

Small Business Administration

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attributable to the Contract for which guaranteed Final Bonds were Executed.

(e) *Loss includes* the following expenses if they are itemized, documented and attributable solely to the Loss under the guaranteed bond:

(1) Amounts actually paid by the Surety which are specifically allocable to the investigation, adjustment, negotiation, compromise, settlement of, or resistance to a claim for Loss resulting from the breach of the terms of the bonded Contract. Any cost allocation method must be reasonable and must comply with generally accepted accounting principles; and

(2) Amounts actually paid by the Surety for court costs and reasonable attorney's fees incurred to mitigate any Loss under paragraphs (a) through (e)(1) of this section including suits to obtain sums due from Obligees, indemnitors, Principals and others.

(f) *Loss does not include* the following expenses:

(1) Any unallocated expenses, or any clear mark-up on expenses or any overhead, of the Surety, its attorney, or any other party hired by the Surety or the attorney;

(2) Expenses paid for any suits, cross-claims, or counterclaims filed against the United States of America or any of its agencies, officers, or employees unless the Surety has received, prior to filing such suit or claim, written concurrence from SBA that the suit may be filed;

(3) Attorney's fees and court costs incurred by the Surety in a suit by or against SBA or its Administrator; and

(4) Fees, costs, or other payments, including tort damages, arising from a successful tort suit or claim by a Principal or any other Person against the Surety.

§ 115.17 Minimization of Surety's Loss.

(a) *Indemnity agreements and collateral—(1) Requirements.* The Surety must take all reasonable action to minimize risk of Loss including, but not limited to, obtaining from each Principal a written indemnity agreement which covers actual Losses under the Contract and Imminent Breach payments under § 115.34(a) or § 115.69. The indemnity agreement must be secured by such collateral as the Surety or SBA

finds appropriate. Indemnity agreements from other Persons, secured or unsecured, may also be required by the Surety or SBA.

(2) *Prohibitions.* No indemnity agreement may be obtained from the Surety, its agent or any other representative of the Surety. The Surety must not separately collateralize the portion of its bond which is not guaranteed by SBA.

(b) *Salvage and recovery—(1) General.* The Surety must pursue all possible sources of salvage and recovery. Salvage and recovery includes all payments made in settlement of the Surety's claim, even though the Surety has incurred other losses as a result of that Principal which are not reimbursable by SBA.

(2) *SBA's share.* SBA is entitled to its guaranteed percentage of all salvage and recovery from a defaulted Principal, its guarantors and indemnitors, and any other party, received by the Surety in connection with the guaranteed bond or any other bond issued by the Surety on behalf of the Principal unless such recovery is unquestionably identifiable as related solely to the non-guaranteed bond. The Surety must reimburse or credit SBA (in the same proportion as SBA's share of Loss) within 90 days of receipt of any recovery by the Surety.

(3) *Multiple Sureties.* In any dispute between two or more Sureties concerning recovery under SBA guaranteed bonds, the dispute must first be brought to the attention of OSG for an attempt at mediation and settlement.

§ 115.18 Refusal to issue further guarantees; suspension and termination of PSB status.

(a) *Improper surety bond guarantee practices—(1) Imprudent practices.* SBA may refuse to issue further guarantees to a Prior Approval Surety or may suspend the preferred status of a PSB Surety, by written notice stating all reasons for such decision and the effective date. Reasons for such a decision include, but are not limited to, a determination that the Surety (in its underwriting, its efforts to minimize Loss, its claims or recovery practices, or its documentation related to SBA guaranteed bonds) has failed to adhere to prudent standards or practices, including

any standards or practices required by SBA, as compared to those of other Sureties participating in the same SBA Surety Bond Guarantee Program to a comparable degree.

(2) *Regulatory violations, fraud.* Acts of wrongdoing such as fraud, material misrepresentation, breach of the Prior Approval or PSB Agreement, or regulatory violations (as defined in §§ 115.19(d) and 115.19(h)) also constitute sufficient grounds for refusal to issue further guarantees, or in the case of a PSB Surety, termination of preferred status.

(3) *Audit; records.* The failure of a Surety to consent to SBA's audit or to maintain and produce records constitutes grounds for SBA to refuse to issue further guarantees for a Prior Approval Surety, to suspend a PSB Surety from participation, and to refuse to honor claims submitted by a Prior Approval or PSB Surety until the Surety consents to the audit.

(4) *Excessive Losses.* If a Surety experiences excessive Losses on SBA guaranteed bonds relative to those of other Sureties participating in the same SBA Surety Bond Guarantee Program to a comparable degree, SBA may also require the renegotiation of the guarantee percentage and/or SBA's charge to the Surety for bonds executed thereafter.

(b) *Lack of business integrity.* A Surety's participation in the Surety Bond Guarantee Programs may be denied, suspended, or terminated upon the occurrence of any event in paragraphs (b) (1) through (5) of this section involving any of the following Persons: The Surety or any of its officers, directors, partners, or other individuals holding at least 20% of the Surety's voting securities, and any agents, underwriters, or any individual empowered to act on behalf of any of the preceding Persons.

(1) If a State or other authority has revoked, canceled, or suspended the license required of such Person to engage in the surety business, the right of such Person to participate in the SBA Surety Bond Guarantee Program may be denied, terminated, or suspended, as applicable, in that jurisdiction or in other jurisdictions. Ineligibility or suspension from the Surety Bond Guarantee Programs is for at

least the duration of the license suspension.

(2) If such Person has been indicted or otherwise formally charged with a misdemeanor or felony bearing on such Person's fitness to participate in the Surety Bond Guarantee Programs, the participation of such Person may be suspended pending disposition of the charge. Upon conviction, participation may be denied or terminated.

(3) If a final civil judgment is entered holding that such Person has committed a breach of trust or violation of a law or regulation protecting the integrity of business transactions or relationships, participation may be denied or terminated.

(4) If such Person has made a material misrepresentation or willfully false statement in the presentation of oral or written information to SBA in connection with an application for a surety bond guarantee or the presentation of a claim, or committed a material breach of the Prior Approval or PSB Agreement or a material violation of the regulations (all as described in § 115.19), participation may be denied or terminated.

(5) If such Person is debarred, suspended, voluntarily excluded from, or declared ineligible for participation in Federal programs, participation may be denied or terminated.

(c) *Notification requirement.* The Prior Approval or PSB Surety must promptly notify SBA of the occurrence of any event in paragraphs (b) (1) through (5) of this section, or if any of the Persons described in paragraph (b) of this section does not, or ceases to, qualify as a Surety. SBA may require submission of a Statement of Personal History (SBA Form 912) from any of these Persons.

(d) *SBA proceedings.* Decisions to suspend, terminate, deny participation in, or deny reinstatement in the Surety Bond Guarantee program are made by the AA/SG. A Surety may file a petition for review of suspensions and terminations with the SBA Office of Hearings and Appeals (OHA) under part 134 of this chapter. SBA's Administrator may, pending a decision pursuant to part 134 of this chapter, suspend the participation of any Surety for any of the causes listed in paragraphs (b) (1) through (5) of this section.

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(e) *Effect on guarantee.* A guarantee issued by SBA before a suspension or termination under this section remains in effect, subject to SBA's right to deny liability under the guarantee.

§ 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 not liable under a Prior Approval or PSB Agreement if any of the circumstances in paragraphs (a) through (h) of this section exist.

(a) *Excess Contract or bond amount.* The total Contract amount at the time of Execution of the bond exceeds \$2,000,000 in face value (see §115.12(e)), or the bond amount at any time exceeds the total Contract 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 \$50,000; 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 \$50,000 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 \$50,000.

(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