

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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HOUSE BILL 2793

Short Title: Additional Surety for Public Construction. (Public)

Sponsors: Representatives Womble and Parmon (Primary Sponsors).

Referred to: Appropriations.

May 30, 2006

1 A BILL TO BE ENTITLED
2 AN ACT TO AUTHORIZE THE USE OF INDIVIDUAL SURETIES AND
3 IRREVOCABLE LETTERS OF CREDIT FOR PERFORMANCE AND
4 PAYMENT BONDS FOR PUBLIC CONSTRUCTION, AND TO APPROPRIATE
5 FUNDS TO IMPLEMENT THIS PROGRAM.

6 The General Assembly of North Carolina enacts:

7 **SECTION 1.** G.S. 44A-26(b) reads as rewritten:

8 "(b) The performance bond and the payment bond shall be executed by one or
9 more sureties that are one of the following:

- 10 (1) A surety ~~companies~~ company legally authorized to do business in the
11 State of North ~~Carolina~~ Carolina.
12 (2) An individual surety qualified under G.S. 44A-26.1.
13 (3) A qualified financial institution in the form of an irrevocable letter of
14 credit under G.S. 44A-26.4.

15 ~~and~~ The performance bond and payment bond shall become effective upon the awarding
16 of the construction contract."

17 **SECTION 2.** Article 3 of Chapter 44A of the General Statutes is amended
18 by adding the following new sections to read:

19 "**§ 44A-26.1. Individual sureties.**

20 (a) An individual who meets the requirements of this section shall qualify as an
21 individual surety for purposes of G.S. 44A-26.

22 (b) The contracting body shall determine the acceptability of individuals
23 proposed as sureties, and shall ensure that the surety's pledged assets are sufficient to
24 cover the bond obligation. The contracting body shall not accept an independent surety
25 excluded under G.S. 44A-26.2.

26 (c) An individual surety must execute the bond, and the unencumbered value of
27 the assets (exclusive of all outstanding pledges for other bond obligations) pledged by
28 the individual surety, must equal or exceed the penal amount of each bond. The
29 individual surety shall execute a standard surety bond form approved by the

1 Commissioner of Insurance and provide a security interest in accordance with
2 G.S. 44A-26.3. One individual surety is adequate support for a bond, provided the
3 unencumbered value of the assets pledged by that individual surety equal or exceed the
4 amount of the bond. A contractor may submit up to three individual sureties for each
5 bond, in which case the pledged assets, when combined, must equal or exceed the penal
6 amount of the bond. Each individual surety must accept both joint and several liability
7 to the extent of the penal amount of the bond.

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

12 (e) When evaluating individual sureties, contracting bodies may obtain assistance
13 from the Attorney General. Contracting bodies shall obtain the opinion of legal counsel
14 as to the adequacy of the documents pledging the assets prior to accepting payment and
15 performance bonds.

16 (f) Chapter 58 of the General Statutes does not apply to sureties provided in
17 accordance with this section.

18 **"§ 44A-26.2. Exclusion of individual sureties.**

19 (a) An individual may be excluded from acting as a surety on bonds submitted by
20 contractors under this Article by the contracting body in accordance with this section.
21 The exclusion shall be for the purpose of protecting the contracting body.

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

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

24 (2) Failure to disclose all bond obligations.

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

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

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

31 (c) An individual surety excluded pursuant to this subsection shall be included in
32 the Excluded Parties List System maintained in the Department of Administration.

33 (d) Contracting bodies shall not accept the bonds of individual sureties whose
34 names appear in the Excluded Parties List System unless the contracting body states in
35 writing the compelling reasons justifying acceptance.

36 (e) An exclusion of an individual surety under this section will also preclude the
37 party from acting as a contractor under G.S. 143-128.

38 **"§ 44A-26.3. Security interest of individual surety.**

39 (a) An individual surety may be accepted only if a security interest in assets
40 acceptable under 48 C.F.R. § 28.203.2 is provided to the contracting body by the
41 individual surety. The security interest shall be furnished with the bond.

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

- 1 (1) An escrow account with a federally insured financial institution in the
2 name of the contracting body. While the contractor is responsible for
3 establishing the escrow account, the terms and conditions must be
4 acceptable to the contracting body. At a minimum, the escrow account
5 shall provide for the following:
- 6 a. The account must provide the contracting body the sole and
7 unrestricted right to draw upon all or any part of the funds
8 deposited in the account. A written demand for withdrawal shall
9 be sent to the financial institution by the contracting body, after
10 obtaining the concurrence of legal counsel, with a copy to the
11 contractor and to the surety. Within the time period specified in
12 the demand, the financial institution would pay the contracting
13 body the amount demanded up to the amount on deposit. If any
14 dispute should arise between the contracting body and the
15 contractor, the surety, or the subcontractors or suppliers with
16 respect to the offer or contract, the financial institution would
17 be required, unless precluded by order of a court of competent
18 jurisdiction, to disburse monies to the contracting body as
19 directed by the contracting body.
- 20 b. The financial institution would be authorized to release to the
21 individual surety all or part of the balance of the escrow
22 account, including any accrued interest, upon receipt of written
23 authorization from the contracting body.
- 24 c. The contracting body would not be responsible for any costs
25 attributable to the establishment, maintenance, administration,
26 or any other aspect of the account.
- 27 d. The financial institution would not be liable or responsible for
28 the interpretation of any provisions or terms and conditions of
29 the solicitation or contract.
- 30 e. The financial institution would provide periodic account
31 statements to the contracting body.
- 32 f. The terms of the escrow account could not be amended without
33 the consent of the contracting body.
- 34 (2) A lien on real property owned in fee simple by the surety without any
35 form of concurrent ownership except where all cotenants agree to act
36 jointly, located within the United States and not the principal residence
37 of the surety. The asset value of real estate will be accepted at one
38 hundred percent (100%) of the most current tax assessment value less
39 encumbrances or seventy-five percent (75%) of the real estate's
40 unencumbered market value provided a current appraisal is furnished.
41 Whenever a bond with a security interest in real property is submitted,
42 the individual surety shall provide all of the following:
- 43 a. Evidence of title in the form of a certificate of title prepared by
44 a title insurance company on the List of Approved Attorneys,

1 Abstracters, and Title Companies approved by the United States
2 Department of Justice. This title evidence must show fee simple
3 title vested in the surety along with any concurrent owners;
4 whether any real estate taxes are due and payable; and any
5 recorded encumbrances against the property, including the lien
6 filed in favor of the contracting body.

7 b. Evidence of the amount due under any encumbrance shown in
8 the evidence of title.

9 c. A copy of the current real estate tax assessment of the property
10 or a current appraisal dated no earlier than six months prior to
11 the date of the bond, prepared by a professional appraiser who
12 certifies that the appraisal has been conducted in accordance
13 with the generally accepted appraisal standards as reflected in
14 the Uniform Standards of Professional Appraisal Practice as
15 promulgated by the Appraisal Foundation.

16 **"§ 44A-26.4. Irrevocable letters of credit.**

17 (a) Any person required to furnish a bond under G.S. 44A-26 has the option to
18 furnish a bond secured by an irrevocable letter of credit in accordance with this section
19 in an amount equal to the penal sum required to be secured under G.S. 44A-26. A
20 separate irrevocable letter of credit is required for each bond.

21 (b) The irrevocable letter of credit shall be irrevocable, require presentation of no
22 document other than a written demand and the irrevocable letter of credit (and letter of
23 confirmation, if any), expire only as provided in subsection (f) of this section, and be
24 issued or confirmed by an acceptable federally insured financial institution as provided
25 in subsection (g) of this section.

26 (c) To draw on the irrevocable letter of credit, the contracting body shall use the
27 sight draft set forth in subsection (h) of this section and present it with the irrevocable
28 letter of credit (including letter of confirmation, if any) to the issuing financial
29 institution or the confirming financial institution (if any).

30 (d) If the contractor does not furnish an acceptable replacement irrevocable
31 letters of credit, or other acceptable substitute, at least 30 days before an irrevocable
32 letter of credit's scheduled expiration, the contracting body shall immediately draw on
33 the irrevocable letter of credit.

34 (e) If, after the period of performance of a contract where irrevocable letters of
35 credit are used to support payment bonds, there are outstanding claims against the
36 payment bond, the contracting body shall draw on the irrevocable letter of credit prior to
37 the expiration date of the irrevocable letter of credit to cover these claims.

38 (f) If used as an alternative to corporate or individual sureties as security for a
39 performance or payment bond, the contractor may submit an irrevocable letter of credit
40 with an initial expiration date estimated to cover the entire period for which financial
41 security is required or an irrevocable letter of credit with an initial expiration date that is
42 a minimum period of one year from the date of issuance. The irrevocable letter of credit
43 shall provide that, unless the issuer provides the beneficiary written notice of
44 nonrenewal at least 60 days in advance of the current expiration date, the irrevocable

1 letter of credit is automatically extended without amendment for one year from the
2 expiration date, or any future expiration date, until the period of required coverage is
3 completed and the contracting body provides the financial institution with a written
4 statement waiving the right to payment. The period of required coverage shall be as
5 follows:

- 6 (1) For performance bonds only, until completion of any warranty period.
- 7 (2) For payment bonds only, until resolution of all claims filed against the
8 payment bond during the one-year period following final payment.

9 (g) Only federally insured financial institutions rated investment grade or higher
10 shall issue or confirm the irrevocable letter of credit. Unless the financial institution
11 issuing the irrevocable letter of credit had letter-of-credit business of at least twenty-five
12 million dollars (\$25,000,000) in the past year, irrevocable letters of credits over five
13 million dollars (\$5,000,000) must be confirmed by another acceptable financial
14 institution that had letter-of-credit business of at least twenty-five million dollars
15 (\$25,000,000) in the past year.

- 16 (1) The contractor shall provide the contracting body a credit rating from a
17 recognized commercial rating service as specified in Office of Federal
18 Procurement Policy Pamphlet No. 7, 48 C.F.R. § 28.204-3(h), that
19 indicates the financial institution has the required rating as of the date
20 of issuance of the irrevocable letter of credit.

- 21 (2) If the contracting body learns that a financial institution's rating has
22 dropped below the required level, the contracting body shall give the
23 contractor 30 days to substitute an acceptable irrevocable letter of
24 credit or shall draw on the irrevocable letter of credit in accordance
25 with subsection (c) of this section.

26 (h) The following format shall be used by the contracting body for a sight draft to
27 draw on the letter of credit:

28 "SIGHT DRAFT

29 _____
30 [City, State]

31 _____
32 (Date)_____

33 _____
34 [Name and address of financial institution]

35 _____
36 Pay to the order of _____ [Contracting Body]
37 the sum of United States \$ _____.

38 _____
39 This draft is drawn under Irrevocable Letter of Credit No. _____.

40 _____
41 _____
42 [Contracting Body]

43 _____
44 By: _____.

1 **SECTION 3.** There is appropriated from the General Fund to the
2 Department of Administration the sum of twenty-five thousand dollars (\$25,000) for the
3 2006-2007 fiscal year to develop a program to implement this act and to educate
4 individual sureties regarding State construction project opportunities.

5 **SECTION 4.** This act becomes effective July 1, 2006.