THE SURETY & FIDELITY ASSOCIATION OF AMERICA

SFAA & NASBP 2023
JOINT LEGISLATIVE FLY-IN

Key Messages

1 Surety bonds provide vital protections for public entities and taxpayers as well as subcontractors, workers, and suppliers on public construction projects. These protections are primarily required at the federal level through the Miller Act and, at the state level, through Little Miller Acts.

2 It is important to understand that surety bonds lower costs and reduce defaults on construction projects. A recent study by Ernst & Young (EY) found that contractor defaults are more likely to occur on unbonded projects than bonded projects (as much as 10x higher). The EY study also found that, when a default does occur, unbonded construction projects experienced substantially higher costs (85% higher) than bonded projects and take at least 2 times as long to complete.

3 To ensure federal investments in water infrastructure projects are protected, one of the key financing vehicles, the Water Infrastructure Finance and Innovation Act (WIFIA), should be modernized to include the same payment and performance bonding requirements that Congress recently enacted to protect Transportation Infrastructure Finance and Innovation Act (TIFIA)-financed projects. We urge you to support H.R. 1740.

4 Congress should mandate that public and private recipients of federal loan and grant funds dedicated for broadband infrastructure expansion through the US Department of Agriculture, Rural Utilities Service (RUS) require performance and payment bonds from their contractors at 100% of the cost of construction.

Surety Bond Protections Have Been Required for Over 100 Years

- The Federal Miller Act (40 U.S.C. Section 3131 to 3134) and similar regulatory requirements adopted in all 50 states have provided vital financial security to protect public construction projects by assuring contractors are qualified to perform the construction and that a reputable and knowledgeable surety stands ready to complete the job if a contractor fails to perform during the project.
- Surety bonds protect taxpayer dollars and ensure subcontractors and suppliers on public construction projects receive payment for their services in the event of a contractor default.

*All data based on analysis by EY

The Economic Value of Surety Bonds
by Ernst & Young (EY)

10x

Unbonded construction projects are more likely to default than bonded projects — by as much as 10 times.*

Nearly five times as many construction leaders report **bonded projects are more likely to be completed on time or ahead of schedule** than unbonded projects.*

The cost savings surety delivers for bonded projects cover the cost of the bonds themselves.*

If a contractor defaults on a bonded project, surety companies intervene, **lowering the cost of project completion by 85% and reducing the time to complete by two times**.*

* Executive Summary available at ***https://surety.org/wp-content/uploads/2022/11/EY-SFAA-Report-on-economic-value-of-surety-bonding-ES-2022-FINAL-1.pdf***. Full report available at ***https://surety.org/wp-content/uploads/2022/11/surety_protects_2022_report.pdf***

Support H.R. 1740
Background on WIFIA Bonding

- Bonding on public-private partnership projects (P3s) has been inconsistent.
- H.R. 1740 aims to clarify that performance and payment bonds are required to protect the public interest for all WIFIA-financed projects. H.R. 1740 allows the Secretary of the Army or EPA Administrator to accept existing state bonding requirements and would require bonding in the event a state does not have applicable requirements for bonding protections.
- SFAA, NASBP and industry partners closed this loophole for the TIFIA program in the IIJA – culminating in a 97-0 vote in the Senate – and are now pursuing H.R. 1740 to maintain parity with the two loan/grant funding programs: TIFIA and WIFIA.
- This legislation would be consistent with OMB Regulation 2 CFR 200.325 requiring all federal agencies to protect assets when awarding grants. Agencies can accept the bonding policy of non-federal grant recipients if such policies are sufficient; if not, then performance and payment bonds for 100% of the construction contract price are required.

Background on Broadband Expansion

- The U.S. Department of Agriculture's Rural Utilities Service (RUS), together with the Federal Communications Commission (FCC) and the Department of Commerce's National Telecommunications and Information Administration (NTIA), are the primary federal agencies responsible for financing and making broadband service available to rural communities by providing states, localities, and private entities with loan and grant opportunities to build broadband infrastructure.
- For states/localities receiving federal grants for rural broadband contracts through RUS involving construction, performance and payment bonds should be required on any construction portion to protect the financial interest of the federal government as well as to provide payment remedies for subcontractors and suppliers should the construction contractor fail to meet payment obligations.
- RUS broadband financing programs do not have clear bond requirements for construction connected with broadband infrastructure undertaken by loan and grant recipients. RUS programs provide loans and grants for water and wastewater rural infrastructure projects, however, regularly require provision of performance and payment bonds on such construction projects. Therefore, RUS should have consistent policies to protect federal taxpayer investments in rural infrastructure.

Federal funds are at the same risk no matter the construction delivery method

- For almost 100 years, the federal and state Miller Acts have protected against the risk of loss on public construction projects by requiring payment and performance bonds.
- Given the enactment of the $1.2 Trillion IIJA, Congress should clearly require bonding to ensure jobs are completed on time and workers are paid.
- Bonding ensures that only capable contractors are awarded publicly-funded work, preserves precious taxpayer dollars, and protects subcontractors and suppliers should the prime contractor fail to meet its payment obligations, ensuring completion of construction and infrastructure projects.

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