



Interim Report on the Analysis of the
Practices of Corporate Sureties and
Individual Sureties in Maryland
MSAR No. 9318

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INTERIM REPORT ON THE ANALYSIS OF THE PRACTICES OF CORPORATE SURETIES AND INDIVIDUAL SURETIES IN MARYLAND

Introduction

During the 2012 Session, the Maryland General Assembly passed Senate Bill 764/House Bill 885, Chapters 299/300, (referred to herein as “Chapters 299/300”)¹ concerning Fraudulent Insurance Acts – Individual Sureties – Contracts of Surety Insurance. Chapters 299/300 require that in accordance with the provisions of § 2-205 of the Insurance Article, Annotated Code of Maryland (“Insurance Article”), the Maryland Insurance Administration (“MIA”) conduct an analysis of the practices of corporate sureties and individual sureties in the State and report to the Senate Finance Committee, the Senate Education, Health, and Environmental Affairs Committee, the House Economic Matters Committee, and the House Health and Government Operations Committee (referred to collectively herein as the “Committees”) on its findings and recommendations.

This document constitutes the required interim report that is due December 1, 2012 and provides the Committees a brief summary of the MIA’s progress in conducting the required analysis. Information presented in this interim report is subject to revision after additional information is obtained and further analysis is performed. The final report containing conclusions and recommendations is due to the Committees on December 1, 2013.

Requirements of the MIA’s Analysis

Chapters 299/300 require the MIA to consult with any person or entity that the MIA determines appropriate in conducting its analysis, including corporate sureties, individual sureties, insurance producers, contractors, the Department of Transportation (“DOT”), the Department of General Services (“DGS”), the Board of Public Works (“BPW”), and the Maryland Property and Casualty Insurance Guaranty Corporation (“MPCIGC”). Chapters 299/300 require completion of the following 13 tasks and their associated sub-tasks. To complete its analysis and submit its final report, the MIA must:

- (1) Consider whether individual sureties should be licensed or otherwise regulated like other surety insurers in order to solicit or issue surety bonds or contracts of surety insurance;
- (2) Determine whether individual sureties have issued or attempted to issue surety bonds or contracts of surety insurance for the State, counties or municipalities since authorized to

¹ A copy of each chapter law appears in the Appendix.

do so under Chapter 299 of the Acts of 2006, Chapter 266 of the Acts of 2008 and any other applicable law, and, if so, the number issued, the number rejected and the reasons for any rejection;

- (3) Consider whether and how the law, as enacted under Chapter 299 of the Acts of 2006 and Chapter 266 of the Acts of 2008, should be expanded to allow individual sureties to issue surety bonds or contracts of surety insurance to subcontractors;
- (4) Determine whether individual sureties are authorized to issue surety bonds or contracts of surety insurance in other states and, if so, how individual sureties are regulated in those states;
- (5) Determine whether corporate sureties or individual sureties have been sanctioned for issuing surety bonds or contracts of surety insurance in the State and other states and the reasons for the sanctions;
- (6) Conduct a review of:
 - (i) all corporate sureties that issued surety bonds or contracts of surety insurance in the State and that were declared insolvent or placed under receivership of the Administration within the last 10 years;
 - (ii) the impact of the insolvency or receivership of the corporate sureties on the availability of surety bonds or contracts of surety insurance in the market;
 - (iii) the impact of the affected surety bonds on surety bond users and insurance producers; and
 - (iv) the notice requirements that the Administration provides to surety bond users, insurance producers, and the public in the event of the insolvency or receivership of a corporate surety;
- (7) Conduct a survey of the MPCIGC to determine:
 - (i) the number of claims submitted to and paid by the Corporation as a result of an insolvency of a corporate surety in the last 10 years;
 - (ii) whether contributions provided by surety insurers to the Corporation are adequate for future claims related to insolvent surety insurers;
 - (iii) the existing statutory requirements of items covered by the Corporation in the event of the insolvency of a corporate surety; and
 - (iv) whether loss of paid premiums or collateral of surety bond principal and any other covered items should be expanded;
- (8) Consider whether the laws and regulations for licensing and regulating corporate sureties are adequate, including whether the current risk-based capital standards are adequate to prevent the insolvency of corporate sureties;
- (9) Consider whether the laws and regulations regulating corporate sureties or individual sureties are adequate to prevent the issuance of fraudulent surety bonds or contracts of surety insurance by corporate sureties or individual sureties;

- (10) Conduct a survey of the BPW, the DOT, the DGS and a representative sample of corporate sureties and individual sureties, if appropriate, for each year beginning with 2004 that includes:
 - (i) the percentage of the total surety bonds or contracts of surety insurance that surety insurers issued in the State on construction projects to minority business enterprises (“MBEs”), as compared to the surety bonds or contracts of surety insurance that surety insurers issued on construction projects to nonminority business enterprises; and
 - (ii) the percentage of the total surety bonds or contracts of surety insurance that surety insurers rejected in the State that would have been issued to MBEs on construction projects, as compared to the surety bonds or contracts of surety insurance that surety insurers rejected that would have been issued to nonminority business enterprises on construction projects;
- (11) Conduct a survey of a representative sample of contractors that have held a surety bond or contract of surety insurance issued by an insolvent surety to determine the method each contractor used to acquire a new surety bond or contract of surety insurance and any additional cost or difficulties the contractor experienced in acquiring a new surety bond or contract of surety insurance;
- (12) Consider whether there are any programs, including the Maryland State Bond Development and Financing Authority and the United States Small Business Administration Bond Guaranty and Lending Program, that enhance the availability of surety bonds or contracts of surety insurance for new, emerging and small businesses, including businesses that qualify as MBEs; and
- (13) Consider the need to establish licensure requirements that are specific for surety insurance producers who sell surety bonds or contracts of surety insurance.

Background: Corporate and Individual Sureties in Maryland

A surety bond is a contract among at least three parties: (1) the “obligee” or project owner who initiates, manages or finances a project and is the recipient of the obligation; (2) the “principal” or party who is performing the contractual obligation; and (3) the “surety” or obligor.² Surety bonds require the surety to cover any losses incurred by the obligee if the principal (*i.e.*, contractor) defaults or otherwise cannot complete a contract as promised. Surety bonds provide assurance to the obligee that the principals or contractors providing services are legitimate, financially sound and can reasonably be expected to fulfill their duties, as the surety would not otherwise have issued the bond and assumed the risk associated with it.

² A surety typically is an insurance company or other established financial institution commonly referred to as a “corporate surety.” As discussed more fully below, a primary focus of this analysis pertains to surety bonds issued by persons other than corporate sureties, who are known as “individual sureties.”

State procurement law requires bid, performance, and payment security for construction contracts that are expected to exceed \$100,000.³ Construction contractors must provide security for an amount deemed appropriate by the agency's procurement officer.⁴ On other State contracts for services, supplies, or construction-related services that exceed \$100,000, procurement officers have the option of requiring contractors to provide security.⁵

A person generally may not act as an insurer, and an insurer may not engage in the insurance business in the State, unless the person has a certificate of authority issued by the Insurance Commissioner ("Commissioner"), and only a corporate entity or reciprocal insurer may receive a certificate of authority.⁶ Chapter 299, Acts of 2006, created a temporary and limited exception to this requirement,⁷ allowing a procurement officer to accept a bond provided by an "individual surety" under certain circumstances to meet the requirements for bid, performance, and payment bonds on certain State procurements. Individual surety bonds are permitted only if: (1) the contractor has been denied corporate surety credit; (2) the individual surety transacts business through a Maryland licensed insurance agency; (3) the individual surety provides a GSA Standard Form 28 affidavit and UCC-1 filing security interest with the bond; and (4) the individual is a U.S. citizen and pledges one or more authorized assets.⁸ Before accepting a bond from an individual surety for State procurements, the procurement officer must review the proposed bond with the Office of the Attorney General to confirm that the requirements for an individual surety bond are met. Chapter 299, Acts of 2006, also allowed individual sureties to pledge certain assets in an amount equal to or greater than the value of the bond required. Assets pledged by an individual surety may not be pledged for any purpose other than the bond until the asset is released by the unit of State government, and include:

- (1) Cash or certificates of deposit;
- (2) Cash or cash equivalents or other assets held by a federally insured financial institution;
- (3) U.S. government securities;
- (4) Stocks and bonds;
- (5) Real property subject to certain criteria; or
- (6) Irrevocable letters of credit issued by a federally insured financial institution.⁹

³ Md. Code Ann., State Fin. and Proc. §§13-207 and 17-103.

⁴ Md. Code Ann., State Fin. and Proc. §17-103.

⁵ Md. Code Ann., State Fin. and Proc. §13-207.

⁶ Md. Code Ann., Ins. § 4-102(a). A reciprocal insurer is an unincorporated aggregation of subscribers that operate individually and collectively through an attorney in fact to provide reciprocal insurance. Md. Code Ann., Ins. §1-101(ii).

⁷ Chapter 299 was due to terminate on September 30, 2009. Chapter 266, Acts of 2008, extended the sunset provision to September 30, 2014.

⁸ Md. Code Ann., State Fin. and Proc. §§17-207 and 17-104. The Uniform Commercial Code Form 1 ("UCC-1") provides notice to the public that an interest has been secured in the individual surety's pledged property.

⁹ Md. Code Ann., State Fin. and Proc. §13-207.

When issuing bonds on State contracts, an individual surety must complete an affidavit of individual surety in a format required by BPW.¹⁰ The affidavit is a notarized form describing the pledged assets attesting to the accuracy and truthfulness of the information submitted.¹¹ The form provides that the following are unacceptable as individual sureties:

- (1) A corporation, partnership or other unincorporated association or firm; or
- (2) Members of a partnership on bonds that a partnership or an association, or any co-partner or member thereof, is the principal obligor.

The form further provides that stockholders of corporate principals are acceptable provided their qualifications are independent of the stockholder's financial interest in the corporate principal. An individual surety may not include among its assets any financial interest in the principal the bond supports.¹²

Chapters 299/300, Acts of 2012, define "individual surety" as a person that issues surety bonds or contracts of surety insurance and does not have a certificate of authority issued by the Commissioner.¹³ An individual surety bond obliges an individual, rather than an insurance company or other established financial institution, to cover the financial losses incurred by a project owner in the event of a default by a contractor. Individual surety bonds provide evidence that the individual surety has the financial resources necessary to cover possible losses.

Also, Chapters 299/300, Acts of 2012, makes it a fraudulent insurance act for an individual surety to solicit or issue a surety bond or contract of surety insurance except as provided under State Finance and Procurement Article §§13-207 and 17-104.¹⁴

Chapters 299/300 Analysis Progress Report

The following is a brief summary of the MIA's progress-to-date in completing each of the 13 tasks and associated sub-tasks specified by Chapters 299/300. Additional data collection, assessment and analysis are ongoing.

Analysis Task (1): *Consider whether individual sureties should be licensed or otherwise regulated like other surety insurers in order to solicit or issue surety bonds or contracts of surety insurance.*

¹⁰ Md. Code Ann., State Fin. and Proc. § 17-104.

¹¹ BPW Advisory No.: 2006-4, original issue date December 7, 2006, revision issued October 2010.

¹² BPW Documentation of Pledged Assets and Affidavit of Individual Surety forms. See Appendix.

¹³ Chapters 299/300 added new §27-406.1 of the Insurance Article, Annotated Code of Maryland, effective June 1, 2012.

¹⁴ See also MIA Bulletin 10-29 – Amended (Nov. 15, 2010) (in Appendix) ("Individual sureties not involved in public works projects have been found by the Insurance Commissioner to be engaging in the business of insurance without the required certificate of authority.").

In consideration of whether individual sureties should be licensed or otherwise regulated like other surety insurers in order to solicit or issue surety bonds or contracts of surety insurance, the MIA is reviewing and assessing State law and related information (e.g., January 10, 2011 letter to The Honorable Dan K. Morhaim of The Maryland House of Delegates from the State's Office of the Attorney General regarding individual sureties).¹⁵ Also, the MIA is researching comparable laws of other States regarding their licensing requirements.

Analysis Task (2): *Determine whether individual sureties have issued or attempted to issue surety bonds or contracts of surety insurance for the State, counties or municipalities since authorized to do so under Chapter 299 of the Acts of 2006, Chapter 266 of the Acts of 2008 and any other applicable law, and, if so, the number issued, the number rejected and the reasons for any rejection.*

To determine whether individual sureties have issued or attempted to issue bonds or contracts of surety insurance in connection with projects for those or other state agencies the MIA has initiated contact with various State agencies, including BPW, DGS, DOT, and the Department of Natural Resources ("DNR") regarding. Among the State agencies contacted directly by the MIA concerning their experience with individual securities, if any, the DNR stated that it does not require surety bonds or security contracts of insurance on any contracts currently. The MIA anticipates that information from other agencies is forthcoming.

Of particular relevance to the Study is the requirement that the BPW report to the Governor, the Senate Education, Health, and Environmental Affairs Committee, and the House Health and Government Operations Committee biennially on the implementation and effects of Chapter 299 of the Acts of 2006, as amended by Chapter 266 of the Acts of 2008, regarding individual surety bonds and the laws' impact on small and minority businesses. Accordingly, State agencies must report annually to the BPW on the use of individual sureties within 60 days after the close of each fiscal year.¹⁶ In its reports for fiscal years 2010-2011 and 2008-2009, the BPW reported that no [State] agencies reported receiving individual surety bonds.¹⁷ The BPW's initial report for fiscal year 2007 stated that only one individual surety bond was submitted by a certified small business in response to a solicitation by the State Highway Administration; however, the individual surety bond was subsequently rejected by the State Highway Administration.¹⁸ The MIA is investigating with the BPW the reason this submission was rejected.

Additionally, the MIA has made initial contact with Maryland counties and local school boards regarding their experience, if any, with individual sureties. Information developed in conjunction with the completion of Analysis Task (11) also will be coordinated with the results

¹⁵ OAG Letter to The Honorable Dan K. Morhaim, January 10, 2011. *See* Appendix.

¹⁶ BPW Advisory No.: 2006-4. *See* Appendix.

¹⁷ Report to the Governor of the State of Maryland and Senate Education, Health and Environmental Affairs Committee and House Health and Government Operations Committee on Individual Surety Bonds, Fiscal Years 2010-2011 and Fiscal Years 2008-2009.

¹⁸ Report to the Governor of the State of Maryland and Senate Education, Health and Environmental Affairs Committee and House Health and Government Operations Committee on Individual Surety Bonds, Fiscal Year 2007.

of this task regarding contractors that may have been engaged by the State, counties or municipalities and may have found it necessary to obtain a new surety bond or contract of surety insurance after their surety insurer for the project became insolvent.

Analysis Task (3): *Consider whether and how the law, as enacted under Chapter 299 of the Acts of 2006 and Chapter 266 of the Acts of 2008, should be expanded to allow individual sureties to issue surety bonds or contracts of surety insurance to subcontractors.*

The MIA has not yet initiated work associated specifically with Analysis Task (3).

Analysis Task (4): *Determine whether individual sureties are authorized to issue surety bonds or contracts of surety insurance in other states and, if so, how individual sureties are regulated in those states.*

The MIA has initiated research regarding the authorization and regulation of individual sureties in other states. Colorado, Idaho, Kentucky and Virginia do not allow individual sureties. New York does not permit licensed brokers (*i.e.*, producers) to procure an individual surety bond for a client for a federal construction job located in that state.

Additional information will be developed to include a broader sample of states. Also, information may be available from the National Association of Insurance Commissioners ("NAIC") concerning the status of state regulation on a national basis.

Analysis Task (5): *Determine whether corporate sureties or individual sureties have been sanctioned for issuing surety bonds or contracts of surety insurance in the State and other states and the reasons for the sanctions.*

The MIA's completion of Analysis Task (5) will be coordinated with the completion of Analysis Tasks (2) and (4).

Analysis Task (6)(i): *Conduct a review of all corporate sureties that issued surety bonds or contracts of surety insurance in the State and that were declared insolvent or placed under receivership of the Administration within the last 10 years; determine the number of claims submitted to and paid by the Corporation as a result of an insolvency of a corporate surety in the last 10 years.*

To determine the surety companies operating in Maryland that were declared insolvent or placed under receivership in the last 10 years, the MIA surveyed the MPCIGC. In this regard, the MPCIGC is responsible for paying covered claims of Maryland residents against surety insurers authorized to write surety bonds in Maryland when the bonds were issued or when the events giving rise to the claims occurred, and against which a court of competent jurisdiction in the insurer's state of domicile has passed a final order of liquidation with a finding of insolvency. It should be noted that an insurer being placed into receivership by its state of domicile does not

necessarily mean that the insurer is unable to pay its claims; the various states' insurance guaranty corporations are only responsible for paying covered claims of insurers ordered to be liquidated with a finding of insolvency.

The MPCIGC advised that in the last 10 years there were two surety companies operating in Maryland that were declared insolvent by their respective states of domicile. These events resulted in total claims of \$161,117, and expenses totaling \$31,859 paid by the MPCIGC, as illustrated in Table 1.

Table 1

<i>Name of Surety Company</i>	<i>Date of Insolvency</i>	<i>State of Domicile</i>	<i>Number of Maryland Claims</i>	<i>\$ Amount of Claims Paid</i>	<i>\$ Amount of Expenses</i>
American Bonding Company	10/08/2004	Arizona	6	\$0.00	\$0.00
First Sealord Surety Incorporated	02/08/2012	Pennsylvania	20	\$161,117.00	\$31,859.50
Totals			26	\$161,117.00	\$31,859.50

Analysis Task (6)(ii) : *Conduct a review of the impact of the insolvency or receivership of the corporate sureties on the availability of surety bonds or contracts of surety insurance in the market.*

The MIA could not discern any impact from the aforementioned insolvencies on the availability of surety bonds or contracts of surety insurance in the market. As of December 31, 2011, there were 148 insurance companies that were actively writing surety insurance in Maryland. During calendar year 2011 these companies wrote surety insurance premiums totaling \$138.2 million in Maryland. There are no known barriers to keep qualified surety insurers from entering the Maryland surety insurance market.

Analysis Task (6)(iii): *Conduct a review of the impact of the affected surety bonds on surety bond users and insurance producers.*

The MPCIGC was created to provide a mechanism for the prompt payment of covered claims of Maryland residents who are claimants or policyholders of insolvent insurers. All of the claims and expenses detailed above for insolvent surety insurers writing in Maryland were paid by the MPCIGC. The MPCIGC advised us that it is not aware of any covered claims that were not paid in full.

The MIA's insurance producer records do not associate producers with specific insurers. As a result it could not be determined which producers were associated with the aforementioned insolvent surety insurers, so the MIA was unable to contact them to determine the impact of the insolvencies on producers. The MPCIGC advised the MIA that it was not aware of any impact of the insolvencies of surety insurers on producers.

Analysis Task (6)(iv): *Conduct a review of the notice requirements that the Administration provides to surety bond users, insurance producers, and the public in the event of the insolvency or receivership of a corporate surety.*

When the MIA suspends a certificate of authority of a surety insurer doing business in Maryland, the MIA posts the suspension order on its website. In addition, the receiver or conservator of a surety insurer generally is required by its state of domicile to notify all of its policyholders of the receivership or conservatorship. In the event a Maryland domiciled surety insurer were placed into receivership or conservatorship, the MIA would require the receiver or conservator to provide notice of the receivership or conservatorship to all policyholders within 15 days pursuant to § 9-214 of the Insurance Article.

Analysis Task (7)(i): *Conduct a survey of the Maryland Property and Casualty Insurance Guaranty Corporation to determine: the number of claims submitted to and paid by the Corporation as a result of an insolvency of a corporate surety in the last 10 years;*

See the information provided in (6)(i) above.

Analysis Task (7)(ii): *Conduct a survey of the Maryland Property and Casualty Insurance Guaranty Corporation to determine whether contributions provided by surety insurers to the Corporation are adequate for future claims related to insolvent surety insurers.*

The MIA surveyed the MPCIGC to determine whether contributions provided by surety insurers to the MPCIGC are adequate for future claims related to insolvent surety insurers. The MPCIGC advised that if a surety insurer were to become insolvent, any unpaid covered claims would be submitted to the MPCIGC. The MPCIGC's Account #4 would be used to pay those claims. In the event of a surety insurer's insolvency, the MPCIGC can assess each member insurer up to 2% of the insurer's direct written premium for business written and covered by Account #4. The premium base for Account #4 is approximately \$3.5 billion. At 2%, the assessment limit is approximately \$70 million per year. If a yearly assessment is insufficient, any deficit can be covered in future year assessments. This assessment capacity is well in excess of losses incurred in prior surety insurer insolvencies. There is no guaranty that the capacity will be sufficient for future insolvencies, but there is a lack of evidence to indicate it would not be.

Analysis Task (7)(iii): *Conduct a survey of the Maryland Property and Casualty Insurance Guaranty Corporation to determine the existing statutory requirements of items covered by the Corporation in the event of the insolvency of a corporate surety.*

The MPCIGC responded to the MIA's inquiry about existing statutory requirements of items covered by the Corporation in the event of the insolvency of a corporate surety. Tables 2 and 3 below indicate the existing statutory requirements under § 9-301 of the Insurance Article regarding items covered by the MPCIGC in the event of the insolvency of a corporate surety for both performance and payment obligations:

Table 2

<i>Type of Obligation</i>	<i>Location of Work</i>	<i>Resident Obligee</i>	<i>Non-Resident Obligee</i>
<u>Performance Obligations</u> (Includes obligations under contract performance and miscellaneous surety bonds)	In Maryland	Claim Covered	Claim Not Covered
	Out of Maryland	Claim Covered	Claim Not Covered

Table 3

<i>Type of Obligation</i>	<i>Location of Work</i>		<i>Resident Obligee</i>	<i>Non-Resident Obligee</i>
<u>Payment Obligations</u> (Includes third party beneficiary obligations under contract payment and miscellaneous surety bonds)	In Maryland	Resident Claimant	Claim Covered	Claim Covered
		Non-Resident Claimant	Claim Covered	Claim Not Covered
	Out of Maryland	Resident Claimant	Claim Covered	Claim Covered
		Non-Resident Claimant	Claim Covered	Claim Not Covered

Analysis Task (7)(iv): *Conduct a survey of the Maryland Property and Casualty Insurance Guaranty Corporation to determine whether loss of paid premiums or collateral of surety bond principal and any other covered items should be expanded.*

Management of the MPCIGC advised the MIA that based on current experience, it did not believe there was any need to expand items covered by the program.

Analysis Task (8): *Consider whether the laws and regulations for licensing and regulating corporate sureties are adequate, including whether the current risk-based capital standards are adequate to prevent the insolvency of corporate sureties.*

The MIA has not identified any areas where the existing regulatory framework for regulating surety insurer financial condition is inadequate. The laws and regulations for licensing companies to conduct insurance business in the State, including surety insurance, and for regulating their financial solvency once licensed, are not designed to absolutely prevent the insolvency of those insurers. Rather, they are designed to help ensure that insurers have appropriate procedures and controls in place, and sufficient capital, to successfully operate. As an example, risk-based capital standards require insurers to maintain increasing amounts of capital as their business grows and they face greater risk of losses.

Additional analysis is ongoing with respect to current laws and regulations for licensing and regulating corporate sureties based on criteria other than risk-based capital standards.

Analysis Task (9): *Consider whether the laws and regulations regulating corporate sureties or individual sureties are adequate to prevent the issuance of fraudulent surety bonds or contracts of surety insurance by corporate sureties or individual sureties.*

Completion of this task will be coordinated with the completion of other required tasks. Information the MIA obtains in communication with BPW will contribute to this analysis, as individual sureties must attest to assets pledged in connection with State contracts. Similar information on corporate sureties needs to be developed and assessed.

Analysis Task (10)(i)-(ii): *Conduct a survey of the Board of Public Works, the Department of Transportation, the Department of General Services, and a representative sample of corporate sureties and individual sureties, if appropriate, for each year beginning with 2000 to include:*

- (i) the percentage of the total surety bonds or contracts of surety insurance that surety insurers issued or rejected in the State on construction projects regarding minority business enterprises, as compared to the surety bonds or contracts of surety insurance that surety insurers issued on construction projects to nonminority business enterprises; and*
- (ii) the percentage of the total surety bonds or contracts of surety insurance that surety insurers rejected in the State that would have been issued to MBEs on construction projects, as compared to the surety bonds or contracts of surety insurance that surety insurers rejected that would have been issued to nonminority business enterprises on construction projects;*

The MIA has prepared a survey questionnaire for the various State agencies identified based on information obtained through contact with the BPW, or otherwise considered to be a source of potentially important information. The MIA expects to send the survey to the designated agencies in early 2013. A companion survey also has been developed and will be concurrently issued to individual and corporate sureties for their responses.

Further, the MIA will discuss with BPW the annual information provided to it by State agencies and review the current lack of construction bidders or offerors utilizing individual surety bonds in response to a State solicitation. As noted previously, the BPW must report biennially on the implementation and effects of Chapter 299, Acts of 2006, as amended by Chapter 266, Acts of 2008 regarding individual surety bonds and the laws' impact on small and minority businesses. The BPW requires State agencies to report annually on the use of individual sureties within 60 days after the close of each fiscal year. A portion of the information reported by agencies pertains to the number of individual sureties issued and rejected. Although the BPW reported no agencies receiving individual surety bonds in fiscal years 2010-2011 and 2008-2009, one bond was reported received and ultimately rejected in fiscal year 2007 (see Analysis Task (2)).

Analysis Task (11): *Conduct a survey of a representative sample of contractors that have held a surety bond or contract of surety insurance issued by an insolvent surety insurer to determine the method each contractor used to acquire a new surety bond or contract of surety insurance and any additional costs or difficulties the contractor experienced in acquiring a new surety bond or contract of surety insurance.*

The MIA has contacted a variety of professional organizations and unions regarding its analysis of individual and corporate securities. A survey questionnaire has been developed and will be distributed to a representative and diverse group of contractors, subcontractors and MBEs concerning methods used to acquire, and any costs or difficulties in acquiring, a new surety bond or contract of surety insurance after the contractor's surety insurer became insolvent. Additionally, information developed in conjunction with the completion of Analysis Task (2) will be coordinated with the results of this task regarding contractors that may have been engaged by the State, counties or municipalities and may have found it necessary to obtain a new surety bond or contract of surety insurance after their surety insurer for the project became insolvent.

Analysis Task 12: *Consider whether there are any programs, including the Maryland State Bond Development and Financing Authority and the United States Small Business Administration Bond Guaranty and Lending Program, that enhance the availability of surety bonds or contracts of surety insurance for new, emerging and small businesses, including businesses that qualify as MBEs.*

The MIA has not initiated work associated specifically with Analysis Task (12).

In its report for fiscal years 2009-2008, the BPW stated that it interviewed several State agencies and found them "open to considering individual surety bonds as acceptable security." However, the BPW concluded in that report that the lack of interest in State agencies using individual surety bonds may be "attributable to the existence of other good alternatives, e.g. less expensive corporate bonds and the Surety Bond Program offered by the Maryland Small Business Development Financing Authority."¹⁹

Analysis Task 13: *Consider the need to establish licensure requirements that are specific for surety insurance producers who sell surety bonds or contracts of surety insurance.*

The MIA's completion of Analysis Task (13) will be coordinated with completion of Analysis Task (1). Refer to discussion regarding Analysis Task (1).

¹⁹ Report to the Governor of the State of Maryland and Senate Education, Health and Environmental Affairs Committee and House Health and Government Operations Committee on Individual Surety Bonds, Fiscal Years 2008-2009.

Conclusion

Since tasked with this study, the MIA has made significant progress in the research needed to respond to the Maryland General Assembly's request for an analysis of the practices of corporate sureties and individual sureties in the State. As summarized in this interim report, a majority of tasks have been addressed and substantial information has been developed. The MIA's work plan is tailored to the list of mandated tasks and a considerable continuing effort is necessary to satisfy the requirements of Chapters 299/300. Consequently, at this time, it is too early to draw meaningful conclusions based on the research completed or make any specific recommendations to the Committees. The complete report of findings and recommendations is due to the Committees on December 1, 2013.

APPENDIX

- I. Senate Bill 764, Chapter 299, Acts of 2012
- II. House Bill 885, Chapter 300, Acts of 2012
- III. House Bill 169, Chapter 299, Acts of 2006
- IV. House Bill 312, Chapter 266, Acts of 2008
- V. MIA Bulletin 10-29 - Amended
- VI. BPW Advisory No.: 2006-4
- VII. BPW Documentation of Pledged Assets and Affidavit of Individual Surety forms
- VIII. OAG Letter to The Honorable Dan K. Morhaim, January 10, 2011

I. Senate Bill 764, Chapter 299, Acts of 2012

Chapter 299

(Senate Bill 764)

AN ACT concerning

Fraudulent Insurance Acts – Individual Sureties – Contracts of Surety Insurance

FOR the purpose of establishing that it is a fraudulent insurance act for an individual surety to make a certain representation or to issue a contract of surety insurance, except as provided in certain provisions of law; ~~establishing that it is a fraudulent insurance act for a person to knowingly or willfully assist a person to obtain a contract of surety insurance from an individual surety, except as provided in certain provisions of law; establishing that it is a fraudulent insurance act for a person to knowingly or willfully make a certain false or fraudulent statement or representation about certain assets pledged by an individual surety or to knowingly or willfully fail to return certain money or premiums paid for a contract of surety insurance under certain circumstances;~~ establishing certain penalties for certain violations of this Act; defining a certain term; requiring the Maryland Insurance Administration to conduct a certain analysis of certain practices of corporate sureties and individual sureties; requiring the Administration to consult with certain persons or entities; requiring the Administration to consider certain items, make certain determinations, and conduct certain surveys and reviews in a certain analysis; requiring the Administration to submit certain reports to certain committees of the General Assembly on or before certain dates; and generally relating to individual sureties, contracts of surety insurance, and fraudulent insurance acts.

BY adding to

Article – Insurance
Section 27-406.1
Annotated Code of Maryland
(2011 Replacement Volume)

BY repealing and reenacting, with amendments,

Article – Insurance
Section 27-408
Annotated Code of Maryland
(2011 Replacement Volume)

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

Article - Insurance

27-406.1.

(A) IN THIS SECTION, "INDIVIDUAL SURETY" MEANS A PERSON THAT:

(1) ISSUES ~~CONTRACT SURETY BONDS OR CONTRACTS OF SURETY INSURANCE;~~ AND

(2) DOES NOT HAVE A CERTIFICATE OF AUTHORITY ISSUED BY THE COMMISSIONER.

(B) ~~EXCEPT AS PROVIDED IN §§ 13-207 AND 17-104 OF THE STATE FINANCE AND PROCUREMENT ARTICLE, IT IS A FRAUDULENT INSURANCE ACT FOR AN INDIVIDUAL SURETY TO:~~ SOLICIT OR ISSUE A SURETY BOND OR CONTRACT OF SURETY INSURANCE EXCEPT AS PROVIDED IN:

(1) §§ 13-207 AND 17-104 OF THE STATE FINANCE AND PROCUREMENT ARTICLE; AND

(2) FOR AN UNCOMPENSATED PERSON, §§ 5-203 AND 5-204 OF THE CRIMINAL PROCEDURE ARTICLE.

~~(1) REPRESENT THAT IT HAS THE LEGAL AUTHORITY TO ISSUE A CONTRACT OF SURETY INSURANCE; OR~~

~~(2) ISSUE A CONTRACT OF SURETY INSURANCE.~~

~~(C) EXCEPT AS PROVIDED IN §§ 13-207 AND 17-104 OF THE STATE FINANCE AND PROCUREMENT ARTICLE, IT IS A FRAUDULENT INSURANCE ACT FOR A PERSON TO KNOWINGLY OR WILLFULLY ASSIST A PERSON TO OBTAIN A CONTRACT OF SURETY INSURANCE FROM AN INDIVIDUAL SURETY.~~

~~(D) IT IS A FRAUDULENT INSURANCE ACT FOR A PERSON TO:~~

~~(1) KNOWINGLY OR WILLFULLY MAKE A FALSE OR FRAUDULENT STATEMENT OR REPRESENTATION AS TO THE EXISTENCE, VALUE, OR MARKETABILITY OF ANY ASSETS PLEDGED BY AN INDIVIDUAL SURETY TO SECURE ITS OBLIGATIONS UNDER A CONTRACT OF SURETY INSURANCE; OR~~

~~(2) KNOWINGLY OR WILLFULLY FAIL TO RETURN ANY MONEY OR PREMIUMS PAID FOR A CONTRACT OF SURETY INSURANCE ISSUED BY AN INDIVIDUAL SURETY IF THE CONTRACT OF SURETY INSURANCE IS REJECTED OR~~

~~NOT ACCEPTED BY THE GOVERNMENTAL ENTITY OR PERSON THAT REQUIRES
THE CONTRACT OF SURETY INSURANCE.~~

27-408.

(a) (1) A person that violates § 27-407 of this subtitle, or another provision of this subtitle in which the claim or act that is the subject of the fraud has a value of \$300 or more is guilty of a felony and on conviction, for each violation, is subject to:

(i) liability for restoring to the victim the property taken or the value of the property taken; and

(ii) 1. for a violation of any provision of § 27-403 of this subtitle, a fine, the maximum of which is the greater of three times the value of the claim or act that is the subject of the fraud and \$10,000 and the minimum of which is \$500, or imprisonment not exceeding 15 years or both; and

2. for a violation of any provision of § 27-404, § 27-405, § 27-406, § 27-406.1, § 27-407, or § 27-407.1 of this subtitle, a fine not exceeding \$10,000 or imprisonment not exceeding 15 years or both.

(2) A person that violates a provision of this subtitle in which the claim or act that is the subject of the fraud has a value of less than \$300 is guilty of a misdemeanor and on conviction, for each violation, is subject to:

(i) liability for restoring to the victim the property taken or the value of the property taken; and

(ii) 1. for a violation of any provision of § 27-403 of this subtitle, a fine, the maximum of which is the greater of three times the value of the claim or act that is the subject of the fraud and \$10,000 and the minimum of which is \$500, or imprisonment not exceeding 18 months or both; and

2. for a violation of any provision of § 27-404, § 27-405, § 27-406, § 27-406.1, § 27-407, or § 27-407.1 of this subtitle, a fine not exceeding \$10,000 or imprisonment not exceeding 18 months or both.

(b) (1) The penalties imposed under this section may be imposed separately from and consecutively to or concurrently with a sentence for another offense based on the act that constitutes a violation of this subtitle.

(2) Each act of solicitation under § 27-407 of this subtitle constitutes a separate violation for purposes of the penalties imposed under this section.

(3) Notwithstanding any other provision of law, a fine imposed under this section is mandatory and not subject to suspension.

SECTION 2. AND BE IT FURTHER ENACTED, That:

(a) In accordance with the provisions of § 2-205 of the Insurance Article, the Maryland Insurance Administration shall conduct an analysis of the practices of corporate sureties and individual sureties in the State, as specified under this section.

(b) In conducting the analysis, the Administration shall consult with any person or entity that the Administration determines appropriate, including corporate sureties, individual sureties, insurance producers, contractors, the Department of Transportation, the Department of General Services, and the Maryland Property and Casualty Insurance Guaranty Corporation.

(c) In its analysis, the Administration shall:

(1) consider whether individual sureties should be licensed or otherwise regulated like other surety insurers in order to solicit or issue surety bonds or contracts of surety insurance;

(2) determine whether individual sureties have issued or attempted to issue surety bonds or contracts of surety insurance for the State, counties, or municipalities since authorized to issue surety bonds or contracts of surety insurance under Chapter 299 of the Acts of the General Assembly of 2006, Chapter 266 of the Acts of the General Assembly of 2008, and other applicable provisions of law, and, if so, the number of surety bonds or contracts of surety insurance issued, the number of surety bonds or contracts of surety insurance rejected, and the reasons for any rejection of the surety bonds or contracts of surety insurance;

(3) consider whether and how the law, as enacted under Chapter 299 of the Acts of the General Assembly of 2006 and Chapter 266 of the Acts of the General Assembly of 2008, should be expanded to allow individual sureties to issue surety bonds or contracts of surety insurance to subcontractors;

(4) determine whether individual sureties are authorized to issue surety bonds or contracts of surety insurance in other states and, if so, how individual sureties are regulated in those states;

(5) determine whether corporate sureties or individual sureties have been sanctioned for issuing surety bonds or contracts of surety insurance in the State and other states and the reasons for the sanctions;

(6) conduct a review of:

(i) all corporate sureties that issued surety bonds or contracts of surety insurance in the State and that were declared insolvent or placed under receivership of the Administration within the last 10 years;

(ii) the impact of the insolvency or receivership of the corporate sureties on the availability of surety bonds or contracts of surety insurance in the market;

(iii) the impact of the affected surety bonds on surety bond users and insurance producers; and

(iv) the notice requirements that the Administration provides to surety bond users, insurance producers, and the public in the event of the insolvency or receivership of a corporate surety;

(7) conduct a survey of the Maryland Property and Casualty Insurance Guaranty Corporation to determine:

(i) the number of claims submitted to and paid by the Corporation as a result of an insolvency of a corporate surety in the last 10 years;

(ii) whether contributions provided by surety insurers to the Corporation are adequate for future claims related to insolvent surety insurers;

(iii) the existing statutory requirements of items covered by the Corporation in the event of the insolvency of a corporate surety; and

(iv) whether loss of paid premiums or collateral of surety bond principal and any other covered items should be expanded;

(8) consider whether the laws and regulations for licensing and regulating corporate sureties are adequate, including whether the current risk-based capital standards are adequate to prevent the insolvency of corporate sureties;

(9) consider whether the laws and regulations regulating corporate sureties or individual sureties are adequate to prevent the issuance of fraudulent surety bonds or contracts of surety insurance by corporate sureties or individual sureties;

(10) conduct a survey of the Board of Public Works, the Department of Transportation, the Department of General Services, and a representative sample of corporate sureties and individual sureties, if appropriate, for each year beginning with 2004, that includes:

(i) the percentage of the total surety bonds or contracts of surety insurance that surety insurers issued in the State on construction projects to

minority business enterprises, as compared to the surety bonds or contracts of surety insurance that surety insurers issued on construction projects to nonminority business enterprises; and

(ii) the percentage of the total surety bonds or contracts of surety insurance that surety insurers rejected in the State that would have been issued to minority business enterprises on construction projects, as compared to the surety bonds or contracts of surety insurance that surety insurers rejected that would have been issued to nonminority business enterprises on construction projects;

(11) conduct a survey of a representative sample of contractors that have held a surety bond or contract of surety insurance issued by an insolvent surety insurer to determine the method each contractor used to acquire a new surety bond or contract of surety insurance and any additional costs or difficulties the contractor experienced in acquiring a new surety bond or contract of surety insurance;

(12) consider whether there are any programs, including the Maryland State Bond Development and Financing Authority and the United States Small Business Administration Bond Guaranty and Lending Program, that enhance the availability of surety bonds or contracts of surety insurance for new, emerging, and small businesses, including businesses that qualify as minority business enterprises; and

(13) consider the need to establish licensure requirements that are specific for surety insurance producers who sell surety bonds or contracts of surety insurance.

(d) (1) On or before December 1, 2012, the Administration shall submit an interim report, in accordance with § 2-1246 of the State Government Article, on its findings and recommendations to the Senate Finance Committee, the Senate Education, Health, and Environmental Affairs Committee, the House Economic Matters Committee, and the House Health and Government Operations Committee.

(2) On or before December 1, 2013, the Administration shall submit a final report, in accordance with § 2-1246 of the State Government Article, on its findings and recommendations to the Senate Finance Committee, the Senate Education, Health, and Environmental Affairs Committee, the House Economic Matters Committee, and the House Health and Government Operations Committee.

SECTION ~~2~~ 3. AND BE IT FURTHER ENACTED, That this Act shall take effect ~~October~~ June 1, 2012.

Approved by the Governor, May 2, 2012.

II. House Bill 885, Chapter 300, Acts of 2012

Chapter 300

(House Bill 885)

AN ACT concerning

Fraudulent Insurance Acts – Individual Sureties – Contracts of Surety Insurance

FOR the purpose of establishing that it is a fraudulent insurance act for an individual surety to make a certain representation or to issue a contract of surety insurance, except as provided in certain provisions of law; ~~establishing that it is a fraudulent insurance act for a person to knowingly or willfully assist a person to obtain a contract of surety insurance from an individual surety, except as provided in certain provisions of law; establishing that it is a fraudulent insurance act for a person to knowingly or willfully make a certain false or fraudulent statement or representation about certain assets pledged by an individual surety or to knowingly or willfully fail to return certain money or premiums paid for a contract of surety insurance under certain circumstances;~~ establishing certain penalties for certain violations of this Act; defining a certain term; requiring the Maryland Insurance Administration to conduct a certain analysis of certain practices of corporate sureties and individual sureties; requiring the Administration to consult with certain persons or entities; requiring the Administration to consider certain items, make certain determinations, and conduct certain surveys and reviews in a certain analysis; requiring the Administration to submit certain reports to certain committees of the General Assembly on or before certain dates; and generally relating to individual sureties, contracts of surety insurance, and fraudulent insurance acts.

BY adding to

Article – Insurance
Section 27-406.1
Annotated Code of Maryland
(2011 Replacement Volume)

BY repealing and reenacting, with amendments,

Article – Insurance
Section 27-408
Annotated Code of Maryland
(2011 Replacement Volume)

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

Article - Insurance

27-406.1.

(A) IN THIS SECTION, "INDIVIDUAL SURETY" MEANS A PERSON THAT:

(1) ~~ISSUES CONTRACT SURETY BONDS OR CONTRACTS OF SURETY INSURANCE; AND~~

(2) DOES NOT HAVE A CERTIFICATE OF AUTHORITY ISSUED BY THE COMMISSIONER.

(B) ~~EXCEPT AS PROVIDED IN §§ 13-207 AND 17-104 OF THE STATE FINANCE AND PROCUREMENT ARTICLE, IT IS A FRAUDULENT INSURANCE ACT FOR AN INDIVIDUAL SURETY TO:~~ SOLICIT OR ISSUE A SURETY BOND OR CONTRACT OF SURETY INSURANCE EXCEPT AS PROVIDED IN:

(1) §§ 13-207 AND 17-104 OF THE STATE FINANCE AND PROCUREMENT ARTICLE; AND

(2) FOR AN UNCOMPENSATED PERSON, §§ 5-203 AND 5-204 OF THE CRIMINAL PROCEDURE ARTICLE.

(1) ~~REPRESENT THAT IT HAS THE LEGAL AUTHORITY TO ISSUE A CONTRACT OF SURETY INSURANCE; OR~~

(2) ~~ISSUE A CONTRACT OF SURETY INSURANCE.~~

(C) ~~EXCEPT AS PROVIDED IN §§ 13-207 AND 17-104 OF THE STATE FINANCE AND PROCUREMENT ARTICLE, IT IS A FRAUDULENT INSURANCE ACT FOR A PERSON TO KNOWINGLY OR WILLFULLY ASSIST A PERSON TO OBTAIN A CONTRACT OF SURETY INSURANCE FROM AN INDIVIDUAL SURETY.~~

(D) ~~IT IS A FRAUDULENT INSURANCE ACT FOR A PERSON TO:~~

(1) ~~KNOWINGLY OR WILLFULLY MAKE A FALSE OR FRAUDULENT STATEMENT OR REPRESENTATION AS TO THE EXISTENCE, VALUE, OR MARKETABILITY OF ANY ASSETS PLEDGED BY AN INDIVIDUAL SURETY TO SECURE ITS OBLIGATIONS UNDER A CONTRACT OF SURETY INSURANCE; OR~~

(2) ~~KNOWINGLY OR WILLFULLY FAIL TO RETURN ANY MONEY OR PREMIUMS PAID FOR A CONTRACT OF SURETY INSURANCE ISSUED BY AN INDIVIDUAL SURETY IF THE CONTRACT OF SURETY INSURANCE IS REJECTED OR~~

~~NOT ACCEPTED BY THE GOVERNMENTAL ENTITY OR PERSON THAT REQUIRES
THE CONTRACT OF SURETY INSURANCE.~~

27-408.

(a) (1) A person that violates § 27-407 of this subtitle, or another provision of this subtitle in which the claim or act that is the subject of the fraud has a value of \$300 or more is guilty of a felony and on conviction, for each violation, is subject to:

(i) liability for restoring to the victim the property taken or the value of the property taken; and

(ii) 1. for a violation of any provision of § 27-403 of this subtitle, a fine, the maximum of which is the greater of three times the value of the claim or act that is the subject of the fraud and \$10,000 and the minimum of which is \$500, or imprisonment not exceeding 15 years or both; and

2. for a violation of any provision of § 27-404, § 27-405, § 27-406, **§ 27-406.1**, § 27-407, or § 27-407.1 of this subtitle, a fine not exceeding \$10,000 or imprisonment not exceeding 15 years or both.

(2) A person that violates a provision of this subtitle in which the claim or act that is the subject of the fraud has a value of less than \$300 is guilty of a misdemeanor and on conviction, for each violation, is subject to:

(i) liability for restoring to the victim the property taken or the value of the property taken; and

(ii) 1. for a violation of any provision of § 27-403 of this subtitle, a fine, the maximum of which is the greater of three times the value of the claim or act that is the subject of the fraud and \$10,000 and the minimum of which is \$500, or imprisonment not exceeding 18 months or both; and

2. for a violation of any provision of § 27-404, § 27-405, § 27-406, **§ 27-406.1**, § 27-407, or § 27-407.1 of this subtitle, a fine not exceeding \$10,000 or imprisonment not exceeding 18 months or both.

(b) (1) The penalties imposed under this section may be imposed separately from and consecutively to or concurrently with a sentence for another offense based on the act that constitutes a violation of this subtitle.

(2) Each act of solicitation under § 27-407 of this subtitle constitutes a separate violation for purposes of the penalties imposed under this section.

(3) Notwithstanding any other provision of law, a fine imposed under this section is mandatory and not subject to suspension.

SECTION 2. AND BE IT FURTHER ENACTED, That:

(a) In accordance with the provisions of § 2-205 of the Insurance Article, the Maryland Insurance Administration shall conduct an analysis of the practices of corporate sureties and individual sureties in the State, as specified under this section.

(b) In conducting the analysis, the Administration shall consult with any person or entity that the Administration determines appropriate, including corporate sureties, individual sureties, insurance producers, contractors, the Department of Transportation, the Department of General Services, and the Maryland Property and Casualty Insurance Guaranty Corporation.

(c) In its analysis, the Administration shall:

(1) consider whether individual sureties should be licensed or otherwise regulated like other surety insurers in order to solicit or issue surety bonds or contracts of surety insurance;

(2) determine whether individual sureties have issued or attempted to issue surety bonds or contracts of surety insurance for the State, counties, or municipalities since authorized to issue surety bonds or contracts of surety insurance under Chapter 299 of the Acts of the General Assembly of 2006, Chapter 266 of the Acts of the General Assembly of 2008, and other applicable provisions of law, and, if so, the number of surety bonds or contracts of surety insurance issued, the number of surety bonds or contracts of surety insurance rejected, and the reasons for any rejection of the surety bonds or contracts of surety insurance;

(3) consider whether and how the law, as enacted under Chapter 299 of the Acts of the General Assembly of 2006 and Chapter 266 of the Acts of the General Assembly of 2008, should be expanded to allow individual sureties to issue surety bonds or contracts of surety insurance to subcontractors;

(4) determine whether individual sureties are authorized to issue surety bonds or contracts of surety insurance in other states and, if so, how individual sureties are regulated in those states;

(5) determine whether corporate sureties or individual sureties have been sanctioned for issuing surety bonds or contracts of surety insurance in the State and other states and the reasons for the sanctions;

(6) conduct a review of:

(i) all corporate sureties that issued surety bonds or contracts of surety insurance in the State and that were declared insolvent or placed under receivership of the Administration within the last 10 years;

(ii) the impact of the insolvency or receivership of the corporate sureties on the availability of surety bonds or contracts of surety insurance in the market;

(iii) the impact of the affected surety bonds on surety bond users and insurance producers; and

(iv) the notice requirements that the Administration provides to surety bond users, insurance producers, and the public in the event of the insolvency or receivership of a corporate surety;

(7) conduct a survey of the Maryland Property and Casualty Insurance Guaranty Corporation to determine:

(i) the number of claims submitted to and paid by the Corporation as a result of an insolvency of a corporate surety in the last 10 years;

(ii) whether contributions provided by surety insurers to the Corporation are adequate for future claims related to insolvent surety insurers;

(iii) the existing statutory requirements of items covered by the Corporation in the event of the insolvency of a corporate surety; and

(iv) whether loss of paid premiums or collateral of surety bond principal and any other covered items should be expanded;

(8) consider whether the laws and regulations for licensing and regulating corporate sureties are adequate, including whether the current risk-based capital standards are adequate to prevent the insolvency of corporate sureties;

(9) consider whether the laws and regulations regulating corporate sureties or individual sureties are adequate to prevent the issuance of fraudulent surety bonds or contracts of surety insurance by corporate sureties or individual sureties;

(10) conduct a survey of the Board of Public Works, the Department of Transportation, the Department of General Services, and a representative sample of corporate sureties and individual sureties, if appropriate, for each year beginning with 2004, that includes:

(i) the percentage of the total surety bonds or contracts of surety insurance that surety insurers issued in the State on construction projects to

minority business enterprises, as compared to the surety bonds or contracts of surety insurance that surety insurers issued on construction projects to nonminority business enterprises; and

(ii) the percentage of the total surety bonds or contracts of surety insurance that surety insurers rejected in the State that would have been issued to minority business enterprises on construction projects, as compared to the surety bonds or contracts of surety insurance that surety insurers rejected that would have been issued to nonminority business enterprises on construction projects;

(11) conduct a survey of a representative sample of contractors that have held a surety bond or contract of surety insurance issued by an insolvent surety insurer to determine the method each contractor used to acquire a new surety bond or contract of surety insurance and any additional costs or difficulties the contractor experienced in acquiring a new surety bond or contract of surety insurance;

(12) consider whether there are any programs, including the Maryland State Bond Development and Financing Authority and the United States Small Business Administration Bond Guaranty and Lending Program, that enhance the availability of surety bonds or contracts of surety insurance for new, emerging, and small businesses, including businesses that qualify as minority business enterprises; and

(13) consider the need to establish licensure requirements that are specific for surety insurance producers who sell surety bonds or contracts of surety insurance.

(d) (1) On or before December 1, 2012, the Administration shall submit an interim report, in accordance with § 2-1246 of the State Government Article, on its findings and recommendations to the Senate Finance Committee, the Senate Education, Health, and Environmental Affairs Committee, the House Economic Matters Committee, and the House Health and Government Operations Committee.

(2) On or before December 1, 2013, the Administration shall submit a final report, in accordance with § 2-1246 of the State Government Article, on its findings and recommendations to the Senate Finance Committee, the Senate Education, Health, and Environmental Affairs Committee, the House Economic Matters Committee, and the House Health and Government Operations Committee.

SECTION ~~2~~ 3. AND BE IT FURTHER ENACTED, That this Act shall take effect ~~October~~ June 1, 2012.

Approved by the Governor, May 2, 2012.

III. House Bill 169, Chapter 299, Acts of 2006

By: Delegates Morhaim, Cane, Goodwin, Hubbard, Oaks, Shewell, and Weldon Weldon, Barve, Benson, Bromwell, Donoghue, Kohl, Kullen, Mandel, McDonough, Murray, Nathan-Pulliam, Pendergrass, Rudolph, and V. Turner

Introduced and read first time: January 19, 2006
Assigned to: Health and Government Operations

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 21, 2006

CHAPTER _____

1 AN ACT concerning

2 **Procurement - Bid, Payment, and Performance Security Requirements**

3 FOR the purpose of increasing the maximum amount of the bonds that the Maryland
4 Small Business Development Financing Authority may issue as a surety for the
5 benefit of a principal in connection with certain contracts; expanding bid,
6 payment, and performance security to include a bond provided or executed by an
7 individual surety if the individual surety provides a security interest in certain
8 assets at the time the bond is furnished and the individual surety pledges
9 certain assets in an amount equal to or greater than the aggregate penal
10 amounts of the bonds required by the solicitation; expanding bid security to
11 include another form of security satisfactory to a certain public body; expanding
12 payment and performance security to include another form of security allowed
13 by regulation; requiring the Procurement Advisor appointed by the Board of
14 Public Works to report to the Governor and certain committees by certain dates
15 regarding the implementation of this Act; providing for the application of this
16 Act; providing for the termination of this Act; and generally relating to bid,
17 payment, and performance security requirements.

18 BY repealing and reenacting, with amendments,
19 Article 83A - Department of Business and Economic Development
20 Section 5-1035
21 Annotated Code of Maryland
22 (2003 Replacement Volume and 2005 Supplement)

23 BY repealing and reenacting, without amendments,

1 Article 83A - Department of Business and Economic Development
 2 Section 5-1037
 3 Annotated Code of Maryland
 4 (2003 Replacement Volume and 2005 Supplement)

5 BY repealing and reenacting, with amendments,
 6 Article - State Finance and Procurement
 7 Section 13-207 and 17-104
 8 Annotated Code of Maryland
 9 (2001 Replacement Volume and 2005 Supplement)

10 BY repealing and reenacting, without amendments,
 11 Article - State Finance and Procurement
 12 Section 13-208 and 13-216
 13 Annotated Code of Maryland
 14 (2001 Replacement Volume and 2005 Supplement)

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

17 Article 83A - Department of Business and Economic Development

18 5-1035.

19 (a) Subject to the restrictions of this Part VI, the Authority, on application,
 20 may guarantee any surety up to the lesser of 90 percent or \$1,350,000 of its losses
 21 incurred under a bid bond, a payment bond, or a performance bond on any contract,
 22 the majority of the funding for which is provided by the federal government or a state
 23 government, a local government or a utility regulated by the Public Service
 24 Commission.

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

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

30 (d) (1) The Authority may execute and perform bid, performance, and
 31 payment bonds as a surety for the benefit of a principal in connection with any
 32 contract, the majority of the funding for which is provided by the federal government
 33 or a state government, a local government, or a utility regulated by the Public Service
 34 Commission.

35 (2) The bonds:

36 (i) May not exceed [\$1,000,000] \$5,000,000 each; and

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

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

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

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

11 (i) The amount of the guaranty obligation;

12 (ii) The terms of the bond to be guaranteed;

13 (iii) The number of new jobs that will be created by the contract to
14 be bonded; and

15 (iv) Any other factor that the Authority considers relevant.
16 5-1037.

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

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

20 (1) (i) The principal is of good moral character; or

21 (ii) If the principal is not an individual, the principal is owned by
22 individuals of good moral character;

23 (2) As determined from creditors, employers, and other individuals who
24 have personal knowledge of the principal;

25 (i) The principal has a reputation for financial responsibility; or

26 (ii) If the principal is not an individual, a majority of the principal
27 is owned by individuals with a reputation for financial responsibility;

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

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

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

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

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

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

7 **Article - State Finance and Procurement**

8 13-207.

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

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

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

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

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

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

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

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

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

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

32 (d) Bid security under this section shall be:

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

1 (2) A BOND PROVIDED BY AN INDIVIDUAL SURETY THAT MEETS THE
2 REQUIREMENTS OF ~~SUBSECTION (E)~~ OF THIS SECTION;

3 [(2)] (3) cash; or

4 [(3)] (4) another form of security:

5 (I) ~~allowed by regulation~~ AUTHORIZED BY FEDERAL OR STATE
6 REGULATION; OR

7 (II) ~~THAT IS SATISFACTORY TO THE PUBLIC BODY~~ UNIT AWARDING
8 THE CONTRACT.

9 (E) A BOND PROVIDED BY AN INDIVIDUAL SURETY SHALL BE ACCEPTABLE AS
10 BID SECURITY UNDER THIS SECTION IF:

11 ~~(1) THE INDIVIDUAL SURETY PROVIDES A SECURITY INTEREST IN ONE~~
12 ~~OR MORE OF THE ASSETS LISTED IN PARAGRAPH (2) OF THIS SUBSECTION TO THE~~
13 ~~PROCUREMENT OFFICER AT THE TIME THE BOND IS FURNISHED; AND~~

14 (1) THE CONTRACTOR HAS BEEN DENIED CORPORATE SURETY CREDIT;

15 (2) THE INDIVIDUAL SURETY ONLY TRANSACTS BUSINESS THROUGH AN
16 INSURANCE AGENCY LICENSED BY THE MARYLAND INSURANCE ADMINISTRATION;

17 (3) THE INDIVIDUAL SURETY ATTACHES THE GSA STANDARD FORM 28.
18 AFFIDAVIT OF INDIVIDUAL SURETY, TO THE BID SECURITY;

19 (4) THE INDIVIDUAL SURETY PROVIDES A UCC-1 FILING SECURITY
20 INTEREST TO THE UNIT FOR ONE OR MORE OF THE ASSETS LISTED IN ITEM (5)(I)
21 THROUGH (IV) AND (VI) OF THIS SUBSECTION AT THE TIME THE BOND IS FURNISHED;
22 AND

23 ~~(2)~~ (5) THE INDIVIDUAL SURETY PLEDGES ONE OR MORE OF THE
24 FOLLOWING ASSETS IN AN AMOUNT EQUAL TO OR GREATER THAN THE AGGREGATE
25 PENAL AMOUNTS OF THE BONDS REQUIRED BY THE SOLICITATION, INCLUDING:

26 (I) CASH OR CERTIFICATES OF DEPOSIT;

27 (II) CASH EQUIVALENTS HELD WITH A FEDERALLY INSURED
28 FINANCIAL INSTITUTION, ~~INCLUDING CASH EQUIVALENTS EVIDENCED BY~~
29 ~~IRREVOCABLE TRUST RECEIPTS ISSUED BY THE INSTITUTION OR BY AN~~
30 ~~INDEPENDENT TRUSTEE OR ASSETS THAT ARE EVIDENCED BY A SECURITY~~
31 ~~INTEREST, INCLUDING AN IRREVOCABLE TRUST RECEIPT ISSUED BY THE FINANCIAL~~
32 ~~INSTITUTION OR BY AN INDEPENDENT TRUSTEE IN THE NAME OF THE UNIT THAT:~~

33 1. ARE ISSUED IN ACCORDANCE WITH ~~THE UNIFORM~~
34 ~~CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS OF THE INTERNATIONAL~~
35 ~~CHAMBER OF COMMERCE; AND § 9-109 OF THE COMMERCIAL LAW ARTICLE;~~

1 2. CONTAIN A PAYOUT CLAUSE IN THE EVENT THAT
2 DEFAULT CANNOT BE REMEDIED; AND

3 3. IDENTIFY THE SOLICITATION OR CONTRACT NUMBER FOR
4 WHICH THE SECURITY INTEREST IS PROVIDED:

5 (III) UNITED STATES GOVERNMENT SECURITIES AT MARKET
6 VALUE;

7 (IV) STOCKS AND BONDS THAT:

8 1. ARE ACTIVELY TRADED ON A NATIONAL UNITED STATES
9 SECURITY EXCHANGE;

10 2. ARE ACCOMPANIED BY CERTIFICATES ISSUED IN THE
11 NAME OF THE INDIVIDUAL SURETY; AND

12 3. ARE PLEDGED AT 90% OF THEIR 52-WEEK LOW, AS
13 REFLECTED AT THE TIME OF SUBMISSION OF THE BOND;

14 (V) REAL PROPERTY THAT:

15 1. ~~IS LOCATED IN THE UNITED STATES OR ITS OUTLYING~~
16 ~~AREAS;~~

17 2. THAT IS OWNED BY THE CONTRACTOR OR INDIVIDUAL
18 SURETY IN FEE SIMPLE OR WITH COTENANTS THAT ALL AGREE TO ACT JOINTLY;
19 AND

20 2. THAT MAY INCLUDE THE GRANTING OF A MORTGAGE OR
21 DEED OF TRUST ON REAL PROPERTY LOCATED WITHIN THE STATE IF SATISFACTORY
22 TO THE UNIT;

23 3. A. IS PLEDGED AT 100% OF THE MOST CURRENT REAL
24 ESTATE TAX ASSESSMENT VALUE OF THE PROPERTY, EXCLUSIVE OF
25 ENCUMBRANCES; OR

26 B. IS PLEDGED AT 75% OF THE UNENCUMBERED MARKET
27 VALUE OF THE PROPERTY, AS DETERMINED BY AN APPRAISAL DATED NO EARLIER
28 THAN 6 MONTHS BEFORE THE DATE OF THE BOND; OR

29 3. FOR WHICH THE FACE AMOUNT OF THE MORTGAGE OR
30 DEED OF TRUST ON THE REAL PROPERTY LOCATED WITHIN THE STATE DOES NOT
31 EXCEED 75% OF THE CONTRACTOR'S OR INDIVIDUAL SURETY'S EQUITY INTEREST IN
32 THE PROPERTY; AND

33 4. FOR WHICH A MORTGAGE OR DEED OF TRUST ACCEPTED
34 UNDER THIS SUBSECTION IS RECORDED BY AN OFFICIAL DESIGNATED BY THE UNIT
35 WHERE THE REAL PROPERTY IS SITUATED IN ACCORDANCE WITH § 3-103 OF THE
36 REAL PROPERTY ARTICLE; OR

1 (VI) IRREVOCABLE LETTERS OF CREDIT THAT:

2 1. ARE ISSUED BY A FEDERALLY INSURED FINANCIAL
3 INSTITUTION IN THE NAME OF THE CONTRACTING AGENCY; ~~AND~~

4 2. IDENTIFY THE AGENCY AND THE SOLICITATION OR
5 CONTRACT NUMBER FOR WHICH THE IRREVOCABLE LETTER OF CREDIT IS
6 PROVIDED; AND

7 3. CONTAIN A PAYOUT CLAUSE IF THAT DEFAULT CANNOT
8 BE REMEDIED.

9 (F) ANY ASSET LISTED UNDER SUBSECTION (E)(5) OF THIS SECTION SHALL BE
10 PLEGGED ONLY FOR THE INTENDED SECURITY AND MAY NOT BE PLEDGED FOR ANY
11 OTHER SECURITY OR CONTRACT IN OR OUTSIDE THE STATE UNTIL THE ASSET IS
12 RELEASED BY THE UNIT.

13 13-208.

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

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

19 (1) the procurement officer determines that:

20 (i) the deficiency in the amount is insubstantial; and

21 (ii) acceptance of the bid or proposal would be in the best interests
22 of the State; and

23 (2) the procurement officer further determines that:

24 (i) the bid or proposal was the only one submitted and there is no
25 time for rebidding;

26 (ii) the bid security became inadequate as a result of the correction
27 of a mistake in the bid or proposal or as a result of a modification in the bid or
28 proposal in accordance with applicable regulations, and the bidder or offeror
29 increased the amount of bid security to required limits within 48 hours after the
30 correction or modification; or

31 (iii) after consideration of the risks involved and the difference
32 between the lowest bid and the next lowest bid, it would be fiscally advantageous to
33 the State to accept the lowest bid or proposal.

1 13-216.

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

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

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

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

15 (1) circumstances warrant security; and

16 (2) the price of the procurement contract exceeds \$100,000.

17 17-104.

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

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

22 (2) A BOND EXECUTED BY AN INDIVIDUAL SURETY THAT MEETS THE
23 REQUIREMENTS OF ~~SUBSECTION (C) OF THIS SECTION;~~

24 [(2)] (3) cash in an amount equivalent to a bond; or

25 [(3)] (4) [other] ANOTHER FORM OF security:

26 (I) ~~ALLOWED BY REGULATION AUTHORIZED BY FEDERAL OR~~
27 STATE REGULATION; OR

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

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

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

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

5 (C) A BOND EXECUTED BY AN INDIVIDUAL SURETY SHALL BE ACCEPTABLE AS
 6 PAYMENT SECURITY OR PERFORMANCE SECURITY UNDER THIS SUBTITLE IF:

7 (4) ~~THE INDIVIDUAL SURETY PROVIDES A SECURITY INTEREST IN ONE~~
 8 ~~OR MORE OF THE ASSETS LISTED IN PARAGRAPH (2) OF THIS SUBSECTION TO THE~~
 9 ~~PROCUREMENT OFFICER AT THE TIME THE BOND IS FURNISHED; AND~~

10 (1) THE CONTRACTOR HAS BEEN DENIED CORPORATE SURETY CREDIT;

11 (2) THE INDIVIDUAL SURETY ONLY TRANSACTS BUSINESS THROUGH AN
 12 INSURANCE AGENCY LICENSED BY THE MARYLAND INSURANCE ADMINISTRATION;

13 (3) THE INDIVIDUAL SURETY ATTACHES THE GSA STANDARD FORM 28,
 14 AFFIDAVIT OF INDIVIDUAL SURETY, TO THE BID SECURITY;

15 (4) THE INDIVIDUAL SURETY PROVIDES A UCC-1 FILING SECURITY
 16 INTEREST TO THE PUBLIC BODY FOR ONE OR MORE OF THE ASSETS LISTED IN ITEM
 17 (5)(I) THROUGH (IV) AND (VI) OF THIS SUBSECTION AT THE TIME THE BOND IS
 18 FURNISHED; AND

19 (2) (5) ~~THE INDIVIDUAL SURETY PLEDGES ONE OR MORE OF THE~~
 20 ~~FOLLOWING ASSETS IN AN AMOUNT EQUAL TO OR GREATER THAN THE AGGREGATE~~
 21 ~~PENAL AMOUNTS OF THE BONDS REQUIRED BY THE SOLICITATION, INCLUDING:~~

22 (I) CASH OR CERTIFICATES OF DEPOSIT;

23 (II) CASH EQUIVALENTS HELD WITH A FEDERALLY INSURED
 24 FINANCIAL INSTITUTION, ~~INCLUDING CASH EQUIVALENTS EVIDENCED BY~~
 25 ~~IRREVOCABLE TRUST RECEIPTS ISSUED BY THE INSTITUTION OR BY AN~~
 26 ~~INDEPENDENT TRUSTEE OR ASSETS THAT ARE EVIDENCED BY A SECURITY~~
 27 ~~INTEREST, INCLUDING AN IRREVOCABLE TRUST RECEIPT ISSUED BY THE FINANCIAL~~
 28 ~~INSTITUTION OR BY AN INDEPENDENT TRUSTEE IN THE NAME OF THE PUBLIC BODY~~
 29 ~~THAT:~~

30 1. ARE ISSUED IN ACCORDANCE WITH ~~THE UNIFORM~~
 31 ~~CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS OF THE INTERNATIONAL~~
 32 ~~CHAMBER OF COMMERCE; AND § 9-109 OF THE COMMERCIAL LAW ARTICLE;~~

33 2. CONTAIN A PAYOUT CLAUSE IN THE EVENT THAT
 34 DEFAULT CANNOT BE REMEDIED; AND

35 3. IDENTIFY THE SOLICITATION OR CONTRACT NUMBER FOR
 36 WHICH THE SECURITY INTEREST IS PROVIDED;

- 1 (III) UNITED STATES GOVERNMENT SECURITIES AT MARKET
 2 VALUE;
- 3 (IV) STOCKS AND BONDS THAT:
- 4 1. ARE ACTIVELY TRADED ON A NATIONAL UNITED STATES
 5 SECURITY EXCHANGE;
- 6 2. ARE ACCOMPANIED BY CERTIFICATES ISSUED IN THE
 7 NAME OF THE INDIVIDUAL SURETY; AND
- 8 3. ARE PLEDGED AT 90% OF THEIR 52-WEEK LOW, AS
 9 REFLECTED AT THE TIME OF SUBMISSION OF THE BOND;
- 10 (V) REAL PROPERTY THAT:
- 11 1. ~~IS LOCATED IN THE UNITED STATES OR ITS OUTLYING~~
 12 ~~AREAS;~~
- 13 2. THAT IS OWNED BY THE CONTRACTOR OR INDIVIDUAL
 14 SURETY IN FEE SIMPLE OR WITH COTENANTS THAT ALL AGREE TO ACT JOINTLY;
 15 ~~AND~~
- 16 2. THAT MAY INCLUDE THE GRANTING OF A MORTGAGE OR
 17 DEED OF TRUST ON REAL PROPERTY LOCATED WITHIN THE STATE IF SATISFACTORY
 18 TO THE PUBLIC BODY;
- 19 3. A. ~~IS PLEDGED AT 100% OF THE MOST CURRENT REAL~~
 20 ~~ESTATE TAX ASSESSMENT VALUE OF THE PROPERTY, EXCLUSIVE OF~~
 21 ~~ENCUMBRANCES; OR~~
- 22 B. ~~IS PLEDGED AT 75% OF THE UNENCUMBERED MARKET~~
 23 ~~VALUE OF THE PROPERTY, AS DETERMINED BY AN APPRAISAL DATED NO EARLIER~~
 24 ~~THAN 6 MONTHS BEFORE THE DATE OF THE BOND; OR~~
- 25 3. FOR WHICH THE FACE AMOUNT OF THE MORTGAGE OR
 26 DEED OF TRUST ON THE REAL PROPERTY LOCATED WITHIN THE STATE DOES NOT
 27 EXCEED 75% OF THE CONTRACTOR'S OR INDIVIDUAL SURETY'S EQUITY INTEREST IN
 28 THE PROPERTY; AND
- 29 4. FOR WHICH A MORTGAGE OR DEED OF TRUST ACCEPTED
 30 UNDER THIS SUBSECTION IS RECORDED BY AN OFFICIAL DESIGNATED BY THE UNIT
 31 WHERE THE REAL PROPERTY IS SITUATED IN ACCORDANCE WITH § 3-103 OF THE
 32 REAL PROPERTY ARTICLE; OR
- 33 (VI) IRREVOCABLE LETTERS OF CREDIT THAT:
- 34 1. ARE ISSUED BY A FEDERALLY INSURED FINANCIAL
 35 INSTITUTION IN THE NAME OF THE CONTRACTING AGENCY; ~~AND~~

1 2. IDENTIFY THE AGENCY AND THE SOLICITATION OR
2 CONTRACT NUMBER FOR WHICH THE IRREVOCABLE LETTER OF CREDIT IS
3 PROVIDED; AND

4 3. CONTAIN A PAYOUT CLAUSE IF THAT DEFAULT CANNOT
5 BE REMEDIED.

6 (D) ANY ASSET LISTED UNDER SUBSECTION (C)(5) OF THIS SECTION SHALL BE
7 PLEGGED ONLY FOR THE INTENDED SECURITY AND MAY NOT BE PLEDGED FOR ANY
8 OTHER SECURITY OR CONTRACT IN OR OUTSIDE THE STATE UNTIL THE ASSET IS
9 RELEASED BY THE PUBLIC BODY.

10 SECTION 2. AND BE IT FURTHER ENACTED, That on or before September
11 30, 2007, and annually thereafter through September 30, 2009, inclusive, the
12 Procurement Advisor appointed by the Board of Public Works shall report to the
13 Governor, and, in accordance with § 2-1246 of the State Government Article, to the
14 Senate Education, Health, and Environmental Affairs Committee and House Health
15 and Government Operations Committee, regarding the implementation of this Act
16 during the immediately preceding fiscal year, including the impact of this Act on
17 small business and minority business enterprises.

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

22 SECTION 2-4. AND BE IT FURTHER ENACTED, That this Act shall take
23 effect October 1, 2006. It shall remain effective for a period of 3 years and, at the end
24 of September 30, 2009, with no further action required by the General Assembly, this
25 Act shall be abrogated and of no further force and effect.

IV. House Bill 312, Chapter 266, Acts of 2008

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 ~~2 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 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.} 2.~~ 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.} 3.~~ AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2006. ~~It shall remain effective for a period of 3 8 years and, at the end of September 30, 2009~~ **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.

V. MIA Bulletin 10-29 - Amended

MARTIN O'MALLEY
Governor

ANTHONY G. BROWN
Lt. Governor



BETH SAMMIS
Acting Commissioner

KAREN STAKEM HORNIG
Deputy Commissioner

P. RANDI JOHNSON
Associate Commissioner
Property & Casualty

200 St. Paul Place, Suite 2700, Baltimore, Maryland 21202
Direct Dial: 410-468-2301 Fax: 410-468-2306
Email: pjohnson@mdinsurance.state.md.us
1-800-492-6116 TTY: 1-800-735-2258
www.mdinsurance.state.md.us

BULLETIN 10-29 - AMENDED

DATE: November 15, 2010

TO: All Property & Casualty Producers, Surety Insurers and Interested Parties

RE: Individual Sureties

The Maryland Insurance Administration ("MIA") has been asked whether individual sureties who do not hold certificates of authority are authorized to write payment and performance bonds in Maryland. The answer depends on whether or not the project involves a public works project. An individual surety is permitted for public works projects so long as the applicable law is complied with. In all other circumstances, it is not permitted.

The applicable provisions of § 4-101 of the Insurance Article require a person to obtain a certificate of authority from the Insurance Commissioner before engaging in the business of insurance in Maryland. This includes providing surety insurance, which is defined in the Insurance Article as including, among other items insurance that guarantees the:

- performance of contracts other than insurance contracts; and
- execution of bonds, undertakings, and contracts of suretyship.

The State Finance and Procurement Article of the Annotated Code of Maryland permits individuals to serve as sureties for State and local procurement contracts ONLY if the:

- contractor has been denied bonding by a corporate surety;
- individual surety transacts business through an insurance agency licensed by the MIA;
- individual surety attaches an Affidavit of Individual Surety with Appendix to the bid security; and
- individual security meets the criteria found in §§ 13-207 and 17-104 of the State Finance and Procurement Article.

See BPW Advisory NO. 2006-4 (December 7, 2006).

Similarly, individual sureties are permitted as an exception to the federal requirement that a surety company appear on the U.S. Treasury's List of Approved Surety companies if it has fully complied with the requirements of the Federal Acquisition Regulations (FAR § 28.203).

Outside of the public works projects covered by the State Finance and Procurement Article and the Federal Acquisition Regulations, there is no exception to the licensing requirements of the Insurance Article.

Producers should be aware that it is a violation of § 4-203 of the Insurance Article to directly or indirectly act as an insurance producer for or otherwise represent or help on behalf of another an unauthorized insurer. Individual sureties not involved in public works projects have been found by the Insurance Commissioner to be engaging in the business of insurance without the required certificate of insurance. *See MIA v. Stephen R. Woods, et al.* (MIA Case No. 1055-1/90).

Any questions regarding these requirements should be directed to Dave Diehl, Chief Administrator, Property & Casualty Unit at ddiehl@mdinsurance.state.md.us or by calling 410-468-2320.

Beth Sammis, Acting Insurance Commissioner

By: SIGNATURE ON FILE WITH ORIGINAL
P. Randi Johnson, Associate Commissioner
Property & Casualty

VI. BPW Advisory No.: 2006-4



Board of Public Works



BPW Advisory No.: 2006-4

Revision Date: October 2010
Original Date: **December 7, 2006**

Subject: **Individual Surety Bonds**

Effective: **Immediately**

Martin O'Malley
Governor

Nancy K. Kopp
Treasurer

Peter Franchot
Comptroller

Sheila McDonald
Executive Secretary

Purpose: To provide guidance to State agencies concerning the use of *individual* sureties to submit bid, payment, and performance bonds for State and local government procurements. General guidance concerning the use and types of bid, payment, and performance security may be found in BPW Advisory 1996-03.

Authority: Bid, payment, and performance security may be in the form of: (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 certain criteria; (3) cash; (4) another form of security required by State or federal law; or (5) another form of security satisfactory to the unit awarding the contract. Sections 13-207, 13-216, 17-104 of the State Finance and Procurement Article, Annotated Code of Maryland.

Background: The 2006 General Assembly expanded the scope of acceptable security to provide more State contracting opportunities for businesses unable to obtain bonding from surety companies. The 2006 law permits *individuals* to serve as sureties. (Chapter 299, Laws of 2006.)

Procedure:

- I. *Acceptability of Bonds from Individual Sureties:* A State agency may accept a bond provided by an individual surety ONLY if:
- A. The contractor has been denied bonding by a corporate surety;
 - B. The individual surety transacts business through an insurance agency licensed by the Maryland Insurance Administration;
 - C. The individual surety attaches an Affidavit of Individual Surety with Appendix to the bid security (affidavit form included with this Advisory);

D. The individual surety pledges one or more of the following assets in an amount equal to or greater than the bond's total penal amount:

- (1) Cash or certificates of deposit.
- (2) Cash equivalents held with a federally-insured financial institution.
- (3) Certain assets evidenced by a security interest including irrevocable trust receipts.
- (4) U.S. Government securities at market value.
- (5) Stocks and bonds that meet certain criteria.*
- (6) Real property that meets certain criteria.*
- (7) Irrevocable letters of credit that meet certain criteria.*

* These criteria may be found at State Finance and Procurement Article §§13-207 and 17-104.

II. *Pledged Assets:*

A. *Personal property.* If using the personal property assets listed in II. D. 1-5, 7 above, an individual surety must provide a current UCC-1 financing statement at the time the bond is furnished. The financing statement is filed to perfect the State's security interest in the property and establishes the State's priority in case of debtor default or bankruptcy. An example of a UCC-1 financing statement (National UCC Financing Statement) may be found on the State Department of Assessments and Taxation Web site (www.dat.state.md.us/sdatweb/ucc/ucc1.pdf).

B. *Real property.* Pledged real property must be owned by the contractor or individual surety in fee simple or by co-tenants who all agree to act jointly. Evidence of title must be a certificate of title prepared by an attorney or a title insurance company licensed by the State. Title evidence must show:

- Fee simple title vested in the contractor or surety along with any concurrent owners;
- Whether any real estate taxes are due and payable; and
- Any recorded encumbrances.

The individual surety must also provide a copy of the current real estate tax assessment of the property or a current appraisal dated no earlier than 6 months before the bond date, prepared by a professional appraiser who certifies that the appraisal was conducted in accordance with the generally accepted appraisal standards as reflected in the Uniform Standards of Professional Appraisal Practice.

- C. Pledged assets may not be pledged for any other security or contract until the State agency releases the asset.
- III. *Who may act as an individual surety?* An individual surety must be a United States citizen. Corporations and partnerships cannot act as individual sureties. Individual sureties who have been suspended or debarred by the State may not submit bonds.
- IV. *Office of the Attorney General Review:* Before accepting a bond from an individual surety, the procurement officer must consult with the Office of the Attorney General to determine whether the requirements for an individual surety bond have been met.
- V. *BPW Reporting:* Through fiscal year 2014, each agency shall annually report to the Board of Public Works on the impact of the use of individual surety bonds within 60 days after the close of each fiscal year.

Attachments:

Affidavit of Individual Surety (Attachment A)

Surety Affidavit Appendix (Attachment B)

Questions concerning this Advisory may be addressed to:

Board of Public Works
80 Calvert Street, Room 117
Annapolis, Maryland 21401
410-260-7335 Toll Free: 877-591-7320
Fax: 410-974-5240
Mary Jo Childs, Procurement Advisor
email: mchilds@comp.state.md.us

Greg Bedward, General Counsel
Email: gbedward@comp.state.md.us

VII. BPW Documentation of Pledged Assets and Affidavit of Individual Surety forms

**DOCUMENTATION OF THE PLEDGED ASSETS MUST BE ATTACHED
INSTRUCTIONS**

Individual sureties on bonds executed in connection with State contracts must complete and submit this form with the bond. The surety must have the completed form notarized.

No corporation, partnership, or other unincorporated association or firm, as such, is acceptable as an individual surety. Likewise, members of a partnership are not acceptable as sureties on bonds that a partnership or an association, or any co-partner or member thereof, is the principal obligor. However, stockholders of corporate principals are acceptable provided their qualifications are independent of the stockholder's financial interest therein. An individual surety will not include any financial interest in assets connected with the principal on the bond that this affidavit supports.

United State citizenship is a requirement for individual sureties for contracts and bonds.

All signatures of the affidavit submitted must be originals. Affidavits bearing reproduced signatures are not acceptable. An authorized person must sign the bond. Any person signing in a representative capacity (e.g. an attorney-in-fact) must furnish evidence of authority if that representative is not a member of a firm, partnership, or joint venture, or an officer of the corporation involved.

The following is a true representation of the assets I have pledged to the State of Maryland in support of the attached Bond:

(a) Real estate (Include a legal description, street address and other identifying description; the market value: attach supporting certified documents including recorded lien; evidence of title and the current tax assessment of the property. For market value approach, also provide a current appraisal.)

(b) Assets other than real estate (describe the assets, the details of the escrow account, and attach certified evidence thereof).

Identify all mortgages, liens, judgments or any other encumbrances involving subject assets including real estate taxes due and payable.

Identify all bonds, including bid guarantees for which the subject assets have been pledged within 3 years prior to the date of execution of this Affidavit.

SIGNATURE OF SURETY

BOND AND CONTRACT TO WHICH THIS AFFIDAVIT RELATES (Where appropriate):

Subscribed and sworn to before me, this _____ day of _____, 20__.

Signature

Printed/Typed Name

My commission expires:

_____, 20__

NOTARY PUBLIC [Seal]

AFFIDAVIT OF INDIVIDUAL SURETY
(See instructions on reverse) (Type or print all answers)

County: _____ State: _____
 Social Security Number: _____

I, the undersigned, being duly sworn, depose and say that I am: (1) the surety to the attached bond(s); (2) a citizen of the United States; and of full age and legally competent. I also depose and say that, concerning any stocks or bonds included in the assets listed below, that there are no restrictions on the resale of these securities pursuant to the registration provisions of Section 5 of the Securities Act of 1933. I recognize that statements contained herein concern a matter within the jurisdiction of an agency of the State of Maryland and the making of a false, fictitious or fraudulent statement may render the maker subject to prosecution under the Criminal Law Article, §9-101, Annotated Code of Maryland and the State Finance and Procurement Article, §11-205.1, Annotated Code of Maryland. This affidavit is made to induce the State of Maryland to accept me as surety on the attached bond.

 Name *(First, Middle, Last)*

 Home Address *(Number, Street, City, State, Zip)*

 Type and Duration of Occupation

 Name of Employer *(if self-employed, so state)*

 Address of Employer

 Name and Address of Individual Surety Broker Used *(If any)*

(Number, Street, City, State, Zip)

 Telephone Number *(Home)*

(Office)

**VIII. OAG Letter to The Honorable Dan K. Morhaim,
January 10, 2011**

DOUGLAS F. GANSLER
Attorney General



KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

bmcDonald@oag.state.md.us

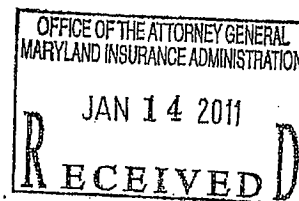
E-Mail

(410) 576-7036
FACSIMILE NO.

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

(410) 576-6327
WRITER'S DIRECT DIAL NO.

January 10, 2011



The Honorable Dan K. Morhaim
The Maryland House of Delegates
House Office Building - Room 362
Annapolis, Maryland 21401

Dear Delegate Morhaim:

You have posed three questions related to individual sureties. Those questions and my answers to them, are set forth below.

1 - Are counties subject to the State Procurement Law and, accordingly, would the use of individual sureties be exempt from the licensing requirement?

There are two parts to this question. The first has to do with application of the State Procurement Law to counties; the second concerns application of an implied exemption for individual sureties from licensing provisions of the State insurance code.

The "State Procurement Law" is often used as a shorthand reference to Division II of the State Finance & Procurement Article of the Annotated Code of Maryland ("SFP"). As a general rule, the procurement provisions of Division II do not apply to counties or other local government entities. See SFP §11-101(x) (definition of "unit"); *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129, 747 A.2d 625 (2000) (county school system is not a "unit" subject to the State Procurement Law).

However, certain provisions of Division II apply to counties and other local government entities. In particular, the provisions of SFP §17-101 *et seq.* concerning security for construction contracts extends to any "public body," which is defined to include counties. SFP §17-101(d)(2). That statute requires that a contractor provide payment security and performance security for any construction contract with a "public body" that exceeds \$100,000 in value. SFP §17-103(a). A county may also require payment security or

The Honorable Dan K. Morhaim
January 10, 2011
Page 2

performance security for a construction contract which does not meet that threshold, but which exceeds \$25,000 in value. SFP §17-103(b).

The statute lists various ways in which the payment security or performance security requirement might be satisfied. With respect to a bond executed by an individual surety, the statute provides:

(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 an affidavit of individual surety in a format that the Board [of Public of Public Works] 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.

SFP §17-104(c)-(d). The Attorney General's Office has interpreted this provision and a parallel provision in SFP §13-207 to authorize public agencies to accept bonds by individual sureties, but not to compel them to do so. Memorandum of Deputy Attorney General Donna Hill Staton to Mary Jo Childs, General Counsel of the Board of Public Works (October 20, 2006).¹

¹ In addition to the authorities in the well-reasoned Staton memo, I note that the proponents of the bill that added the individual surety provisions to the SFP Article indicated in their testimony that the provisions would allow, but not compel, agencies to utilize individual surety bonds for construction contracts. Recorded testimony of Karen Barbour on Senate Bill 391 before the Senate Education Health and Environmental Affairs Committee (March 2, 2006) at 6:40 ("What this bill is trying to do is to provide the State with a choice. You don't have to take the choice, but it's a choice.").

The Staton memo also recommended that the General Assembly eliminate a reference in the 2006 legislation to a General Services Administration form – a recommendation that the Legislature subsequently followed. Chapter 266, Laws of Maryland 2008.

The Honorable Dan K. Morhaim

January 10, 2011

Page 5

Thus, a county may choose to accept a bond executed by an individual surety that meets the requirements of SFP §17-104(c)-(d) to satisfy its obligation to obtain payment or performance security for certain types of contracts.

The second part of your question related to licensing by the Maryland Insurance Administration ("MIA"). An answer to that part of your question requires a brief detour into the law of suretyship.² A surety bond has been described as a "three party arrangement intended to provide personal security for the payment of a debt or performance of an obligation." *National Union Fire Insurance Co. v. Bramble*, 388 Md. 195, 205, 879 A.2d 101 (2005). The law of suretyship developed over many centuries in the context of uncompensated individual sureties. *Id.* at 206. In the nineteenth century, compensated corporate surety companies emerged with the purpose of profiting from the provision of surety bonds. *Id.* at 207. Given the change in the nature of sureties, the courts developed different standards for compensated sureties. *Id.* at 207-8. The Court of Appeals has stated that "[t]he rule is well settled ... that a compensated surety is in effect an insurer, that its contract will be construed as an insurance contract ..." *A/C Electric Co., Inc. v. Aetna Insurance Co.*, 251 Md. 410, 416, 247 A.2d 708 (1968) citations omitted; *see also Berry v. United States Fidelity & Guaranty Co.*, 249 Md. 150, 157, 238 A.2d 907 (1968) ("A paid surety ... is usually considered to be in the same class as an insurance company...").

I assume that the individual sureties referenced in your question would be compensated for providing surety bonds.³ The State insurance code defines "surety insurance" to include "insurance that guarantees the performance of contracts other than insurance contracts" as well as "insurance that guarantees the execution of bonds, undertakings, and contracts of suretyship." Annotated Code of Maryland, Insurance Article ("IN"), §1-101(o)(2)-(3); *see also* IN §21-101 *et seq.* Similarly, the insurance code provides that one is considered to be in the insurance business and must act with specific statutory authorization if one "mak[es] or propos[es] to make, as guarantor or surety insurer, a contract of guaranty or suretyship as a vocation and not merely as incidental to another legitimate business or activity of the guarantor or surety insurer." IN §4-205(c)(2).

² In this discussion, I do not address bail bonds, a form of guaranty or surety that is governed by other statutes and rules.

³ If a relative or friend of a contractor offers to provide the requisite security without compensation by, for example, posting real estate, the agency would consider the adequacy of such security under SFP §13-207(d)(4)(ii) or §17-104(a)(4)(ii).

The Honorable Dan K. Morhaim
January 10, 2011
Page 6

In light of the statute and governing case law, individuals who provide surety bonds for compensation would be deemed to be in the business of insurance. State law requires that a person have a certificate of authority from MIA in order to engage in the insurance business in Maryland. IN §4-101. However, under the current statute, only a corporate entity or reciprocal insurer may obtain a certificate of authority. IN §4-102. Thus, an individual would not ordinarily be able to obtain a certificate of authority and would not be authorized to offer surety bonds for compensation in Maryland.

The Legislature, however, has created an implied exception for surety bonds provided to contractors on public works construction projects. The 2006 amendment of SFP §13-207 and SFP §17-104 referenced above clearly contemplates the availability of individual surety bonds for contractors who enter into construction contracts with public agencies. When the bill that added that amendment was before the Legislature, the General Assembly was informed that an alternative to the 2006 legislation would be for individual sureties to seek a license from MIA, presumably after adopting a corporate form. See recorded testimony of John A. Andryszak on Senate Bill 391 before the Senate Education Health and Environmental Affairs Committee (March 2, 2006) at 27:15. However, the Legislature elected instead to pass the proposed bill without imposing a licensing requirement. Thus, one may infer that the Legislature contemplated that individual sureties who provided surety bonds for such government contracts did not need to obtain a license from MIA for that purpose.

The MIA has essentially treated individual sureties who provide bonds under SFP §17-104 or §13-207 as having an implied exemption from the normal licensing requirements for surety insurance. See MIA Bulletin 10-29 - Amended (November 15, 2010). A court would likely accord deference to the MIA's interpretation, as it is the agency charged with administering the insurance code. *BGE v. PSC*, 305 Md. 145, 161-62, 501 A.2d 1307 (1986).

2 - May subcontractors for State and local construction projects use individual sureties?

SFP §17-103 requires that a *contractor* provide payment security and performance security. It does not require the provision of security by a subcontractor. Any requirement for a performance bond by a subcontractor is generally a matter between the general contractor and subcontractor. However, the implied exception to the licensing requirement for an individual surety who provides security pursuant to SFP §17-104 would not necessarily extend to a security bond that guarantees performance by a subcontractor to a general contractor.

The Honorable Dan K. Morhaim
January 10, 2011
Page 7

3 - Is the MIA correct that sureties must ordinarily be licensed by MIA?

As indicated in the answer to the first question above, compensated sureties ordinarily must be licensed by MIA. As explained above, there appears to be an implied exception to that requirement for individual sureties who provide a bond for a contractor on a construction contract that exceeds certain threshold amounts and that satisfies the criteria of SFP §13-207 or SFP §17-104. Otherwise one who provides surety bonds for compensation must be licensed by MIA.

Very truly yours,



Robert N. McDonald
Chief Counsel
Opinions and Advice