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April 18, 2007

Mr. Charles E. Williams
Director, Bureau of Overseas Building Operations
US Department of State
Washington, DC 20522-0611

Dear Mr. Williams:

Thank you for your letter of March 13, 2007, responding to my inquiry about the bonding policies of the Bureau of Overseas Buildings Operations. As you note in your letter, it appears that we hold different views concerning federally-mandated bond requirements. NASBP continues to believe that payment and performance bonds are to be considered "necessary" to the procurement of construction services for federal projects. In fact, it is the contention of NASBP that Miller Act requirements for payment and performances bonds on federal construction projects of a certain dollar threshold, whether located within the United States or overseas, is the rule, not the exception. The fact that Congress included a provision in the Miller Act permitting waiver of such requirements by contracting officers in limited circumstances supports the contention that payment and performance bonds are to be considered necessary requirements of procuring federal construction services. As I noted in my letter of March 1 to Ms. Pinzino, numerous courts have held that the requirements of the federal Miller Act must be *construed and applied liberally* to affect its remedial purposes—that is, to protect the contracting agency from contractor nonperformance and to provide certain categories of subcontractors and suppliers with assurance that they will be paid for their labor and materials.

As you and I both have noted, the Miller Act does permit contracting officers to waive bonds, but the contracting officer's ability to do so is limited. The Act provides that, in order to waive bond requirements on federal projects to be performed in foreign countries, the contracting officer must make a specific determination that furnishing bonds *is impracticable for the contractor* on that project. Absent that determination, however, bonds are to be required. The inclusion in the Miller Act of a provision permitting waiver of bonds in limited circumstances cannot and should not be construed as making performance and payment bonds "permissive" on contracts performed in foreign countries. To state that "bonds aren't considered necessary" on federal construction projects undertaken overseas broadens the discretion of contracting officers beyond that expressly provided in the Act and conveniently overlooks the protective purposes of the Miller Act.

In light of our apparent differences, NASBP respectfully requests the opportunity to meet with representatives of the Bureau of Overseas Buildings Operations to discuss these matters further.

Sincerely,

Mark H. McCallum
General Counsel & Director of Government Relations
cc: Perry Fowler, Associated General Contractors of America
Edward Gallagher, Surety & Fidelity Association of America