



July 29, 2022

Aaron Snyder
US Army Corp of Engineers (USACE)
USACE Water Infrastructure Financing Team
441 G. Street NW
Washington, DC 20314

RE: Docket Number COE-2022-0004; suggested language to include surety bonds to Part 386—Credit Assistance for Water Resources Infrastructure Projects

Submitted via <https://www.regulations.gov>

Dear Mr. Snyder;

On behalf of the National Association of Surety Bond Producers (NASBP)¹ and The Surety & Fidelity Association of America (SFAA)², we submit comments and suggested language for consideration on the proposed rule implementing a new credit assistance program consistent with the funding provided under Subtitle C of Title V of the Water Resources Reform and Development Act of 2014 (WRRDA), often referred to as the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA), for safety projects to maintain, upgrade, and repair dams as recommended by the USACE.

Surety Bonds—Background

The federal government long has recognized the importance of surety bonding requirements for its direct public works procurements. The federal Miller Act (40 U.S.C. §§ 3131-3134), enacted in 1935, and related regulations, require the general contractor to post a payment and performance bond on any direct federal construction contract in excess of \$150,000. The performance bond assures the public entity and taxpayers the construction contract will be performed fully according to its terms and conditions. The payment bond provides invaluable protection to parties furnishing labor and/or materials on federal construction projects.

Requiring Payment and Performance bonds on all federally-financed projects is critical for protecting federal assets

It is critical the financial interests of the federal government are protected on projects, as well as the federal funds themselves. Whether the federal government directly funds or finances a project through schemes such as loans and/or grants, federal assets are at stake, and therefore, federal regulations have been enacted to protect these federal funds.

Water projects funded under WIFIA generally are procured by state and local owners, and therefore would ordinarily be subject to state bonding requirements (known as Little Miller Acts). Several federal agencies also require bonding to ensure federal funds obtained in the form of grants, loans and loan guarantees are secured when used to finance public construction projects. The following regulations do not supplant state bond requirements but establish a critical and uniform floor to ensure adequate bonding is in place, regardless of variations in state requirements. We strongly urge the USACE to consider including regulatory guidelines in its final WIFIA regulations consistent with the

¹ NASBP is a national trade association whose membership includes firms employing licensed surety bond producers placing bid, performance, and payment bonds throughout the United States and its territories.

² SFAA is a national trade association of more than 400 insurance companies that write 98 percent of surety and fidelity bonds in the U.S. SFAA is licensed as a rating or advisory organization in all states, and it has been designated by state insurance departments as a statistical agent for the reporting of fidelity and surety experience.

precedent cited below. By doing so, USACE will make certain subcontractors and suppliers have payment remedies available in the event of nonpayment, while also protecting precious taxpayer dollars by ensuring the government receives a completed project from a qualified, financially fit construction company or its surety as bargained for and thereby protecting the federal funds financing the project. Such protections are particularly needed when the federal government provides credit assistance to private parties undertaking water infrastructure projects for public benefit, as, in such instances, state or local requirements for performance and payment bonds may not be clear or even exist.

Cited examples where federal agencies require bonds

Below is a non-exhaustive list of various federal agencies, including regulatory citations, which require a grant recipient to follow state or federal bonding requirements when receiving federal loans and/or grant funds.

1. The Office of Management and Budget (OMB) 2 CFR § 200.325 - Bonding requirements.

In accordance with 2 CFR 200.325 Subtitle A, OMB Guidance for Grants and Agreements, for construction or facility improvement in contracts that exceed the simplified acquisition threshold, the federal agency can accept the bonding policy and requirements of the non-federal entity recipient if the federal agency determines they are sufficient to protect federal interests. If such bonding policy is not acceptable, a 5% bid guarantee and a performance and payment bond for 100% of the contract price is required.

2. U.S. Federal Aviation Administration (FAA) Title 2 CFR Part 200

Subtitle D—Airport Improvement Program Modifications (AIP) of the 2012 FAA Modernization and Reform Act (PL 112-95) addressed federal grants for commercial service and general airports. The current National Plan of Integrated Airport Systems (NPIAS) has identified over 3,300 commercial service and general aviation airports that are eligible to receive federal grants under the AIP for infrastructure development projects. Procurement and contracting for AIP projects must adhere to the provisions outlined in Title 2, CFR part 200, Subpart D, §200.304, Bonding requirements.

3. U.S. Department of Housing and Urban Development (HUD)—24 CFR PART 85 Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments § 85.36 Procurement, (h) Bonding requirements.

For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency determines the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows: a bid guarantee from each bidder equivalent to five percent of the bid price; a performance bond on the part of the contractor for 100 percent of the contract price; a payment bond is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

4. U.S. Department of Transportation (DOT) 49 CFR Title: Part 18—"Uniform Administrative Requirements for Grants and Cooperative Agreements to state and local governments" (§18.36 Procurement, (h) Bonding requirements) Title 49 - Transportation. Subtitle A - Office of the Secretary of Transportation

The U.S. Department of Transportation regulations contain a surety bond requirement for transportation projects involving federal grant funds for state highway construction projects at 49 CFR Part 18. These requirements specifically address bonding for state-level construction projects financed partly by federal grants, establishing performance and payment bonds for 100% of the construction amount is the minimal standard for such partially federally financed projects.

5. U.S. Armed Services Title 10 – Armed Services Subtitle A - General Military Law, Part IV – Service, Supply, and Procurement, Chapter 169- Military Construction and Military Family Housing Subchapter IV – Alternative Authority for Acquisition and Improvement of Military Housing

In 1996 the Military Housing Privatization Initiative (MHPI) privatized the construction and management of military housing through 50-year long contracts with private entities. Although viewed as a success, the MHPI experienced some significant performance and quality issues. There were unreliable contractors and others unwilling to make

repairs. Several situations prompted discussions in Congress regarding the need for better accountability on military housing privatization projects, including better methods to award project. To address this, in 2008 Congress included bond requirements in the National Defense Authorization Act for Fiscal Year 2009, which is now codified at 10 U.S.C. § 2885, “Oversight and accountability for privatization projects,” (c) Bonding Levels.

Bonds required for TIFIA Program

Infrastructure Investment & Jobs Act (IIJA)—Public Law 117-58, Nov. 2021, Sec. 12002, “Federal Requirements for the Transportation Infrastructure Finance and Innovation Act (TIFIA) Eligibility and Project Selection,” (a)(3), “Payment and Performance Security.”

Congress recognized the importance of surety bond requirements in the recently enacted IIJA to include performance and payment security on federally financed infrastructure projects receiving loans and grants under TIFIA, including public-private projects (P3s). The language requires that if there are no payment and performance security requirements applicable to the obligor, the security under section 3131(b) of title 40 (Miller Act 40 U.S.C. §§ 3131-3134) or an equivalent State or local requirement, as determined by the Secretary, shall be required.” This language is consistent with OMB Regulation 2 CFR 200.325 as referenced above.

Suggested changes to proposed rule

Based on the policy arguments and examples of federal agencies with similar requirements presented above, NASBP and SFAA strongly suggest including bond requirements as a condition for those receiving credit assistance under WIFIA by amending the following sections in the proposed rule:

Section §386.5, Federal requirements (d) Other authorities. “Other Federal and compliance requirements as may be applicable,” INCLUDING OMB REGULATIONS, 2 CFR § 200.325 - Bonding requirements.

Section §386.13 Closing on the Loan Agreement or Loan Guarantee Agreement.

(2)(v) The borrower is pledging collateral and/or providing a general obligation pledge, determined by the Corps to be necessary to secure the repayment of the credit agreement WHICH INCLUDES A REQUIREMENT THAT BORROWER AS A CONDITION OF CREDIT ASSISTANCE SHALL REQUIRE PERFORMANCE AND PAYMENT BONDS FROM PARTIES PERFORMING CONSTRUCTION, ALTERATION, MAINTENANCE, OR REPAIR OF A PROJECT consistent with the Miller Act or applicable state little miller act.

Final observation--Conclusion

Although procurement methods have evolved—including the increased use of federal loans, grants and public-private partnerships—the construction risks remain the same, making surety bonds just as relevant and important today on any type of public works project. The surety provides a bond only to those contractors that, based on the surety's experience and evaluation, can perform the work and will pay subcontractors, suppliers and workers furnishing labor and materials on the job. The surety's pre-qualification aims to prevent default, and by issuing a bond, the surety provides the public contracting entity with assurance from an independent third party that the contractor can perform and fulfill its obligations under the construction contract. If the contractor does default for some reason, the surety performs its obligations under the bond drawing on its own funds to rectify the default. Other federal agencies referenced above recognize the critical role surety bonds play to mitigate risk and to protect the federal interest, the federal purse, and the payment remedies of the many downstream parties which participate on the projects as subcontractors and suppliers by implementing similar requirements on their funded projects.

For the reasons stated, NASBP and SFAA believe it is critical to ensure surety bonding is a required protection for the construction portion of projects receiving financing through WIFIA. Therefore, we respectfully urge the USACE to include the important protections of performance bonds and payment bonds in your final rules.

NASBP and SFAA are available to answer any questions concerning the points expressed in our letter. Thank you for your consideration of our request.

Sincerely,

National Association of Surety Bond Producers

A handwritten signature in black ink, appearing to read "Lawrence E. LeClair".

Lawrence E. LeClair
Director, Government Relations

The Surety & Fidelity Association of America

A handwritten signature in blue ink, appearing to read "Julie Alleyne".

Julie Alleyne
Vice President, Policy and General Counsel