



Informational Guideline Release

Bureau of Accounts
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SPECIAL REVOLVING FUNDS FOR PERFORMANCE SURETY DEPOSITS

(G.L. c. 44, § 53G½)

This Informational Guideline Release (IGR) informs local officials about a new statute, [G.L. c. 44, § 53G½](#), which was added by the 2016 Municipal Modernization Act to let cities and towns establish special Performance Surety Deposit Revolving Funds for cash or other financial surety they require to secure satisfactory performance of obligations under a municipal contract or as a condition of the issuance of a municipal license, permit, approval or authorization. The IGR also describes the local procedures required to implement these accounts.

Topical Index Key:

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Distribution:

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SPECIAL REVOLVING FUNDS FOR PERFORMANCE SURETY DEPOSITS

(G.L. c. 44, § 53G½)

SUMMARY:

These guidelines explain the new statute, [G.L. c. 44, § 53G½](#), enacted as part of the Municipal Modernization Act, that allows cities and towns to establish special revolving funds for the deposit of cash paid or other financial surety provided by a contractor or applicant to secure satisfactory completion of obligations imposed under a contract or as a condition of the issuance of any license, permit, approval or authorization. [St. 2016, c. 218, § 92](#).

Often a local permitting board, commission, department or officer may require cash, bonds, escrow accounts, negotiable securities or other financial sureties, in order to guarantee any performance obligations required of a third party as a condition of obtaining a license, permit, approval, authorization or contract. State law requires or sets standards for performance bonds, bid bonds or other surety in connection with particular approvals or contracts, for example, [G.L. c. 41, § 81U](#) (subdivision approvals), [G.L. c. 43, § 29](#) (city contracts) and [G.L. c. 30, § 39M](#) and [c. 149, § 44A](#) (construction contracts). However, no statute generally governed the treatment of cash or other financial surety otherwise provided as part of a licensing or permitting application or under a municipal contract. Under the new [G.L. c. 44, § 53G½](#), cities and towns may now reserve any cash or other surety they require of applicants or contractors by the adoption of by-laws, ordinances, rules or regulations that set appropriate standards for the disposition of the surety, without appropriation or other legislative body action, upon the satisfactory completion or default of the secured obligation. Any surety forfeited upon default that is not used to complete the work closes to the general fund.

These guidelines are in effect. They apply to performance surety deposits, except those governed by other general laws or special acts, received on or after November 7, 2016 for which the city or town has established a revolving fund as explained in these guidelines.

GUIDELINES:

A. DEFINITION OF PERFORMANCE SURETY DEPOSITS

Performance surety deposits are typically in the form of cash payments made by developers, businesses or municipal contractors to a city or town to secure completion of regulatory or contractual obligations. For example, a by-law, ordinance or contract may require a cash deposit to be held by the municipal treasurer to secure restoration of a public roadway under a street opening permit, or completion of work required under a drainage or driveway permit within a specified time. The intent is to return the amount of the deposit if the work is satisfactorily performed, but if there is a default, for the municipality to be able to use it to complete the work if it so chooses.

There are also non-monetary instruments that may be provided to and held by a municipality as surety to secure performance, such as, for example, standby letters of credit, surety bonds, negotiable bonds or securities, insurance policies or other forms of financial guarantees. In the event of a default, the municipality may also obtain monies from these forms of guarantees to be used to complete the work.

Performance guarantees that are often required by a permit or licensing authority or under a contract, include, but are not limited to the following:

- Repair of damage to municipal property related to driveway street opening permits;
- Safeguards relative to installation of solar facilities, wireless antennas and wind turbines on public properties;
- Restoration of land for earth removal by-law permits;
- Potential damage relative to the installation of signs over public properties;
- Wetlands by-law or ordinance requirements;
- Remediation for wetlands by-law approvals; and
- Permit for use of public property by private groups.

These guidelines do not apply to any performance deposits or other financial surety received under a particular general law or special act. [G.L. c. 44, § 53G½](#).

B. CREATION OF PERFORMANCE SURETY DEPOSIT REVOLVING FUNDS

In order to segregate any cash or other financial surety into a revolving fund under [G.L. c. 44, § 53G½](#), municipalities must first adopt by-laws, ordinances, rules or regulations in the manner required by their charters, ordinances or by-laws. Municipal counsel should be consulted to ensure consistency with the style, organization and format of the by-laws, ordinances, rules and regulations of the municipality, as well as compliance with applicable charter and statutory requirements.

The by-laws, ordinances, rules or regulations must specify the following for each type of permit, license, approval, authorization or contract for which a performance surety deposit may be required and credited to a revolving fund rather than the general fund.

1. Type of Financial Guarantees Required

The by-laws, ordinances, rules or regulations must specify the types of allowable cash or non-cash guarantees that may be made to secure performance of the particular obligations. The guarantees could include, for example, a cash deposit, passbook, negotiable bond or security or other liquid asset, standby letter of credit, performance bond or insurance policy. The by-laws, ordinances, rules or regulations should also specify the amount, or method for determining the amount, of surety needed to secure the obligations guaranteed.

2. **Treatment of Investment Earnings**

The by-laws, ordinances, rules or regulations must specify whether any interest earned on the investment of cash performance surety deposits by the treasurer shall inure to the applicant or contractor. See Section C-2 below. Any interest earned belongs to the municipality's general fund otherwise.

3. **Required Performance and Standards for Determining Satisfactory Completion or Default**

The by-laws, ordinances, rules or regulations must specify the standards for determining whether the work for which the performance surety deposit is held has been satisfactorily completed, including the board, commission or official designated to make the determination and authorized to spend the deposit to complete the work needed in the event of a default. It may also include any required releases, covenants and agreements to be provided in order to allow entry of municipal officials and agents onto private land to inspect the work or remedy deficiencies; the deadline for completion and the final inspection procedures.

4. **Disposition of Deposit upon Satisfactory Completion**

The by-laws, ordinances, rules or regulations must specify the procedure for the applicant or contractor to obtain a determination by the designated board, commission or official whether the conditions or work for which the performance surety deposit is held have been met, which may include for example, the procedure for inspection and certification of the completion of the secured work and the disposition of the deposit.

5. **Use of Deposits upon Default**

The by-laws, ordinances, rules or regulations must designate the applicable procedure when there is a determination the applicant or contractor has defaulted on the obligations secured by the performance surety deposit. This may include, for example, the process for analyzing the work needed to secure compliance and whether to complete it using the deposit, notifying municipal counsel of the possibility of default so that counsel may advise of any legal prerequisites for the work required to remedy the default such as compliance with the local and state wetlands provisions, and public bidding laws and notifying the applicant or counsel of the default.

If the obligation is secured with a non-liquid surety, such as a performance bond or standby letter of credit, the by-laws, ordinances, rules or regulations should detail the procedure to ensure timely notice to and meet other requirements of the guarantor of the instrument in order to secure the monies from that surety needed to complete the work. This may include, for example, notice to municipal counsel as to the possibility of a default so that counsel may determine any applicable terms and conditions regarding default in the surety, such as a formal written notice or declaration of default to be given within a stated time period and in a particular manner to the guarantor.

6. Other Conditions or Rules

The by-laws, ordinances, rules or regulations may include any other conditions or rules the municipality considers necessary to ensure the financial guarantees are adequate and appropriate and that the proper procedures for imposing and accounting for them are followed. These may include internal rules, reporting requirements and other measures, as well as conditions or rules applicable to the applicants or contractors required to provide the guarantees.

If the board, commission or official is one that may charge an applicant a fee to hire outside consultants to provide assistance in reviewing and evaluating an application for a permit, license or approval, it may want to consider whether to engage outside consultants to assist in implementing its duties under any by-law, ordinance, rule or regulation that requires a performance surety deposit of that applicant. For example, the board, commission or official may find that consultant assistance is desired or needed to assist in determining the appropriate amount of financial guarantees to secure performance, the appropriate timelines for performance, the scope and cost of any work that may be required in the event of default and any other assistance as may be needed to implement the duties of the board, commission or official. [G.L. c. 44, § 53G](#); See [Informational Guideline Release \(IGR\) 17-14, *Special Revolving Funds for Outside Consultant Fees*](#).

C. ACCOUNTING FOR DEPOSITS

1. Deposit Turnover

The board, commission, committee or official must turn over to the treasurer (a) all cash and non-cash performance surety deposits required by a by-law, ordinance, rule or regulation and (b) all cash proceeds from non-cash guarantees liquidated or obtained after default, for which a revolving fund has been created. The monies or other instruments should be turned over as soon as possible, but at least weekly. The turnover should be accompanied by a report identifying by depositor the amount or instrument deposited for each obligation. A copy of the report must also be forwarded to the accounting officer.

2. Investment and Interest

The treasurer may invest all cash deposits in the same manner as general fund revenue cash. The treasurer does not have to establish a separate bank account for each deposit made by an applicant or contractor. The treasurer may pool the monies with other cash or establish a separate, common bank account for these deposits. However, the treasurer must allocate any interest earned on the amount deposited in the event it accrues to the benefit of an applicant or contractor upon successful completion or is available for expenditure upon default. See Sections B-2 above and D-1 below.

3. Deposit Accounts

The accounting officer must establish and maintain a separate account for the deposit made by each applicant or contractor and record all activity in the account. Expenditures are recorded as direct expenditures in the account. See Section D below. Any balance at the end of a fiscal year carries over to the next fiscal year until it is returned upon satisfactory completion or forfeited after default. See Section E below.

D. EXPENDITURE OF DEPOSITS

1. Allowable Use

Upon default, the performance surety deposit, and any interest if applicable, is forfeited to the municipality. The board, commission, committee or official designated in the governing by-law, ordinance rule or regulation may spend the defaulted surety without appropriation to complete the work or meet the conditions imposed on the applicant or contractor. The surety deposit account may be charged for any expenses associated with performing the work, including any required labor, materials and supplies, whether performed by municipal employees or outside contractors.

2. Bills

The board, commission, committee or official must use the same process used for payment of other departmental expenses to obtain payment of all bills or expenses being charged to the revolving fund. A payment voucher with appropriate supporting documentation is submitted to the accounting officer for placement of the bill on the treasury warrant.

3. Supplemental Appropriations

Appropriations from other municipal funding sources, such as the tax levy, free cash or other available funds, may be made in order to supplement the monies in an account for completing the work. Performance surety deposit accounts are special revenue funds, however, and no appropriations may be made directly into the accounts or otherwise credited to them.

E. DISPOSITION OF DEPOSITS

1. Account Report

The board, commission, committee or official must notify the accounting officer when (a) the conditions or work secured by the performance surety deposit has been satisfactorily completed by the applicant or contractor; (b) upon default, all bills or expenses to be charged to surety deposit account for completion of the work have been submitted for payment; or (c) upon default, the municipality will not complete the work.

2. Satisfactory Completion

Upon satisfactory completion, the deposit, including any interest if applicable, must be returned to the applicant or contractor. The board, commission, committee or official should submit a voucher to the accounting officer for placement on the treasury warrant. Upon approval of the warrant, the treasurer will pay the monies owed, or return any non-cash instrument deposited, to the applicant or contractor.

3. Default

Upon default, the performance surety deposit, and any interest if applicable, is forfeited. If not used to complete the work secured by the deposit, the forfeited surety is credited to the general fund. If the forfeited surety is used to complete the work, the balance remaining after all expenses have been paid closes to the general fund.