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No. 92744-8

SUPREME COURT  
OF THE STATE OF WASHINGTON

KING COUNTY,

Respondent,

v.

TRAVELERS CASUALTY AND  
SURETY COMPANY OF  
AMERICA, a Connecticut  
corporation, LIBERTY  
MUTUAL INSURANCE  
COMPANY, a Massachusetts  
corporation; FEDERAL  
INSURANCE COMPANY, an  
Indiana corporation; FIDELITY  
AND DEPOSIT COMPANY OF  
MARYLAND, a Maryland  
corporation; and ZURICH  
AMERICAN INSURANCE  
COMPANY, a New York  
corporation,

Petitioners.

SURETY PETITIONERS'  
RESPONSE TO  
MEMORANDUM OF THE  
SURETY AND FIDELITY  
ASSOCIATION OF  
AMERICA

Petitioners Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity and Deposit Company of Maryland, and Zurich American Insurance Company ("Sureties") submit this answer to The Surety and Fidelity Association of America's ("SFAA") amicus

memorandum in support of review. SFAA's amicus memorandum accurately reflects the tripartite government/contractor/surety relationship in a statutory public works contract and bond (SFAA 5-7), and explains why the County's proffered justification for an award of *Olympic Steamship* fees, which was adopted by the Court of Appeals in its published decision, is bad public policy and contrary to the legislative scheme governing public works contracts, statutory public works bonds, and awards of fees in disputes arising out of public works contracts. (SFAA 9-10)

The difference between the parties' relationship here and that of an insurer and its insured is reflected in the events surrounding VPFK's claimed "default." A performance bond is called a performance bond for a reason: a surety has the right to perform the bonded obligation. Yet here (contrary to the representations in the County's answer to the petitions for review), prior to the "Interim Agreement" the County never asked the Sureties to remedy VPFK's claimed default or otherwise "perform." Rather, as set out in the Sureties' opening merits brief at 9-13, the County and VPFK, without any participation by the Sureties, independently negotiated a means of completing the BT-3 tunnel by another contractor through the Interim Agreement. The County

then immediately and belatedly demanded the Sureties pay for the work, giving the Sureties no opportunity to perform the bonded obligation, let alone investigate the County's demands before the Interim Agreement was implemented. Thereafter, the County withdrew its demand, and shortly after, filed suit against VPFK.

Under the tripartite government/contractor/surety relationship, a surety's performance obligation does not arise until the contractor is in default, is declared in default, and the government owner has performed the government owner's obligations – that is, the government is not in default. To determine if these events have occurred, a surety investigates the claim or, subsequently, an adjudicative body determines the contractor is liable in the underlying construction dispute between the government and contractor.

This is nothing like the insurer/insured relationship, where the insured relies upon the insurer to defend and pay an injured third party's claim. *See, e.g. Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52-53 ¶17, 70-71 ¶71, 164 P.3d 454 (2007). In particular, a public works construction dispute, where the government has the overwhelming advantage, does not present the “disparity of bargaining power between an insurance company and its

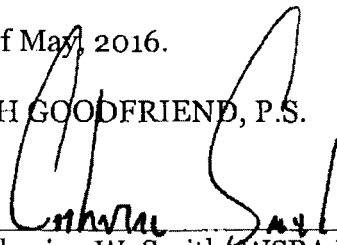
policyholder” that caused the Court to create an exception to the American Rule in *Olympic Steamship Co., Inc. v. Centennial Insurance Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991). See also *Colorado Structures, Inc. v. Insurance Company of the West*, 161 Wn.2d 577, 620-21 ¶¶ 57-58, 167 P.3d 1125 (2007) (Madsen, J.); *City of Seattle v. McCready*, 131 Wn.2d 266, 275, 931 P.2d 156 (1997).

Another example of the government’s advantage is the County’s exclusive control over the terms and language of the construction contract and surety bond, the terms of which the County alone drafts, and which distinguishes statutory public works bonds from insurance policies or private performance bond forms drafted by the surety. Here, the County was at no disadvantage in either the creation of the public works contract and statutory bond, which contain terms the County exclusively drafted and required the contractor and surety to accept on a take it or leave it basis, or in the performance of the public works contract.

For the reasons set out in the Sureties’ petition for review, and SFAA’s amicus memorandum in support of it, this Court should accept review.

DATED this 26<sup>th</sup> day of May, 2016.

SMITH GOODFRIEND, P.S.

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**DECLARATION OF SERVICE**

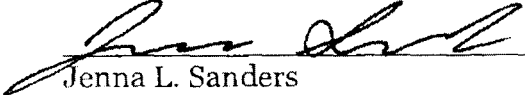
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 26, 2016, I arranged for service of the foregoing Surety Petitioners' Response to Memorandum of the Surety and Fidelity Association of America, to the Court and to counsel for the parties to this action as follows:

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**DATED** at Seattle, Washington this 26<sup>th</sup> day of May, 2016.

  
Jenna L. Sanders

**SMITH GOODFRIEND, PS**

**May 26, 2016 - 3:43 PM**

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**Comments:**

Response to Memorandum

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