

TITLE 15 - COMMERCE AND TRADE
CHAPTER 14B - SMALL BUSINESS INVESTMENT PROGRAM
SUBCHAPTER IV-A - GUARANTEES
Part B - Surety Bond Guarantees

§ 694b. Surety bond guarantees

(a) Authority of Administration to guarantee surety against loss from principal's breach of bond

- (1) The Administration may, upon such terms and conditions as it may prescribe, guarantee and enter into commitments to guarantee any surety against loss resulting from a breach of the terms of a bid bond, payment bond, performance bond, or bonds ancillary thereto, by a principal on any total work order or contract amount at the time of bond execution that does not exceed \$2,000,000.
- (2) The terms and conditions of said guarantees and commitments may vary from surety to surety on the basis of the Administration's experience with the particular surety.
- (3) The Administration may authorize any surety, without further administration approval, to issue, monitor, and service such bonds subject to the Administration's guarantee.
- (4) No such guarantee may be issued, unless—
 - (A) the person who would be principal under the bond is a small business concern;
 - (B) the bond is required in order for such person to bid on a contract, or to serve as a prime contractor or subcontractor thereon;
 - (C) such person is not able to obtain such bond on reasonable terms and conditions without a guarantee under this section; and
 - (D) there is a reasonable expectation that such principal will perform the covenants and conditions of the contract with respect to which such bond is required, and the terms and conditions of such bond are reasonable in the light of the risks involved and the extent of the surety's participation.
- (5)
 - (A) The Administration shall promptly act upon an application from a surety to participate in the Preferred Surety Bond Guarantee Program, authorized by paragraph (3), in accordance with criteria and procedures established in regulations pursuant to subsection (d) of this section.
 - (B) The Administration is authorized to reduce the allotment of bond guarantee authority or terminate the participation of a surety in the Preferred Surety Bond Guarantee Program based on the rate of participation of such surety during the 4 most recent fiscal year quarters compared to the median rate of participation by the other sureties in the program.

(b) Indemnification of surety against loss from avoiding breach

Subject to the provisions of this section, in connection with the issuance by the Administration of a guarantee to a surety as provided by subsection (a) of this section, the Administration may agree to indemnify such surety against a loss sustained by such surety in avoiding or attempting to avoid a breach of the terms of a bond guaranteed by the Administration pursuant to subsection (a) of this section: Provided, however—

- (1) prior to making any payment under this subsection, the Administration shall first determine that a breach of the terms of such bond was imminent;
- (2) a surety must obtain approval from the Administration prior to making any payments pursuant to this subsection unless the surety is participating under the authority of subsection (a)(3) of this section; and
- (3) no payment by the Administration pursuant to this subsection shall exceed 10 per centum of the contract price unless the Administrator determines that a greater payment should be made as a result of a finding by the Administrator that the surety's loss sustained in avoiding or attempting to avoid such breach was necessary and reasonable.

In no event shall the Administration pay a surety pursuant to this subsection an amount exceeding the guaranteed share of the bond available to such surety pursuant to subsection (a) of this section.

(c) Limitation of liability

Any guarantee or agreement to indemnify under this section shall obligate the Administration to pay to the surety a sum—

- (1) not to exceed 70 per centum of the loss incurred and paid by a surety authorized to issue bonds subject to the Administration's guarantee under subsection (a)(3) of this section;
- (2) not to exceed 90 per centum of the loss incurred and paid in the case of a surety requiring the Administration's specific approval for the issuance of such bond, but in no event may the Administration make any duplicate payment pursuant to subsection (b) of this section or any other subsection;
- (3) equal to 90 per centum of the loss incurred and paid in the case of a surety requiring the administration's ¹ specific approval for the issuance of a bond, if—
 - (A) the total amount of the contract at the time of execution of the bond or bonds is \$100,000 or less, or
 - (B) the bond was issued to a small business concern owned and controlled by socially and economically disadvantaged individuals as defined by section 637 (d) of this title, or to a qualified HUBZone small business concern (as defined in section 632 (p) of this title); or
- (4) determined pursuant to subsection (b) of this section, if applicable.

(d) Regulations

The Administration may establish and periodically review regulations for participating sureties which shall require such sureties to meet Administration standards for underwriting, claim practices, and loss ratios.

(e) Reimbursement of surety; conditions

Pursuant to any such guarantee or agreement, the Administration shall reimburse the surety, as provided in subsection (c) of this section, except that the Administration shall be relieved of all liability if—

- (1) the surety obtained such guarantee or agreement, or applied for such reimbursement, by fraud or material misrepresentation,
- (2) the total contract amount at the time of execution of the bond or bonds exceeds \$2,000,000,
- (3) the surety has breached a material term or condition of such guarantee ² agreement, or
- (4) the surety has substantially violated the regulations promulgated by the Administration pursuant to subsection (d) of this section.

(f) Procedure for reimbursement

The Administration may, upon such terms and conditions as it may prescribe, adopt a procedure for reimbursing a surety for its paid losses billed each month, based upon prior monthly payments to such surety, with subsequent adjustments after such disbursement.

(g) Audit

- (1) Each participating surety shall make reports to the Administration at such times and in such form as the Administration may require.
- (2) The Administration may at all reasonable times audit, in the offices of a participating surety, all documents, files, books, records, and other material relevant to the Administration's guarantee, commitments to guarantee, or agreements to indemnify any surety pursuant to this section.
- (3) Each surety participating under the authority of paragraph (3) of subsection (a) of this section shall be audited at least once every three years by examiners selected and approved by the Administration.

(h) Administrative provisions

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The Administration shall administer this part on a prudent and economically justifiable basis and establish such fee or fees for small business concerns and premium or premiums for sureties as it deems reasonable and necessary, to be payable at such time and under such conditions as may be determined by the Administration.

(i) Powers of Administration respecting loans

The provisions of section 693 of this title shall apply in the administration of this section.

Footnotes

¹ So in original. Probably should be capitalized.

² So in original. Probably should be followed by “or”.

(Pub. L. 85–699, title IV, § 411, as added Pub. L. 91–609, title IX, § 911(a)(4), Dec. 31, 1970, 84 Stat. 1813; amended Pub. L. 93–386, §§ 6(a)(3), 11, Aug. 23, 1974, 88 Stat. 747, 749; Pub. L. 95–507, title I, § 111, Oct. 24, 1978, 92 Stat. 1758; Pub. L. 96–302, title I, § 115, July 2, 1980, 94 Stat. 839; Pub. L. 99–272, title XVIII, § 18014, Apr. 7, 1986, 100 Stat. 370; Pub. L. 100–590, title II, §§ 202–204, Nov. 3, 1988, 102 Stat. 3007–3009; Pub. L. 104–208, div. D, title II, § 206(a), Sept. 30, 1996, 110 Stat. 3009–738; Pub. L. 105–135, title VI, § 604(d), Dec. 2, 1997, 111 Stat. 2633; Pub. L. 106–554, § 1(a)(9) [title VIII, § 805(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A–705; Pub. L. 108–447, div. K, title II, § 203(a), (b), Dec. 8, 2004, 118 Stat. 3465, 3466.)

Amendments

2004—Subsec. (a)(1). Pub. L. 108–447, § 203(a), substituted “total work order or contract amount at the time of bond execution that does not exceed” for “contract up to”.

Subsec. (g)(3). Pub. L. 108–447, § 203(b), substituted “every three years” for “each year”.

2000—Subsecs. (a)(1), (e)(2). Pub. L. 106–554 substituted “\$2,000,000” for “\$1,250,000”.

1997—Subsec. (c)(3)(B). Pub. L. 105–135 inserted “, or to a qualified HUBZone small business concern (as defined in section 632 (p) of this title)” before semicolon.

1996—Subsec. (a)(5). Pub. L. 104–208 added par. (5).

1988—Subsec. (a). Pub. L. 100–590, § 202, amended subsec. (a) generally, substituting pars. (1) to (4) for former pars. (1) to (6).

Subsec. (b). Pub. L. 100–590, § 203(c), added par. (2), redesignated former par. (2) as (3), struck out former par. (3) which prohibited the making subsequent to two years after Oct. 24, 1978, of new agreements to indemnify, and inserted concluding provision: “In no event shall the Administration pay a surety pursuant to this subsection an amount exceeding the guaranteed share of the bond available to such surety pursuant to subsection (a) of this section.”

Subsec. (c). Pub. L. 100–590, § 203(b), amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: “Any guarantee or agreement to indemnify under this section shall obligate the Administration to pay to the surety a sum not to exceed (1) in the case of a breach of contract, 90 percent of the loss incurred and paid by the surety as the result of the breach; or (2) in a case in which subsection (b) of this section applies, the amount determined under subsection (b) of this section.”

Subsec. (e)(3), (4). Pub. L. 100–590, § 203(c), added pars. (3) and (4).

Subsec. (g). Pub. L. 100–590, § 204, amended subsec. (g) generally. Prior to amendment, subsec. (g) read as follows: “The Administration may at all reasonable times audit in the offices of a participating surety all documents, files, books, records, and other material relevant to the Administration’s guarantee, commitments to guarantee, or agreements to indemnify any surety pursuant to this section.”

1986—Subsecs. (a), (e)(2). Pub. L. 99–272 substituted “\$1,250,000” for “\$1,000,000”.

1980—Subsec. (c). Pub. L. 96–302 struck out “to or on behalf of the obligee, or to labor and materialmen, in fulfilling the terms of the contract” after “paid by the surety” in cl. (1).

1978—Subsec. (a). Pub. L. 95–507 amended subsec. (a) generally, striking out requirement that the Administration consult with the Secretary of Housing and Urban Development, and inserting authority to vary the terms and conditions of guarantees on the basis of experience with a particular surety and authority to guarantee bonds ancillary and conterminous with the other named bonds.

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Subsec. (b). Pub. L. 95–507 substituted provisions relating to indemnification of a surety against loss sustained in attempting to avoid or avoiding breach for provisions relating to the extent of liability of the Administration for loss incurred by a surety.

Subsec. (c). Pub. L. 95–507 substituted provisions relating to the limitation of the Administration’s guarantee liability for provisions relating to the administration of the program and a study and report to Congress regarding the economic soundness of the program.

Subsec. (d). Pub. L. 95–507 substituted provisions relating to regulations for participating sureties for provisions relating to the application of section 693 of this title in the administration of this section.

Subsecs. (e) to (i). Pub. L. 95–507 added subsecs. (e) to (i).

1974—Subsec. (a). Pub. L. 93–386, § 6(a)(3), substituted “\$1,000,000” for “\$500,000”.

Subsec. (c). Pub. L. 93–386, § 11, inserted provisions relating to the administration of the program on a prudent and economically justifiable basis and provisions requiring the Administration to publish the cost of the program to the Administration, to conduct a study of the program in order to determine what must be done to make the program economically sound, and to transmit a report to Congress of the findings, conclusions, and recommendations of the study.

Effective Date of 1997 Amendment

Amendment by Pub. L. 105–135 effective Oct. 1, 1997, see section 3 of Pub. L. 105–135, set out as a note under section 631 of this title.

Effective Date of 1996 Amendment

Section 206(b) of div. D of Pub. L. 104–208 provided that: “The amendments made by subsection (a) [amending this section] shall apply with respect to applications received (or pending substantive evaluation) on or after October 1, 1995.”

Effective and Termination Dates of 1988 Amendment

Pub. L. 100–590, title II, § 207, Nov. 3, 1988, 102 Stat. 3009, as amended by Pub. L. 101–574, title II, § 216(a), Nov. 15, 1990, 104 Stat. 2822; Pub. L. 103–403, title III, § 302, Oct. 22, 1994, 108 Stat. 4188; Pub. L. 104–36, § 7, Oct. 12, 1995, 109 Stat. 297; Pub. L. 105–135, title V, § 503, Dec. 2, 1997, 111 Stat. 2624; Pub. L. 106–554, § 1(a)(9) [title VIII, § 805(b)], Dec. 21, 2000, 114 Stat. 2763, 2763A–706, which provided that the provisions contained in section 694b (a)(3) of this title would cease to be effective after Sept. 30, 2003, was repealed by Pub. L. 108–447, div. K, title II, § 203(c), Dec. 8, 2004, 118 Stat. 3466.

Section 209 of title II of Pub. L. 100–590 provided that: “Except as otherwise provided in this title, the provisions of this title [amending this section and section 694c of this title and enacting provisions set out as notes under this section], shall become effective upon expiration of one hundred and eighty days after the date of its enactment [Nov. 3, 1988].”

Effective Date of 1980 Amendment

Amendment by Pub. L. 96–302 effective Oct. 1, 1980, see section 507 of Pub. L. 96–302, set out as a note under section 631 of this title.

Regulations

Section 205 of title II of Pub. L. 100–590 provided that: “The Administration shall promulgate final regulations to implement the amendments made by this title [amending this section and section 694c of this title] not later than one hundred and eighty days after the date of the enactment of this Act [Nov. 3, 1988].”

Small Business Access to Surety Bonding Survey

Pub. L. 102–366, title III, subtitle A, Sept. 4, 1992, 106 Stat. 1002–1005, known as the Small Business Access to Surety Bonding Survey Act of 1992, directed Comptroller General to conduct a comprehensive survey of business firms, from a statistically valid sample of business firms developed from the most recent list of construction firms maintained by Dun and Bradstreet Company and using a questionnaire with specifically designated questions, to obtain data on the experiences of such firms, and especially the experiences of small business concerns, in obtaining surety bonds from corporate surety firms and to submit a report to Congress, not later than 18 months after Sept. 4, 1992, which report was to contain a summary of responses of business firms to the survey and a description of any trends found by Comptroller General in such responses, which specific information on responses and trends of small business concerns, small business concerns owned and controlled by women, and small business concerns owned and controlled by socially and economically disadvantaged individuals.

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Evaluation of Preferred Surety Bond Guarantee Program; Report

Section 206 of title II of Pub. L. 100-590, as amended by Pub. L. 101-574, title II, § 216(b), Nov. 15, 1990, 104 Stat. 2823, directed Comptroller General, not later than 3 years after Nov. 3, 1988, to transmit a report to Congress evaluating the preferred surety bond guarantee program, with such report to be transmitted not later than Mar. 1, 1994, and cover the period Oct. 1, 1990, through Sept. 30, 1993.