

for the payment of claims arising under this part may be invested in bonds or other obligations of, or bonds or other obligations guaranteed as to principal and interest by, the United States; except that moneys provided as capital for the fund shall not be so invested.<sup>139</sup>

PART B -- SURETY BOND GUARANTEES<sup>140</sup>

## Sec. 410. DEFINITIONS

15 USC 694a.

As used in this part—

- (1) the term "bid bond" means a bond conditioned upon the bidder on a contract entering into the contract, if he receives the award thereof, and furnishing the prescribed payment bond and performance bond. "Bid bond."
- (2) the term "payment bond" means a bond conditioned upon the payment by the principal of money to persons under contract with him. "Payment bond."
- (3) the term "performance bond" means a bond conditioned upon the completion by the principal of a contract in accordance with its terms. "Performance bond."
- (4) the term "surety" means the person who, (A) under the terms of a bid bond, undertakes to pay a sum of money to the obligee in the event the principal breaches the conditions of the bond, (B) under the terms of a performance bond, undertakes to incur the cost of fulfilling the terms of a contract in the event the principal breaches the conditions of the contract, (C) under the terms of a payment bond, undertakes to make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract if the principal fails to make prompt payment, or (D) is an agent, independent agent, underwriter, or any other company or individual empowered to act on behalf of such person.<sup>141</sup> "Surety".
- (5) the term "obligee" means (A) in the case of a bid bond, the person requesting bids for the performance of a contract, or (B) in the case of a payment bond or performance bond, the person who has contracted with a principal for the completion of the contract and to whom the obligation of the surety runs in the event of a breach by the principal of the conditions of a payment bond or performance bond. "Obligee."
- (6) the term "principal" means (A) in the case of a bid bond, a person bidding for the award of a contract, or (B) the person primarily liable to complete a contract for the obligee, or to make payments to other persons in respect of such contract, and for "Principal."

<sup>139</sup>Last sentence added by § 112 of P.L. 96-302, approved July 2, 1980 (94 Stat. 833).

<sup>140</sup>Part B added by § 911(a)(4) of P.L. 91-609, the Housing and Urban Development Act of 1970, approved Dec. 31, 1970 (84 Stat. 1812).

<sup>141</sup>Sec. 410(4)(D) added by § 110 of P.L. 95-507, approved Oct. 24, 1978 (92 Stat. 1757).

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§ 411(a)(4)(A)

whose performance of his obligation the surety is bound under the terms of a payment or performance bond. A principal may be a prime contractor or a subcontractor.

(7) the term "prime contractor" means the person with whom the obligee has contracted to perform the contract.

"Prime contractor."

(8) the term "subcontractor" means a person who has contracted with a prime contractor or with another subcontractor to perform a contract.

"Subcontractor."

Sec. 411.<sup>142</sup> AUTHORITY OF THE ADMINISTRATION

15 USC 694b.

(a) (1) The Administration may, upon such terms and conditions as it may prescribe, guarantee and enter into commitments to guarantee any surety against loss resulting from a breach of the terms of a bid bond, payment bond, performance bond, or bonds ancillary thereto, by a principal on any total work order or contract amount at the time of bond execution that does not exceed \$2,000,000.<sup>143</sup>

Surety bond guarantee.

(2) The terms and conditions of said guarantees and commitments may vary from surety to surety on the basis of the Administration's experience with the particular surety.

(3)<sup>144</sup> The Administration may authorize any surety, without further Administration approval, to issue, monitor, and service such bonds subject to the Administration's guarantee.

Preferred surety bond guarantee program.

(4) No such guarantee may be issued, unless—

(A) the person who would be principal under the bond is a small business concern;

<sup>142</sup>Sec. 411(a) substantially rewritten by § 202 of P.L. 100-590, approved Nov. 3, 1988 (102 Stat. 3007). For prior text, see § 111 of P.L. 95-507, approved Oct. 24, 1978 (92 Stat. 1758).

<sup>143</sup>"\$1,250,000" inserted in lieu of "\$1,000,000", per § 18014 of P.L. 99-272, approved April 7, 1986 (100 Stat. 370). "\$2,000,000" inserted instead of "\$1,250,000" by § 805(a)(1) of P.L. 106-554, approved Dec. 21, 2000 (114 Stat. 2763A-705). Phrase "contract up to" replaced by language beginning "total work order" by § 203(a) of P.L. 108-447, approved Dec. 8, 2004 (118 Stat. 2809-657).

<sup>144</sup>Section 207 of P.L. 100-590 (102 Stat. 3009) provided for an expiration date of September 30, 1991 "or the last day of the third full fiscal year after the date of enactment of this Act, whichever is later," for paragraph 411(a)(3). Expiration date of this paragraph changed to September 30, 1994, by § 216(a) of P.L. 101-574, approved Nov. 15, 1990 (104 Stat. 2823). Expiration date changed to Sept. 30, 1995, by § 302 of P.L. 103-403, approved Oct. 22, 1994 (108 Stat. 4188). Expiration date changed to Sept. 30, 1997, by § 7 of P.L. 104-36, approved Oct. 12, 1995 (109 Stat. 297). Expiration date changed to Sept. 30, 2000, by § 503 of P.L. 105-135, approved Dec. 2, 1997 (111 Stat. 2624). Changed again to Sept. 30, 2003, by § 805(b) of P.L. 106-554, approved Dec. 21, 2000 (114 Stat. 2763A-706). Section 207 of P.L. 100-590 was repealed by § 204(c) of P.L. 108-447, approved Dec. 8, 2004 (118 Stat. 2809-658). [Section 206 of P.L. 100-590, approved Nov. 3, 1988, as amended by § 216(b) of P.L. 101-574, requires the Comptroller General of the U.S. to report on the success of this provision not later than March 1, 1994, and cover the period Oct. 1, 1990, through Sept. 30, 1993.]

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§ 411(a)(4)(B) to  
§ 411(b)(3)

(B) the bond is required in order for such person to bid on a contract, or to serve as a prime contractor or subcontractor thereon;

(C) such person is not able to obtain such bond on reasonable terms and conditions without a guarantee under this section; and

(D) there is a reasonable expectation that such principal will perform the covenants and conditions of the contract with respect to which such bond is required, and the terms and conditions of such bond are reasonable in the light of the risks involved and the extent of the surety's participation.

(5)<sup>145</sup> (A) The Administration shall promptly act upon an application from a surety to participate in the Preferred Surety Bond Guarantee Program, authorized by paragraph (3), in accordance with criteria and procedures established in regulations pursuant to subsection (d).

(B) The Administration is authorized to reduce the allotment of bond guarantee authority or terminate the participation of a surety in the Preferred Surety Program [sic] Guarantee Program based on the rate of participation of such surety during the 4 most recent fiscal year quarters compared to the median rate of participation by the other sureties in the program.

(b) Subject to the provisions of this section, in connection with the issuance by the Administration of a guarantee to a surety as provided by subsection (a), the Administration may agree to indemnify such surety against a loss sustained by such surety in avoiding or attempting to avoid a breach of the terms of a bond guaranteed by the Administration pursuant to subsection (a): Provided, however—

Indemnifi-  
cation.

(1) prior to making any payment under this subsection, the Administration shall first determine that a breach of the terms of such bond was imminent;

(2)<sup>146</sup> a surety must obtain approval from the Administration prior to making any payments pursuant to this subsection unless the surety is participating under the authority of subsection (a)(3); and

(3) no payment by the Administration pursuant to this subsection shall exceed 10 per centum of the contract price unless the Administrator determines that a greater payment should be made as a result of a finding by the Administrator that the surety's loss sustained in avoiding or attempting to avoid such breach was necessary and reasonable.

<sup>145</sup>Paragraph 411(a)(5) added by § 206(a) of P.L. 104-208, approved Sept. 30, 1996 (110 Stat. 3009-738). Section 206(b) of P.L. 104-208 provides that "[t]he amendments made by subsection (a) shall apply with respect to applications received (or pending substantive evaluation) on or after October 1, 1995."

<sup>146</sup>Section 411(b)(2) was rewritten by § 203(a) of P.L. 100-590, approved Nov. 3, 1988 (102 Stat. 3008), which deleted existing paragraph 411(b)(3), inserted new paragraph (2), and renumbered existing paragraph (2) as paragraph (3). For prior version, see § 111 of P.L. 95-507, approved Oct. 24, 1978 (92 Stat. 1758).

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§ 411(c) to  
§ 411(e)

In no event shall the Administration pay a surety pursuant to this subsection an amount exceeding the guaranteed share of the bond available to such surety pursuant to subsection (a).<sup>147</sup> Limitation.

(c)<sup>148</sup> Any guarantee or agreement to indemnify under this section shall obligate the Administration to pay to the surety a sum--

(1) not to exceed 70 per centum of the loss incurred and paid by a surety authorized to issue bonds subject to the Administration's guarantee under subsection (a)(3);

(2) not to exceed 90 per centum of the loss incurred and paid in the case of a surety requiring the Administration's specific approval for the issuance of such bond, but in no event may the Administration make any duplicate payment pursuant to subsection (b) or any other subsection;

(3) equal to 90 per centum of the loss incurred and paid in the case of a surety requiring the Administration's specific approval for the issuance of a bond, if--

(A) the total amount of the contract at the time of execution of the bond or bonds is \$100,000 or less, or

(B) the bond was issued to a small business concern owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act or to a qualified HUBZone small business concern (as defined in section 3(p) of the Small Business Act<sup>149</sup>; or

(4) determined pursuant to subsection (b), if applicable.

(d) The Administration may establish and periodically review regulations for participating sureties which shall require such sureties to meet Administration standards for underwriting, claim practices, and loss ratios. Regulations.

(e) Pursuant to any such guarantee or agreement, the Administration shall reimburse the surety, as provided in subsection (c) of this section, except that the Administration shall be relieved of all liability if-- SBA not liable if--

<sup>147</sup>Last sentence in § 411(b) added by § 203(a)(5) of P.L. 100-590, approved Nov. 3, 1988 (102 Stat. 3008).

<sup>148</sup>Sec. 411(c) rewritten by section 203(b) of P.L. 100-590. For prior version, see § 115 of P.L. 96-302, approved July 2, 1980 (94 Stat. 833). Section 5(a) of P.L. 100-442, the Indian Financing Act of 1988, approved Sept. 22, 1988 (102 Stat. 1764) authorizes the Secretary of the Interior to provide a supplemental surety bond guarantee not to exceed 20% of any loss for any Indian individual or economic enterprise eligible for a surety guarantee under § 411 of the Small Business Investment Act. For text of P.L. 100-442, see the Related Provisions of Law section of this Handbook.

<sup>149</sup>Reference to "qualified HUBZone small business concern" added by § 604(d) of P.L. 105-135, approved Dec. 2, 1997 (111 Stat. 2633).

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§ 411(e)(1) to  
§ 411(h)

- (1) the surety obtained such guarantee or agreement, or applied for such reimbursement, by fraud or material misrepresentation,
- (2) the total contract amount at the time of execution of the bond or bonds exceeds \$2,000,000,<sup>150</sup>
- (3)<sup>151</sup> the surety has breached a material term or condition of such guarantee agreement, or
- (4) the surety has substantially violated the regulations promulgated by the Administration pursuant to subsection (d).

(f) The Administration may, upon such terms and conditions as it may prescribe, adopt a procedure for reimbursing a surety for its paid losses billed each month, based upon prior monthly payments to such surety, with subsequent adjustments after such disbursement.

(g)<sup>152</sup> (1) Each participating surety shall make reports to the Administration at such times and in such form as the Administration may require.

Reports to  
SBA.

(2) The Administration may at all reasonable times audit, in the offices of a participating surety, all documents, files, books, records, and other material relevant to the Administration's guarantee, commitments to guarantee, or agreements to indemnify any surety pursuant to this section.

(3) Each surety participating under the authority of paragraph (3) of subsection (a) shall be audited at least once every three years<sup>153</sup> by examiners selected and approved by the Administration.

Audit of  
surety.

(h) The Administration shall administer this Part on a prudent and economically justifiable basis<sup>154</sup> and establish such fee or fees for small business concerns and premium or premiums for sureties as it deems reasonable and necessary, to be payable at such time and under such conditions as may be determined by the Administration.

Fees.

<sup>150</sup>"\$1,250,000" inserted in lieu of "\$1,000,000", per § 18014 of P.L. 99-272, approved April 7, 1986 (100 Stat. 370).

"\$2,000,000" inserted in lieu of "\$1,250,000" per § 805(a)(2) of P.L. 106-554, approved Dec. 21, 2000 (114 Stat. 2763A-705).

<sup>151</sup>Paragraphs 411(e)(3) and (4) added by § 203(c) of P.L. 100-590, approved Nov. 3, 1988 (102 Stat. 3008).

<sup>152</sup>Paragraphs (1) and (3) of section 411(g) added by § 204 of P.L. 100-590, *supra*.

<sup>153</sup> Audit frequency changed from each year to every three years by § 202(b) of P.L. 108-447, approved Dec. 8, 2004 (118 Stat. 2809-658).

<sup>154</sup>The phrase "administer this program on a prudent and economically justifiable basis" added to the original § 411 by § 11(a) of P.L. 93-386, the Small Business Amendments of 1974, approved Aug. 23, 1974 (88 Stat. 742). Subsection (h), formerly (c), entirely rewritten by said section, to distinguish between fees payable by small concerns, and premiums paid by sureties, and to eliminate several sentences.

SMALL BUSINESS INVESTMENT ACT OF 1958

§ 411(i) to  
§ 501(b)

- (i) The provisions of section 402 shall apply in the administration of this section.

Sec. 412.<sup>155</sup> FUND

15 USC 69  
Surety bon  
guarantee  
fund.

(a) There is hereby created within the Treasury a separate fund for guarantees which shall be available to the Administrator without fiscal year limitation as a revolving fund for the purposes of this part. All amounts received by the Administrator, including any moneys, property, or assets derived by him from his operations in connection with this part, shall be deposited in the fund. All expenses and payments, excluding administrative expenses, pursuant to operations of the Administrator under this part shall be paid from the fund.<sup>156</sup>

(b)<sup>157</sup> Such sums as may be appropriated to the Fund to carry out the programs authorized by this part shall be without fiscal year limitation.

TITLE V -- LOANS TO STATE AND LOCAL DEVELOPMENT COMPANIES

Sec. 501. STATE DEVELOPMENT COMPANIES.

15 USC 695.

(a)<sup>158</sup> The Congress hereby finds and declares that the purpose of this title is to foster economic development and to create or preserve job opportunities in both urban and rural areas by providing long-term financing for small business concerns through the development company program authorized by this title.

State  
development  
companies.

(b) The Administration is authorized to make loans to State development companies to assist in carrying out the purposes of this Act. Any funds advanced under this subsection shall be in exchange for obligations of the development company which bear interest at such rate, and contain such other terms, as the Administration may fix, and funds may be so advanced without regard to the use and investment by the development company of funds secured by it from other sources.

<sup>155</sup>Sec. 412, added by § 6(a)(4) of P.L. 93-386, the Small Business Amendments of 1974, approved Aug. 23, 1974 (88 Stat. 742), was rewritten by § 105 of P.L. 95-89, approved Aug. 4, 1977, effective Oct. 1, 1977 (91 Stat. 553). The authorization language was transferred to § 20 of the Small Business Act; SBA is no longer required to pay interest to the Treasury on appropriated funds to be used to pay claims under this program and the authority to invest idle funds was modified.

<sup>156</sup>Last sentence, repealed by § 111 of P.L. 96-302, approved July 2, 1980 (94 Stat. 833), authorized investment of funds not needed for operating expenses or claims payments to be invested in U.S. bonds and U.S. guaranteed obligations, except for moneys provided as capital. See § 6(a) of P.L. 93-386, approved Aug. 23, 1974 (88 Stat. 742).

<sup>157</sup>Existing § 412 redesignated (a) and subsection 412(b) added by § 208 of P.L. 100-590, approved Nov. 3, 1988 (102 Stat. 3009).

<sup>158</sup>Subsections 501(a) and (b) redesignated as 501(b) and (c), respectively, and new subsection 501(a) added by § 115(a) of P.L. 100-590, approved Nov. 3, 1988 (102 Stat. 2997). Section 115(b)(1) added the heading "State development companies". Subsection 501 (a) rewritten by § 214(a) of P.L. 101-574, approved Nov. 15, 1990 (104 Stat. 2821).

(c) The total amount of obligations purchased and outstanding at any one time by the Administration under this section from any one State development company shall not exceed the total amount borrowed by it from all other sources. Funds advanced to a State development company under this section shall be treated on an equal basis with those funds borrowed by such company after the date of the enactment of this Act, regardless of source, which have the highest priority, except when this requirement is waived by the Administrator.

(d)<sup>159</sup> In order to qualify for assistance under this title, the development company must demonstrate that the project to be funded is directed toward at least one of the following economic development objectives--

(1) the creation of job opportunities within two years of the completion of the project or the preservation or retention of jobs attributable to the project;

(2) improving the economy of the locality, such as stimulating other business development in the community, bringing new income into the area, or assisting the community in diversifying and stabilizing its economy; or

(3) the achievement of one or more of the following public policy goals:

(A) business district revitalization,

(B) expansion of exports,

(C) expansion of minority business development or women-owned business development,<sup>160</sup>

(D) rural development,

(E)<sup>161</sup> expansion of small business concerns owned and controlled by veterans, as defined in section 3(q) of the Small Business Act (15 U.S.C. 632(q)), especially service-disabled veterans, as defined in such section 3(q).

(F) enhanced economic competition, including the advancement of technology, plant retooling, conversion to robotics, or competition with imports,

(G) changes necessitated by Federal budget cutbacks, including defense related industries, or

<sup>159</sup>New subsection 501(d) added by § 214(b) of P.L. 101-574, approved Nov. 15, 1990 (104 Stat. 2821).

<sup>160</sup>Reference to women-owned business development added by § 302 of P.L. 106-554, approved Dec. 21, 2000 (114 Stat. 2763).

<sup>161</sup>Subparagraphs 501(d)(3)(E)–(G) renumbered as (F)–(H), respectively, and new subparagraph 501(d)(3)(E) added by § 405 of P.L. 106-50, approved August 17, 1999 (113 Stat. 246).