

erty, or assets derived by him from his operations in connection with section 694-1 of this title shall be deposited in the fund. All expenses and payments, excluding administrative expenses, pursuant to operations of the Administrator under section 694-1 of this title shall be paid from the fund. Moneys in the fund not needed for the payment of current operating expenses or for the payment of claims arising under this part may be invested in bonds or other obligations of, or bonds or other obligations guaranteed as to principal and interest by, the United States; except that moneys provided as capital for the fund shall not be so invested.

(Pub. L. 85-699, title IV, §405, as added Pub. L. 94-305, title I, §102, June 4, 1976, 90 Stat. 665; amended Pub. L. 95-89, title I, §104, Aug. 4, 1977, 91 Stat. 556; Pub. L. 96-302, title I, §112, July 2, 1980, 94 Stat. 837.)

### Editorial Notes

#### AMENDMENTS

1980—Pub. L. 96-302 inserted investment of idle funds provision.

1977—Pub. L. 95-89 prohibited payment of administrative expenses from the fund and deleted provisions which authorized: a \$15,000,000 appropriation of capital for the fund; payment during the fiscal year into the Treasury as miscellaneous receipts, from the fund, of interest on the cumulative amount of appropriations available as capital to the fund less the average undisbursed cash balance in the fund during the year; and investment of noncapital moneys, when not needed for payment of current operating expenses or claims arising under section 694-2 of this title, in Federal bonds or obligations or bonds or obligations guaranteed by the United States as to principal and interest.

### Statutory Notes and Related Subsidiaries

#### EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96-302 effective Oct. 1, 1980, see section 507 of Pub. L. 96-302, set out as a note under section 631 of this title.

#### EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95-89 effective Oct. 1, 1977, see section 106 of Pub. L. 95-89, set out as a note under section 633 of this title.

### PART B—SURETY BOND GUARANTEES

### § 694a. Definitions

As used in this part—

(1) The term “bid bond” means a bond conditioned upon the bidder on a contract entering into the contract, if he receives the award thereof, and furnishing the prescribed payment bond and performance bond.

(2) The term “payment bond” means a bond conditioned upon the payment by the principal of money to persons under contract with him.

(3) The term “performance bond” means a bond conditioned upon the completion by the principal of a contract in accordance with its terms.

(4) The term “surety” means the person who (A) under the terms of a bid bond, undertakes to pay a sum of money to the obligee in the event the principal breaches the conditions of the bond, (B) under the terms of a performance bond, undertakes to incur the cost of fulfilling

the terms of a contract in the event the principal breaches the conditions of the contract, (C) under the terms of a payment bond, undertakes to make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract if the principal fails to make prompt payment, or (D) is an agent, independent agent, underwriter, or any other company or individual empowered to act on behalf of such person.

(5) The term “obligee” means (A) in the case of a bid bond, the person requesting bids for the performance of a contract, or (B) in the case of a payment bond or performance bond, the person who has contracted with a principal for the completion of the contract and to whom the obligation of the surety runs in the event of a breach by the principal of the conditions of a payment bond or performance bond.

(6) The term “principal” means (A) in the case of a bid bond, a person bidding for the award of a contract, or (B) the person primarily liable to complete a contract for the obligee, or to make payments to other persons in respect of such contract, and for whose performance of his obligation the surety is bound under the terms of a payment or performance bond. A principal may be a prime contractor or a subcontractor.

(7) The term “prime contractor” means the person with whom the obligee has contracted to perform the contract.

(8) The term “subcontractor” means a person who has contracted with a prime contractor or with another subcontractor to perform a contract.

(9) Notwithstanding any other provision of law or any rule, regulation, or order of the Administration, for purpose of sections 694a, 694b, and 694c of this title the term “small business concern” means a business concern that meets the size standard for the primary industry in which such business concern, and the affiliates of such business concern, is engaged, as determined by the Administrator in accordance with the North American Industry Classification System.

(Pub. L. 85-699, title IV, §410, as added Pub. L. 91-609, title IX, §911(a)(4), Dec. 31, 1970, 84 Stat. 1812; amended Pub. L. 95-507, title I, §110, Oct. 24, 1978, 92 Stat. 1758; Pub. L. 111-5, div. A, title V, §508(c), Feb. 17, 2009, 123 Stat. 158; Pub. L. 112-239, div. A, title XVI, §1695(c), Jan. 2, 2013, 126 Stat. 2090.)

### Editorial Notes

#### AMENDMENTS

2013—Par. (9). Pub. L. 112-239 added par. (9).

2009—Par. (9). Pub. L. 111-5, §508(c), (f), temporarily added par. (9) which read as follows: “Notwithstanding any other provision of law or any rule, regulation, or order of the Administration, for purposes of sections 694a, 694b, and 694c of this title the term “small business concern” means a business concern that meets the size standard for the primary industry in which such business concern, and the affiliates of such business concern, is engaged, as determined by the Administrator in accordance with the North American Industry Classification System.” See Termination Date of 2009 Amendment note below.

1978—Par. (4)(D). Pub. L. 95-507 added cl. (D).

**Statutory Notes and Related Subsidiaries****TERMINATION DATE OF 2009 AMENDMENT**

Pub. L. 111-5, div. A, title V, §508(f), Feb. 17, 2009, 123 Stat. 159, provided that: “The amendments made by this section [amending this section and section 694b of this title] shall remain in effect until September 30, 2010.”

**TECHNICAL ASSISTANCE IN CONNECTION WITH CONSTRUCTION CONTRACTS; AUTHORIZATION OF APPROPRIATIONS**

Section 911(b) of Pub. L. 91-609 authorized the Secretary of Housing and Urban Development to take such steps and carry out such activities as he determined to be necessary or desirable to provide, either directly or by contract or other arrangement, technical assistance to any contractor or subcontractor for whom a bid, payment, or performance bond is guaranteed under part B of title IV of the Small Business Investment Act of 1958 [this part] in connection with any construction contract, in order to assist such contractor or subcontractor in obtaining or carrying out such contract, and authorized to be appropriated for each of the first three fiscal years ending after the date of the enactment of this Act [Dec. 31, 1970] such sums, not to exceed \$1,500,000, as were necessary to enable the Secretary to carry out his functions under paragraph (1).

**§ 694b. Surety bond guarantees****(a) Authority of Administration to guarantee surety against loss from principal's breach of bond**

(1)(A) The Administration may, upon such terms and conditions as it may prescribe, guarantee and enter into commitments to guarantee any surety against loss resulting from a breach of the terms of a bid bond, payment bond, performance bond, or bonds ancillary thereto, by a principal on any total work order or contract amount at the time of bond execution that does not exceed \$6,500,000, as adjusted for inflation in accordance with section 1908 of title 41.

(B) The Administrator may guarantee a surety under subparagraph (A) for a total work order or contract amount that does not exceed \$10,000,000, if a contracting officer of a Federal agency certifies that such a guarantee is necessary.

(2) The terms and conditions of said guarantees and commitments may vary from surety to surety on the basis of the Administration's experience with the particular surety.

(3) The Administration may authorize any surety, without further administration approval, to issue, monitor, and service such bonds subject to the Administration's guarantee.

(4) No such guarantee may be issued, unless—

(A) the person who would be principal under the bond is a small business concern;

(B) the bond is required in order for such person to bid on a contract, or to serve as a prime contractor or subcontractor thereon;

(C) such person is not able to obtain such bond on reasonable terms and conditions without a guarantee under this section; and

(D) there is a reasonable expectation that such principal will perform the covenants and conditions of the contract with respect to which such bond is required, and the terms and conditions of such bond are reasonable in the light of the risks involved and the extent of the surety's participation.

(5)(A) The Administration shall promptly act upon an application from a surety to participate

in the Preferred Surety Bond Guarantee Program, authorized by paragraph (3), in accordance with criteria and procedures established in regulations pursuant to subsection (d).

(B) The Administration is authorized to reduce the allotment of bond guarantee authority or terminate the participation of a surety in the Preferred Surety Bond Guarantee Program based on the rate of participation of such surety during the 4 most recent fiscal year quarters compared to the median rate of participation by the other sureties in the program.

**(b) Indemnification of surety against loss from avoiding breach**

Subject to the provisions of this section, in connection with the issuance by the Administration of a guarantee to a surety as provided by subsection (a), the Administration may agree to indemnify such surety against a loss sustained by such surety in avoiding or attempting to avoid a breach of the terms of a bond guaranteed by the Administration pursuant to subsection (a): *Provided, however—*

(1) prior to making any payment under this subsection, the Administration shall first determine that a breach of the terms of such bond was imminent;

(2) a surety must obtain approval from the Administration prior to making any payments pursuant to this subsection unless the surety is participating under the authority of subsection (a)(3); and

(3) no payment by the Administration pursuant to this subsection shall exceed 10 per centum of the contract price unless the Administrator determines that a greater payment should be made as a result of a finding by the Administrator that the surety's loss sustained in avoiding or attempting to avoid such breach was necessary and reasonable.

In no event shall the Administration pay a surety pursuant to this subsection an amount exceeding the guaranteed share of the bond available to such surety pursuant to subsection (a).

**(c) Limitation of liability**

Any guarantee or agreement to indemnify under this section shall obligate the Administration to pay to the surety a sum—

(1) not to exceed 90 per centum of the loss incurred and paid by a surety authorized to issue bonds subject to the Administration's guarantee under subsection (a)(3);

(2) not to exceed 90 per centum of the loss incurred and paid in the case of a surety requiring the Administration's specific approval for the issuance of such bond, but in no event may the Administration make any duplicate payment pursuant to subsection (b) or any other subsection;

(3) equal to 90 per centum of the loss incurred and paid in the case of a surety requiring the administration's<sup>1</sup> specific approval for the issuance of a bond, if—

(A) the total amount of the contract at the time of execution of the bond or bonds is \$100,000 or less, or

(B) the bond was issued to a small business concern owned and controlled by socially

<sup>1</sup> So in original. Probably should be capitalized.