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Title 13 – Business Credit and Assistance
Chapter I – Small Business Administration
Part 115 – Surety Bond Guarantee

Subpart A – Provisions for All Surety Bond Guarantees

Authority: 5 U.S.C. app 3; 15 U.S.C. 636i, 687b, 687c, 694a, and 694b note.

Source: 61 FR 3271, Jan. 31, 1996, unless otherwise noted.

Editorial Note: Nomenclature changes to part 115 appear at 72 FR 50038, Aug. 30, 2007.

§ 115.19 Denial of liability.

In addition to equitable and legal defenses and remedies under contract law, the Act, and the regulations in this Part, SBA is relieved of liability in whole or in part within its discretion if any of the circumstances in paragraphs (a) through (h) of this section exist, except that SBA shall not deny liability on Prior Approval bonds based solely upon material information that was provided to SBA as part of the Surety's guarantee application.

- (a) **Excess Contract or bond amount.** The total Contract or Order amount at the time of Execution of the bond exceeds the Applicable Statutory Limit (see § 115.10) or the bond amount at any time exceeds the total Contract or Order amount.
- (b) **Misrepresentation or fraud.** The Surety obtained the Prior Approval or PSB Agreement, or applied for reimbursement for losses, by fraud or material misrepresentation. Material misrepresentation includes (but is not limited to) both the making of an untrue statement of material fact and the omission of a statement of material fact necessary to make a statement not misleading in light of the circumstances in which it was made. Material misrepresentation also includes the adoption by the Surety of a material misstatement made by others which the Surety knew or under generally accepted underwriting standards should have known to be false or misleading. The Surety's failure to disclose its ownership (or the ownership by any owner of at least 20% of the Surety's equity) of an interest in a Principal or an Obligee is considered the omission of a statement of material fact.
- (c) **Material breach.** The Surety has committed a material breach of one or more terms or conditions of its Prior Approval or PSB Agreement. A material breach is considered to have occurred if:
 - (1) Such breach (or such breaches in the aggregate) causes an increase in the Contract amount or in the bond amount of at least 25% or \$500,000 of the original contract or bond amount, whichever is less; or
 - (2) One of the conditions under Part B of Title IV of the Investment Act is not met.
- (d) **Substantial regulatory violation.** The Surety has committed a "substantial violation" of SBA regulations. For purposes of this paragraph, a "substantial violation" is a violation which causes an increase in the bond amount of at least 25% or \$500,000 of the original contract or bond amount, whichever is less in the aggregate, or is contrary to the purposes of the Surety Bond Guarantee Programs.
- (e) **Alteration.** Without obtaining prior written approval from SBA (which may be conditioned upon payment of additional fees), the Surety agrees to or acquiesces in any material alteration in the terms, conditions, or provisions of the bond, including but not limited to the following acts:

- (1) Naming as an Obligee or co-Obligee any Person that does not qualify as an Obligee under § 115.10;
or
- (2) In the case of a Prior Approval Surety, acquiescing in any alteration to the bond which would increase the bond amount by at least 25% or \$500,000 of the original contract or bond amount, whichever is less.

(f) **Timeliness.**

(1) Either:

- (i) The bond was Executed prior to the date of SBA's guarantee; or
- (ii) The bond was Executed (or approved, if the Surety is legally bound by such approval) after the work under the Contract had begun, unless SBA executes a "Surety Bond Guarantee Agreement Addendum" (SBA Form 991) after receiving all of the following from the Surety:
 - (A) Satisfactory evidence, including a certified copy of the Contract (or a sworn affidavit from the Principal), showing that the bond requirement was contained in the original Contract, or other documentation satisfactory to SBA, showing why a bond was not previously obtained and is now being required;
 - (B) Certification by the Principal that all taxes and labor costs are current, and listing all suppliers and subcontractors, indicating that they are all paid to date, and attaching a waiver of lien from each; or an explanation satisfactory to SBA why such documentation cannot be produced; and
 - (C) Certification by the Obligee that all payments due under the Contract to date have been made and that the job has been satisfactorily completed to date.

(2)

- (i) For purposes of paragraph (f)(1)(ii) of this section, work under a Contract is considered to have begun when a Principal takes any action related to the contract or bond that would have exposed its Surety to liability under applicable law had a bond been Executed (or approved, if the Surety is legally bound by such approval) at the time.
- (ii) For purposes of this paragraph (f), the Surety must maintain a contemporaneous record of the Execution and approval of each bond.

(g) **Delinquent fees.** The Surety has not remitted to SBA the Principal's payment for the full amount of the guarantee fee within the time period required under § 115.30(d) for Prior Approval Sureties or § 115.66 for PSB Sureties, or has not made timely payment of the Surety's fee within the time period required by § 115.32(c). SBA may reinstate the guarantee upon showing that the contract is not in default and that a valid reason exists why a timely remittance or payment was not made.

(h) **Other regulatory violations.** The occurrence of any of the following:

- (1) The Principal on the bonded Contract is not a small business;
- (2) The bond was not required under the bid solicitation or the original Contract;
- (3) The bond was not eligible for guarantee by SBA because the bonded contract was not a Contract as defined in § 115.10;
- (4) The loss occurred under a bond that was not guaranteed by SBA;

- (5) The loss incurred by the Surety was not a Loss as determined under § 115.16; or
- (6) The Surety's loss under a Performance Bond did not result from the Principal's breach or Imminent Breach of the Contract.

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