

August 13, 2007

Linda Argo, Commissioner  
Dept. of Consumer & Regulatory Affairs  
Government of the District of Columbia  
941 North Capitol Street NE  
Washington, DC 20002

**Re: Performance Bond Requirements in DC Green Building Act of 2006**

Dear Ms. Argo:

The Surety and Fidelity Association of America ("SFAA") is a trade association of insurance companies licensed to write fidelity and surety bonds headquartered in the District of Columbia. The National Association of Surety Bond Producers ("NASBP") is a national trade association of surety bond producers and agents headquartered in the District of Columbia. SFAA and NASBP represent the sureties that write the majority of surety bonds in the United States, and the agents who represent them.

SFAA and NASBP commend the Council of the District of Columbia for enacting a law to address "green building" and sustainability requirements for public and private construction. The new law, however, includes bond requirements that, if not clarified significantly, may make sureties reticent to issue such bonds. Concerns and other issues with respect to the bond requirements in the new law include:

- The new law incorrectly uses the term "performance bond," which is likely to engender confusion and misunderstanding in the construction and bonding communities. A performance bond is one in which the surety assures one party, termed the obligee, that another party, termed the principal, will perform the contract in accordance with its terms and conditions. Performance bonds typically are written for the full contract price of the contract. If the principal fully performs the contract, the bond is null and void. However, if the principal is declared in default by the obligee, the surety will investigate the nature of the claim to ascertain

what response, if any, is warranted under the bond. In the context of construction, those options include financing the original contractor to complete the contract, finding a replacement contractor to complete, or disbursing funds to the obligee to complete the contract up to the penal sum. In short, the performance bond assures that the construction contract, and therefore, the project, will be completed.

The “performance bond” described in the new law under Section 6 does not function in the same manner described above. Rather, it seems to function more in the manner of a license or compliance bond, which typically guarantees compliance with a law or code. Thus, the required “performance bond” serves not to assure performance of the building contract but to assure compliance with the Act’s green building requirements by imposing a penalty for noncompliance. For example, where the building fails to meet verification requirements, “all or a part of the performance bond shall be forfeited to the District and deposited in the Green Building Fund”. Moreover, forfeited amounts are not for the purpose of bringing noncompliant buildings into compliance, but for such purposes as funding the costs of staffing and of technical assistance, inspections and monitoring of green buildings, outreach and educational efforts on green building practices, and incentive funding for private buildings.

- The Act does not designate which party is to furnish the “performance bond.” For example, on private projects, it is unclear whether the private owner or developer is to furnish the “performance bond”. It raises questions as to whether the private owner or developer can delegate that duty to another party, such as the architect or construction contractor. It is unclear which party is in the best position to make sure that the building meets the requirements of the Act, especially since, under the Act, verification may occur up to two years after receiving the first certificate of occupancy.

The Act specifically adopts LEED (Leadership in Energy and Environmental Design) criteria for its requirements. LEED is a rating system, not an accreditation standard. Under LEED criteria, multiple parties may have responsibilities: the building owner, the design professional, and the contractor all may have responsibilities that bear upon the fulfillment of LEED criteria. There are many choices or decisions that may be made in order to attain the number of points needed for each LEED category, and those choices or decisions may not

be categorically design or construction decisions. Thus, whether the building achieves LEED certification will depend on the collective decisions of the building owner, the retained design professional, and the construction contractor.

Only one party will furnish the bond, however. In making a decision to lend surety credit, the surety must consider the nature and extent of that party's undertaking and whether that party, through its qualifications and financial means, can carry out the undertaking successfully. From the perspective of complying with green building requirements, neither the design professional's nor the contractor's responsibilities will involve the complete undertaking. Rather, the building owner or developer, as the originator of the building project that retains the design professional and contractor, holds the ultimate responsibility for whether the building achieves compliance with the Act's requirements.

- The "performance bond" amounts set by the Act appear to bear no relation to any quantifiable loss occasioned by noncompliance with green building requirements. The Act premises the amount of the bond on some percentage of the total cost of the building based on size of the building. The Act does contain a limitation on the maximum amount of a performance bond at \$3,000,000. However, such bond amounts are excessive, especially since the purpose of the bond appears to be to penalize noncompliance with the Act's requirements and to fund staffing and other initiatives of the city department charged with oversight of the verification procedures of the green building program.

Moreover, because of the nature and amount of the "performance bond," some sureties might require collateral as an underwriting condition, which, in turn, may make obtaining the bonds more difficult for some parties.

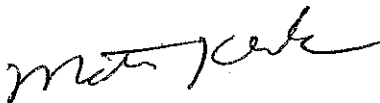
- By requiring that bond amounts forfeited to the District fund staffing, inspections, operations, and green building educational initiatives, the law creates an inherent conflict of interest in the verification process under the Act—that is, the same city department in charge of conducting or overseeing the verification procedures is funded by bond amounts collected for noncompliance with green building requirements. This will impose considerable tension on objective verification of green building requirements.

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- Many other important bond underwriting factors with respect to the "performance bond" are left unaddressed in the Act, such as the term of the bond or whether the bond may be cancelled by the surety by notice to the obligee.

For these and other reasons, we respectfully request an opportunity to meet with you to discuss further our concerns with this law. Without needed clarifications and modifications, sureties likely will be reticent to write these "performance bonds," leaving letters of credit or cash placed in escrow accounts as the only options available to meet the Act's requirements, both of which will be unattractive to contractors.

Respectfully submitted,



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