GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

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HOUSE BILL 2793
Committee Substitute Favorable 7/20/06

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

Sponsors:

Referred to:

May 30, 2006

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE THE USE OF INDIVIDUAL SURETIES AND IRREVOCABLE LETTERS OF CREDIT FOR PERFORMANCE AND PAYMENT BONDS FOR PUBLIC CONSTRUCTION, AND TO ALLOCATE FUNDS TO IMPLEMENT THIS PROGRAM.

The General Assembly of North Carolina enacts:

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

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

(1) A surety ~~companies~~ company legally authorized to do business in the State of North ~~Carolina~~ Carolina.

(2) An individual surety qualified under G.S. 44A-26.1.

(3) A qualified financial institution in the form of an irrevocable letter of credit under G.S. 44A-26.4.

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

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

"**§ 44A-26.1. Individual sureties.**

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

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

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

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

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

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

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

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

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

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

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

(2) Failure to disclose all bond obligations.

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

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

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

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

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

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

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

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

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

(1) An escrow account with a federally insured financial institution in the name of the contracting body. While the contractor is responsible for establishing the escrow account, the terms and conditions must be acceptable to the contracting body. At a minimum, the escrow account shall provide for the following:

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

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

c. The contracting body would not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the account.

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

e. The financial institution would provide periodic account statements to the contracting body.

f. The terms of the escrow account could not be amended without the consent of the contracting body.

(2) A lien on real property owned in fee simple by the surety without any form of concurrent ownership except where all cotenants agree to act jointly, located within the United States and not the principal residence of the surety. The asset value of real estate will be accepted at one hundred percent (100%) of the most current tax assessment value less encumbrances or seventy-five percent (75%) of the real estate's unencumbered market value provided a current appraisal is furnished. Whenever a bond with a security interest in real property is submitted, the individual surety shall provide all of the following:

a. Evidence of title in the form of a certificate of title prepared by a title insurance company on the List of Approved Attorneys, Abstracters, and Title Companies approved by the United States Department of Justice. This title evidence must show fee simple title vested in the surety along with any concurrent owners; whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including the lien filed in favor of the contracting body.

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

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

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

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

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

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

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

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

(f) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the contractor may submit an irrevocable letter of credit with an initial expiration date estimated to cover the entire period for which financial security is required or an irrevocable letter of credit with an initial expiration date that is a minimum period of one year from the date of issuance. The irrevocable letter of credit shall provide that, unless the issuer provides the beneficiary written notice of nonrenewal at least 60 days in advance of the current expiration date, the irrevocable letter of credit is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the contracting body provides the financial institution with a written statement waiving the right to payment. The period of required coverage shall be as follows:

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

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

(1) The contractor shall provide the contracting body a credit rating from a recognized commercial rating service as specified in Office of Federal Procurement Policy Pamphlet No. 7, 48 C.F.R. § 28.204-3(h), that indicates the financial institution has the required rating as of the date of issuance of the irrevocable letter of credit.
(2) If the contracting body learns that a financial institution's rating has dropped below the required level, the contracting body shall give the contractor 30 days to substitute an acceptable irrevocable letter of credit or shall draw on the irrevocable letter of credit in accordance with subsection (c) of this section.

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

"SIGHT DRAFT

____
[City, State]

(Date) _______________

[Name and address of financial institution]

Pay to the order of __________________________ [Contracting Body]
the sum of United States $____________.

This draft is drawn under Irrevocable Letter of Credit No. __________.

____
[Contracting Body]

By: _________________________.""

SECTION 3. There is allocated from funds appropriated from the General Fund to the Department of Administration for the HUB Office the sum of ten thousand dollars ($10,000) for the 2006-2007 fiscal year to develop a program to implement this act and to educate individual sureties regarding State construction project opportunities.

SECTION 4. Sections 1 and 2 of this act become effective September 1, 2006. The remainder of this act is effective when it becomes law.