

112TH CONGRESS
1ST SESSION

H. R. 688

To amend title 49, United States Code, to provide authority to the Secretary of Transportation to guarantee sureties against loss resulting from a breach of the terms of a bond by an eligible small business concern, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 14, 2011

Mr. CUMMINGS introduced the following bill; which was referred to the Committee on Transportation and Infrastructure

A BILL

To amend title 49, United States Code, to provide authority to the Secretary of Transportation to guarantee sureties against loss resulting from a breach of the terms of a bond by an eligible small business concern, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Department of Trans-
5 portation Bonding Assistance Authority Act of 2011”.

1 **SEC. 2. AUTHORITY OF SECRETARY TO GUARANTEE SUR-**
2 **ETY AGAINST LOSS FROM PRINCIPAL'S**
3 **BREACH OF BOND.**

4 Subsection (e) of section 332 of title 49, United
5 States Code, is amended to read as follows:

6 “(e) AUTHORITY OF SECRETARY TO GUARANTEE
7 SURETY AGAINST LOSS FROM PRINCIPAL’S BREACH OF
8 BOND.—

9 “(1) AUTHORITY.—

10 “(A) IN GENERAL.—The Secretary may,
11 upon such terms and conditions as the Sec-
12 retary may prescribe, guarantee and enter into
13 commitments to guarantee any surety against
14 loss resulting from a breach of the terms of a
15 bid bond, payment bond, performance bond, or
16 bonds ancillary thereto, by a principal.

17 “(B) LIMITATION.—No such guarantee
18 may be issued, unless—

19 “(i) the person who would be principal
20 under the bond is an eligible small busi-
21 ness concern;

22 “(ii) the bond is required in order for
23 such person to bid on a contract, or to
24 serve as a prime contractor or subcon-
25 tractor thereon;

1 “(iii) such person is not able to obtain
2 such bond on reasonable terms and condi-
3 tions without a guarantee under this sub-
4 section; and

5 “(iv) there is a reasonable expectation
6 that such principal will perform the cov-
7 enants and conditions of the contract with
8 respect to which such bond is required,
9 and the terms and conditions of such bond
10 are reasonable in light of the risks involved
11 and the extent of the surety’s participa-
12 tion.

13 “(2) INDEMNIFICATION OF SURETY AGAINST
14 LOSS FROM AVOIDING BREACH.—Subject to the pro-
15 visions of this subsection, in connection with the
16 issuance by the Secretary of a guarantee to a surety
17 under paragraph (1), the Secretary may agree to in-
18 demnify such surety against a loss sustained by such
19 surety in avoiding or attempting to avoid a breach
20 of the terms of a bond guaranteed by the Secretary
21 in accordance with the following:

22 “(A) Prior to making any payment under
23 this paragraph, the Secretary shall first deter-
24 mine that a breach of the terms of such bond
25 was imminent.

1 “(B) A surety must obtain approval from
2 the Secretary prior to making any payments
3 pursuant to this paragraph.

4 “(C) No payment by the Secretary pursu-
5 ant to this paragraph shall exceed 10 percent of
6 the contract price unless the Secretary deter-
7 mines that a greater payment should be made
8 as a result of a finding by the Secretary that
9 the surety’s loss sustained in avoiding or at-
10 tempting to avoid such breach was necessary
11 and reasonable.

12 “(D) In no event shall the Secretary pay a
13 surety pursuant to this paragraph an amount
14 exceeding the guaranteed share of the bond
15 available to such surety pursuant to paragraph
16 (1).

17 “(3) REIMBURSEMENT OF SURETY.—

18 “(A) IN GENERAL.—Any guarantee or
19 agreement to indemnify under this subsection
20 shall obligate the Secretary to pay to the surety
21 a sum—

22 “(i) not to exceed 90 percent of the
23 loss incurred and paid by the surety, but
24 in no event may the Secretary make any

1 duplicate payment pursuant to paragraph
2 (2) or any other paragraph; or

3 “(ii) determined pursuant to para-
4 graph (2), if applicable.

5 “(B) EXCEPTION.—Pursuant to any such
6 guarantee or agreement, the Secretary shall re-
7 imburse the surety, as provided in subpara-
8 graph (A), except that the Secretary shall be
9 relieved of all liability if—

10 “(i) the surety obtained such guar-
11 antee or agreement, or applied for such re-
12 imbursement, by fraud or material mis-
13 representation;

14 “(ii) the surety has breached a mate-
15 rial term or condition of such guarantee or
16 agreement; or

17 “(iii) the surety has substantially vio-
18 lated the regulations issued by the Sec-
19 retary pursuant to paragraph (4).

20 “(4) REGULATIONS.—The Secretary may estab-
21 lish and periodically review regulations for partici-
22 pating sureties which shall require such sureties to
23 meet the Secretary’s standards for underwriting,
24 claim practices, and loss ratios.

1 “(5) PROCEDURE FOR REIMBURSEMENT.—The
2 Secretary may, upon such terms and conditions as
3 the Secretary may prescribe, adopt a procedure for
4 reimbursing a surety for its paid losses billed each
5 month, based upon prior monthly payments to such
6 surety, with subsequent adjustments after such dis-
7 bursement.

8 “(6) REPORTS TO AND AUDITS BY THE SEC-
9 RETARY.—

10 “(A) REPORTS TO THE SECRETARY.—The
11 Secretary shall require each participating surety
12 to make reports to the Secretary at such times
13 and in such forms as the Secretary requires.

14 “(B) AUDITS BY THE SECRETARY.—The
15 Secretary may at all reasonable times audit, in
16 the offices of a participating surety, all docu-
17 ments, files, books, records, and other material
18 relevant to the Secretary’s guarantee, commit-
19 ments to guarantee, or agreements to indemnify
20 any surety pursuant to this subsection.

21 “(C) TIMING.—Each participating surety
22 shall be audited at least once every three years
23 by examiners selected and approved by the Sec-
24 retary.

1 “(7) ADMINISTRATIVE PROVISIONS.—The Sec-
2 retary shall administer this subsection on a prudent
3 and economically justifiable basis and establish such
4 fee or fees for eligible small business concerns and
5 premium or premiums for sureties as the Secretary
6 deems reasonable and necessary, to be payable at
7 such time and under such conditions as may be de-
8 termined by the Secretary.

9 “(8) STATE PROGRAM.—

10 “(A) IN GENERAL.—The Secretary shall
11 establish a program under which not more than
12 5 States may be selected to carry out, with a
13 portion of the amounts appropriated for this
14 subsection, the following:

15 “(i) Activities of the Secretary under
16 this subsection with respect to issuing
17 guarantees.

18 “(ii) Activities of a surety to assist eli-
19 gible small business concerns.

20 “(B) ASSESSMENTS AND STANDARDS.—
21 States selected to participate in the program
22 under subparagraph (A) shall be subjected to
23 such assessments and shall meet such stand-
24 ards and conditions as the Secretary may pre-
25 scribe.

1 “(C) REPORTS BY STATES.—A State se-
2 lected to participate in the program under sub-
3 paragraph (A) shall submit to the Secretary an
4 annual report describing, at a minimum, the
5 nature of the program such State administers,
6 the total number and amounts of guarantees
7 provided by the program, and the number of el-
8 igible small business concerns that have partici-
9 pated in the program.

10 “(9) ANNUAL REPORT.—Not later than June 1,
11 2012, and annually thereafter, the Secretary shall
12 submit to the Committee on Transportation and In-
13 frastructure of the House of Representatives and the
14 Committee on Commerce, Science, and Transpor-
15 tation of the Senate a report that describes, at a
16 minimum—

17 “(A) the actions taken to implement this
18 subsection;

19 “(B) the number of sureties that have re-
20 ceived guarantees, the States with respect to
21 which guarantees were issued, the number of el-
22 igible small business concerns that have partici-
23 pated in the program, and the number and
24 total amount of guarantees paid by the Sec-
25 retary; and

1 “(C) the number of States that have ap-
2 plied to manage amounts under the program es-
3 tablished under paragraph (8), the number of
4 States approved to participate in such program,
5 and the results achieved by States participating
6 in such program.

7 “(10) DEFINITIONS.—In this subsection, the
8 following definitions apply:

9 “(A) BID BOND.—The term ‘bid bond’
10 means a bond conditioned upon the bidder on
11 a contract entering into the contract, if the bid-
12 der receives the award thereof, and furnishing
13 the prescribed payment bond and performance
14 bond.

15 “(B) ELIGIBLE SMALL BUSINESS CON-
16 CERN.—The term ‘eligible small business con-
17 cern’ means an entity determined by the Sec-
18 retary to be any of the following:

19 “(i) A small business concern owned
20 and controlled by socially and economically
21 disadvantaged individuals (as such term is
22 defined in section 8(d)(3) of the Small
23 Business Act (15 U.S.C. 637(d)(3))).

24 “(ii) A small business concern owned
25 and controlled by service-disabled veterans

1 (as such term is defined under section 3(q)
2 of the Small Business Act (15 U.S.C.
3 632(q)).

4 “(iii) A qualified HUBZone small
5 business concern (as such term is defined
6 under section 3(p) of the Small Business
7 Act (15 U.S.C. 632(p))).

8 “(iv) A small business concern owned
9 and controlled by women (as such term is
10 defined under section 3(n) of the Small
11 Business Act (15 U.S.C. 632(n))).

12 “(C) OBLIGEE.—The term ‘obligee’
13 means—

14 “(i) in the case of a bid bond, the per-
15 son requesting bids for the performance of
16 a contract; or

17 “(ii) in the case of a payment bond or
18 performance bond, the person who has con-
19 tracted with a principal for the completion
20 of the contract and to whom the obligation
21 of the surety runs in the event of a breach
22 by the principal of the conditions of a pay-
23 ment bond or performance bond.

24 “(D) PAYMENT BOND.—The term ‘pay-
25 ment bond’ means a bond conditioned upon the

1 payment by the principal of money to persons
2 under contract with the principal.

3 “(E) PERFORMANCE BOND.—The term
4 ‘performance bond’ means a bond conditioned
5 upon the completion by the principal of a con-
6 tract in accordance with its terms.

7 “(F) PRIME CONTRACTOR.—The term
8 ‘prime contractor’ means the person with whom
9 the obligee has contracted to perform the con-
10 tract.

11 “(G) PRINCIPAL.—The term ‘principal’
12 means a person who may be a prime contractor
13 or a subcontractor and—

14 “(i) in the case of a bid bond, is bid-
15 ding for the award of a contract; or

16 “(ii) is primarily liable to complete a
17 contract for the obligee, or to make pay-
18 ments to other persons in respect of such
19 contract, and for whose performance of his
20 obligation the surety is bound under the
21 terms of a payment or performance bond.

22 “(H) SECRETARY.—The term ‘Secretary’
23 means the Secretary of Transportation, acting
24 through the Minority Resource Center estab-
25 lished under subsection (b).

1 “(I) SUBCONTRACTOR.—The term ‘subcon-
2 tractor’ means a person who has contracted
3 with a prime contractor or with another subcon-
4 tractor to perform a contract.

5 “(J) SURETY.—The term ‘surety’ means
6 the person or State that—

7 “(i) under the terms of a bid bond,
8 undertakes to pay a sum of money to the
9 obligee in the event the principal breaches
10 the conditions of the bond;

11 “(ii) under the terms of a perform-
12 ance bond, undertakes to incur the cost of
13 fulfilling the terms of a contract in the
14 event the principal breaches the conditions
15 of the contract;

16 “(iii) under the terms of a payment
17 bond, undertakes to make payment to all
18 persons supplying labor and material in
19 the prosecution of the work provided for in
20 the contract if the principal fails to make
21 prompt payment; or

22 “(iv) is an agent, independent agent,
23 underwriter, or any other company or indi-
24 vidual empowered to act on behalf of such
25 person or State.

1 “(11) AUTHORIZATION OF APPROPRIATIONS.—
2 There is authorized to be appropriated to the Sec-
3 retary to carry out activities under this subsection
4 \$50,000,000 for each of fiscal years 2012 through
5 2016, of which not more than \$20,000,000 may be
6 made available each fiscal year to carry out activities
7 under paragraph (8).”.

8 **SEC. 3. NATIONAL INFORMATION CLEARINGHOUSE.**

9 Section 332(b)(1) of title 49, United States Code, is
10 amended by striking “the maintenance, rehabilitation, re-
11 structuring, improvement, and revitalization of the rail-
12 roads of the United States” and inserting “any Federal,
13 State, or local mode of transportation”.

14 **SEC. 4. PROVISION OF RELEVANT INFORMATION.**

15 Section 332(d) of title 49, United States Code, is
16 amended by striking “United States Railway Association,
17 the Consolidated Rail Corporation, and the”.

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