

CITIES AND TOWNS BULLETIN

AND UNIFORM COMPLIANCE GUIDELINES ISSUED BY STATE BOARD OF ACCOUNTS

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OFFICIAL BONDS AND COVERAGE

The statutes related to Official Bonds changed during the most recent legislative session. Public Law 230 - Senate Enrolled Act 393 amended the existing Indiana Code 5-4-1-5.1 (effective July 1, 2015) and Indiana Code 5-4-1-18 (effective January 1, 2016) concerning official bonds and bond coverage.

We have received several questions on the impact of these changes and how certain situations are to be handled. The State Board of Accounts summarized the new statutory provisions which were emailed to the local units in late July. We have condensed the information related to only cities and towns below.

Please refer to Indiana Codes 5-4-1-5.1 and 5-4-1-18 and share this information with other officials and employees as necessary, including your city/town attorney.

Minimum Bond Amounts per statute are as noted:

\$30,000 per \$1,000,000 of Receipts. The bond amount must be at least \$30,000, but not greater than \$300,000 unless approved by the fiscal body. [IC 5-4-1-18(d)(1), (2)]

Bonds in these amounts are required for the following individuals: City controllers, City clerk-treasurers, Town clerk-treasurers, Barrett Law fund custodians.

\$15,000. The following individuals are required to have bonds not less than \$15,000:

1. City judges, City clerk, Town judges. [IC 5-4-1-18(a)(5)]
2. Any employee directed to file an individual bond by the fiscal body of a city, or town. [IC 5-4-1-18(a)(5)]

\$5,000. Employees or contractors of a city or town "whose official duties include receiving, processing, depositing, disbursing, or otherwise having access to funds that belong to the federal government, the state, a political subdivision, or another governmental entity. [IC 5-4-1-18(a)(7), (e)(2)]

The State Board of Accounts may increase minimum bond coverage amounts if an examination report finds malfeasance, misfeasance, or nonfeasance that resulted in the misappropriation of, diversion of, or inability to account for public funds. [IC 5-4-1-18(j), (k), (l)]

Bond Terms

One Year: Effective January 1, 2016, all bonds must have a one year term. IC 5-4-1-18(m)(1). A continuation certificate is not sufficient. Consecutive yearly bonds must provide separate coverage for each year. [IC 5-4-1-18(m)(2)]

We will not take audit exception to a new calendar year bond term greater than one year if the current bond expires before December 31, 2015. For example, if the current bond expires on September 30, 2015, we will not take exception to a new bond term from October 1, 2015 to December 31, 2016, even though it is greater than one year. Similarly, we will not take audit exception to a new calendar year bond term less than one year if the current bond expires after December 31, 2015, but before December 31, 2016. For example, if the current bond expires on March 31, 2016, we will not take exception to a new bond term from April 1, 2016 to December 31, 2016, even though it is less than one year.

Term of Office: Term bonds issued on or after January 1, 2016, are not allowable pursuant to IC 5-4-1-18(m)(1). We recommend that all current term bonds be converted to one year bonds starting January 1, 2016, to comply with the spirit of the amended statute and to reduce the risk of financial exposure to the local unit.

Other Types of Bonds

Blanket Bonds: Blanket bonds are allowable if they are authorized by ordinance, endorsed to cover faithful performance, and include aggregate coverage sufficient to cover all officers, employees, and contractors required to be bonded. [IC 5-4-1-18(b)]

Crime Insurance Policies: Crime insurance policies providing additional coverage for criminal acts or omissions committed by officers, employees, or contractors are permitted if they are authorized by ordinance or resolution. [IC 5-4-1-18(c)] Crime insurance policies do not take the place of bonds.

Aggregate Liability

The aggregate liability for a surety or insurer for a policy year is the sum of the amounts specified in the bonds issued by the surety or insurer for that policy year. IC 5-4-1-18(m)(2). For example, if a clerk-treasurer has four consecutive yearly bonds for \$30,000, the liability of the insurer is \$30,000 for each of the four years.

Commencement Date

Effective January 1, 2016, all bonds must commence on one of the following:

1. The first day of the calendar year;
2. The first day of the fiscal year of the political subdivision or governmental unit; or
3. The first day of the individual's service in the office or employment position for which a bond is required. [IC 5-4-1-18(m)(1)]

Payee

All official bonds shall be made payable to the State of Indiana. [IC 5-4-1-10] The State is considered an additional named insured on all crime insurance policies. [IC 5-4-1-18(c)]

Recording

All bonds must be filed with the county recorder. Beginning July 1, 2015, copies of the bonds must also be filed with the fiscal officer of the political subdivision. [IC 5-4-1-5.1(b)]

The fiscal officer of the political subdivision must submit copies of all bonds to the State Board of Accounts electronically via Gateway with their Annual Financial Report. [IC 5-4-1-5.1(e)]

Bonds must be filed with the county recorder and the fiscal officer of the political subdivision within ten days after their issuance. [IC 5-4-1-5.1(c)]

Current bonds already filed with the county recorder are not required to be re-filed with the fiscal officer of the political subdivision. For example, a bond obtained in January 2015, and properly filed with the county recorder does not need to be filed with the fiscal officer of the political subdivision. However, when the January 2015 bond expires and a new bond is obtained in January 2016, it must be filed with both the county recorder and fiscal officer of the political subdivision.

Bonds for Employees and Contractors

Indiana Code 5-4-1-18(a)(7) states that bonds are required for individuals “(A) who are employees or contractors of a city, town, county, or township; and (B) whose official duties include receiving, processing, depositing, disbursing, or otherwise having access to funds that belong to the federal government, the state, a political subdivision, or another governmental entity.”

The political subdivision must determine who must be bonded under the statute. The term “official duties” is not defined. It is our position that “official duties” may include duties set forth in a job description, duties that are customary or routinely performed, or duties that are assigned but not frequently performed. For example, if an office has four employees who routinely accept payments at the counter, then all four employees must be bonded. If an employee is assigned to accept certain registration fees but only receives funds once every other year, then that employee must be bonded.

There is no dollar threshold or *de minimis* exception in the statute. Thus, it is our position that all employees and contractors whose official duties include receiving, processing, depositing, disbursing, or otherwise having access to public funds—regardless of the dollar amount—are required to be bonded. For example, if an office employee who, as part of her official duties, receives \$5.00 per year for microfilm copies, then she is required to be bonded.

Bonds for Other Public Officials

Bonds for public officials are required in statutes other than IC 5-4-1-18. For example, redevelopment commissioners and deputy marshals must all be bonded. For these officials, we take the following position:

1. The minimum amount of the bond must be the amount stated in the statute at issue. If no amount is stated, we recommend a minimum of \$5,000, unless the position mirrors one of the offices listed in IC 5-4-1-18(a)(1)-(6).
2. If the statute is silent as to the term of bond required, we recommend an annual bond. We will not take audit exception to a term bond or a continuation bond as long as the minimum amount of coverage is provided each year.
3. The bond type may be individual or blanket, as long as the blanket bond is
 - A. authorized by ordinance,
 - B. endorsed to include faithful performance, and
 - C. includes aggregate coverage sufficient to provide coverage amounts specified for all individuals required to be bonded. See IC 5-4-1-18(b).

RAINY DAY FUND

Questions surrounding which funds can transfer monies to the Rainy Day Fund have been raised recently. The term "dedicated fund" has been used throughout the state and the officials have asked for a meaning of that term as it relates to Rainy Day transfers. Our audit position is as follows:

Dedicated fund is a generic term not defined in statute, but is generally construed to mean a fund set aside for a specific purpose. For purposes of transferring to the Rainy Day fund, we are limiting our position to those dedicated funds that result from statutory authority but do not include home rule funds or clearing accounts. Debt service funds are already specifically prohibited from transfer in the Rainy Day statute and so are not considered here either.

In order to determine whether or not monies in a fund may be transferred to the Rainy Day fund, an analysis would need to be made of the authority creating the fund in light of IC 36-1-8-5.1. It would be up to the political subdivision to show SBOA how money transferred to the Rainy Day fund met the criteria for transfer. However, we can provide general guidance based on our position.

Tax levy and LOIT funds have different criteria than other statutorily created funds in regard to transfer to the Rainy Day fund. The key words to tax levy and LOIT funds are: whenever the purposes of a tax levy have been fulfilled and unencumbered balance remains in the fund and unless a statute provides that it be transferred otherwise. In general it will be up to the unit of government to define when the purposes have been fulfilled. There are certain funds that are raised by levy that have very specific language that the balance may not be transferred, such as the assessment fund. For those funds, we would take exception if there were a transfer to Rainy Day fund. Also, for some cumulative funds such as those found under IC 6-1.1-41-1, balances in these funds may only be transferred to the General fund per IC 6-1.1-41-15 and again we would take exception if they were transferred to the rainy day fund.

For other funds, the statute allows for transfer to Rainy Day fund if the funding source is specified in the ordinance or resolution and the transfer is not otherwise prohibited by law. It is our general position that if the statute provides definitive restrictive language on the use of the funds or that the balance is not to be transferred, whether Rainy Day fund is specifically included or not, that the monies are not to be transferred to Rainy Day fund. For example, for MVH funds IC 8-14-1-3(1) provides that for cities or towns, no part of such sum shall be used for any other purpose than for the purposes defined in this chapter. IC 8-14-1-4 provides similar restrictions for counties. For LRS funds, IC 8-14-2-5 defines the exclusive uses of the funds and IC 8-14-2-7 further restricts transfers of certain towns' LRS to General fund after these monies have not been spent for 24 months. Transfers from MVH and LRS (or any other fund with similar statutory restrictions) to Rainy Day would be prohibited and we would take exception if monies were so transferred. Where there is not such restrictive language or prohibition of transfer, we will consider the unit attorney's written opinion as to why the other fund would not fall under the category of prohibited and so be transferred.

**REVENUE BOND ORDINANCES – UTILITY BANK ACCOUNTS –
REPORTS TO BONDHOLDERS**

When drafting a revenue bond ordinance for a city or town utility bond issue, we recommend such ordinance not require the establishment of separate bank accounts for each utility fund. The interests of bondholders are adequately protected and the handling of the funds would be less complicated if the revenue bond ordinance would provide that funds of each municipal utility be deposited in only one depository account separate from all other city or town funds.

Some revenue bond ordinances provide that the Construction Fund is to be deposited in a separate depository account and all other funds of the utility are to be deposited in another depository account separate from all other funds of the city or town. We would not object to such an arrangement since the Construction Fund is usually cleared out within a few months.

One of the covenants often found in contracts between a city or town and the holders of the bonds requires that the officials will prepare and furnish to the original purchasers of the bonds and to any subsequent holder of the bonds, upon written request, complete financial statements of the utility for the preceding fiscal year. These statements must be certified by the clerk-treasurer or controller. Copies of such statements and reports should be kept on file in the office of the clerk-treasurer or controller.

BUILDING PERMIT FEES

Since there is no statutory requirement that building permit fees be placed in a separate fund, we believe that such fees should be receipted to the General Fund and disbursements for compensation of building inspectors, the cost of building permit forms, and other such expenses should be paid from the General Fund and charged against appropriations properly made therefore.

BONDS - REGISTERED

IC 5-1-15 authorizes cities and towns to issue "bonds, notes, evidences of indebtedness, or other written obligations" in fully registered or book entry form.

The entity may employ any bank or trust company as paying agent or registrar, co-registrar, or depository institution. The bank or trust company need not be a depository bank under IC 5-13, and need not be located within the State of Indiana.

Notwithstanding any other provision of law, registrars or registration books or transfer records for bonds, notes, evidence of indebtedness, or other written obligations of any entity are not public records, but are only for the use of the entity, any trustee, fiduciary, paying agent, registrar, co-registrar, or transfer agent. A trust department of a bank having possession of these records shall not disclose them to a bond department, commercial department, subsidiary of the bank, or a subsidiary of the parent corporation of the bank. (IC 5-1-15-5)

Registrars of bond issues shall keep a register of ownership of bonds. (IC 5-1-15-6)

In an effort to facilitate accounting procedures, the State Board of Accounts has issued the following instructions:

1. If a bank, trust company, or other financial institution has been employed as a paying agent or registrar, a properly certified listing of bondholders from the paying agent or registrar shall serve as a mailing list for the fiscal officer. There is no requirement for each individual bondholder to file a claim.

BONDS - REGISTERED - Continued

2. The mailing of the funds for bonds and coupons coming due must be mailed in such a manner to ensure receipt by the bondholder by the due date specific. Personnel of financial institutions state they usually make such mailing by first class mail one to three business days in advance of the due date. They do not mail by certified or registered mail due to costs involved. We suggest you review this with your city or town attorney.
3. Since the paying agency or the registrar shall keep a register of ownership of bonds and all bonds and coupons shall be paid when becoming due, we see no reason for the municipality to duplicate those same records maintained by the paying agent or registrar by keeping a bond register. There should be no unpaid outstanding matured bonds or coupons.
4. In all instances when employing a bank, trust company, or other financial institutions, be sure to protect the municipality from any liability arising due to any possible errors relating to names and addresses of current bondholders. This protection may be obtained by the financial institution furnishing a bond or insurance in favor of the municipality.

As stated previously, please consult your city or town attorney with questions regarding procedures for registered bonds.

MOTOR VEHICLE HIGHWAY FUNDS

Official Opinion No. 27-1965, issued by the Office of the Attorney General, held that cities and towns may construct, purchase and lease buildings with funds distributed to them from the Motor Vehicle Highway account, to be used exclusively for purposes which are incidental to the purposes expressly stated in IC 8-14-1-5.

DEFERRED COMPENSATION PLANS – PUBLIC EMPLOYEES RETIREMENT FUND

IC 5-10-1.1-1 allows cities and towns to contribute amounts before January 1, 1995 and continue or begin to contribute amounts after January 1, 1995, to a nonqualified deferred compensation plan on behalf of eligible employees, subject to any limits and provisions under section 457 of the Internal Revenue Code. IC 5-10-1.1-7 allows cities and towns to offer to their employees both the state deferred compensation plan and another deferred compensation plan that uses private vendors.

IC 5-10.2-2-1 further provides that it does not prohibit a city or town from establishing and providing before January 1, 1995 and continuing to provide after January 1, 1995, retirement, disability, and survivor benefits to the employees of the city or town if the city or town took action before January 1, 1995, and was not a member of the Public Employees' Retirement Fund (PERF) on January 1, 1995.

A city or town has no authority to establish a local pension plan by ordinance, resolution, or contract after January 1, 1995, without specific statutory authority. PERF, deferred compensation plans, police and fire pension plans, and utility employee pension plans are all authorized by statute.

PAYMENT OF CLAIMS PRIOR TO BOARD ALLOWANCE

IC 36-4-8 and IC 36-5-4 list various conditions which must be met prior to issuing warrants in cities and towns. IC 36-4-8-14 and IC 36-5-4-12 permit a city or town council to adopt an ordinance allowing the city or town fiscal officer to pay certain types of claims prior to board allowance.

The types of claims which could be paid before board allowance include:

1. property or services purchased from the U.S. Government,
2. license or permit fees,
3. insurance premiums,
4. utility payments or connect charges,
5. general grant programs where advance refunding is not prohibited and the contracting party posts sufficient security to cover the amount advanced,
6. grants of State funds,
7. maintenance or service agreements,
8. leases or rental agreements,
9. bond or coupon payments,
10. payroll,
11. state, federal, or county taxes,
12. expenses that must be paid because of emergency circumstances, and
13. expenses described in an ordinance.

Each payment of expenses must be supported by a fully itemized claim and certified by the fiscal officer and must be reviewed by the proper board at its next regular or special meeting.

OFFICE SPACE – CITY CLERKS – CITY CLERK-TREASURERS AND TOWN CLERK-TREASURERS

IC 36-4-10-2.5 and IC 36-5-6-5.1 provide that if:

“office space exists in a building owned or leased by a city or town, the city executive and city legislative body, or town legislative body shall provide office space for :

- (1) the clerk or clerk-treasurer; and
- (2) the staff and records of the clerk or clerk-treasurer.”

**ATTORNEYS AND LEGAL RESEARCH ASSISTANTS –
CITY CLERKS AND CITY AND TOWN CLERK-TREASURERS**

IC 36-4-10.5-5.5 and IC 36-5-6-8 state that a Clerk or Clerk-Treasurer may hire or contract with competent attorneys or legal research assistants on terms the Clerk or Clerk-Treasurer considers appropriate. Appropriations for salaries of attorneys and legal on research assistants employed shall be approved in the annual budget and must be allocated to the Clerk or Clerk-Treasurer for payment of attorneys and legal research assistant's salaries.

Furthermore, IC 36-4-10-5.5 states that employment of an attorney by a City Clerk or City Clerk-Treasurer does not affect a city department of law established under IC 36-4-4.

COUNTY ECONOMIC DEVELOPMENT INCOME TAX (CEDIT)-USES

IC 6-3.5-7-13.1 allows such tax revenues to be used for any lawful purpose. If county economic development income tax revenues have been pledged to pay off economic development debt, then it must be used to pay off the debt.

PUBLIC CONSTRUCTION LAW - OVERVIEW

Whenever the cost of a public work project will be:

1. at least \$150,000 or
2. at least \$100,000 in the case of a board of aviation commissioners or an airport authority board,

the board shall prepare general plans and specification describing the kind of public work required, but shall avoid specifications which might unduly limit competition. [IC 36-1-12-4(b)(1)] The board shall file the plans and specifications in a place reasonably accessible to the public, which shall be specified in the notice required. [IC 36-1-12-4(b)(2)] All plans and specifications for public buildings must be approved by the State Board of Health, State Fire Marshal, State Building Commissioner, and other state agencies designated by statute. [IC 36-1-12-10] Upon filing of the plans and specifications, the board shall publish a notice in accordance with IC 5-3-1 calling for sealed proposals for the public work needed. [IC 36-1-12-4(b)(3)]

A bond or certified check *shall* be filed with each bid by a bidder in amount determined and specified by the board if the cost of the public work is estimated to be more than \$200,000. A bond or certified check *may* be filed with each bid by a bidder in an amount determined and specified by the board if the cost of the public work is not more than \$200,000.

The amount may not be more than 10% of the contract price. The bond or certified check shall be made payable to the political subdivision. All checks of unsuccessful bidders shall be returned to them by the board upon selection of successful bidders. Checks of successful bidders shall be held until delivery of the performance bond. [IC 36-1-12-4.5]

In all projects which are under the threshold mentioned in the first paragraph, the board shall invite quotes from at least three persons known to deal in the class of work proposed to be done by mailing a notice that plans are specifications are on file in a specified office. The notice must be mailed not less than seven days before the time fixed for receiving quotes. [IC 36-1-12-4.7 and IC 36-1-12-5]

For all statutory provisions related to Public Works, please see IC 36-1-12.

FACSIMILE TRANSMISSION FEES

Currently, IC 5-14-3-8(d) authorizes the fiscal body to establish a fee schedule for the certification or copying of documents. Prior to July 1, 2007 this subsection allowed for the inclusion of a facsimile machine transmission fee. Effective July 1, 2007 the reference to the inclusion of a fee for facsimile machine transmission was deleted from this subsection and so it is our position that this subsection no longer supports such a fee.

IC 5-14-3-8(f) states in part:

"Notwithstanding subsection...(d).... a public agency shall collect... Facsimile machine transmission fee... that is specified by statute or is ordered by a court".

We are not aware of any statute that specifies a facsimile machine transmission fee.

Per State Court Administration, Trial Rule 81(A) does not allow for a standing court order for facsimile fees.

As to the amount of a facsimile machine transmission fee which a court may order on an individual basis, State Court Administration recommends that it should adopt a fee amount that is reasonable and substantially in conformance with those authorized by existing statutes. The parameters specified in IC 5-14-3-8(d) could be used as a guide. A court may decide that a reasonable facsimile fee may be so small as to not be worth collecting.

In an audit, if a facsimile machine transmission fee is collected we would look for either a specific statute authorizing the fee or a court order.

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