “shall be furnished” “in an amount equal to one hundred percent (100%) of the contract price as it may be increased” It also states that a payment bond “in an amount equal to one hundred percent (100%) of the original contract price” shall also be furnished “for the protection of all persons supplying labor and material to the contractor or his subcontractors.” Further, this bonding requirement is also consistent with Kentucky Administrative Regulation 200 KAR 5:305, stating, in part, that “[a] contract shall not be awarded to a contractor who fails or refuses to give bond to the Commonwealth if required as provided by KRS 45A.190.” This Regulation states that a contractor may be declared in default of a contract, and its bond forfeited, if the contracting agency determines that the contractor is “in breach of the terms and conditions of the contract....”

The Rules of Administrative Procedure of the Court of Justice, Part X, Real Property Management (AP Part X) promulgated by the Kentucky Court of Justice, the compliance of which is required for all court facility projects requested by the Court of Justice and authorized by the Kentucky General Assembly, explicitly recognizes these statutory and regulatory requirements. In Chapter 15 of that Guide, it, in part, states:

“15-4 General Contractor (GC) and Construction Management Service Provider (CM) Bonds

A. Required Bonds:

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These Rules have the effect of law and are referenced and incorporated into the county’s contracts with the construction management at risk for these county courthouse projects.

Obtaining bonds from the construction manager at risk for 100% of the contract price is vital to protect the financial interests of taxpayers and the many downstream businesses—the subcontractors and suppliers to the construction manager at risk—that work on these projects. Failure to obtain any bonds from the construction manager at risk, or obtaining bonds in amounts less than 100% of the contract price—that is, amounts not

fully reflective of the total amount payable under the contract by the county to the construction manager at risk—both constitute statutory and regulatory violations and material breaches of these courthouse contracts. More importantly, the construction manager at risk's failure to provide 100% bonds subjects the contracting agencies and taxpayer funds to unnecessary and unwarranted financial risk that will jeopardize the completion of the project and the viability of subcontractors and suppliers should the construction manager at risk become insolvent or fail to pay its obligations.

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The counties also rely upon the performance bond furnished by the construction manager at risk to provide the county with performance protections in case the construction manager at risk defaults before completion of the courthouse project. In that scenario, the performance bond is a guarantee by the surety to the county that the construction manager at risk's contract will be completed for the Contract Sum and the project will be built. When the construction manager at risk defaults before the completion of the project, another contractor is usually hired to fix the problems and complete the project. Usually, these costs to fix and to complete, especially on large public works projects, greatly exceed the Contract Sum and the question comes down to who is going to pay the additional costs required to complete the project. With a construction manager at risk's performance bond solely in a bond amount of \$500,000 to \$700,000, any additional costs over that amount will have to be paid by county taxpayers if the project is to be completed. For your information, the additional costs caused when the construction manager defaulted on the contract for construction of the Bullitt County Judicial Center easily exceeds \$1,000,000.

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enforcement of the bonding requirements clearly and unambiguously stated in the county's contract with the contraction manager at risk, the county is unintentionally putting its own financial resources into jeopardy as well as those of local subcontractors and suppliers working for the construction manager at risk. This is a problem that mandates your immediate attention.

We respectfully request your review of the performance of any construction management at risk contracts to construct a court facility to ensure that they are being administered in strict accordance with statutory, regulatory and contractual requirements. To that end, many of these contracts require the construction manager at risk to provide performance and payment bonds for 100% of the Project's Cost of the Work to the county before the start of any construction. Compliance is required to protect the interests of Kentucky taxpayers properly. We would be glad to work with you or answer any questions to ensure that the bonding requirements for your project are met.

Yours sincerely,

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cc: Lynn Schubert, SFAA
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The Honorable Bobby Young
County Judge Executive
P.O. Box 115
Scottsville, KY 42164

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Young:

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Mr. Wm. Bud Stevens
Chairman, Project Development Board
P.O.Box 423
Catlettsburg, KY 41129

Re: Surety Bond Requirements for Courthouse Projects

Dear Mr. Stevens:

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Chairman, Project Development Board
P.O. Box 227
Hardinsburg, KY 41043

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Yours sincerely,

Mark H. McCallum
General Counsel
NASBP

Edward G. Gallagher
General Counsel
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cc: Lynn Schubert, SFAA
Richard Foss, NASBP



The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

Mr. Steve Pendery
Chairman, Project Development Board
24 W. 4th Street
Newport, KY 41072

Re: Surety Bond Requirements for Courthouse Projects

Dear Mr. Pendery:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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The requirement for the construction manager at risk to furnish bonds equal to “100% of the Contract Sum” on these courthouse projects mirrors Kentucky Revised Statute § 45A.190, which establishes a statutory requirement that on public works projects exceeding \$40,000, performance bonds “shall be furnished” “in an amount equal to one hundred percent (100%) of the contract price as it may be increased” It also states that a payment bond “in an amount equal to one hundred percent (100%) of the original contract price” shall also be furnished “for the protection of all persons supplying labor and material to the contractor or his subcontractors.” Further, this bonding requirement is also consistent with Kentucky Administrative Regulation 200 KAR 5:305, stating, in part, that “[a] contract shall not be awarded to a contractor who fails or refuses to give bond to the Commonwealth if required as provided by KRS 45A.190.” This Regulation states that a contractor may be declared in default of a contract, and its bond forfeited, if the contracting agency determines that the contractor is “in breach of the terms and conditions of the contract....”

The Rules of Administrative Procedure of the Court of Justice, Part X, Real Property Management (AP Part X) promulgated by the Kentucky Court of Justice, the compliance of which is required for all court facility projects requested by the Court of Justice and authorized by the Kentucky General Assembly, explicitly recognizes these statutory and regulatory requirements. In Chapter 15 of that Guide, it, in part, states:

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These Rules have the effect of law and are referenced and incorporated into the county’s contracts with the construction management at risk for these county courthouse projects.

Obtaining bonds from the construction manager at risk for 100% of the contract price is vital to protect the financial interests of taxpayers and the many downstream businesses—the subcontractors and suppliers to the construction manager at risk—that work on these projects. Failure to obtain any bonds from the construction manager at risk, or obtaining bonds in amounts less than 100% of the contract price—that is, amounts not

fully reflective of the total amount payable under the contract by the county to the construction manager at risk—both constitute statutory and regulatory violations and material breaches of these courthouse contracts. More importantly, the construction manager at risk's failure to provide 100% bonds subjects the contracting agencies and taxpayer funds to unnecessary and unwarranted financial risk that will jeopardize the completion of the project and the viability of subcontractors and suppliers should the construction manager at risk become insolvent or fail to pay its obligations.

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Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Greg Terry
County Judge Executive
P.O. Box 279
Bardwell, KY 42023

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Terry:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Larry Foxworthy
County Judge Executive
201 Court Square
Flemingsburg, KY 41041

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Foxworthy:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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February 25, 2009

The Honorable Ted Collins
County Judge Executive
315 W. Main St., Room 302
Frankfort, KY 40601

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Collins:

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The counties also rely upon the performance bond furnished by the construction manager at risk to provide the county with performance protections in case the construction manager at risk defaults before completion of the courthouse project. In that scenario, the performance bond is a guarantee by the surety to the county that the construction manager at risk's contract will be completed for the Contract Sum and the project will be built. When the construction manager at risk defaults before the completion of the project, another contractor is usually hired to fix the problems and complete the project. Usually, these costs to fix and to complete, especially on large public works projects, greatly exceed the Contract Sum and the question comes down to who is going to pay the additional costs required to complete the project. With a construction manager at risk's performance bond solely in a bond amount of \$500,000 to \$700,000, any additional costs over that amount will have to be paid by county taxpayers if the project is to be completed. For your information, the additional costs caused when the construction manager defaulted on the contract for construction of the Bullitt County Judicial Center easily exceeds \$1,000,000.

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enforcement of the bonding requirements clearly and unambiguously stated in the county's contract with the contraction manager at risk, the county is unintentionally putting its own financial resources into jeopardy as well as those of local subcontractors and suppliers working for the construction manager at risk. This is a problem that mandates your immediate attention.

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Yours sincerely,

Mark H. McCallum
General Counsel
NASBP

Edward G. Gallagher
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cc: Lynn Schubert, SFAA
Richard Foss, NASBP



The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable John Wilson
County Judge Executive
15 Public Square
Lancaster, KY 40444

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Wilson:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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These Rules have the effect of law and are referenced and incorporated into the county’s contracts with the construction management at risk for these county courthouse projects.

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The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Darrell L. Link
County Judge Executive
101 N. Main Street
Williamstown, KY 41097

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Link:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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cc: Lynn Schubert, SFAA
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The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Gary Logsdon
County Judge Executive
10 Public Square
Leitchfield, KY 42754

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Logsdon:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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Washington, DC 20036

February 25, 2009

The Honorable Mary Ann Blaydes Baron
County Judge Executive
203 W. Court St.
Greensburg, KY 42743

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Blaydes Baron:

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Obtaining bonds from the construction manager at risk for 100% of the contract price is vital to protect the financial interests of taxpayers and the many downstream businesses—the subcontractors and suppliers to the construction manager at risk—that work on these projects. Failure to obtain any bonds from the construction manager at risk, or obtaining bonds in amounts less than 100% of the contract price—that is, amounts not

fully reflective of the total amount payable under the contract by the county to the construction manager at risk—both constitute statutory and regulatory violations and material breaches of these courthouse contracts. More importantly, the construction manager at risk's failure to provide 100% bonds subjects the contracting agencies and taxpayer funds to unnecessary and unwarranted financial risk that will jeopardize the completion of the project and the viability of subcontractors and suppliers should the construction manager at risk become insolvent or fail to pay its obligations.

Subcontractors and suppliers that directly contract with the construction manager at risk rely on the protections afforded them by the payment bond furnished by the construction manager at risk to the contracting authority. Subcontractors and suppliers that directly contract with the construction manager at risk on these types of public works projects do not have mechanic lien rights against public property. If the construction manager at risk fails to pay its subcontractors and suppliers due to bankruptcy or for other reasons, such subcontractors and suppliers do not have an alternative means to get paid for their labor and materials except the payment bond provided by the construction manager at risk—that is, they cannot place a lien against the public property and without a direct contract with the county, they cannot sue the county. Only the payment bond furnished by the construction manager at risk to the county protects these subcontractors and suppliers with a payment remedy should the construction manager at risk fail to pay them. Despite what some may be saying, subcontractor payment bonds do *NOT* provide any payment protection to subcontractors and suppliers who contract directly with the construction manager at risk.

The counties also rely upon the performance bond furnished by the construction manager at risk to provide the county with performance protections in case the construction manager at risk defaults before completion of the courthouse project. In that scenario, the performance bond is a guarantee by the surety to the county that the construction manager at risk's contract will be completed for the Contract Sum and the project will be built. When the construction manager at risk defaults before the completion of the project, another contractor is usually hired to fix the problems and complete the project. Usually, these costs to fix and to complete, especially on large public works projects, greatly exceed the Contract Sum and the question comes down to who is going to pay the additional costs required to complete the project. With a construction manager at risk's performance bond solely in a bond amount of \$500,000 to \$700,000, any additional costs over that amount will have to be paid by county taxpayers if the project is to be completed. For your information, the additional costs caused when the construction manager defaulted on the contract for construction of the Bullitt County Judicial Center easily exceeds \$1,000,000.

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Yours sincerely,

Mark H. McCallum
General Counsel
NASBP

Edward G. Gallagher
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cc: Lynn Schubert, SFAA
Richard Foss, NASBP



The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

Mr. Jack B. McCaslin
Chairman, Project Development Board
P.O. Box 580
Hawesville, KY 42348

Re: Surety Bond Requirements for Courthouse Projects

Dear Mr. McCaslin:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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Richard Foss, NASBP



The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Terry L. Martin
County Judge Executive
P.O. Box 490
Munfordville, KY 42786

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Martin:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable William O. Smith
County Judge Executive
P.O. Box 175
McKee, KY 40447

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Smith:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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Washington, DC 20036

February 25, 2009

The Honorable Lawrence Kuhl
County Judge Executive
101 S. Main Street
London, KY 40741

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Kuhl:

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These Rules have the effect of law and are referenced and incorporated into the county’s contracts with the construction management at risk for these county courthouse projects.

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Yours sincerely,

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The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Chris Lasher
County Judge Executive
P.O. Box 70
Smithland, KY 42081

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Lasher:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Logan Chick
County Judge Executive
P.O. Box 365
Russellville, KY 42276

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Chick:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable John G. Mattingly
County Judge Executive
223 Spalding Ave., Suite 201
Lebanon, KY 40033

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Mattingly:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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February 25, 2009

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County Judge Executive
134 S. Main St.
Harrodsburg, KY 40330

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Questionable practices recently have been brought to our attention about a number of county courthouse construction projects throughout the Commonwealth of Kentucky. These practices center on discrepancies between statutory and contractual bond requirements and the actual bonds furnished by construction managers at risk which have received awards to build these projects. More specifically, the contracts for a number of county courthouse projects properly have required that the construction manager at risk furnish the county with performance and payment bonds to insure the “faithful performance of the Contract and payment of obligations arising thereunder” in amounts equal to “100% of the Contract Sum.” The term “Contract Sum” is a defined term in the contract and represents the sum of the construction manager at risk’s fee *and* the “Cost of the Work.” The “Cost of the Work” includes all material, equipment, labor, subcontracts, etc. to build the courthouse project. Yet, the amount of the performance and payment bonds actually being furnished by the construction managers at risk hired by the counties

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The requirement for the construction manager at risk to furnish bonds equal to “100% of the Contract Sum” on these courthouse projects mirrors Kentucky Revised Statute § 45A.190, which establishes a statutory requirement that on public works projects exceeding \$40,000, performance bonds “shall be furnished” “in an amount equal to one hundred percent (100%) of the contract price as it may be increased” It also states that a payment bond “in an amount equal to one hundred percent (100%) of the original contract price” shall also be furnished “for the protection of all persons supplying labor and material to the contractor or his subcontractors.” Further, this bonding requirement is also consistent with Kentucky Administrative Regulation 200 KAR 5:305, stating, in part, that “[a] contract shall not be awarded to a contractor who fails or refuses to give bond to the Commonwealth if required as provided by KRS 45A.190.” This Regulation states that a contractor may be declared in default of a contract, and its bond forfeited, if the contracting agency determines that the contractor is “in breach of the terms and conditions of the contract....”

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These Rules have the effect of law and are referenced and incorporated into the county’s contracts with the construction management at risk for these county courthouse projects.

Obtaining bonds from the construction manager at risk for 100% of the contract price is vital to protect the financial interests of taxpayers and the many downstream businesses—the subcontractors and suppliers to the construction manager at risk—that work on these projects. Failure to obtain any bonds from the construction manager at risk, or obtaining bonds in amounts less than 100% of the contract price—that is, amounts not

fully reflective of the total amount payable under the contract by the county to the construction manager at risk—both constitute statutory and regulatory violations and material breaches of these courthouse contracts. More importantly, the construction manager at risk's failure to provide 100% bonds subjects the contracting agencies and taxpayer funds to unnecessary and unwarranted financial risk that will jeopardize the completion of the project and the viability of subcontractors and suppliers should the construction manager at risk become insolvent or fail to pay its obligations.

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cc: Lynn Schubert, SFAA
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The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Wilbur Graves
County Judge Executive
200 N. Main St., Suite C
Tompkinsville, KY 42167

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Graves:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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cc: Lynn Schubert, SFAA
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The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Rick Newman
Muhlenberg County Fiscal Court
P.O. Box 137
Greenville, KY 42345

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Newman:

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1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



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1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Carolyn H. Keith
County Judge Executive
100 N. Thomas St.
Owenton, KY 40359

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Keith:

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1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Henry Bertram
Chairman, Project Development Board
233 Main Street
Falmouth, KY 41040

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Bertram:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

Questionable practices recently have been brought to our attention about a number of county courthouse construction projects throughout the Commonwealth of Kentucky. These practices center on discrepancies between statutory and contractual bond requirements and the actual bonds furnished by construction managers at risk which have received awards to build these projects. More specifically, the contracts for a number of county courthouse projects properly have required that the construction manager at risk furnish the county with performance and payment bonds to insure the “faithful performance of the Contract and payment of obligations arising thereunder” in amounts equal to “100% of the Contract Sum.” The term “Contract Sum” is a defined term in the contract and represents the sum of the construction manager at risk’s fee *and* the “Cost of the Work.” The “Cost of the Work” includes all material, equipment, labor, subcontracts, etc. to build the courthouse project. Yet, the amount of the performance and payment bonds actually being furnished by the construction managers at risk hired by the counties

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The requirement for the construction manager at risk to furnish bonds equal to “100% of the Contract Sum” on these courthouse projects mirrors Kentucky Revised Statute § 45A.190, which establishes a statutory requirement that on public works projects exceeding \$40,000, performance bonds “shall be furnished” “in an amount equal to one hundred percent (100%) of the contract price as it may be increased” It also states that a payment bond “in an amount equal to one hundred percent (100%) of the original contract price” shall also be furnished “for the protection of all persons supplying labor and material to the contractor or his subcontractors.” Further, this bonding requirement is also consistent with Kentucky Administrative Regulation 200 KAR 5:305, stating, in part, that “[a] contract shall not be awarded to a contractor who fails or refuses to give bond to the Commonwealth if required as provided by KRS 45A.190.” This Regulation states that a contractor may be declared in default of a contract, and its bond forfeited, if the contracting agency determines that the contractor is “in breach of the terms and conditions of the contract....”

The Rules of Administrative Procedure of the Court of Justice, Part X, Real Property Management (AP Part X) promulgated by the Kentucky Court of Justice, the compliance of which is required for all court facility projects requested by the Court of Justice and authorized by the Kentucky General Assembly, explicitly recognizes these statutory and regulatory requirements. In Chapter 15 of that Guide, it, in part, states:

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These Rules have the effect of law and are referenced and incorporated into the county’s contracts with the construction management at risk for these county courthouse projects.

Obtaining bonds from the construction manager at risk for 100% of the contract price is vital to protect the financial interests of taxpayers and the many downstream businesses—the subcontractors and suppliers to the construction manager at risk—that work on these projects. Failure to obtain any bonds from the construction manager at risk, or obtaining bonds in amounts less than 100% of the contract price—that is, amounts not

fully reflective of the total amount payable under the contract by the county to the construction manager at risk—both constitute statutory and regulatory violations and material breaches of these courthouse contracts. More importantly, the construction manager at risk's failure to provide 100% bonds subjects the contracting agencies and taxpayer funds to unnecessary and unwarranted financial risk that will jeopardize the completion of the project and the viability of subcontractors and suppliers should the construction manager at risk become insolvent or fail to pay its obligations.

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enforcement of the bonding requirements clearly and unambiguously stated in the county's contract with the contraction manager at risk, the county is unintentionally putting its own financial resources into jeopardy as well as those of local subcontractors and suppliers working for the construction manager at risk. This is a problem that mandates your immediate attention.

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Yours sincerely,

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The Honorable Wayne T. Rutherford
County Judge Executive
146 Main St.
Pikeville, KY 41501

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Rutherford:

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February 25, 2009

The Honorable Billy R. Allison
County Judge Executive
P.O. Box 76
Mt. Olivet, KY 41064

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Allison:

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February 25, 2009

The Honorable Jim Nickell
County Judge Executive
627 E. Main Street
Morehead, KY 40351

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Yours sincerely,

Mark H. McCallum
General Counsel
NASBP

Edward G. Gallagher
General Counsel
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cc: Lynn Schubert, SFAA
Richard Foss, NASBP



The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Mickey Garner
County Judge Executive
P.O. Box 397
Jamestown, KY 42629

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Garner:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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The requirement for the construction manager at risk to furnish bonds equal to “100% of the Contract Sum” on these courthouse projects mirrors Kentucky Revised Statute § 45A.190, which establishes a statutory requirement that on public works projects exceeding \$40,000, performance bonds “shall be furnished” “in an amount equal to one hundred percent (100%) of the contract price as it may be increased” It also states that a payment bond “in an amount equal to one hundred percent (100%) of the original contract price” shall also be furnished “for the protection of all persons supplying labor and material to the contractor or his subcontractors.” Further, this bonding requirement is also consistent with Kentucky Administrative Regulation 200 KAR 5:305, stating, in part, that “[a] contract shall not be awarded to a contractor who fails or refuses to give bond to the Commonwealth if required as provided by KRS 45A.190.” This Regulation states that a contractor may be declared in default of a contract, and its bond forfeited, if the contracting agency determines that the contractor is “in breach of the terms and conditions of the contract....”

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These Rules have the effect of law and are referenced and incorporated into the county’s contracts with the construction management at risk for these county courthouse projects.

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fully reflective of the total amount payable under the contract by the county to the construction manager at risk—both constitute statutory and regulatory violations and material breaches of these courthouse contracts. More importantly, the construction manager at risk's failure to provide 100% bonds subjects the contracting agencies and taxpayer funds to unnecessary and unwarranted financial risk that will jeopardize the completion of the project and the viability of subcontractors and suppliers should the construction manager at risk become insolvent or fail to pay its obligations.

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The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Rob Rothenberger
County Judge Executive
419 W. Washintgon St.
Shelbyville, KY 40065

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Rothenberger:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Edwin Rogers
County Judge Executive
203 Court St., Suite 4
Campbellsville, KY 42718

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Rogers:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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Washington, DC 20036



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Washington, DC 20036

February 25, 2009

The Honorable Arthur Green
County Judge Executive
P.O. Box 355
Elkton, KY 42220

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Green:

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The counties also rely upon the performance bond furnished by the construction manager at risk to provide the county with performance protections in case the construction manager at risk defaults before completion of the courthouse project. In that scenario, the performance bond is a guarantee by the surety to the county that the construction manager at risk's contract will be completed for the Contract Sum and the project will be built. When the construction manager at risk defaults before the completion of the project, another contractor is usually hired to fix the problems and complete the project. Usually, these costs to fix and to complete, especially on large public works projects, greatly exceed the Contract Sum and the question comes down to who is going to pay the additional costs required to complete the project. With a construction manager at risk's performance bond solely in a bond amount of \$500,000 to \$700,000, any additional costs over that amount will have to be paid by county taxpayers if the project is to be completed. For your information, the additional costs caused when the construction manager defaulted on the contract for construction of the Bullitt County Judicial Center easily exceeds \$1,000,000.

It is our understanding that performance and payment bonds from the construction manager at risk have *NOT* been furnished on several county courthouse projects even though construction on those projects has already commenced. Further, on other courthouse projects, bonds have been furnished, but apparently only in the amount of the construction manager's fee (approximately 5-6% of the Project's Cost of the Work) instead of bonds for 100% of the Project's Cost of the Work. Without requiring the strict

enforcement of the bonding requirements clearly and unambiguously stated in the county's contract with the contraction manager at risk, the county is unintentionally putting its own financial resources into jeopardy as well as those of local subcontractors and suppliers working for the construction manager at risk. This is a problem that mandates your immediate attention.

We respectfully request your review of the performance of any construction management at risk contracts to construct a court facility to ensure that they are being administered in strict accordance with statutory, regulatory and contractual requirements. To that end, many of these contracts require the construction manager at risk to provide performance and payment bonds for 100% of the Project's Cost of the Work to the county before the start of any construction. Compliance is required to protect the interests of Kentucky taxpayers properly. We would be glad to work with you or answer any questions to ensure that the bonding requirements for your project are met.

Yours sincerely,

Mark H. McCallum
General Counsel
NASBP

Edward G. Gallagher
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cc: Lynn Schubert, SFAA
Richard Foss, NASBP



The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Stanley H. Humphries
County Judge Executive
P.O. Box 672
Cadiz, KY 42211

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Humphries:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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The requirement for the construction manager at risk to furnish bonds equal to “100% of the Contract Sum” on these courthouse projects mirrors Kentucky Revised Statute § 45A.190, which establishes a statutory requirement that on public works projects exceeding \$40,000, performance bonds “shall be furnished” “in an amount equal to one hundred percent (100%) of the contract price as it may be increased” It also states that a payment bond “in an amount equal to one hundred percent (100%) of the original contract price” shall also be furnished “for the protection of all persons supplying labor and material to the contractor or his subcontractors.” Further, this bonding requirement is also consistent with Kentucky Administrative Regulation 200 KAR 5:305, stating, in part, that “[a] contract shall not be awarded to a contractor who fails or refuses to give bond to the Commonwealth if required as provided by KRS 45A.190.” This Regulation states that a contractor may be declared in default of a contract, and its bond forfeited, if the contracting agency determines that the contractor is “in breach of the terms and conditions of the contract....”

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These Rules have the effect of law and are referenced and incorporated into the county’s contracts with the construction management at risk for these county courthouse projects.

Obtaining bonds from the construction manager at risk for 100% of the contract price is vital to protect the financial interests of taxpayers and the many downstream businesses—the subcontractors and suppliers to the construction manager at risk—that work on these projects. Failure to obtain any bonds from the construction manager at risk, or obtaining bonds in amounts less than 100% of the contract price—that is, amounts not

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The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable John A. Settles
County Judge Executive
P.O. Box 126
Springfield, KY 40069

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Settles:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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Mark H. McCallum
General Counsel
NASBP

Edward G. Gallagher
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SFAA

cc: Lynn Schubert, SFAA
Richard Foss, NASBP



The Surety & Fidelity Association of America
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20036



The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
Washington, DC 20036

February 25, 2009

The Honorable Pat White, Jr.
County Judge Executive
P.O. Box 237
Williamsburg, KY 40769

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable White, Jr.:

The National Association of Surety Bond Producers (“NASBP”) is a national trade association of professional surety bond producers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, payment and performance bonds for the Nation’s construction projects and other types of bonds, such as license and permit bonds. The Surety & Fidelity Association of America (“SFAA”) is a national trade association representing insurance companies writing surety and fidelity bonds. Among the memberships of NASBP and SFAA are those companies that place or write the vast majority of contract performance and payment bonds in the Commonwealth of Kentucky.

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The National Association of Surety Bond Producers
1828 L Street, NW, Suite 720
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February 25, 2009

The Honorable Raymond Hurst
County Judge Executive
P.O. Box 429
Campton, KY 41301

Re: Surety Bond Requirements for Courthouse Projects

Dear Honorable Hurst:

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1. Over \$25,000: Every contractor with a proposed contract for services exceeding \$25,000 shall, prior to the award of such contract, give a bond or bonds to the Owner as obligee, in a form satisfactory to AP Part X, executed by a surety company authorized to do business in the Commonwealth of Kentucky, and in a penal sum equal to one hundred percent (100%) of the contract amount, as it may be increased, the conditions of which shall bind the contractor, as principal, and the surety, to the performance of the contract according to the terms, conditions, and specifications of the contract, and any changes or modifications thereto, and to the payment of all costs for labor, materials, equipment, supplies, taxes, and other proper charges and expenses incurred or to be incurred in the performance of the contract.”

These Rules have the effect of law and are referenced and incorporated into the county’s contracts with the construction management at risk for these county courthouse projects.

Obtaining bonds from the construction manager at risk for 100% of the contract price is vital to protect the financial interests of taxpayers and the many downstream businesses—the subcontractors and suppliers to the construction manager at risk—that work on these projects. Failure to obtain any bonds from the construction manager at risk, or obtaining bonds in amounts less than 100% of the contract price—that is, amounts not

fully reflective of the total amount payable under the contract by the county to the construction manager at risk—both constitute statutory and regulatory violations and material breaches of these courthouse contracts. More importantly, the construction manager at risk's failure to provide 100% bonds subjects the contracting agencies and taxpayer funds to unnecessary and unwarranted financial risk that will jeopardize the completion of the project and the viability of subcontractors and suppliers should the construction manager at risk become insolvent or fail to pay its obligations.

Subcontractors and suppliers that directly contract with the construction manager at risk rely on the protections afforded them by the payment bond furnished by the construction manager at risk to the contracting authority. Subcontractors and suppliers that directly contract with the construction manager at risk on these types of public works projects do not have mechanic lien rights against public property. If the construction manager at risk fails to pay its subcontractors and suppliers due to bankruptcy or for other reasons, such subcontractors and suppliers do not have an alternative means to get paid for their labor and materials except the payment bond provided by the construction manager at risk—that is, they cannot place a lien against the public property and without a direct contract with the county, they cannot sue the county. Only the payment bond furnished by the construction manager at risk to the county protects these subcontractors and suppliers with a payment remedy should the construction manager at risk fail to pay them. Despite what some may be saying, subcontractor payment bonds do *NOT* provide any payment protection to subcontractors and suppliers who contract directly with the construction manager at risk.

The counties also rely upon the performance bond furnished by the construction manager at risk to provide the county with performance protections in case the construction manager at risk defaults before completion of the courthouse project. In that scenario, the performance bond is a guarantee by the surety to the county that the construction manager at risk's contract will be completed for the Contract Sum and the project will be built. When the construction manager at risk defaults before the completion of the project, another contractor is usually hired to fix the problems and complete the project. Usually, these costs to fix and to complete, especially on large public works projects, greatly exceed the Contract Sum and the question comes down to who is going to pay the additional costs required to complete the project. With a construction manager at risk's performance bond solely in a bond amount of \$500,000 to \$700,000, any additional costs over that amount will have to be paid by county taxpayers if the project is to be completed. For your information, the additional costs caused when the construction manager defaulted on the contract for construction of the Bullitt County Judicial Center easily exceeds \$1,000,000.

It is our understanding that performance and payment bonds from the construction manager at risk have *NOT* been furnished on several county courthouse projects even though construction on those projects has already commenced. Further, on other courthouse projects, bonds have been furnished, but apparently only in the amount of the construction manager's fee (approximately 5-6% of the Project's Cost of the Work) instead of bonds for 100% of the Project's Cost of the Work. Without requiring the strict

enforcement of the bonding requirements clearly and unambiguously stated in the county's contract with the contraction manager at risk, the county is unintentionally putting its own financial resources into jeopardy as well as those of local subcontractors and suppliers working for the construction manager at risk. This is a problem that mandates your immediate attention.

We respectfully request your review of the performance of any construction management at risk contracts to construct a court facility to ensure that they are being administered in strict accordance with statutory, regulatory and contractual requirements. To that end, many of these contracts require the construction manager at risk to provide performance and payment bonds for 100% of the Project's Cost of the Work to the county before the start of any construction. Compliance is required to protect the interests of Kentucky taxpayers properly. We would be glad to work with you or answer any questions to ensure that the bonding requirements for your project are met.

Yours sincerely,

Mark H. McCallum
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Edward G. Gallagher
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SFAA

cc: Lynn Schubert, SFAA
Richard Foss, NASBP