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 U.S. mail, facsimile at 202-501-4067, and online at http://www.regulations.gov.

April 1, 2010

Ms. Hada Flowers
General Services Administration, Regulatory
Secretariat (MVPR), 1800 F Street, N.W., Room 4041,
Washington, DC 20405

Re: Comments on FAR Case 2008-024

Dear Ms. Flowers:

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 place bid, payment, and performance bonds for the Nation's construction and infrastructure projects, I am contacting you to express our comments on FAR Case 2008-024, a proposed rule to amend multiple parts of the Federal Acquisition Regulation (FAR). Of particular interest and concern to us is that portion of the proposed rule that would amend FAR Part 28—"Bond and Insurance" to increase the threshold at which performance and payment bonds are required for federal construction contracts. The proposed rule would raise that threshold from $100,000 to $150,000.

NASBP recognizes that FAR Case 2008-024 implements Section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, which requires an adjustment every five years of acquisition-related thresholds for inflation using the Consumer Price Index for all urban consumers, with the exception of the Davis-Bacon Act, the Service Contract Act and trade agreement thresholds. A similar process to the one proposed in FAR Case 2008-024 occurred in 2005, but did not result in changes to thresholds as inflation in 2005 did not overcome rounding requirements.

Under the Federal Miller Act (40 USC §3131 et. seq.), before any contract exceeding $100,000 is awarded for the construction, alteration or repair of any public building or public work of the United States, the construction contractor must furnish a performance and a payment bond to the contracting agency. Enacted in 1935, the Miller Act ensures that vital federal construction projects are completed and that subcontractors', suppliers', and taxpayers' interests are protected in the event of a contractor default. The performance bonds provide assurance of performance of the construction contract to the federal contracting agency, thereby protecting precious taxpayer dollars. Payment bonds, in turn, provide invaluable payment remedies to the many subcontractors and suppliers that furnish labor and materials on these public improvement or work projects in the event that the prime contractor fails to pay or becomes insolvent. Often these subcontractors and suppliers are *small businesses* whose only avenue to participate in the federal public procurement arena is as a subcontractor to the prime

contractor or to another subcontractor. The lack of a payment bond may portend disastrous consequences for these downstream businesses, which do not possess lien rights against public property and may have no other means of redress for nonpayment.

Congress long has recognized the importance of Miller Act bond protections. In *Clifford F. MacEvoy Company v. United States*, 322 US 102 (1944), the US Supreme Court characterized its protections as follows: "The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects."

While NASBP recognizes that 41USC § 431a provides for automatic, periodic inflation adjustments to procurement thresholds, it is our opinion that this indexing requirement is an unfortunate and contradictory statutory requirement, as it overlooks and, in fact, undermines the original, protective purposes of the statutory bonding requirements set forth in the Federal Miller Act. The proposed increase to the threshold for Miller Act performance and payment bonds from $100,000 to $150,000 will increase the number of contracts where surety bond protection is not provided to small businesses and U.S. taxpayers dramatically.

Ironically, by subjecting Miller Act bonding thresholds to regular indexing every five years, each subsequent threshold increase will ensure that more federal construction projects will be undertaken without the benefit of payment bond protection for those businesses furnishing labor and materials on those projects. In passing Section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Congress recognized that certain protections should not be subject to this automatic adjustment. Specifically, Davis Bacon protection is excluded from the application of this automatic adjustment to protect the payment of wages to laborers on federal projects. We believe that the critical protections of the bonding requirements of the Miller Act also should be exempt from adjustments for inflation.

NASBP understands that the FAR Council is simply carrying out its mandate with respect to the existing statutory requirement to index bonding thresholds every five years. Nonetheless, NASBP implores the Council to assess and to explain accurately to the U.S. Congress the significant, negative impact that such an increase, occurring regularly, will have on protections to federal contracting agencies, to taxpayers, and to the myriad subcontractors and suppliers, many of which are small businesses, which furnish labor and materials on public construction projects.

NASBP further points out the absence of any discussion in the proposed rule on the impact of increasing the Miller Act bonding threshold on small businesses and invites the FAR Council to undertake a more thorough analysis of such an impact on payment protections for small businesses furnishing labor and materials on federal construction projects. The supplementary material to the proposed rule even states that the $50,000 increase "is not believed to be a detriment to small business." With more projects falling under higher statutory bonding thresholds, how can that be? How will contracting agencies and subcontractors and suppliers be protected in circumstances where no bonds were required? In the

current, strained economic climate, Miller Act bonding requirements—which assure careful third-party assessment of the capability and financial wherewithal of businesses receiving public contract award—not only are prudent but essential.

For the foregoing reasons, we respectfully request your consideration that the proposed rule not be implemented and that Congress be given an accurate assessment of the negative impact of increases to bonding thresholds on the nation's taxpayers and businesses. Please tell Congress how the periodic indexing of the bonding thresholds under the Miller Act will compromise the payment protections for many more small businesses serving as subcontractors and suppliers on federal construction projects.

Sincerely yours,

Mark McCallum
Chief Executive Officer

cc: Larry LeClair, NASBP