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By: ~~Senator Grosfeld~~ **Senators Grosfeld and Haines**

Introduced and read first time: January 31, 2006

Assigned to: Education, Health, and Environmental Affairs

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Committee Report: Favorable with amendments

Senate action: Adopted with floor amendments

Read second time: March 15, 2006

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CHAPTER \_\_\_\_\_

1 AN ACT concerning

2 **Procurement - Security Requirements – ~~Individual Surety~~**

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,  
 24 Article 83A - Department of Business and Economic Development  
 25 Section 5-1037

1 Annotated Code of Maryland  
2 (2003 Replacement Volume and 2005 Supplement)

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

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

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

15 **Article 83A - Department of Business and Economic Development**

16 5-1035.

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

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

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

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

33 (2) The bonds:

34 (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 (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 ~~allowed by regulation;~~

5 (I) AUTHORIZED BY FEDERAL OR STATE REGULATION; OR

6 (II) THAT IS SATISFACTORY TO THE UNIT AWARDING THE  
7 CONTRACT.

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

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

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

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

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

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

22 ~~(2)~~ (5) THE INDIVIDUAL SURETY PLEDGES ONE OR MORE ~~OF THE~~  
23 ~~FOLLOWING~~ ASSETS IN AN AMOUNT EQUAL TO OR GREATER THAN THE AGGREGATE  
24 PENAL AMOUNTS OF THE BONDS REQUIRED BY THE SOLICITATION, INCLUDING:

25 (I) CASH OR CERTIFICATES OF DEPOSIT;

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

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

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

1                                   3.     IDENTIFY THE SOLICITATION OR CONTRACT NUMBER FOR  
2 WHICH THE SECURITY INTEREST IS PROVIDED;

3                                   (III)    UNITED STATES GOVERNMENT SECURITIES AT MARKET  
4 VALUE;

5                                   (IV)    STOCKS AND BONDS THAT:

6                                   1.       ARE ACTIVELY TRADED ON A NATIONAL UNITED STATES  
7 SECURITY EXCHANGE;

8                                   2.       ARE ACCOMPANIED BY CERTIFICATES ISSUED IN THE  
9 NAME OF THE INDIVIDUAL SURETY; AND

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

12                                  (V)     REAL PROPERTY ~~THAT:~~

13                                  1.       ~~IS LOCATED IN THE UNITED STATES OR ITS OUTLYING~~  
14 ~~AREAS;~~

15                                  ~~2-~~     THAT IS OWNED BY THE CONTRACTOR OR INDIVIDUAL  
16 SURETY IN FEE SIMPLE OR WITH COTENANTS THAT ALL AGREE TO ACT JOINTLY;  
17 ~~AND~~

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

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

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

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

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

35                                  (VI)    IRREVOCABLE LETTERS OF CREDIT THAT:

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

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

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

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

12 13-208.

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

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

18 (1) the procurement officer determines that:

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

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

22 (2) the procurement officer further determines that:

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

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

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

33 13-216.

34 (a) Except as provided in subsection (b) of this section, a procurement officer  
35 may not require a contractor to provide a performance bond, payment bond, or other

1 security on a procurement contract for construction, construction related services,  
2 services, or supplies if the price of the procurement contract is \$100,000 or less.

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

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

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

12 (1) circumstances warrant security; and

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

14 17-104.

15 (a) Payment security or performance security required under this subtitle  
16 shall be:

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

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

21 [(2)] (3) cash in an amount equivalent to a bond; or

22 [(3)] (4) ~~other~~ ANOTHER FORM OF security;

23 (I) AUTHORIZED BY FEDERAL OR STATE REGULATION; OR

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

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

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

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



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

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

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

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

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

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

15 ~~(2)~~ (5) THE INDIVIDUAL SURETY PLEDGES ONE OR MORE ~~OF THE~~  
16 ~~FOLLOWING~~ ASSETS IN AN AMOUNT EQUAL TO OR GREATER THAN THE AGGREGATE  
17 PENAL AMOUNTS OF THE BONDS REQUIRED BY THE SOLICITATION, INCLUDING:

18 (I) CASH OR CERTIFICATES OF DEPOSIT;

19 (II) CASH EQUIVALENTS HELD WITH A FEDERALLY INSURED  
20 FINANCIAL INSTITUTION, ~~INCLUDING~~ OR ASSETS THAT ARE EVIDENCED BY A  
21 SECURITY INTEREST, INCLUDING AN IRREVOCABLE TRUST RECEIPTS RECEIPT  
22 ISSUED BY THE FINANCIAL INSTITUTION OR BY AN INDEPENDENT TRUSTEE IN THE  
23 NAME OF THE PUBLIC BODY THAT:

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

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

29 3. IDENTIFY THE SOLICITATION OR CONTRACT NUMBER FOR  
30 WHICH THE SECURITY INTEREST IS PROVIDED;

31 (III) UNITED STATES GOVERNMENT SECURITIES AT MARKET  
32 VALUE;

33 (IV) STOCKS AND BONDS THAT:

34 1. ARE ACTIVELY TRADED ON A NATIONAL UNITED STATES  
35 SECURITY EXCHANGE;

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

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

5 (V) REAL PROPERTY ~~THAT~~:

6 1. ~~IS LOCATED IN THE UNITED STATES OR ITS OUTLYING~~  
7 ~~AREAS;~~

8 2. THAT IS OWNED BY THE CONTRACTOR OR INDIVIDUAL  
9 SURETY IN FEE SIMPLE OR WITH COTENANTS THAT ALL AGREE TO ACT JOINTLY;  
10 ~~AND~~

11 2. THAT MAY INCLUDE THE GRANTING OF A MORTGAGE OR  
12 DEED OF TRUST ON REAL PROPERTY LOCATED WITHIN THE STATE IF SATISFACTORY  
13 TO THE PUBLIC BODY;

14 3. A. ~~IS PLEDGED AT 100% OF THE MOST CURRENT REAL~~  
15 ~~ESTATE TAX ASSESSMENT VALUE OF THE PROPERTY, EXCLUSIVE OF~~  
16 ~~ENCUMBRANCES; OR~~

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

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

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

28 (VI) IRREVOCABLE LETTERS OF CREDIT THAT:

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

31 2. IDENTIFY THE AGENCY AND THE SOLICITATION OR  
32 CONTRACT NUMBER FOR WHICH THE IRREVOCABLE LETTER OF CREDIT IS  
33 PROVIDED; AND

34 3. CONTAIN A PAYOUT CLAUSE IF THAT DEFAULT CANNOT  
35 BE REMEDIED.

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

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  
12 small business and minority business enterprises.

13 SECTION 3. 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  
16 security or performance security due before the effective date of this Act.

17 SECTION 4. 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.