

FILED

FEB 10, 2014

Hearings Unit, OIC
Patricia D. Petersen
Chief Hearing Officer

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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re the Matter of

EDMUND C. SCARBOROUGH and
WALTER W. WOLF,

Respondents.

No. 13-0084

RESPONDENT EDMUND C.
SCARBOROUGH'S REPLY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

RESPONDENT EDMUND C. SCARBOROUGH'S
REPLY IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT - 1

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. INTRODUCTION.....3

II. REPLY AUTHORITY AND ARGUMENT.....3

 A. The Facts Material to Mr. Scarborough’s Motion Are Not Disputed.3

 B. The Insurance Code Does Not Apply to Individual Sureties.4

 1. The Insurance Code Can Be Harmonized with Other Laws Only by Concluding that It Does Not Apply to Any Individual Sureties, Regardless of Compensation.4

 2. An Individual Surety Is Not Required to Obtain a Certificate or License from the Commissioner.9

 C. Even Assuming the Insurance Code Applied to Individual Sureties, It Would Be Preempted as to Federal Projects.10

 D. The Commissioner Is Not Entitled to Summary Judgment Regarding Authority to Impose a Fine under Chapter 48.15 RCW, an Issue Not Raised by Mr. Scarborough’s Motion.12

III. CONCLUSION14

RESPONDENT EDMUND C. SCARBOROUGH’S
REPLY IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT – 2

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I. INTRODUCTION

The Office of Insurance Commissioner (OIC) does not dispute that (1) individual sureties are expressly authorized under state and federal law; (2) an individual surety must be deemed to have acted as an "insurer" before any provision of the insurance code could apply to him; or (3) classifying *all* individual sureties as insurers and subjecting them to the insurance code's certificate of authority requirement would nullify the express authorization of individual sureties in chapter 19.72 RCW. The OIC's assertion that only one who issues bonds gratuitously may qualify as an individual surety finds no support in Washington law and, in fact, conflicts with the provisions in state and federal law expressly authorizing individual sureties on public works projects. The hearing officer should grant summary judgment in favor of Mr. Scarborough that individual sureties are governed by chapter 19.72 RCW and not the insurance code. In the alternative, the hearing officer should exclude Miller Act bonds from consideration in this proceeding and rule that the OIC may not seek any fine under RCW 48.05.185 in this matter. The OIC's cross motions should be denied.

II. REPLY AUTHORITY AND ARGUMENT

A. The Facts Material to Mr. Scarborough's Motion Are Not Disputed.

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Mr. Scarborough's summary judgment motion is premised on the essential, material facts relating to his issuance of bonds on 22 projects in 2009-12, all of which are now expired. While it makes new factual allegations and quarrels with the stay of discovery, the OIC does not claim that any basis exists to challenge any facts material to Mr. Scarborough's motion. The OIC does request that certain statements in Mr. Scarborough's declaration be disregarded or stricken, but while Mr. Scarborough opposes that request and the asserted bases for it, none of the statements identified by the OIC is critical to Mr. Scarborough's motion. *See Opposition* at 7.

1 The OIC's new factual allegations are also not material to Mr. Scarborough's motion,
2 as they do not address or conflict with his declaration testimony, upon which the motion is
3 predicated. To the extent that the OIC's cross motions are premised on the new allegations,
4 Mr. Scarborough objects and requests that the allegations be disregarded. While summary
5 judgment may be granted to a nonmoving party on legal issues raised by the original motion,
6 a party may not be deprived of a full and fair opportunity to rebut the factual allegations on
7 which summary judgment is to be granted. CR 56(c); *Leland v. Frogge*, 71 Wn.2d 197, 201,
8 427 P.2d 724 (1967). See also *TEGLAND, WASH. PRAC., RULES PRAC. CR 56, § 17*
9 ("Summary judgment should be entered for the nonmoving party only if the original moving
10 party has had an adequate opportunity to present materials and argument in rebuttal.")¹

11 **B. The Insurance Code Does Not Apply to Individual Sureties.**

12 **1. The Insurance Code Can Be Harmonized with Other Laws Only by**
13 **Concluding that It Does Not Apply to Any Individual Sureties, Regardless**
14 **of Compensation.**

15 The OIC's extensive argument that surety bonds are within the scope of the insurance
16 code is nonresponsive. The insurance code does not impliedly repeal or trump other statutes,
17 and its scope is not determined in a vacuum, based strictly on its own terms. Rather, other
18 statutes that more specifically govern the conduct at issue must be taken into account, because
19 "[a] specific statute will supersede a general one when both apply." *Waste Mgmt. of Seattle,*
20 *Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 630, 869, P.2d 1034 (1994). Furthermore,
21 applicable statutes outside the insurance code may not be disregarded, as statutes must be
22 harmonized where possible and must not be construed so as to render any portion

23
24 ¹ While the OIC asserts that its allegations are supported by the 600-plus pages of materials attached
25 to attorney Alan Singer's declaration, the OIC's brief contains no citations to those materials or any
26 other source, making it unduly burdensome to ascertain whether the specific allegations have any
support, or to rebut or respond to them. Mr. Scarborough objects on this ground, in addition to
timeliness concerns.

1 meaningless or superfluous. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). See
2 *Motion* at 6.

3 The OIC does not dispute that individual sureties are expressly authorized under
4 chapter 19.72 RCW. Nothing in that chapter limits its scope to certain types of bonds the
5 OIC maintains only “occasionally arise,” such as for court proceedings or public officials.
6 See *Opposition* at 22-23. While certain provisions of chapter 19.72 RCW address specific
7 types of bonds, other provisions, including those addressing individual sureties, contain no
8 limitations and apply to all individual surety bonds. See RCW 19.72.020-.040.

9 Furthermore, the OIC does not dispute that classifying *all* individual sureties as
10 insurers and subjecting them to the insurance code’s certificate of authority requirement
11 would nullify the express authorization of individual sureties in chapter 19.72 RCW. This is
12 because every applicant for a certificate of authority must be incorporated, meaning that an
13 individual surety is, by definition, *not eligible to obtain a certificate of authority*. RCW
14 48.05.040(1); RCW 48.06.010: Indeed, the OIC concedes that a “true” individual surety
15 “need[s] no Certificate of Authority.” *Opposition* at 25. Consequently, to support its position
16 that Mr. Scarborough was required to obtain a certificate of authority, while avoiding
17 nullification of chapter 19.72 RCW, the OIC invents a novel definition of “individual surety”
18 not used by the legislature and found nowhere in the statutes.

19 The OIC asserts that, to qualify as an individual surety under chapter 19.72 RCW, the
20 individual must provide the bond *gratuitously*, i.e., “for free.” See, e.g., *Opposition* at 25
21 (“[T]rue individual sureties serve without charging or collecting any premium.”); *id.* at 29
22 (“A true individual surety...just occasionally provides a bond as an accommodation party,
23 gratuitously, motivated solely by friendship.”). Because Mr. Scarborough charged money for
24 his bonds, the OIC argues, he did not act as an “individual surety.” This argument is
25 unsupported by Washington law, including chapter 19.72 RCW, which does not distinguish
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RESPONDENT EDMUND C. SCARBOROUGH’S
MOTION FOR SUMMARY JUDGMENT – 5

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1 between sureties based on whether they are compensated. In addition, the OIC's argument
2 conflicts with state and federal public works laws.

3 Public entities have always been allowed to accept individual sureties for public
4 works projects in Washington, under RCW 39.08.010 and its predecessor statutes dating back
5 to 1888. See notes following RCW 39.08.010 (2012). Before 1989, the public works statute
6 provided that a bond could be issued by "two or more sureties [or] with a surety company as
7 surety[.]" See 1989 WASH. LAWS ch. 145, § 1.² In 1989, the legislature amended the law to
8 clarify that public entities are authorized to accept bonds from individual sureties on any
9 contract up to \$100,000. See *id.*; RCW 39.08.010(5) ("[T]he public entity may accept a full
10 payment and performance bond from an individual surety or sureties..."). The assertion that
11 a surety will issue a performance or payment bond on a public works project *gratuitously* is
12 absurd, but necessary to the OIC's argument.

13 Furthermore, as the OIC recognizes, "individual sureties may provide surety bonds for
14 federal contracts under the Miller Act[.]" *Opposition* at 4. There is nothing ambiguous about
15 the Federal Acquisition Regulation (FAR) provision that states, "An individual surety is
16 acceptable for all types of bonds except position schedule bonds." 48 C.F.R. § 28.203(a).³
17 Plainly, the Washington state legislature and the United States General Services
18 Administration contemplate the use of compensated individual sureties. To accept the OIC's
19 position that every compensated surety is necessarily an "insurer" and therefore subject to the
20 insurance code requirement to obtain a certificate of authority—which an individual surety by
21 definition cannot obtain—would nullify the state and federal laws that expressly authorize
22 individual sureties on public works projects.

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25 ² Copy at Exh. 1 to *Anderson Decl.*

26 ³ Copy at Exh. 2 to *Anderson Decl.*

1 The few cases cited by the OIC to support its assertion that individual sureties must
2 issue their bonds gratuitously are not from Washington and therefore cannot be relied upon as
3 a basis to nullify or interpret the Washington statute. Moreover, they do not support the
4 OIC's position. For instance, the OIC omits critical language from its quotation of *U.S.*
5 *Fidelity & Guaranty Co. v. U.S.*, 178 F. 692 (3d Cir. 1910). The court there was addressing
6 whether corporate sureties are entitled to strict construction of their bonds, as volunteer
7 sureties traditionally were, and in that context the court quoted an older district court decision
8 as follows:

9 The defendant is not entitled to the tender consideration that is accorded to an
10 individual surety *who is* a mere volunteer. ... Just how far the rules that apply
11 to volunteer sureties should be modified when their protection is sought by a
12 surety company is not yet settled; but that some modification is necessary
13 plainly appears from several decisions.

14 *Id.*, quoting *Baglin v. Title Guaranty & Sur. Co.*, 166 F. 356, 363-64 (E.D. Pa. 1909)
15 (emphasis added). In observing that volunteer sureties are entitled to special protection, the
16 court plainly did not even consider whether an individual surety *must* be a volunteer, much
17 less hold that to be the rule.

18 To be sure, the Washington state legislature has established qualifications and
19 limitations for individual sureties, as illustrated by RCW 19.72.020-.040 and RCW
20 39.08.010(5). But those requirements do not include any provision that one will be
21 considered an individual surety only if he issues bonds gratuitously. Furthermore, because
22 the insurance code does not address individual sureties and none of the requirements for
23 individual sureties is found in the insurance code, their regulation is not within the insurance
24 commissioner's jurisdiction. *See* RCW 48.02.060(1) (commissioner's authority derives
25 exclusively from insurance code).

26 Besides its arguments based on the insurance code itself, which unlike chapter 19.72
RCW does not mention individual sureties, the OIC points to no authority for the proposition

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MOTION FOR SUMMARY JUDGMENT - 7

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1 that individual sureties are deemed "insurers" or sell "surety insurance" under Washington
2 law. None of the Washington appellate decisions cited by the OIC addresses this issue. And
3 contrary to the OIC's assertion, chapter 19.72 RCW does not deem every surety bond to be
4 "surety insurance," in RCW 19.72.107(1). That subsection does not say that every surety
5 bond is "surety insurance," but only that a surety bond may include only the coverage
6 identified in the definition of "surety insurance" in chapter 48.11 RCW. See RCW
7 19.72.107(1).⁴ The legislature enacted this section in 1992 to ensure that no surety could be
8 held responsible for a contractor's breach of a contractual requirement to maintain liability
9 insurance. See *House Bill Report, HB 2651* (1992).⁵

10 Moreover, viewed in the context of the entire section and chapter, the definition of
11 "surety bond" in RCW 19.72.107(1) cannot be read to mean that every surety bond is "surety
12 insurance." Immediately following the sections of chapter 19.72 RCW that address
13 individual sureties is a section that singles out corporate surety (as opposed to individual
14 surety) as being the "surety insurance" governed by the insurance code. RCW 19.72.060
15 ("Corporate surety. See surety insurance: Chapter 48.28 RCW."). And considering that
16 individual sureties cannot become authorized surety insurers, accepting the OIC's reading
17 would nullify other provisions of chapter 19.72 RCW, as well as RCW 39.08.010, which

18 ⁴ The entire section RCW 19.72.107 provides:

19 (1) Except under RCW 19.72.109, surety bond means any form of surety insurance as
20 defined in RCW 48.11.080. A surety bond may not provide any other type of
21 insurance coverage defined in chapter 48.11 RCW. Language in any statute,
22 ordinance, contract, or surety bond to the contrary is void.

23 (2) A surety bond shall not be liable for damages based upon or arising out of any:

24 (a) Tortious injury, including death, to:

25 (i) Any person; or

26 (ii) Any real or personal property; or

(b) Failure to have any or adequate insurance coverage, even if liability under (a)
or (b) of this subsection is imposed on the surety's principal or the surety by
contract, surety bond, strict liability, ordinance, statute, or common law.

⁵ Copy at Exh. 3 to *Anderson Decl.*

RESPONDENT EDMUND C. SCARBOROUGH'S
MOTION FOR SUMMARY JUDGMENT - 8

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1 expressly authorize individual sureties. There is no indication that the legislature intended to
2 ban individual sureties in enacting RCW 19.72.107 to prevent sureties from becoming de
3 facto liability insurers.

4 The insurance code, chapter 19.72 RCW, and RCW 39.08.010 can be harmonized
5 only by recognizing that individual sureties, whether or not compensated, are not "insurers"
6 and do not transact "surety insurance" as corporate sureties do. Construing the statutes in this
7 manner gives effect to all provisions and text and avoids nullifying the laws that authorize
8 individual sureties. In addition, the result is consistent with the principle that "a statute...in
9 derogation of the common law, must be strictly construed and no intent to change that law
10 will be found, unless it appears with clarity." *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d
11 1285 (1980). The OIC does not dispute that suretyship, *at common law*, is distinct from
12 insurance. To be sure, the insurance code contains provisions that govern "surety insurance,"
13 but these provisions are in derogation of common law, which means that they must be
14 construed narrowly. *See Motion* at 6-9. The OIC's construction would essentially eliminate
15 individual sureties and therefore must be rejected.

16 **2. An Individual Surety Is Not Required to Obtain Any Certificate or**
17 **License from the Commissioner.**

18 The OIC acknowledges that Mr. Scarborough must be deemed to have acted as an
19 "insurer" before any provision of the insurance code would apply to the bonds he issued in
20 Washington. *See Opposition* at 19. For the reasons discussed above, an individual surety
21 may not be deemed an "insurer." Consequently, no individual surety is required to obtain a
22 certificate of authority, a producer's license, or a surplus lines broker's license.

1 **C. Even Assuming the Insurance Code Applied to Individual Sureties, It Would Be**
2 **Preempted as to Federal Projects.**

3 Even if the insurance code applied to individual sureties, any attempt to apply it to
4 individual sureties on federal projects would be preempted for at least two reasons, neither of
5 which the OIC can rebut.

6 First, because individual sureties are not eligible to obtain a certificate of authority
7 under the insurance code, subjecting them to that requirement would interfere with the federal
8 government's ability to accept individual sureties pursuant to 48 C.F.R. § 28.203, a regulation
9 designed to ensure the availability of Miller Act bonds for federal public works. *See Motion*
10 *at 12.* This is precluded under the doctrine of conflict preemption, which applies where
11 compliance with both laws is impossible or where the state law stands as an obstacle to the
12 accomplishment of the federal government's purposes and objectives. *See Inlandboatmen's*
13 *Union of the Pac. v. Dep't of Transp.*, 119 Wn.2d 697, 702, 836 P.2d 823 (1992). When it
14 asserts that nothing in the insurance code prevents individuals from serving as individual
15 sureties on federal projects, *Opposition at 39*, the OIC ignores that individual sureties are not
16 eligible to obtain a certificate of authority. Furthermore, this assertion highlights the
17 absurdity of the OIC's claim that individual sureties may issue bonds only gratuitously.

18 Second, subjecting individual sureties to the requirement to obtain a certificate of
19 authority would give the insurance commissioner an impermissible "virtual power of review"
20 over the federal government's determination to accept bonds from particular individual
21 sureties. *Leslie Miller, Inc. v. State of Arkansas*, 352 U.S. 187, 189-90, 77 S. Ct. 257, 1 L.
22 Ed. 2d 231 (1956); *Gartrell Constr., Inc. v. Aubry*, 940 F.2d 437 (9th Cir. 1991). The OIC
23 fails to distinguish *Leslie Miller* or *Gartrell*. In describing the Supreme Court's holding in
24 *Leslie Miller*, the OIC states: "[T]he Court correctly determined that the Arkansas laws
25 allowing the state [in issuing a contractor's license] to review the same issues and same
26 requirements the federal government would review [in selecting a contractor] would

1 improperly give the state a virtual power of review over the federal government's decision."
2 *Opposition* at 39. That situation is analogous to this matter, except that in *Leslie Miller*,
3 requiring a contractor's license would not eliminate contractors, whereas here requiring a
4 certificate of authority would eliminate individual sureties.

5 *Leslie Miller* cannot be distinguished on the ground that "state insurance regulators
6 and OIC are not second-guessing any federal determination made about whether a person is
7 truly an individual surety or an insurer[.]" *Opposition* at 39. That is not the issue. The *Leslie*
8 *Miller* analysis involves a comparison of the substantive requirements being applied by the
9 state and federal governments. As explained in Mr. Scarborough's motion (p. 12), individual
10 sureties are subject to close scrutiny by the federal government, including of their conduct,
11 responsibility, sufficiency of pledged assets, and more. See 48 C.F.R. § 28.203(b); 48
12 C.F.R. § 28.203(f); 48 C.F.R. § 28.203-7.⁶ Similarly, the OIC's review for purposes of
13 issuing a certificate of authority includes—at the very least—background checks of corporate
14 officers and directors and determination of whether the corporation has the "capital funds as
15 required by this code." RCW 48.05.040(2); WAC 284-07-620. As the Ninth Circuit
16 observed in *Gartrell*, in applying *Leslie-Miller*:

17 Because the federal government made a direct determination of Gartrell's
18 responsibility, California may not exercise a power of review by requiring
19 Gartrell to obtain state licenses. To hold otherwise would interfere with
20 federal government functions and would frustrate the federal policy of
21 selecting the lowest responsible bidder.

22 940 F.2d at 441.

23 This issue was not addressed by the Ninth Circuit in *K-W Industries v. National*
24 *Surety Corp.*, 855 F.2d 640 (9th Cir. 1988), cited by the OIC. That case did not involve a
25 state license requirement, the FAR, or individual sureties. Instead, a corporate surety insurer

26 ⁶ Copies at Exh. 2 to *Anderson Decl.*

1 argued that Montana's insurance bad faith tort law was preempted by the Miller Act
2 generally. *Id.* at 642. Not surprising, the Ninth Circuit rejected this argument. *Id.* at 642-43.

3 Finally, the McCarran-Ferguson Act does not save the insurance code from
4 preemption as to individual sureties. The McCarran-Ferguson Act provides that it does not
5 apply to federal laws that specifically relate to the business of insurance:

6 No Act of Congress shall be construed to invalidate, impair, or supersede any
7 law enacted by any State for the purpose of regulating the business of
8 insurance, or which imposes a fee or tax upon such business, *unless such Act*
specifically relates to the business of insurance....

9 15 U.S.C. § 1012(b) (emphasis added). While Mr. Scarborough maintains that individual
10 surety bonds are not "insurance," and argues federal preemption only in the alternative, if
11 individual surety bonds are to be deemed "insurance," then the FAR provisions regarding
12 Miller Act bonds and specifically individual sureties must be deemed to "relate[] to the
13 business of insurance." Consequently, the McCarran-Ferguson Act does not save the
14 insurance code and its requirement of a certificate of authority from preemption by the FAR
15 provisions on Miller Act bonds and individual sureties.

16 **D. The Commissioner Is Not Entitled to Summary Judgment Regarding Authority**
17 **to Impose a Fine under Chapter 48.15 RCW, an Issue Not Raised by Mr.**
Scarborough's Motion.

18 The OIC does not address Mr. Scarborough's arguments that (1) the OIC lacks
19 authority to impose a fine for failing to obtain a certificate of authority, if required, and (2)
20 even if the OIC had such authority, the maximum total fine would be \$10,000 under RCW
21 48.05.185. Instead, the OIC responds by making a "cross motion" for summary judgment
22 that it may impose a fine of up to \$25,000 per violation under a different statute, RCW
23 48.15.023(5)(a), and claims that a separate fine may be imposed "per bond." *Opposition* at
24 41-42. Mr. Scarborough did not in his motion raise any issue regarding the OIC's authority
25
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1 to impose fines under chapter 48.15 RCW. He therefore objects to any determination being
2 made on a purported "cross motion" regarding this other statute.

3 In any event, chapter 48.15 RCW, like the rest of the insurance code, does not apply
4 because Mr. Scarborough may not be deemed an "insurer." Even assuming that chapter 48.15
5 RCW could apply, imposing any fine calculated "per bond" would be unwarranted and
6 contrary to the facts. Mr. Scarborough incurred surety obligations on 22 projects in the state
7 of Washington.⁷ Mr. Scarborough in some instances issued only a performance bond and in
8 some instances only a payment bond. Where both a performance and payment bond were
9 issued they covered the same risk, did not increase or duplicate coverage, and did not result in
10 charging a second premium. Regardless of whether Mr. Scarborough bonded performance,
11 payment, or both, he incurred a single surety obligation and charged a single premium.

12 For example, on the Clarkston Public Safety Building project, Mr. Scarborough issued
13 a performance bond and a payment bond, each for the amount of Skyline Contractors'
14 contract with the City of Clarkston.⁸ Each of these bonds included the following statement:

15 Void without attached IRREVOCABLE TRUST RECEIPT. The Owner
16 agrees that the exclusive source of funds to pay any available claims under the
17 terms of this bond is the assets represented by the attached Irrevocable Trust
Receipt.⁹

18 Attached to the two bonds was the single Irrevocable Trust Receipt showing that Mr.
19 Scarborough had pledged assets with value equal to the amount of Skyline Contractors'
20 contract plus 10%.¹⁰ This was typical of Mr. Scarborough's bonds.¹¹

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23 ⁷ Scarborough Decl., ¶ 4.

24 ⁸ Exh. A to Scarborough Decl.

25 ⁹ Id. at SCA00072, SCA00076.

26 ¹⁰ Id. at SCA00081, SCA00083-85.

¹¹ See Exh. E to Singer Decl.

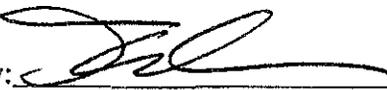
1 While the OIC asserts that a fine may be calculated "per bond," such that Mr.
2 Scarborough may be fined as much as \$900,000 for 36 bonds under RCW 48.15.023(5)(a),
3 such a fine would not be warranted or authorized given that Mr. Scarborough incurred only a
4 single surety obligation for a single premium on each of 22 projects. Therefore, if any issue
5 is to be decided under chapter 48.15 RCW, the hearing officer should rule that any fine must
6 be calculated per surety obligation and not per bond.

7 **III. CONCLUSION**

8 Because he was not required to obtain a certificate of authority from the commissioner
9 or utilize or be a licensed surplus lines broker, Mr. Scarborough respectfully requests that the
10 hearing officer grant his motion for summary judgment, vacate the commissioner's cease and
11 desist order, and dismiss this proceeding.

12 DATED this 10th day of February, 2014.

13 CARNEY BADLEY SPELLMAN, P.S.

14
15 By: 

16 Timothy J. Parker, WSBA No. 8797

17 • Jason W. Anderson, WSBA No. 30512

18 Attorneys for Respondent Edmund C. Scarborough

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RESPONDENT EDMUND C. SCARBOROUGH'S
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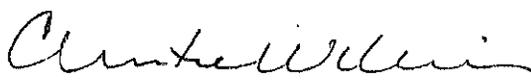
DECLARATION OF SERVICE

I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On February 10, 2014, I caused to be delivered in the manner indicated a copy of the foregoing document on the following parties at the last known address as stated:

Judge Patricia Petersen – ORIGINAL Chief Hearing Officer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 kellyc@oic.wa.gov via e-mail and legal messenger	<u>Attorney for OIC</u> Mr. Alan M. Singer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 alans@oic.wa.gov via e-mail and legal messenger
<u>Attorney for Walter W. Wolf</u> James A. McPhee Workland & Witherspoon, PLLC 601 W Main Avenue, Suite 714 Spokane, WA 99201 jmcphee@workwith.com via e-mail and U.S. mail	

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 10th day of February, 2014.



Christine Williams, Legal Assistant

IN THE STATE OF WASHINGTON, IN AND FOR THE OFFICE OF THE
INSURANCE COMMISSIONER

IN RE THE MATTER OF:

No. 13-0084

EDMUND C. SCARBOROUGH and
WALTER W. WOLF,

DECLARATION OF
EMAILED DOCUMENT
(DCLR)

Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 3400 Capitol Blvd. SE #103, Tumwater WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 16 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: February 10, 2014 at Tumwater, Washington.

Signature: 

Print Name: James Lincoln

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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re the Matter of
EDMUND C. SCARBOROUGH and
WALTER W. WOLF,
Respondents.

No. 13-0084
DECLARATION OF JASON W.
ANDERSON IN SUPPORT OF
RESPONDENT SCARBOROUGH'S
MOTION FOR SUMMARY
JUDGMENT

JASON W. ANDERSON declares:

1. I am one of the attorneys for Respondent Edmund C. Scarborough in this matter. I am over the age of eighteen and competent to testify.

2. Attached are true and correct copies of the following documents:

Exhibit 1 1989 WASH. LAWS ch. 145;

Exhibit 2 Selected provisions of Federal Acquisition Regulation (48 C.F.R. § 203, 203-1, 203-2, 203-3, and 203-7); and

Exhibit 3 House Bill Report, HB 2651 (1992).

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

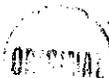
DATED this 10th day of February, 2014, at Seattle, Washington.


Jason W. Anderson

DECLARATION OF JASON W. ANDERSON IN SUPPORT OF RESPONDENT SCARBOROUGH'S MOTION FOR SUMMARY JUDGMENT - 1

CARNEY
BADLEY
SPELLMAN

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A Professional Service Corporation
701 Fifth Avenue, Suite 3600
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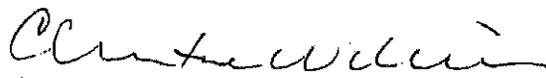
DECLARATION OF SERVICE

I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On February 10, 2014, I caused to be delivered in the manner indicated a copy of the foregoing document on the following parties at the last known address as stated:

Judge Patricia Petersen – ORIGINAL Chief Hearing Officer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 kellyc@oic.wa.gov via e-mail and legal messenger	<u>Attorney for OIC</u> Mr. Alan M. Singer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 alans@oic.wa.gov via e-mail and legal messenger
<u>Attorney for Walter W. Wolf</u> James A. McPhee Workland & Witherspoon, PLLC 601 W Main Avenue, Suite 714 Spokane, WA 99201 jmcphee@workwith.com via e-mail and U.S. mail	

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 10th day of February, 2014.



Christine Williams, Legal Assistant

DECLARATION OF JASON W. ANDERSON IN
SUPPORT OF RESPONDENT
SCARBOROUGH'S MOTION FOR SUMMARY
JUDGMENT – 2

**CARNEY
BADLEY
SPELLMAN**

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CHAPTER 145

[Senate Bill No. 5756]

PUBLIC WORKS—SURETY BONDS—REQUIREMENTS

AN ACT Relating to sureties for public works bonds; and amending RCW 39.08.010.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 1, chapter 207, Laws of 1909 as last amended by section 5, chapter 98, Laws of 1982 and RCW 39.08.010 are each amended to read as follows:

Whenever any board, council, commission, trustees, or body acting for the state or any county or municipality or any public body shall contract with any person or corporation to do any work for the state, county, or municipality, or other public body, city, town, or district, such board, council, commission, trustees, or body shall require the person or persons with whom such contract is made to make, execute, and deliver to such board, council, commission, trustees, or body a good and sufficient bond, ~~((with two or more sureties, or))~~ with a surety company as surety, conditioned that such person or persons shall faithfully perform all the provisions of such contract and pay all laborers, mechanics, and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, which bond in cases of cities and towns shall be filed with the clerk or comptroller thereof, and any person or persons performing such services or furnishing material to any subcontractor shall have the same right under the provisions of such bond as if such work, services or material was furnished to the original contractor: **PROVIDED, HOWEVER,** That the provisions of RCW 39.08.010 through 39.08.030 shall not apply to any money loaned or advanced to any such contractor, subcontractor or other person in the performance of any such work: **PROVIDED FURTHER,** That on contracts of twenty-five thousand dollars or less, at the option of the contractor the respective public entity may, in lieu of the bond, retain fifty percent of the contract amount for a period of thirty days after date of final acceptance, or until receipt of all necessary releases from the department of revenue and the department of labor and industries and settlement of any liens filed under chapter 60.28 RCW, whichever is later: **PROVIDED FURTHER,** That for contracts of one hundred thousand dollars or less, the public entity may accept a full payment and performance bond from an individual surety or sureties: AND **PROVIDED FURTHER,** That the surety must agree to be bound by the

laws of the state of Washington and subjected to the jurisdiction of the state of Washington.

Passed the Senate March 13, 1989.

Passed the House April 11, 1989.

Approved by the Governor April 20, 1989.

Filed in Office of Secretary of State April 20, 1989.

CHAPTER 146

[Senate Bill No. 5054]

MINORITY TEACHER RECRUITMENT PROGRAM

AN ACT Relating to teacher recruitment; and adding new sections to chapter 28A.67 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature finds that it is important to have a teaching force that reflects the rich diversity of the students served in the public schools. The legislature further finds that certain groups, as characterized by ethnic background, are traditionally underrepresented in the teaching profession in the state of Washington and that the ethnic diversity of the student population in the state of Washington is increasing. The legislature intends to increase the number of people from underrepresented groups entering our teaching force.

NEW SECTION. Sec. 2. (1) The Washington state minority teacher recruitment program is established. The program shall be administered by the state board of education. The state board of education shall consult with the higher education coordinating board, representatives of institutions of higher education, education organizations having an interest in teacher recruitment issues, the superintendent of public instruction, the state board for community college education, the department of employment security, and the state board of vocational education within the office of the governor. The program shall be designed to recruit future teachers from students in the targeted groups who are in the ninth through twelfth grades and from adults in the targeted groups who have entered other occupations.

(2) The program shall include the following:

(a) Encouraging students in targeted groups in grades nine through twelve to acquire the academic and related skills necessary to prepare for the study of teaching at an institution of higher education;

(b) Promoting teaching career opportunities to develop an awareness of opportunities in the education profession;

(c) Providing opportunities for students to experience the application of regular high school course work to activities related to a teaching career; and

ELECTRONIC CODE OF FEDERAL REGULATIONS**e-CFR Data is current as of November 5, 2013**

Title 48: Federal Acquisition Regulations System
PART 28—BONDS AND INSURANCE
Subpart 28.2—Sureties and Other Security for Bonds

28.203 Acceptability of individual sureties.

(a) An individual surety is acceptable for all types of bonds except position schedule bonds. The contracting officer shall determine the acceptability of individuals proposed as sureties, and shall ensure that the surety's pledged assets are sufficient to cover the bond obligation. (See 28.203-7 for information on excluded individual sureties.)

(b) An individual surety must execute the bond, and the unencumbered value of the assets (exclusive of all outstanding pledges for other bond obligations) pledged by the individual surety, must equal or exceed the penal amount of each bond. The individual surety shall execute the Standard Form 28 and provide a security interest in accordance with 28.203-1. One individual surety is adequate support for a bond, provided the unencumbered value of the assets pledged by that individual surety equal or exceed the amount of the bond. An offeror may submit up to three individual sureties for each bond, in which case the pledged assets, when combined, must equal or exceed the penal amount of the bond. Each individual surety must accept both joint and several liability to the extent of the penal amount of the bond.

(c) If the contracting officer determines that no individual surety in support of a bid guarantee is acceptable, the offeror utilizing the individual surety shall be rejected as nonresponsible, except as provided in 28.101-4. A finding of nonresponsibility based on unacceptability of an individual surety, need not be referred to the Small Business Administration for a competency review. (See 19.602-1(a)(2)(i) and 61 Comp. Gen. 456 (1982).)

(d) A contractor submitting an unacceptable individual surety in satisfaction of a performance or payment bond requirement may be permitted a reasonable time, as determined by the contracting officer, to substitute an acceptable surety for a surety previously determined to be unacceptable.

(e) When evaluating individual sureties, contracting officers may obtain assistance from the office identified in 28.202(d).

(f) Contracting officers shall obtain the opinion of legal counsel as to the adequacy of the documents pledging the assets prior to accepting the bid guarantee and payment and performance bonds.

(g) Evidence of possible criminal or fraudulent activities by an individual surety shall be referred to the appropriate agency official in accordance with agency procedures.

[54 FR 48986, Nov. 28, 1989]

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Title 48: Federal Acquisition Regulations System
PART 28—BONDS AND INSURANCE
Subpart 28.2—Sureties and Other Security for Bonds

28.203-1 Security interests by an individual surety.

(a) An individual surety may be accepted only if a security interest in assets acceptable under 28.203-2 is provided to the Government by the individual surety. The security interest shall be furnished with the bond.

(b) The value at which the contracting officer accepts the assets pledged must be equal to or greater than the aggregate penal amounts of the bonds required by the solicitation and may be provided by one or a combination of the following methods:

(1) An escrow account with a federally insured financial institution in the name of the contracting agency. (See 28.203-2(b)(2) with respect to Government securities in book entry form.) Acceptable securities for deposit in escrow are discussed in 28.203-2. While the offeror is responsible for establishing the escrow account, the terms and conditions must be acceptable to the contracting officer. At a minimum, the escrow account shall provide for the following:

(i) The account must provide the contracting officer the sole and unrestricted right to draw upon all or any part of the funds deposited in the account. A written demand for withdrawal shall be sent to the financial institution by the contracting officer, after obtaining the concurrence of legal counsel, with a copy to the offeror/contractor and to the surety. Within the time period specified in the demand, the financial institution would pay the Government the amount demanded up to the amount on deposit. If any dispute should arise between the Government and the offeror/contractor, the surety, or the subcontractors or suppliers with respect to the offer or contract, the financial institution would be required, unless precluded by order of a court of competent jurisdiction, to disburse monies to the Government as directed by the contracting officer.

(ii) The financial institution would be authorized to release to the individual surety all or part of the balance of the escrow account, including any accrued interest, upon receipt of written authorization from the contracting officer.

(iii) The Government would not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the account.

(iv) The financial institution would not be liable or responsible for the interpretation of any provisions or terms and conditions of the solicitation or contract.

(v) The financial institution would provide periodic account statements to the contracting officer.

(vi) The terms of the escrow account could not be amended without the consent of the contracting officer.

(2) A lien on real property, subject to the restrictions in 28.203-2 and 28.203-3.

[54 FR 48986, Nov. 28, 1989]

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Title 48: Federal Acquisition Regulations System
PART 28—BONDS AND INSURANCE
Subpart 28.2—Sureties and Other Security for Bonds

28.203-2 Acceptability of assets.

(a) The Government will accept only cash, readily marketable assets, or irrevocable letters of credit from a federally insured financial institution from individual sureties to satisfy the underlying bond obligations.

(b) Acceptable assets include—

(1) Cash, or certificates of deposit, or other cash equivalents with a federally insured financial institution;

(2) United States Government securities at market value. (An escrow account is not required if an individual surety offers Government securities held in book entry form at a depository institution. In lieu thereof, the individual shall provide evidence that the depository institution has (i) placed a notation against the individual's book entry account indicating that the security has been pledged in favor of the respective agency; (ii) agreed to notify the agency prior to maturity of the security; and (iii) agreed to hold the proceeds of the security subject to the pledge in favor of the agency until a substitution of securities is made or the security interest is formally released by the agency);

(3) Stocks and bonds actively traded on a national U.S. security exchange with certificates issued in the name of the individual surety. National security exchanges are—(i) the New York Stock Exchange; (ii) the American Stock Exchange; (iii) the Boston Stock Exchange; (iv) the Cincinnati Stock Exchange; (v) the Midwest Stock Exchange; (vi) the Philadelphia Stock Exchange; (vii) the Pacific Stock Exchange; and (viii) the Spokane Stock Exchange. These assets will be accepted at 90 percent of their 52-week low, as reflected at the time of submission of the bond. Stock options and stocks on the over-the-counter (OTC) market or NASDAQ Exchanges will not be accepted. Assistance in evaluating the acceptability of securities may be obtained from the Securities and Exchange Commission, Division of Enforcement, 450 Fifth Street NW., Washington, DC 20549.

(4) Real property owned in fee simple by the surety without any form of concurrent ownership, except as provided in paragraph (c)(3)(iii) of this subsection, and located in the United States or its outlying areas. These assets will be accepted at 100 percent of the most current tax assessment value (exclusive of encumbrances) or 75 percent of the properties' unencumbered market value provided a current appraisal is furnished (see 28.203-3).

(5) Irrevocable letters of credit (ILC) issued by a federally insured financial institution in the name of the contracting agency and which identify the agency and solicitation or contract number for which the ILC is provided.

(c) Unacceptable assets include but are not limited to—

(1) Notes or accounts receivable;

- (2) Foreign securities;
- (3) Real property as follows:
 - (i) Real property located outside the United States and its outlying areas.
 - (ii) Real property which is a principal residence of the surety.
 - (iii) Real property owned concurrently regardless of the form of co-tenancy (including joint tenancy, tenancy by the entirety, and tenancy in common) except where all co-tenants agree to act jointly.
 - (iv) Life estates, leasehold estates, or future interests in real property.
- (4) Personal property other than that listed in paragraph (b) of this subsection (e.g., jewelry, furs, antiques);
- (5) Stocks and bonds of the individual surety in a controlled, affiliated, or closely held concern of the offeror/contractor;
- (6) Corporate assets (e.g., plant and equipment);
- (7) Speculative assets (e.g., mineral rights);
- (8) Letters of credit, except as provided in 28.203-2(b)(5).

[54 FR 48987, Nov. 28, 1989, as amended at 68 FR 28083, May 22, 2003]

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ELECTRONIC CODE OF FEDERAL REGULATIONS

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Title 48: Federal Acquisition Regulations System
 PART 28—BONDS AND INSURANCE
 Subpart 28.2—Sureties and Other Security for Bonds

28.203-3 Acceptance of real property.

(a) Whenever a bond with a security interest in real property is submitted, the individual surety shall provide—

(1) A mortgagee title insurance policy, in an insurance amount equal to the amount of the lien, or other evidence of title that is consistent with the requirements of Section 2 of the United States Department of Justice Title Standards at http://www.justice.gov/enrd/ENRD_Assets/Title_Standards_2001.pdf. This title evidence must show fee simple title vested in the surety along with any concurrent owners; whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including the lien filed in favor of the Government under paragraph (d) of this subsection. Agency contracting officers should request the assistance of their designated agency legal counsel in determining if the title evidence is consistent with the Department of Justice standards;

(2) Evidence of the amount due under any encumbrance shown in the evidence of title;

(3) A copy of the current real estate tax assessment of the property or a current appraisal dated no earlier than 6 months prior to the date of the bond, prepared by a professional appraiser who certifies that the appraisal has been conducted in accordance with the generally accepted appraisal standards as reflected in the Uniform Standards of Professional Appraisal Practice as promulgated by the Appraisal Foundation, 1029 Vermont Avenue NW., Washington, DC 20005.

(b) Failure to provide evidence that the lien has been properly recorded will render the offeror nonresponsible.

(c) The individual surety is liable for the payment of all administrative costs of the Government, including legal fees, associated with the liquidation of pledged real estate.

(d) The following format, or any document substantially the same, shall be signed by all owners of the property and used by the surety and recorded in the local recorder's office when a surety pledges real estate on Standard Form 28, Affidavit of Individual Surety.

LIEN ON REAL ESTATE

I/we agree that this instrument constitutes a lien in the amount of \$_____ on the property described in this lien. The rights of the United States Government shall take precedence over any subsequent lien or encumbrance until the lien is formally released by a duly authorized representative of the United States. I/we hereby grant the United States the power of sale of subject property, including the right to satisfy its reasonable administrative costs, including legal fees associated with any sale of subject property, in the event of contractor default if I/we otherwise fail to satisfy the underlying () bid guarantee, () performance bond, () or payment bond obligations as an individual surety on solicitation/contract number _____. The lien is upon the real estate now owned by me/us described as follows: (legal description, street address and other identifying description)

IN WITNESS HEREOF, I/we have hereunto affixed my/our hand(s) and seal(s) this ___ DAY OF _____
20__.

WITNESS:

(SEAL)

I, _____, a Notary Public In and for the (CITY) _____, (STATE) _____, do hereby certify that _____, a party or parties to a certain Agreement bearing the date ___ day of _____ 20__, and hereunto annexed, personally appeared before me, the said _____ being personally well known to me as the person(s) who executed said Ilen, and acknowledged the same to be his/her/their act and deed. GIVEN under my hand and seal this ___ day of _____ 20__.

NOTARY PUBLIC, STATE

My Commission expires:

[54 FR 48987, Nov. 28, 1989, as amended at 70 FR 11763, Mar. 9, 2005; 74 FR 40467, Aug. 11, 2009; 77 FR 204, Jan. 3, 2012]

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Title 48: Federal Acquisition Regulations System
PART 28—BONDS AND INSURANCE
Subpart 28.2—Sureties and Other Security for Bonds

28.203-7 Exclusion of individual sureties.

(a) An individual may be excluded from acting as a surety on bonds submitted by offerors on procurement by the executive branch of the Federal Government, by the acquiring agency's head or designee utilizing the procedures in subpart 9.4. The exclusion shall be for the purpose of protecting the Government.

(b) An individual may be excluded for any of the following causes:

(1) Failure to fulfill the obligations under any bond.

(2) Failure to disclose all bond obligations.

(3) Misrepresentation of the value of available assets or outstanding liabilities.

(4) Any false or misleading statement, signature or representation on a bond or affidavit of individual suretyship.

(5) Any other cause affecting responsibility as a surety of such serious and compelling nature as may be determined to warrant exclusion.

(c) An individual surety excluded pursuant to this subsection shall be included in the System for Award Management Exclusions. (See 9.404.)

(d) Contracting officers shall not accept the bonds of individual sureties whose names appear in the System for Award Management Exclusions (see 9.404) unless the acquiring agency's head or a designee states in writing the compelling reasons justifying acceptance.

(e) An exclusion of an individual surety under this subsection will also preclude such party from acting as a contractor in accordance with subpart 9.4.

[54 FR 48988, Nov. 28, 1989, as amended at 60 FR 33066, June 26, 1995; 69 FR 76349, Dec. 20, 2004; 78 FR 37678, June 21, 2013]

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HOUSE BILL REPORT

HB 2651

*As Reported By House Committee on:
Financial Institutions & Insurance*

Title: An act relating to insurance coverage.

Brief Description: Limiting surety liability.

Sponsor(s): Representatives Heavey and Fuhrman.

Brief History:

Reported by House Committee on:
Financial Institutions & Insurance, February 5, 1992,
DPS.

**HOUSE COMMITTEE ON
FINANCIAL INSTITUTIONS & INSURANCE**

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Dellwo, Chair; Zellinsky, Vice Chair; Broback, Ranking Minority Member; Mielke, Assistant Ranking Minority Member; Anderson; Inslee; R. Johnson; R. Meyers; Paris; Schmidt; and Scott.

Staff: John Conniff (786-7119).

Background: Many state statutes require bonds to guarantee performance of either legal or contractual obligations. In addition, contracting parties often require posting of a bond to ensure contractual performance. Legal problems arise for sureties when the person covered by the bond fails to perform a contractual duty that results in bodily injury or property damage. For example, if a contract required a building contractor to maintain liability insurance and the contractor allows liability insurance to lapse resulting in no insurance for a subsequent third party injury, it could be argued that failure to obtain insurance resulted in non-performance of the contract, thus requiring the surety to pay for such non-performance.

Summary of Substitute Bill: A surety bond may not provide any insurance coverage other than surety coverage defined by the insurance code. Any statute, ordinance or contract requiring, or bond providing, coverage not permitted under the insurance code is void. A bond may not provide coverage for damages arising out of tortious injury or death to any

person or to real or personal property. A bond is not liable for the principal's failure to have adequate insurance coverage under a contract. These restrictions apply to all sureties whether the surety is compensated or not.

Substitute Bill Compared to Original Bill: A technical amendment is made.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: Surety bonds are not designed to provide liability coverage. When no other source of funds to compensate for property damage or bodily injury can be found, attempts are made to force a surety to provide such compensation. Without clarification, surety bonds will be hard to get and hard to afford.

Testimony Against: None.

Witnesses: (Pro) Doug Bohlke, Contractors Bonding and Insurance Company; Don Sirkin, Contractors Bonding and Insurance Company; and (questions) Dennis Martin, Washington State Trial Lawyers Association.

IN THE STATE OF WASHINGTON, IN AND FOR THE OFFICE OF THE
INSURANCE COMMISSIONER

IN RE THE MATTER OF:

No. 13-0084

EDMUND C. SCARBOROUGH and
WALTER W. WOLF,

DECLARATION OF
EMAILED DOCUMENT
(DCLR)

Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 3400 Capitol Blvd. SE #103, Tumwater WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 15 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: February 10, 2014 at Tumwater, Washington.

Signature: _____



Print Name: James Lincoln