

Bonding Guarantee Assistance Program
Rules and Regulations

Bonding Guarantee Assistance Program

xxNYCRR Chapter x Part xxxx

Statutory Authority

**Section 16-f of the New York State Urban Development Corporation Act,
Chapter 174 of the Laws of 1968, as amended**

Historical Note

Part xxxx (Sections xxxx – xxxx) filed xx__, 2011 eff. xxx __ 2011

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Section I Purpose

The purpose of this rule and these regulations is to effectuate section 16-f of the New York State Urban Development Corporation Act, that authorizes the Bonding Guarantee Assistance Program, and to provide for the implementation and administration of the program by the New York State Urban Development Corporation which is authorized by the Program (i) to provide to surety companies the additional financial backing needed in order to induce such companies to issue payment and performance bonds for contractors that are small businesses, as defined in this rule, and certified, pursuant to article fifteen-A of the Executive Law, minority-owned business enterprises or women-owned business enterprises, in order for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects and (ii) to provide technical assistance in completing bonding applications for such contractors seeking to become eligible for bonding in preparation for bidding on construction projects, including transportation related projects.

Section II Definitions

a) "Agent" shall mean a third party that has entered into an agreement with the Corporation for the purpose of administering the Program.

b) “Bid Bond” shall mean a written guaranty provided to a principal by a surety on behalf of a contractor with a bid in order to ensure that upon acceptance of the bid by the principal, the contractor will proceed with the contract and will replace the bid bond with a performance bond.

c) “Program” shall mean the Bonding Guarantee Assistance Program created pursuant to section 16-f of the New York State Urban Development Corporation Act.

d) “Certified” shall mean certification of a business enterprise as a Minority-Owned Business Enterprise or a Women-Owned Business Enterprise pursuant to article 15-A of the Executive Law.

e) “Corporation” shall mean the new York State Urban Development Corporation d/b/a Empire State Development, a corporate governmental agency of the State of New York, constituting a political subdivision and public benefit corporation created by chapter one hundred seventy-four of the Laws of nineteen hundred sixty-eight, as amended.

f) “Minority-Owned Business Enterprise” shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: (i) at least fifty-one percent owned by one or more Minority Group Members; (ii) an enterprise in which such minority ownership is real, substantial and continuing; (iii) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (iv) an enterprise authorized to do business in this state and independently owned and operated; (v) an enterprise owned

by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (vi) an enterprise that is a Small Business, unless the term Minority-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

g) Minority Group Members shall mean persons who are:

1) Black;

2) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent or either Indian or Hispanic origin, regardless of race;

3) Asian and Pacific Islander persons having origins in the Far East, Southeast Asia, the Indian sub-continent or the Pacific Islands; or

4) American Indian or Alaskan Native persons having origins in any of the original people of North America and maintaining identifiable tribal affiliations through membership and participation or community identification, unless the term Minority Group Member is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

h) "Payment bond" shall mean a written guaranty provided to a principal by a surety on behalf of a contractor that guarantees that a contractor will pay suppliers, laborers, and subcontractors subject to contract terms for labor and materials.

i) "Performance bond" shall mean shall mean a written guaranty provided to a principal by a surety on behalf of a contractor that guarantees that a contractor will adhere to the terms and conditions of a contract.

j) "Small Business" shall mean a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, whose primary place of business is in New York State, and which employs one hundred or fewer persons on a full time basis, unless such term is otherwise defined in section 131 of the Economic Development Law, in which case the definition shall be as set forth for such term in such section.

k) "State" shall mean the State of New York.

l) "Surety Company" shall mean a surety company that has a certificate of solvency from, and its rates approved by, the State Department of Financial Services and/ or appears in the most current edition of the United States of America Department of Treasury Circular 570 as eligible to issue bonds in connection with procurement contracts for the United States of America.

m) "Women-Owned Business Enterprise" shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: 1) at least fifty-one percent owned by one or more United States citizens or permanent resident aliens who are women; 2) an enterprise in which the ownership interest of such women is real, substantial and continuing; 3) an enterprise in which such women ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; 4) an enterprise authorized to do business in State and independently

owned and operated; 5) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and 6) an enterprise that is a Small Business, unless the term Women-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

Section III Program Overview

- 1) The amount of additional financial backing Program assistance provided to a Surety Company with respect to each contract shall generally not be greater than the amount necessary to induce such Surety Company to issue the bonds required for the contract, provided, however, that the amount of such Program assistance shall not exceed fifty percent of the face value of bonds to be issued by the Surety Company for such contract.
- 2) The Corporation may provide to Small Businesses and Certified Minority-Owned Business Enterprises or Certified Women-Owned Business Enterprises seeking to become eligible for bonding in preparation for bidding on construction projects, including transportation related projects, technical assistance in completing bonding applications. The Corporation may provide technical assistance and may refer such businesses to the business service providers to the Department of Economic

Development for technical assistance as such businesses may need, including, but not limited to:

- a. a review of the applicant's market and business competitive strategy;
- b. consultation and review of the development and planned implementation of a working capital budget;
- c. assistance with applications for the receipt of funding from other financial sources and providing referrals to other appropriate public and private sources of financing; and
- d. assistance from the regional offices of the Department of Economic Development, pursuant to article 11 of the Economic Development Law, and the Entrepreneurial Assistance Program, pursuant to article 9 of such law, and any other such program receiving State funds from the New York State Urban Development Corporation Act or the Department of Economic Development or any other state agency that is intended to provide technical assistance to Small Businesses and Certified Minority-owned Business Enterprises and Certified Women-owned Business Enterprises.

Section IV Eligible Contractors

In order to be eligible for consideration for additional financial backing Program assistance, a contractor must be a Small Business or a Certified Minority-Owned Business Enterprise or

Certified Women-Owned Businesses Enterprise that is unable to obtain a bond from a Surety Company without Program assistance.

Preference for Program assistance is given to Certified Minority-Owned Business Enterprises and Certified Women-Owned Business Enterprises.

The Corporation may provide each Surety Company that participates in the Program with additional requirements or guidelines on contractor eligibility, such as minimum years in businesses, contract performance history, revenue limits or minimums, or other factors. The Surety Company may be required to verify information regarding Program eligible contractors or to secure such assurances from prospective Program eligible contractors as the Corporation may deem necessary.

Section V Eligible Surety Companies

In order to be eligible to participate in the Program, a surety must, among other requirements to be determined by the Corporation:

- i. have a certificate of solvency (pursuant to section 111 of the Insurance Law) from, and have its rates approved by, the State Department of Financial Services and/or appear in the most current edition of the United States of America Department of Treasury Circular 570 as eligible to issue bonds in connection with procurement contracts for the United States of America;

- ii. have a satisfactory performance record regarding contractor default, termination of contracts, application of satisfactory underwriting standards and principles and practices for evaluating contractor credit and capacity, and processing claims, including diligent and commercially reasonable recovery efforts; and
- iii. be rated B+ or higher if rated by A.M Best's Key Rating Guide Property/Casualty.

Section VI Financial Backing Program Assistance

Additional financial backing Program assistance is limited to financial backing necessary to secure Bid Bonds, Performance Bonds, and Payment Bonds issued in connection with a contract bids or awards. Such Program assistance shall be in such form as the Corporation may determine, and may include irrevocable standby letters of credits issued to a Surety Company by a financial institution for the account of the Corporation in connection the Surety Company providing such bonds on behalf of a Program eligible contractor with respect to a contract. The amount of such additional financial backing Program assistance provided to a Surety Company with respect to each contract shall generally not be greater than the amount necessary to induce such Surety Company to issue the bonds required for the contract, provided, however, that the amount of such Program assistance shall not exceed fifty percent of the face value of bonds to be issued by the Surety Company for such contract. Generally, a Surety Company may not receive additional financial backing Program assistance for more than two contracts for the same contractor at the same time.

Section VII Program Administration

- 1) In order for a Surety Company to participate in the Program, the Surety Company shall enter into a Program participation agreement with the Corporation in such form as the Corporation or the Agent may prescribe. Such agreements may include provisions for proof of contractor default; termination of contracts; underwriting standards and principles and practices used in evaluating credit and capacity; and requirements for the claims process, including requirements that the Surety Company conduct diligent and commercially reasonable recovery efforts.
- 2) The Corporation shall have the oversight and management of the Program, and the Corporation may engage an Agent for administration and implementation of the Program.
- 3) The Corporation may contract with one or more financial institutions in order that such financial institution will provide to Surety Companies, as additional financial backing Program assistance, letters of credit or other guarantees for the account of the Corporation.
- 4) The Corporation or the Agent shall evaluate applications for Program Assistance and make determinations as to business creditworthiness and whether to provide the requested additional financial backing Program assistance. Evaluations of eligible contractors may, among other things, include review of financial information, contract performance history, documents submitted to the Surety Company and other business information.

- 5) The Corporation may facilitate the provision of technical assistance to eligible Small Businesses and Certified Minority-Owned Business Enterprises and Certified Women-Owned Business Enterprises in accordance with applicable law and regulations.
- 6) The Corporation or the Agent shall prepare annual reports for the Program.

.Section VIII Fees

A participating Surety Company may charge application fees, commitment fees, bonding premiums and other reasonable fees and expenses pursuant to a schedule of fees and expenses adopted by the Surety Company and approved in writing by the Corporation. The Corporation may require a contractor participating in the Program to pay the Corporation for its out-of-pocket costs in connection the Program assistance for the contractor, including, without limiting the foregoing, the costs with respect to letter of credit and other guarantees to be provided to a Surety Company in connection with bonds for such contractor's contract.

Section IX Confidentiality and State Employees

- a) To the extent permitted by law, all information regarding the financial condition, marketing plans, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Program administered through the Participating Surety Company, shall be confidential and exempt from public disclosures.

- b) No full time employee of the State of New York or any agency, department, authority or public benefit corporation thereof shall be eligible to receive assistance under this Program.

Section X Non-Discrimination and Affirmative Action

The Corporation's affirmative action and non-discrimination policies and programs are grounded in both public policy and applicable law, including but not limited to, Section 2879 of the Public Authorities Law, Article 15-A of the Executive Law and Section 6254 (11) of the Unconsolidated Laws. These laws mandate the Corporation to take affirmative action in implementing programs. The Corporation has charged the affirmative action department with overall responsibility to ensure that the spirit of these mandates is incorporated into the Corporation's policies and projects. Where applicable, the affirmative action department will work with applicants in developing an appropriate Affirmative Action Program for business and employment opportunities generated by the Corporation's participation of the Program.