

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

Committee Report: Favorable with amendments

House action: Adopted

Read second time: February 20, 2008

CHAPTER _____

1 AN ACT concerning

2 **Procurement – Security Requirements – ~~Repeal~~ Extension of Sunset**
3 **Provision**

4 FOR the purpose of ~~repealing~~ altering the format of certain affidavits required to be
5 attached to certain bid security; altering a certain reporting requirement ~~on the~~
6 implementation of included in a certain Act ~~on~~ relating to security requirements
7 for procurement; ~~repealing~~ altering the termination provision of a certain Act
8 relating to security requirements for procurement; and generally relating to
9 security requirements for procurement.

10 ~~BY repealing and reenacting, without amendments,~~
11 ~~Article 83A – Department of Business and Economic Development~~
12 ~~Section 5–1035 and 5–1037~~
13 ~~Annotated Code of Maryland~~
14 ~~(2003 Replacement Volume and 2007 Supplement)~~

15 BY repealing and reenacting, without amendments,
16 Article – Economic Development
17 Section 5–568 and 5–569
18 Annotated Code of Maryland
19 (As enacted by Chapter _____ (H.B. 1050) of the Acts of the General Assembly of
20 2008)

21 BY repealing and reenacting, with amendments,
22 Article – State Finance and Procurement
23 Section 13–207 and 17–104

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike-out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



1 Annotated Code of Maryland
 2 (2006 Replacement Volume and 2007 Supplement)

3 BY repealing and reenacting, without amendments,
 4 Article – State Finance and Procurement
 5 ~~Section 13-207, 13-208, 13-216, and 17-104~~
 6 Section 13-208 and 13-216
 7 Annotated Code of Maryland
 8 (2006 Replacement Volume and 2007 Supplement)

9 ~~BY repealing~~
 10 ~~Chapter 299 of the Acts of the General Assembly of 2006~~
 11 ~~Section 2~~

12 BY repealing and reenacting, with amendments,
 13 Chapter 299 of the Acts of the General Assembly of 2006
 14 Section ~~3 and 4~~ 2, 3, and 4

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 \$5,000,000 of its losses~~
 21 ~~incurred under a bid bond, a payment bond, or a performance bond on any contract~~
 22 ~~financed by the federal government or a state government, a local government, a~~
 23 ~~private entity, or a utility regulated by the Public Service Commission.~~

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

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

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

33 ~~(2) The bonds:~~

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

1 (ii) ~~Shall be subject to the approval of the Authority, based on~~
2 ~~the 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~~
5 ~~of funding for the bonds are grants.~~

6 (c) (1) ~~The Authority may not approve a guaranty or a bond under this~~
7 ~~Part VI unless the Authority considers the economic impact of the contract, for which~~
8 ~~a 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~~
14 ~~to 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~~
22 ~~by individuals of good moral character;~~

23 (2) ~~As determined from creditors, employers, and other individuals~~
24 ~~who 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~~
27 ~~principal 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.~~

1 (3) cash; or

2 (4) another form of security:

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

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

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

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

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

10 (3) the individual surety attaches ~~the GSA Standard Form 28,~~
11 ~~Affidavit of Individual Surety,~~ **AN AFFIDAVIT OF INDIVIDUAL SURETY IN A FORMAT**
12 **THAT THE BOARD REQUIRES** to the bid security;

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

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

19 (i) cash or certificates of deposit;

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

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

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

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

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

31 (iv) stocks and bonds that:

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

3 (1) the procurement officer determines that:

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

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

7 (2) the procurement officer further determines that:

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

10 (ii) the bid security became inadequate as a result of the
11 correction of a mistake in the bid or proposal or as a result of a modification in the bid
12 or proposal in accordance with applicable regulations, and the bidder or offeror
13 increased the amount of bid security to required limits within 48 hours after the
14 correction or modification; or

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

18 13–216.

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

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

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

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

32 (1) circumstances warrant security; and

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

1 17-104.

2 (a) Payment security or performance security required under this subtitle
3 shall be:

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

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

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

9 (4) another form of security:

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

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

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

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

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

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

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

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

28 (3) the individual surety attaches ~~the GSA Standard Form 28,~~
29 ~~Affidavit of Individual Surety,~~ **AN AFFIDAVIT OF INDIVIDUAL SURETY IN A FORMAT**
30 **THAT THE BOARD REQUIRES** to the bid security;

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

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

7 (i) cash or certificates of deposit;

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

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

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

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

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

19 (iv) stocks and bonds that:

20 1. are actively traded on a national United States
21 security exchange;

22 2. are accompanied by certificates issued in the name of
23 the individual surety; and

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

26 (v) real property:

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

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

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

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

4 (vi) irrevocable letters of credit that:

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

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

9 3. contain a payout clause if that default cannot be
10 remedied.

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

14 Chapter 299 of the Acts of 2006

15 ~~SECTION 2. AND BE IT FURTHER ENACTED, That on or before September~~
16 ~~30, 2007, and annually thereafter through September 30, 2009, inclusive,~~
17 **SEPTEMBER 30, 2009 AND EVERY 2 YEARS THEREAFTER** the Procurement Advisor
18 appointed by the Board of Public Works shall report to the Governor, and, in
19 accordance with § 2-1246 of the State Government Article, to the Senate Education,
20 Health, and Environmental Affairs Committee and House Health and Government
21 Operations Committee, regarding the ~~implementation~~ **EFFECTIVENESS** of this Act
22 ~~during the immediately preceding fiscal year, ACT,~~ including the impact of this Act on
23 small business and minority business enterprises.‡

24 SECTION ~~3.‡ 2.~~ AND BE IT FURTHER ENACTED, That this Act shall be
25 construed to apply only prospectively and may not be applied or interpreted to have
26 any effect on or application to any requirement for bid security or for payment security
27 or performance security due before the effective date of this Act.

28 SECTION ~~4.‡ 3.~~ AND BE IT FURTHER ENACTED, That this Act shall take
29 effect October 1, 2006. ~~It shall remain effective for a period of 3 8 years and, at the~~
30 ~~end of September 30, 2009~~ **SEPTEMBER 30, 2014**, with no further action required by
31 the General Assembly, this Act shall be abrogated and of no further force and effect.‡

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