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HRC-09

SENT VIA TELEFAX

Honorable Malaetasi M. Togafau
Attorney General
American Samoa Government
P.O. Box 7
Pago Pago, American Samoa 96799

Dear General Togafau:

I have been requested by the Federal Highway Administration (FHWA) Hawaii Division Office to provide you with information on bonding requirements applicable to FHWA-funded projects. As I understand it, the American Samoa Government (ASG) generally requires surety companies to have a certificate of authority issued by the Treasury Department. Such a certificate is normally required of a bonding company to do business with the United States. See 31 C.F.R. Part 223. Companies that hold such certificates are listed in Treasury Department Circular No. 570, issued annually.

There is no FHWA requirement that ASG require sureties on FHWA-funded projects to have a Treasury Department certificate. FHWA bonding requirements are set forth in the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments." These requirements are generally referred to as the "Common Rule" and, for the Department of Transportation, including FHWA, are set forth at 49 C.F.R. Part 18. Provisions applicable to procurement by a federal grantee, including procurement of services (such as a highway construction project), are addressed at 49 C.F.R. § 18.36.

It is important to note the provision at 49 C.F.R. § 18.36(a). Under this provision a State (which by definition at 49 C.F.R. § 18.3 includes ASG), if it is the grantee, "will follow the same policies and procedures it uses for procurements from its non-Federal funds," except for specific federally-mandated contract clauses. Other grantees and subgrantees must comply

with the requirements of 49 C.F.R. §§ 18.36(b) through (i). All DOT grantees and subgrantees must comply with the DOT-specific additions to the Common Rule procurement requirements at 49 C.F.R. §§ 18.36(j) through (t).

Bonding requirements are set forth at 49 C.F.R. § 18.36(h). These requirements, which do not require a Treasury Department certificate, apply to grantees other than a State and to all subgrantees. However, where a State or a Territory, such as ASG, is the grantee and is awarding the DOT-funded contract, the provision at 49 C.F.R. § 18.36(a) allows the contracting entity to comply with its own bonding requirements rather than those set forth at 49 C.F.R. § 18.36(h).

It is appropriate that a State or Territory should establish and ensure compliance with its own administrative requirements applicable to Federally funded procurements. In fact, for FHWA-funded programs, since construction has to be properly completed in order to be eligible for FHWA participation, bonding requirements serve to protect the State or Territorial interest rather than any particular Federal interest. In this situation, it is particularly appropriate that the States and Territories establish the requirements that best fit their needs.

There is one aspect of FHWA's program requirements that may have implications for State or Territorial bonding requirements, and that is in the area of competition. Title 23 C.F.R. § 635.110(b) precludes, among other things, a bonding requirement that "may operate to restrict competition, to prevent submission of a bid, or to prohibit the consideration of a bid submitted by, any responsible contractor" The applicability of this provision is covered in the Common Rule at 49 C.F.R. § 18.36(j), which applies to all grantees and subgrantees.

In summary, ASG may establish and follow its own bonding requirements on FHWA-funded projects, so long as those requirements do not unduly limit competition. I trust this information is responsive to your concerns. Please let me know if you require any additional information.

Sincerely,

/s/DAVID G. ORTEZ
David G. Ortez
Regional Counsel