

HOUSE BILL 312

P2

8lr1543

By: **Delegates Morhaim, Oaks, Pendergrass, and Weldon**

Introduced and read first time: January 24, 2008

Assigned to: Health and Government Operations

A BILL ENTITLED

1 AN ACT concerning

2 **Procurement – Security Requirements – Repeal Sunset Provision**

3 FOR the purpose of repealing a certain reporting requirement on the implementation
4 of a certain Act on security requirements for procurement; repealing the
5 termination provision of a certain Act relating to security requirements for
6 procurement; and generally relating to security requirements for procurement.

7 BY repealing and reenacting, without amendments,
8 Article 83A – Department of Business and Economic Development
9 Section 5–1035 and 5–1037
10 Annotated Code of Maryland
11 (2003 Replacement Volume and 2007 Supplement)

12 BY repealing and reenacting, without amendments,
13 Article – State Finance and Procurement
14 Section 13–207, 13–208, 13–216, and 17–104
15 Annotated Code of Maryland
16 (2006 Replacement Volume and 2007 Supplement)

17 BY repealing
18 Chapter 299 of the Acts of the General Assembly of 2006
19 Section 2

20 BY repealing and reenacting, with amendments,
21 Chapter 299 of the Acts of the General Assembly of 2006
22 Section 3 and 4

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

25 **Article 83A – Department of Business and Economic Development**

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 5-1035.

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

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

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

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

16 (2) The bonds:

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

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

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

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

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

28 (i) The amount of the guaranty obligation;

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

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

32 (iv) Any other factor that the Authority considers relevant.

1 5-1037.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 **Article – State Finance and Procurement**

26 13-207.

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

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

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

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

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

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

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

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

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

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

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

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

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

24 (3) cash; or

25 (4) another form of security:

26 (i) authorized by federal or State regulation; or

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

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

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

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

3 (3) the individual surety attaches the GSA Standard Form 28,
4 Affidavit of Individual Surety, to the bid security;

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

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

11 (i) cash or certificates of deposit;

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

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

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

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

22 (iii) United States government securities at market value;

23 (iv) stocks and bonds that:

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

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

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

30 (v) real property:

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

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

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

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

9 (vi) irrevocable letters of credit that:

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

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

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

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

19 13-208.

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

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

25 (1) the procurement officer determines that:

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

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

29 (2) the procurement officer further determines that:

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

1 (ii) the bid security became inadequate as a result of the
2 correction of a mistake in the bid or proposal or as a result of a modification in the bid
3 or proposal in accordance with applicable regulations, and the bidder or offeror
4 increased the amount of bid security to required limits within 48 hours after the
5 correction or modification; or

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

9 13-216.

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

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

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

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

23 (1) circumstances warrant security; and

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

25 17-104.

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

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

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

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

33 (4) another form of security:

1 (i) authorized by federal or State regulation; or

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

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

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

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

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

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

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

19 (3) the individual surety attaches the GSA Standard Form 28,
20 Affidavit of Individual Surety, to the bid security;

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

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

27 (i) cash or certificates of deposit;

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

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

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

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

5 (iii) United States government securities at market value;

6 (iv) stocks and bonds that:

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

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

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

13 (v) real property:

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

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

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

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

24 (vi) irrevocable letters of credit that:

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

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

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

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

4 **Chapter 299 of the Acts of 2006**

5 [SECTION 2. AND BE IT FURTHER ENACTED, That on or before September
6 30, 2007, and annually thereafter through September 30, 2009, inclusive, the
7 Procurement Advisor appointed by the Board of Public Works shall report to the
8 Governor, and, in accordance with § 2-1246 of the State Government Article, to the
9 Senate Education, Health, and Environmental Affairs Committee and House Health
10 and Government Operations Committee, regarding the implementation of this Act
11 during the immediately preceding fiscal year, including the impact of this Act on small
12 business and minority business enterprises.]

13 SECTION [3.] 2. AND BE IT FURTHER ENACTED, That this Act shall be
14 construed to apply only prospectively and may not be applied or interpreted to have
15 any effect on or application to any requirement for bid security or for payment security
16 or performance security due before the effective date of this Act.

17 SECTION [4.] 3. AND BE IT FURTHER ENACTED, That this Act shall take
18 effect October 1, 2006. [It shall remain effective for a period of 3 years and, at the end
19 of September 30, 2009, with no further action required by the General Assembly, this
20 Act shall be abrogated and of no further force and effect.]

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