



**Office of the Attorney General
State of Texas**

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ATTORNEY GENERAL

October 6, 1992

Honorable Garfield W. Thompson
Texas House of Representatives
P. O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 92-61

Re: Whether a political subdivision may prevent sureties licensed under the Insurance Code from making construction bonds under article 5160, V.T.C.S., unless such sureties are listed on the United States Department of Treasury List of Approved Sureties (ID# 16744)

Dear Representative Thompson:

You have asked whether a political subdivision may prevent sureties licensed under the Insurance Code from making construction bonds under article 5160, V.T.C.S., unless such sureties are listed on the United States Department of Treasury List of Approved Sureties.

The relevant statutes for our inquiry are article 5160, V.T.C.S., concerning performance and payment bonds for the construction, alteration, or repair of public buildings or public works, and article 7.19-1 of the Insurance Code, concerning the bonds of a surety company. Both these provisions were amended during the most recent session of the Texas Legislature. See Acts 1991, 72d Leg., ch. 242, §§ 11.28, 11.29, at 1067 (amending both); Acts 1991, 72d Leg., 2d C.S., ch. 12, § 5.01, at 319 (amending art. 7.19-1).

Article 5160 requires "[a]ny person or persons, firm or corporation" which enters into a contract worth more than \$25,000 with a governmental entity for the construction, alteration or repair of any public building or the prosecution or completion of any public work, to execute a performance bond and a payment bond in the amount of the contract. V.T.C.S. art. 5160(A). According to the 1991 amendment, "[e]ach such bond shall be executed by a corporate surety or corporate sureties in accordance with" article 7.19-1 of the Insurance Code. *Id.* Before the

1991 amendment, article 5160 only required that such surety or sureties be "duly authorized and admitted to do business in this State."

Under article 7.19-1, as amended,

[w]henever any bond ... is, by law or the charter, ordinances, rules and regulations of a [governmental entity], required or permitted to be made ... such bond ... may be executed by a surety company duly authorized to do business in this state; and, except as provided by Subsection (b) of this section, such execution by such company of such bond ... shall be in all respects a full and complete compliance with every law, charter, rule or regulation

Ins. Code art. 7.19-1(a). Subsection (b) of article 7.19-1 requires that if a surety writes a bond in an amount in excess of 10 percent of the surety company's capital and surplus, the amount in excess of 10 percent must be reinsured by reinsurers who are duly authorized, accredited, or trusted to do business in this state.

Reading the statutes together, we conclude that governmental entities generally may not require that a surety writing a performance bond or payment bond on a public construction project be on the United States Department of Treasury List of Approved Sureties. *But see* Local Gov't Code § 271.025(e) (county with a population of 2.2 million or more may establish financial criteria for surety companies). Any surety duly authorized to do business in Texas may write performance and payment bonds on a project without reinsurance to the limit of 10 percent of its capital and surplus. Such a surety must reinsure any obligation over 10 percent.

To require financial criteria beyond those authorized by statute -- save where the legislature has, as in section 271.025(e) of the Local Government Code, expressly permitted the governmental entity to do so -- would be contrary to the plain language of article 7.19-1, subsection (a) of the Insurance Code. It states that bonds issued by any authorized surety "shall be in all respects a full and complete compliance with every law, charter, rule or regulation" and that governmental entities "shall accept and treat such bond[s] ... as conforming to, and fully and completely complying with, every requirement of every such law, charter, ordinance, rule or regulation."

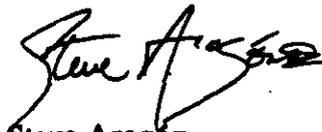
Accordingly, the answer to your question is that, unless specifically so authorized by law, *see, e.g.*, Local Gov't Code § 271.025(e), governmental entities may not impose additional financial criteria on authorized sureties issuing performance and payment bonds on public works or construction contracts beyond those in article 7.19-1 of the Insurance Code and article 5160, V.T.C.S.

A recent attorney general opinion, Attorney General Opinion DM-165 (1992), issued by this office on a related matter, may be of some aid to you, and I have therefore enclosed a copy of it.

S U M M A R Y

Governmental entities may not, unless specifically so authorized by statute, impose additional financial criteria beyond those permitted by article 7.19-1 of the Insurance Code and article 5160, V.T.C.S., on authorized sureties issuing payment and performance bonds on public works or construction contracts.

Yours very truly,



Steve Aragon
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Opinion Committee