

CHAPTER 266

(House Bill 312)

AN ACT concerning

Procurement – Security Requirements – ~~Repeal~~ Extension of Sunset Provision

FOR the purpose of ~~repealing~~ altering the format of certain affidavits required to be attached to certain bid security; altering a certain reporting requirement on the implementation of included in a certain Act on relating to security requirements for procurement; ~~repealing~~ altering the termination provision of a certain Act relating to security requirements for procurement; and generally relating to security requirements for procurement.

~~BY repealing and reenacting, without amendments,
Article 83A – Department of Business and Economic Development
Section 5-1035 and 5-1037
Annotated Code of Maryland
(2003 Replacement Volume and 2007 Supplement)~~

BY repealing and reenacting, without amendments,
Article – Economic Development
Section 5-568 and 5-569
Annotated Code of Maryland
(As enacted by Chapter 306 (H.B. 1050) of the Acts of the General Assembly of 2008)

BY repealing and reenacting, with amendments,
Article – State Finance and Procurement
Section 13-207 and 17-104
Annotated Code of Maryland
(2006 Replacement Volume and 2007 Supplement)

BY repealing and reenacting, without amendments,
Article – State Finance and Procurement
Section 13-207, 13-208, 13-216, and 17-104
Section 13-208 and 13-216
Annotated Code of Maryland
(2006 Replacement Volume and 2007 Supplement)

~~BY repealing
Chapter 299 of the Acts of the General Assembly of 2006
Section 2~~

BY repealing and reenacting, with amendments,
Chapter 299 of the Acts of the General Assembly of 2006
Section ~~3 and 4~~ 2, 3, and 4

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

~~Article 83A — Department of Business and Economic Development~~

~~5-1035.~~

~~(a) Subject to the restrictions of this Part VI, the Authority, on application, may guarantee any surety up to the lesser of 90 percent or \$5,000,000 of its losses incurred under a bid bond, a payment bond, or a performance bond on any contract financed by the federal government or a state government, a local government, a private entity, or a utility regulated by the Public Service Commission.~~

~~(b) The term of a guaranty under this Part VI may not exceed the contract term.~~

~~(c) The Authority may vary the terms and conditions of the guaranty from surety to surety, based upon the Authority's history of experience with that surety and upon any other factor that the Authority considers relevant.~~

~~(d) (1) The Authority may execute and perform bid, performance, and payment bonds as a surety for the benefit of a principal in connection with any contract financed by the federal government or a state government, a local government, a private entity, or a utility regulated by the Public Service Commission.~~

~~(2) The bonds:~~

~~(i) May not exceed \$5,000,000 each; and~~

~~(ii) Shall be subject to the approval of the Authority, based on the bond worthiness of the principal as determined by the Authority on review of an application.~~

~~(3) The monetary limit in this subsection does not apply if the sources of funding for the bonds are grants.~~

~~(e) (1) The Authority may not approve a guaranty or a bond under this Part VI unless the Authority considers the economic impact of the contract, for which a bond is sought to be guaranteed or issued, to be substantial.~~

~~(2) To determine the economic impact of a contract, the Authority may consider:~~

- ~~(i) The amount of the guaranty obligation;~~
- ~~(ii) The terms of the bond to be guaranteed;~~
- ~~(iii) The number of new jobs that will be created by the contract to be bonded; and~~
- ~~(iv) Any other factor that the Authority considers relevant.~~

~~5-1037.~~

~~(a) To qualify for a surety bond or guaranty under the Program, a principal shall meet the requirements of this section.~~

~~(b) The principal shall satisfy the Authority that:~~

- ~~(1) (i) The principal is of good moral character; or~~
 - ~~(ii) If the principal is not an individual, the principal is owned by individuals of good moral character;~~

~~(2) As determined from creditors, employers, and other individuals who have personal knowledge of the principal:~~

- ~~(i) The principal has a reputation for financial responsibility; or~~
 - ~~(ii) If the principal is not an individual, a majority of the principal is owned by individuals with a reputation for financial responsibility;~~

~~(3) The principal is a resident of Maryland or has its principal place of business in Maryland; and~~

~~(4) The principal is unable to obtain adequate bonding on reasonable terms through normal channels.~~

~~(c) The principal shall certify to the Authority and the Authority shall be satisfied that:~~

~~(1) A bond is required in order to bid on a contract or to serve as a prime contractor or subcontractor;~~

~~(2) A bond is not obtainable on reasonable terms and conditions without assistance under the Maryland Small Business Surety Bond Program; and~~

~~(3) The principal will not subcontract more than 75 percent of the dollar value of the contract.~~

Article – Economic Development

5-568.

(a) The Authority may guarantee a surety up to the lesser of 90% or \$5,000,000 of its loss under a bid bond, payment bond, or performance bond on a contract financed by the federal government, a state government, a local government, a private entity, or a utility that the Public Service Commission regulates.

(b) The term of a guaranty under this part may not exceed the contract term, including:

(1) the maintenance or warranty period required by the contract; and

(2) the period during which the surety may be liable for latent defects.

(c) The Authority may vary the terms and conditions of a guaranty based on:

(1) the Authority's history of experience with a surety; and

(2) any other factor the Authority considers relevant.

5-569.

(a) The Authority may execute and perform a bid bond, performance bond, and payment bond as a surety for the benefit of a principal in connection with a contract financed by the federal government or a state government, a local government, a private entity, or a utility regulated by the Public Service Commission.

(b) (1) This subsection does not apply if the sources of funding for the bonds are grants.

(2) The bonds may not exceed \$5,000,000 each.

(c) Bonds are subject to the approval of the Authority based on the bond worthiness of the principal.

Article – State Finance and Procurement

13-207.

(a) Except as otherwise provided in this section, a procurement officer may not require a bidder or offeror to provide bid security on a procurement contract if the procurement officer expects the price to be \$100,000 or less.

(b) (1) A procurement officer shall require a bidder or offeror to provide bid security on a procurement contract for construction if:

(i) the price is expected to exceed \$100,000; or

(ii) the price is expected to be \$100,000 or less but federal law or a condition of federal assistance requires the security.

(2) The amount of bid security required for a procurement contract for construction shall be:

(i) at least 5% of the bid or price proposal; or

(ii) if the bid or price proposal states a rate but not a total price, an amount determined by the procurement officer.

(c) (1) A procurement officer may require a bidder or offeror to provide bid security on a procurement contract for services, supplies, or construction related services if the price of the procurement contract is expected to exceed \$50,000.

(2) A procurement officer shall require a bidder or offeror to provide bid security on a procurement contract for services, supplies, or construction related services if federal law or a condition of federal assistance requires the security.

(3) The amount of bid security required for a procurement contract for services, supplies, or construction related services shall be an amount determined by the procurement officer. If a bid or proposal states a rate but not a total price, the procurement officer shall determine the dollar amount of the bid security.

(d) Bid security under this section shall be:

(1) a bond provided by a surety company authorized to do business in the State;

(2) a bond provided by an individual surety that meets the requirements of this section;

(3) cash; or

(4) another form of security:

(i) authorized by federal or State regulation; or

(ii) that is satisfactory to the unit awarding the contract.

(e) A bond provided by an individual surety shall be acceptable as bid security under this section if:

(1) the contractor has been denied corporate surety credit;

(2) the individual surety only transacts business through an insurance agency licensed by the Maryland Insurance Administration;

(3) the individual surety attaches ~~the GSA Standard Form 28, Affidavit of Individual Surety,~~ **AN AFFIDAVIT OF INDIVIDUAL SURETY IN A FORMAT THAT THE BOARD REQUIRES** to the bid security;

(4) the individual surety provides a UCC-1 filing security interest to the unit for one or more of the assets listed in item (5)(i) through (iv) and (vi) of this subsection at the time the bond is furnished; and

(5) the individual surety pledges one or more assets in an amount equal to or greater than the aggregate penal amounts of the bonds required by the solicitation, including:

(i) cash or certificates of deposit;

(ii) cash equivalents held with a federally insured financial institution, or assets that are evidenced by a security interest, including an irrevocable trust receipt issued by the financial institution or by an independent trustee in the name of the unit that:

1. are issued in accordance with § 9-109 of the Commercial Law Article;

2. contain a payout clause in the event that default cannot be remedied; and

3. identify the solicitation or contract number for which the security interest is provided;

(iii) United States government securities at market value;

(iv) stocks and bonds that:

1. are actively traded on a national United States security exchange;

2. are accompanied by certificates issued in the name of the individual surety; and

3. are pledged at 90% of their 52-week low, as reflected at the time of submission of the bond;

(v) real property:

1. that is owned by the contractor or individual surety in fee simple or with cotenants that all agree to act jointly;

2. that may include the granting of a mortgage or deed of trust on real property located within the State if satisfactory to the unit;

3. for which the face amount of the mortgage or deed of trust on the real property located within the State does not exceed 75% of the contractor's or individual surety's equity interest in the property; and

4. for which a mortgage or deed of trust accepted under this subsection is recorded by an official designated by the unit where the real property is situated in accordance with § 3-103 of the Real Property Article; or

(vi) irrevocable letters of credit that:

1. are issued by a federally insured financial institution in the name of the contracting agency;

2. identify the agency and the solicitation or contract number for which the irrevocable letter of credit is provided; and

3. contain a payout clause if that default cannot be remedied.

(f) Any asset listed under subsection (e)(5) of this section shall be pledged only for the intended security and may not be pledged for any other security or contract in or outside the State until the asset is released by the unit.

13-208.

(a) Except as provided under subsection (b) of this section, if a procurement officer requires bid security, the procurement officer shall reject a bid or proposal that is not accompanied by proper security.

(b) A procurement officer may accept a bid or proposal that is accompanied by bid security in less than the amount required if:

- (1) the procurement officer determines that:
 - (i) the deficiency in the amount is insubstantial; and
 - (ii) acceptance of the bid or proposal would be in the best interests of the State; and
- (2) the procurement officer further determines that:
 - (i) the bid or proposal was the only one submitted and there is no time for rebidding;
 - (ii) the bid security became inadequate as a result of the correction of a mistake in the bid or proposal or as a result of a modification in the bid or proposal in accordance with applicable regulations, and the bidder or offeror increased the amount of bid security to required limits within 48 hours after the correction or modification; or
 - (iii) after consideration of the risks involved and the difference between the lowest bid and the next lowest bid, it would be fiscally advantageous to the State to accept the lowest bid or proposal.

13-216.

(a) Except as provided in subsection (b) of this section, a procurement officer may not require a contractor to provide a performance bond, payment bond, or other security on a procurement contract for construction, construction related services, services, or supplies if the price of the procurement contract is \$100,000 or less.

(b) A procurement officer shall require a contractor to provide a performance bond, payment bond, or other security if federal law or a condition of federal assistance requires the security.

(c) If the price of a procurement contract for construction exceeds \$100,000, a procurement officer shall require a contractor to provide security as required under Title 17, Subtitle 1 of this article.

(d) A procurement officer may require a contractor to provide a performance bond or other security on a procurement contract for supplies, services, or construction related services if:

- (1) circumstances warrant security; and
- (2) the price of the procurement contract exceeds \$100,000.

17-104.

(a) Payment security or performance security required under this subtitle shall be:

(1) a bond executed by a surety company authorized to do business in the State;

(2) a bond executed by an individual surety that meets the requirements of this section;

(3) cash in an amount equivalent to a bond; or

(4) another form of security:

(i) authorized by federal or State regulation; or

(ii) that is satisfactory to the public body awarding the contract.

(b) (1) Subject to paragraphs (2) and (3) of this subsection, performance security may include the granting of a mortgage or deed of trust on real property located within the State if such security is satisfactory to the public body awarding the contract.

(2) The face amount of a mortgage or deed of trust on real property granted as security under this subsection may not exceed 75% of the contractor's equity interest in the property.

(3) A mortgage or deed of trust accepted under this subsection shall be recorded by an official designated by the public body accepting the mortgage or deed of trust in the land records of the county where the real property is situated in accordance with § 3-103 of the Real Property Article.

(c) A bond executed by an individual surety shall be acceptable as payment security or performance security under this subtitle if:

(1) the contractor has been denied corporate surety credit;

(2) the individual surety only transacts business through an insurance agency licensed by the Maryland Insurance Administration;

(3) the individual surety attaches ~~the GSA Standard Form 28, Affidavit of Individual Surety,~~ **AN AFFIDAVIT OF INDIVIDUAL SURETY IN A FORMAT THAT THE BOARD REQUIRES** to the bid security;

(4) the individual surety provides a UCC–1 filing security interest to the public body for one or more of the assets listed in item (5)(i) through (iv) and (vi) of this subsection at the time the bond is furnished; and

(5) the individual surety pledges one or more assets in an amount equal to or greater than the aggregate penal amounts of the bonds required by the solicitation, including:

(i) cash or certificates of deposit;

(ii) cash equivalents held with a federally insured financial institution, or assets that are evidenced by a security interest, including an irrevocable trust receipt issued by the financial institution or by an independent trustee in the name of the public body that:

1. are issued in accordance with § 9–109 of the Commercial Law Article;

2. contain a payout clause in the event that default cannot be remedied; and

3. identify the solicitation or contract number for which the security interest is provided;

(iii) United States government securities at market value;

(iv) stocks and bonds that:

1. are actively traded on a national United States security exchange;

2. are accompanied by certificates issued in the name of the individual surety; and

3. are pledged at 90% of their 52–week low, as reflected at the time of submission of the bond;

(v) real property:

1. that is owned by the contractor or individual surety in fee simple or with cotenants that all agree to act jointly;

2. that may include the granting of a mortgage or deed of trust on real property located within the State if satisfactory to the public body;

3. for which the face amount of the mortgage or deed of trust on the real property located within the State does not exceed 75% of the contractor's or individual surety's equity interest in the property; and

4. for which a mortgage or deed of trust accepted under this subsection is recorded by an official designated by the unit where the real property is situated in accordance with § 3-103 of the Real Property Article; or

(vi) irrevocable letters of credit that:

1. are issued by a federally insured financial institution in the name of the contracting agency;

2. identify the agency and the solicitation or contract number for which the irrevocable letter of credit is provided; and

3. contain a payout clause if that default cannot be remedied.

(d) Any asset listed under subsection (c)(5) of this section shall be pledged only for the intended security and may not be pledged for any other security or contract in or outside the State until the asset is released by the public body.

Chapter 299 of the Acts of 2006

~~SECTION 2. AND BE IT FURTHER ENACTED, That on or before September 30, 2007, and annually thereafter through September 30, 2009, inclusive,~~
SECTION 2. AND BE IT FURTHER ENACTED, That on or before September 30, 2009 and every 2 years thereafter the Procurement Advisor appointed by the Board of Public Works shall report to the Governor, and, in accordance with § 2-1246 of the State Government Article, to the Senate Education, Health, and Environmental Affairs Committee and House Health and Government Operations Committee, regarding the ~~implementation~~ **EFFECTIVENESS** of this Act ~~during the immediately preceding fiscal year,~~ **ACT**, including the impact of this Act on small business and minority business enterprises.

~~SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any requirement for bid security or for payment security or performance security due before the effective date of this Act.~~

~~SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2006. It shall remain effective for a period of 8 years and, at the end of September 30, 2009~~ **SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2006. It shall remain effective for a period of 8 years and, at the end of September 30, 2014,** with no further action required by the General Assembly, this Act shall be abrogated and of no further force and effect.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2008.

Approved by the Governor, April 24, 2008.