Surety bonds and bank guarantees M2.2

Statement of Intent

To ensure a consistent approach across government, this Treasurer’s Direction has been developed for the purpose of outlining the framework for the acceptance of surety bonds and bank guarantees. In general, this Treasurer’s Direction outlines the:

* + types of surety bonds and bank guarantees that will be acceptable to the Territory Government; and
	+ minimum requirements for issuing entities of surety bonds and bank guarantees.

Main Features

Section 38 of the Financial Management Act requires each Accountable Officer and each employee of an Agency to comply with the Treasurer’s Directions.

Acceptable Surety Bonds and Bank Guarantees

* Bank guarantees and surety bonds are acceptable forms of security under contracts entered into by the Northern Territory Government.
* Of the many types of surety bonds available in the market place, the only ones that should be accepted by Agencies are performance bonds, which offer a nominal monetary amount as surety for the satisfactory fulfilment of the contractor's obligations under the contract.
* The only type of bank guarantee that should be accepted by agencies is an unconditional bank guarantee issued by an Authorised Deposit-taking Institution (ADI) that is regulated by the Australian Prudential Regulation Authority (APRA) in accordance with the Banking Act 1959.
* Surety bonds and bank guarantees are to comply with a list of minimum requirements.
* The issuing entities for both bank guarantees and surety bonds must comply with certain minimum requirements.

List of Approved Providers

* Surety bonds can only be accepted from approved providers who meet certain minimum requirements. The list of approved providers is at Appendix A.
* Bank guarantees can only be accepted from ADIs that are regulated by APRA in accordance with the Banking Act 1959.

For authoritative instruction and guidance, reference should be made to the Financial Management Act, related Treasurer’s Directions and associated commentary.

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Authorities

Financial Management Act

References

Banking Act 1959

Corporations Act 2001

Acceptance of Surety Bonds and Bank Guarantees

M2.2.1

Agencies may accept either surety bonds or bank guarantees as a form of security for contracts entered into.

1. There are various types of contracts under which the Territory may require security, including construction contracts valued at $1 million or greater.
2. The dollar value of security required to ensure fulfilment of the contractor's obligation under the contract is the dollar amount of security specified in the relevant contract or agreement.
3. The Territory Government does not have a preference for either surety bonds or bank guarantees, so long as the terms of either the bank guarantee or the surety bond is in accordance with the requirements of this Treasurer's Direction.

Surety Bonds

M2.2.2

Of the many different types of surety bonds available, the only types acceptable are performance bonds that provide security for fulfilment of contract obligations.

1. Of the many types of surety bonds available in the market place, the only ones that should be accepted by Agencies are performance bonds, which offer a nominal monetary amount as surety for the satisfactory fulfilment of the contractor's obligations under the contract.
2. Surety bonds must be able to be called upon immediately by Government agencies in the event that a contractor fails to fulfil its contractual obligations or otherwise breaches its contractual obligations.
3. At a minimum, surety bonds accepted by Agencies must be:
	* unconditional,
	* irrevocable;
	* payable on demand and without reference to the contractor; and
	* not limited as to time (that is, no expiry date).
4. The Northern Territory of Australia must be the only beneficiary of the bond. If a statutory corporation (for example, the Land Development Corporation) is the principal under the contract, the relevant statutory corporation must be the only beneficiary of the bond.
5. Where possible, the governing law should be that of the Northern Territory. If this is not possible, the governing law must be another jurisdiction within Australia.

M2.2.3

The issuing entities for surety bonds are to comply with the below requirements before Agencies will accept surety bonds from them.

1. The issuing entity for a surety bond is the entity that provides the unconditional undertaking to the Territory.
2. The issuing entity must:
	* be registered with the Australian Securities and Investments Commission (ASIC). It is acceptable for the ultimate parent company to be registered and located outside Australia, but the subsidiary that issues the surety bond must itself be located in Australia and registered with ASIC;
	* be authorised by APRA and fully comply with Australia’s regulatory and legal requirements, including holding an Australian financial services licence under the Corporations Act 2001; and
	* have a minimum long-term credit rating of:
		+ [A-] by Standard and Poor’s; or
		+ [A3] by Moody's Investor Service; or
		+ [A-] by Fitch Ratings.
3. Commonwealth Government entities that are not required to be authorised by APRA may be added to the list of approved providers, provided that they are a Commonwealth entity for the purposes of the Public Governance, Performance and Accountability Act with appropriate systems of risk oversight, management and internal control.

M2.2.4

Surety bonds should only be accepted from companies on Treasury's list of approved surety bond providers (Appendix A).

1. Treasury will maintain and monitor the list of approved surety bond providers that meet the above requirements.
2. Other providers may be added to this list upon application, following assessment by Treasury to determine whether the relevant requirements are met. Treasury will remove providers from the list where they no longer meet the minimum requirements.
3. A surety bond must be replaced by the contractor, where the provider no longer meets the requirements.
4. Where a surety bond provider has been removed from the approved list, the agency responsible for accepting a surety bond is responsible for informing the contractor that the surety bond will need to be replaced.
5. If there is any uncertainty regarding the entity issuing the surety bond, agencies may seek advice from the Solicitor for the Northern Territory (SFNT) or a legal provider approved by SFNT.

Bank Guarantees

M2.2.5

The issuing entities for bank guarantees are to be ADIs that are regulated by APRA in accordance with the Banking Act 1959.

1. Agencies may accept bank guarantees from Australian-owned banks, foreign subsidiary banks, branches of foreign banks, building societies and credit unions, which are operating in Australia as ADIs in accordance with the Banking Act 1959.
2. Bank guarantees must meet these minimum requirements, being:
	* unconditional;
	* irrevocable;
	* payable on demand and without reference to the contractor; and
	* not limited as to time (that is, no expiry date).
3. The Northern Territory of Australia must be the only beneficiary of the guarantee. If a statutory corporation (for example, the Land Development Corporation) is the principal under the contract, the relevant statutory corporation must be the only beneficiary of the guarantee.
4. Where possible the governing law should be that of the Northern Territory. If this is not possible, the governing law must be another jurisdiction within Australia.

Checklist of Minimum Requirements

M2.2.6

A checklist of minimum requirements is to be referred to by Agencies in determining whether to accept a surety bond or bank guarantee.

1. Appendix B contains a checklist of minimum requirements to be referred to by Agencies when they receive a bank guarantee or surety bond.
2. If there is any doubt as to whether the minimum requirements have been met, legal advice should be sought from SFNT.

Appendix A: List of Approved Surety Bond Providers

* Insurance Australia Ltd
* Swiss Re International SE
* AAI Limited (trading as Vero Insurance)
* Tokio Marine & Nichido Fire Insurance Co Ltd
* Indigenous Business Australia (a corporate Commonwealth entity under the Public Governance, Performance and Accountability Act) as trustee of the Performance Bond Fund
* QBE Insurance (Australia) Limited
* Berkshire Hathaway Specialty Insurance Company
* Liberty Mutual Insurance Company
* Allianz Australia Insurance Limited

Appendix B: Checklist of Minimum Requirements

Surety Bonds

| I have received a surety bond | [ ]  |
| --- | --- |
| The issuing entity of the bond is on Treasury’s list of approved surety bond providers | [ ]  |
| The surety bond is: |  |
| * unconditional (no special requirements to be met when calling on the surety bond)
 | [ ]  |
| * irrevocable
 | [ ]  |
| * payable on demand and without reference to the contractor
 | [ ]  |
| * not limited as to time (that is, no expiry date)
 | [ ]  |
| * made in favour of the Northern Territory of Australia, with the Northern Territory of Australia as the only beneficiary of the bond
 | [ ]  |
| * governed by the law of Australia (where possible it should be that of the Northern Territory)
 | [ ]  |
| The surety bond includes: |  |
| * the name of the contractor/developer, the contract name and contract number
 | [ ]  |
| * a brief description of the project or works to be carried out under the contract
 | [ ]  |
| * the dollar amount of security provided by the bond
 | [ ]  |

Bank Guarantees

| I have received a bank guarantee | [ ]  |
| --- | --- |
| The bank guarantee has been made by an Authorised Deposit-taking Institution under the Banking Act 1959  | [ ]  |
| The bank guarantee is: |  |
| * unconditional (no special requirements to be met when calling on the bank guarantee)
 | [ ]  |
| * irrevocable
 | [ ]  |
| * payable on demand and without reference to the contractor
 | [ ]  |
| * not limited as to time (that is, no expiry date)
 | [ ]  |
| * made in favour of the Northern Territory of Australia, with the Northern Territory of Australia as the only beneficiary of the guarantee
 |  |
| * governed by the law of Australia (where possible it should be that of the Northern Territory)
 | [ ]  |
| The bank guarantee includes: |  |
| * the name of the contractor/developer and the contract name (and contract number if applicable)
 | [ ]  |
| * a brief description of the project or works to be carried out under the contract
 | [ ]  |
| * the dollar amount of security provided by the guarantee
 | [ ]  |