

## **Request for Emergency Action to Require Acceptance of Electronic Execution and Delivery of Legally Required Construction and Commercial Bonds due to COVID-19 Pandemic**

While operating during the COVID-19 pandemic, the Surety & Fidelity Association of America (SFAA) and the National Association of Surety Bond Producers (NASBP), on behalf of the construction industry and surety industry, urge public officials at the federal, state, and local level, to issue guidance (1) accepting electronic execution and delivery of construction surety bonds and commercial surety bonds to the extent this practice is not already officially adopted by federal, state or local officials and (2) waiving notary requirements consistent with this request.

Construction bonds have far reaching impacts. They guarantee the performance of and payment to small business contractors on thousands of public construction projects nationally and in the states, thereby providing critical protection of significant state and federal tax revenue and interests. Commercial bonds have an equally important impact and provide financial security for millions of consumers across the country in every state through, for example, license and permit bonds, guardian and conservatorship bonds, appeal bonds, lease bonds, utility bonds, and public official bonds.

### **Pandemic Shelter-In-Place Requirements Make Traditional Signatures and Notary Requirements Unworkable**

The COVID-19 pandemic has necessitated remote working arrangements and social distancing standards making it unworkable to meet the traditional requirements for the issuance of surety bonds on essential and legally-mandated national, state, and local construction projects, as well as on commercial bonds that serve to protect the public from financial harm. In the case of construction surety bonds, these bonds have been legally required since the late 1800s for the protection of public works projects. Traditionally, a fully executed bond with a raised corporate seal, wet signatures, and notarization requires a minimum of two agents—and often a third individual to serve as the notary. Agents print out the bond form and power of attorney, physically apply a corporate seal to the bond with a crimper, sign and date the bond and power of attorney, and finally, have a notary execute the bond. Given the social distancing and remote working orders from Federal and State officials, the traditional execution of surety bonds is unworkable. Therefore, it is vital that public officials and the construction and surety industries, working together, find a way to issue bonds in the current environment while continuing to achieve the public policy purpose of construction and commercial surety bonds.

### **Electronic Bond Issuance is a Proven and Workable Solution and Should Be More Broadly Allowed**

The electronic issuance of surety bonds meets the legal standards for the historic wet signature and notary requirements. The Electronic Signatures in Global and National Commercial Act (E-Sign), which is largely based on the Uniform Electronic Transactions Act (UETA), provides that a contract relating to interstate commerce may not be denied legal effect solely because an electronic signature or record was used in its formation. E-records and e-signatures have the same legal effect as paper contracts and handwritten signatures, subject to specific exceptions not applicable in this context. E-Sign serves as the currently accepted basis for conducting electronic business transactions. As long as the obligee consents to receipt of the surety bond in this manner, the electronically executed and delivered surety bond will be equally binding and enforceable as its paper predecessor.

Given this evolution of the law and technology, electronic execution has been successfully used with many construction and commercial surety bonds, including, for example, the many surety companies which have implemented electronic bonding platforms with bond specific Powers of Attorney and digital seals accepted by obligees, including, as examples, the NMLS system for mortgage broker bonds and with Customs and Border Protection for customs bonds. To date, no issues have arisen with the enforcement of electronic bonds in these sectors. Based on the foregoing, we respectfully request public officials expand acceptance of the successful practice to execution of all construction surety bonds and commercial bonds.

### **Waiver of Notary Requirement is Necessary and Should Be Allowed**

Given the challenges and barriers created by a remote working environment and social distancing standards ordered by government authorities, the requirement of a notary is impractical, if not impossible, and should be waived given the pandemic. Remote Online Notarization (RON) is not a practical, workable solution under the current circumstances because 1) many states do not yet allow it; and 2) most of those states which have adopted RON require a notary to first register with and receive certification by the state before utilizing RON. Furthermore, notarization is not necessary to have a legally binding contract, i.e. a surety bond in this case. The critical element needed for a legally binding contractual obligation is a written document with a clear intent to be bound, which can be found within the four corners of the surety bond and accompanying power of attorney.

In those circumstances where a question about the validity of a bond exists, the obligee may directly contact the surety (most powers of attorneys include contact information for the surety; surety contact information is also readily at <https://www.surety.org/resource/resmgr/pubs-public/bondobligeeguide.pdf> and <https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html>). For the vast majority of bonds, however, this will be unnecessary given today's widely accepted practice of electronically executed and binding contracts in business generally. Based on the foregoing, the notarization of a surety bond should be waived during the COVID-19 pandemic work environment.

### **Emergency Action Needed Immediately**

SFAA and NASBP urge the federal, state, and local public officials issue the following order for contract surety bonds and commercial surety bonds due to the COVID-19 pandemic:

1. With respect to all construction surety bonds, public procurement officials shall accept all surety bonds and powers of attorney containing e-signatures and e-corporate seals affixed to each document, and shall waive the requirement of a notary.
2. With respect to all commercial surety bonds, all government agencies and officials shall accept surety bonds and powers of attorney containing e-signatures and e-corporate seals affixed to each document, and shall waive the requirement of a notary.

For Questions, please contact Julie Alleyne, SFAA, Vice President of Policy and General Counsel, at [jalleyne@surety.org](mailto:jalleyne@surety.org) or Larry LeClair, NASBP, Director, Government Relations, at [lleclair@nasbp.org](mailto:lleclair@nasbp.org).