SFAA

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

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Key Messages

1 Surety bonds provide vital protections for public entities and taxpayers as well as subcontractors, workers, and suppliers on public construction projects. These protections are primarily required at the federal level through the Miller Act and, at the state level, through Little Miller Acts.

2 Congress has appropriated $55 Billion for water infrastructure projects in the Infrastructure Investment and Jobs Act (IIJA). To ensure federal investments in water projects are protected, one of the key financing vehicles, the Water Infrastructure Finance and Innovation Act (WIFIA), should be modernized to include the same payment and performance bonding requirements that protect Transportation Infrastructure Finance and Innovation Act (TIFIA)-financed projects.

3 Bidders participating in broadband auctions at the Federal Communications Commission (FCC), the U.S. Department of Agriculture's Rural Utilities Service (RUS), and the Department of Commerce's National Telecommunications and Information Administration (NTIA) should be allowed to use performance bonds as their preferred means of providing required security. This would provide small business internet service providers (ISPs) with a better cash-management alternative than letters of credit LOCs, allowing them to retain the working capital necessary to better compete for awards.

4 Require broadband grants funded by the IIJA to be bonded like the security requirements for TIFIA grants.

Surety Bond Protections Have Been Required for Over 100 Years

- The Federal Miller Act (40 U.S.C. Section 3131 to 3134) and similar regulatory requirements adopted in all 50 states have provided vital financial security to protect public construction projects by assuring contractors are qualified to perform the construction and that a reputable and knowledgeable surety stands ready to complete the job if a contractor fails to perform during the project.
- Surety bonds protect taxpayer dollars and ensure subcontractors and suppliers on public construction projects receive payment for their services in the event of a contractor default.

Background on WIFIA Bonding

- Bonding on public-private partnership projects (P3s) has been inconsistent.
- Legislation being drafted aims to clarify that performance and payment bonds are required to protect the public interest for all WIFIA-financed projects. It would allow the Secretary of the Army or Environmental Protection Agency (EPA) Administrator to accept existing state bonding requirements and would require bonding in the event a state does not have applicable requirements for bonding protections.
- SFAA, NASBP and industry partners closed this loophole for the TIFIA program in the IIJA – culminating in a 97-0 vote in the Senate – and are now pursuing similar legislation to maintain parity with the two loan/grant funding programs: TIFIA and WIFIA.
- This legislation would be consistent with Office of Management and Budget (OMB) Regulation 2 CFR 200.325 requiring all federal agencies to protect assets when awarding grants. Agencies can accept the bonding policy and amounts of the non-federal grant recipient if they are sufficient; if not, then performance and payment bonds for 100% of the contract price are required. The Small Business Administration (SBA) has long required bonding for its 7(a) loans backing construction projects.

Background on Broadband Expansion

- The FCC, RUS and NTIA are responsible for financing and making broadband service available to rural communities by providing loan and grant opportunities to ISPs who otherwise may not have the financial wherewithal to bid and complete these public contracts.
- Currently, these federal agencies require ISPs who obtain loans/grants to furnish LOCs to protect the federal government's financial interest should the ISP fail to meet its contractual obligations and performance milestones.
- Small ISPs have raised concerns about the direct impact LOCs have on working capital.
- Allowing surety bonds (performance bonds) as an alternative form of security when federal loans and/or grants are provided protects taxpayers while allowing small business ISPs the opportunity to responsibly participate in these rural broadband auctions.
- Expanding performance security through bidder choice of providing surety bonds creates greater competition and participation, which can reduce costs while still protecting the government's financial interest.
- The IIJA included $65 billion to help close the digital divide and to ensure all Americans have access to reliable and affordable high-speed broadband.
- For states/localities receiving federal grants for rural broadband contracts involving construction, performance and payment bonds should be required on the construction portion to protect the financial interest of the federal government as well as to provide payment remedies for subcontractors and suppliers.

For almost 100 years, the federal and state Miller Acts have protected against the risk of loss on public construction projects by requiring payment and performance bonds. The risks of a contractor's default, nonpayment to subcontractors and suppliers, and the increased completion costs are the same no matter the construction delivery method. Bonding protects taxpayer dollars, ensures project completion, supports economic growth, and protects subcontractors and workers.

Given the enactment of the $1.2 Trillion IIJA, Congress should clearly require bonding to ensure jobs are completed on time and workers are paid.

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