State of California - The Resources Agency CALIFORNIA STATE PARKS **DEPARTMENTAL NOTICE** No. 97-39		MANUAL Operations
SUBJECT SURETY POLICY - PERFORMANCE BOND AND ALTERNATIVES		CHAPTER 1700 Concessions
ISSUED October 31, 1997	EXPIRES When Incorporated	REFERENCE DOM 1700

DPR 375 (Rev. 11/97)(Word, 11/19/97)

WHEN APPLICABLE, ENTER THE NUMBER AND DATE OF THIS DEPARTMENTAL NOTICE IN THE MARGIN OF THE MANUAL PAGE, ADJACENT TO THE SECTION(S) AFFECTED BY IT.

This Departmental Notice has been re-created for transmittal in electronic format. The original notice was signed by Kenneth B. Jones, Deputy Director for Park Stewardship.

INTRODUCTION

This Departmental Notice establishes a Statewide policy on the types of sureties the Department will accept from concessionaires. Performance bonds are the standard surety acceptable to the Department; however, there are alternatives to this instrument. Acceptable alternatives are designed to improve access to securing concession contracts for small businesses, increase competition among bidders by having more bidders respond as a result of improved access, and remove potential constraints to competition for the private sector.

AUTHORITY

Public Resources Code Section 5080.18 (d) requires concessionaires to provide a performance bond or other surety acceptable to the Department:

PRC 5080.18 (d): "A performance bond shall be obtained and maintained by the concessionaire. In lieu of a bond, a concessionaire may substitute a deposit of funds acceptable to the department. Interest on the deposit shall accrue to the concessionaire."

POLICY

Successful bidders shall provide a surety acceptable to the Department before execution of a contract. All sureties are to be reviewed and approved by Department counsel. Concession law authorizes DPR to substitute a *deposit of funds* instead of a performance bond. It is DPR's policy to accept the following sureties in place of a performance bond. This policy conforms with Department of General Services policies on acceptable sureties:

Standby Letter of Credit
Irrevocable Letter of Credit
Savings Passbook
Cashier's Check
Certificate of Deposit (CD)

When a concessionaire finds it difficult to obtain a performance bond or another approved surety, the concessionaire may elect to use fixed assets as collateral to secure one of the approved sureties.

Surety Formula

Surety requirements shall range from two months' rent to one year's rent, depending on the level of risk imposed on the Department should the concession fail. Concessions with two-year terms or less generally impose less risk, and shall post a surety instrument equivalent to two months' rent. Concessions with two- to five-year terms and whose annual rental payments are less than $30,000 shall post a surety instrument equivalent to four months' rent. Concessions with five- to ten-year terms whose annual rental payments are less than $30,000 shall post a surety instrument equivalent to six months' rent. Concessions with annual rental payments exceeding $30,000 and terms exceeding 10 years are considered "high risk," and shall post a surety equivalent to one year's rent. Such concessions include but are not limited to retail, restaurant, marina, and golf course concessions.

Regardless of the term, any concession with rental payments exceeding $30,000 per year or annual sales exceeding $350,000 per year shall post a surety equivalent to one year's rent.

Surety Formula Table

Concession Contract Term	**Concession Rent**	**Surety Amount**
Two-year terms or less	$30,000 or less annually*	Two months' rent
Two- to five-year terms	$30,000 or less annually	Four months' rent
Five- to ten-year terms	$30,000 or less annually	Six months' rent
Ten plus year terms	$30,000 or more annually	One year's rent
All contracts regardless of term	$30,000 or more	One year's rent

*Rent for this category rarely exceeds $10,000.

Interpretive Concessions

Considering the value of other factors unique to interpretive concessions that charge no fees, generate no revenue, and pay no rent to the State, sureties shall generally be set at $100 to $1,000 depending on the potential for damage to the facilities and artifacts.

Districts shall require concessionaires to complete a loan agreement (DPR 416) when borrowing artifacts for use in their businesses. The Department requires concessionaires to insure the artifacts on loan.

Release of Sureties

The Department will release sureties only on satisfaction that concessionaires have met all terms and conditions of the contract. Districts shall return the surety after performance conditions have been fully satisfied, or thirty (30) days after contract expiration, if all conditions have been satisfied.

Surety Maintenance Requirements

Sureties shall be acceptable for a minimum period of one year, and concessionaires shall renew them annually thereafter. It is the concessionaire's responsibility to ensure that the surety, as approved by the Department, remains current. Concessionaires shall replace sureties that have a stated expiration date at least thirty (30) days before the surety expires. Failure to do so could cause the Department to draw on the surety. An expired surety constitutes a *breach of contract*, and could result in contract termination.

Attached to this Departmental Notice are questions and answers about this policy for further clarification. If you have any additional questions, please contact your Concession Specialist or Andrea Patterson, Concessions and Reservations Manager, at 916/653-8939 or CALNET 453-8939.

original signed by

Kenneth B. Jones
Deputy Director
Park Stewardship

SURETY QUESTIONS AND ANSWERS

There is a fundamental reason for requiring a surety. The surety protects the interests of the State by compensating the State for concession noncompliance. If the concessionaire fails to meet all the requirements of the contract or abandons or damages state park property, the Department shall, as a last resort, demand compensation from the surety company or retain the cash compensation provided by the concessionaire.

(1) What is a performance bond?

A performance bond calls for specific monetary payment to a beneficiary (State of California, Department of Parks and Recreation) if the purchaser or maker (concessionaire) violates the contract terms and conditions. It protects taxpayers against financial loss.

(2) What is the role of a surety company?

A surety is a third-party guarantee. Basically, the surety company guarantees the Department that the concessionaire will perform as stated in the concession contract. If the concessionaire fails to perform, the surety company will pay the value of the bond.

(3) What are the performance bond alternatives permitted by the Department?

There are five performance bond alternatives permitted by the Department:

(a) Standby Letter of Credit: Issued by a bank, it guarantees that the issuing bank will pay a third party (beneficiary) in the event the bank's customer fails to meet a contractual obligation.

(b) Irrevocable Letter of Credit: A letter which must (1) be issued by a bank doing business in California and insured by the Federal Deposit Insurance Corporation (FDIC); (2) identify the State of California, Department of Parks and Recreation as beneficiary; (3) provide for honor of a draft or demand for payment presented with the State's written statement; and (4) be signed by an authorized DPR representative. This person certifies that there has been loss, damage, or liability resulting from the concessionaire's actions or non-performance of duties and obligations under the contract, or from negligence or act of omission by the concessionaire or his/her agents, servants, and employees, and that the amount of the draft or demand is now due and payable.

A letter of credit is a commitment by a bank to lend funds to a borrower up to a specified amount over a specified future period. Reviewed annually, letters of credit do not require fees or compensating balances unless guaranteed by the lender.

(c) Savings Passbook: An interest-bearing deposit account without a stated maturity (as opposed to a time deposit account paying interest for a fixed time) with the understanding that funds cannot be withdrawn before maturity without giving advance notice. The passbook must be in the name of the State of California, Department of Parks and Recreation for the amount of the required surety. Co-signature accounts are not acceptable.

(d) Cashier's Check: A check drawn on a bank by itself, signed by a bank officer, authorizing payment of the amount shown to the payee - generally regarded as "as good as cash." Concessionaires shall make cashier's checks payable to the State of California, Department of Parks and Recreation in the amount of the required surety. The Department will pay no interest to the concessionaire on surety funds held in cash by the Department.

(e) Certificate of Deposit (CD): A receipt for a time deposit issued for a stated period of time and normally paying a fixed rate of interest. CDs must be a security deposit/time certificate deposit from a bank insured by the FDIC for the amount specified in the contract, and in the name of the State of California, Department of Parks and Recreation. CDs shall be automatically renewable during the contract period, and shall remain in effect until the concessionaire has satisfactorily complied with the terms and conditions of the contract.

(4) Why are performance bonds and other sureties required?

Concession law (PRC 5080.18 (d)) requires sureties to protect the interests of the State (taxpayers) in the event of a contract default. They serve as an assurance that the concessionaire will perform according to the terms and conditions of the concession contract.

(5) What happens if a surety expires?

Expiration of a surety is cause to terminate the concession contract.

(6) What is the formula for calculating the amount of a surety?

Sureties range from two months' rent to one year's rent, depending on the level of risk. Concessions with two-year terms or less post a surety equivalent to two months' rent. Concessions with two- to five-year terms and annual rental of less than $30,000 post a surety equivalent to four months' rent. Concessions with five- to ten-year terms and annual rental of less than $30,000 post a surety equivalent to six months' rent. Concessions with terms exceeding ten years and annual rental exceeding $30,000 post a surety equivalent to one year's rent.

(7) What is the Department's policy on waiving or reducing a surety for concessionaires who have a proven track record?

Concession law provides no authority to waive a performance bond. The surety is a form of insurance that protects the public's interest should the concession run into unforeseen problems. Unlike the National Park Service and other agencies who are leinholders on the concessionaire's property, DPR has no other mechanism to protect the public's interest.

(8) How does concession law (PRC 5080.18 (d)) help concessionaires?

The law is fair to business and taxpayers. It permits alternatives to the performance bond, and allows interest accrued on alternative sureties to accrue to the concessionaire. The Department's policy, as an extension of the law, generally requires from two months' to one year's rent as surety, and other necessary costs such as insurance for all contractual obligations, regardless of the contract's length.

(9) What is DPR's rationale for not accepting an interest in real estate, stocks, or securities other than those permitted under policy as alternatives to the performance bond?

Fluctuation of these markets could change the value of the surety required under contract. While an increase in these instruments would certainly be to everyone's advantage, a decrease in them would place all at risk. With respect to real estate, although the same applies to fluctuations, this goes beyond the authority of the Department. Concessionaires may use these assets as collateral to obtain sureties acceptable to the Department.

(10) Does DPR require a specific form from surety companies or banks?

Forms vary from company to company. DPR must review forms to ensure inclusion of pertinent information discussed in response to question #3 (performance bond alternatives).

(11) What is DPR's position on allowing concessionaires to pay more monthly rent instead of requiring a surety?

There must be enough security available to fairly compensate DPR in the event of a default. If the Department permits a concessionaire to pay on a *payment plan*, the Department becomes a bonding or insurance company, a function that exceeds its authority.

(12) Who selects the surety?

The concessionaire determines the type of security as permitted in this policy as long as the District Superintendent agrees that the surety adequately protects the State's interests. The Concessionaire must ensure that there is no lapse in coverage, and that the surety is approved by the District Superintendent.

(13) To whom must the surety be made payable?

Make the surety payable to the State of California, Department of Parks and Recreation.

(14) What is the period of liability for the concessionaire?

The concessionaire is responsible for maintenance of sureties, as specified in the contract, throughout the term of the contract.

(15) What happens to the surety when a concession is sold or assigned?

When a concessionaire sells or assigns a concession, the surety remains in effect until the Department of General Services and the Office of the Attorney General approve the new assignment. The new concessionaire shall provide a new surety in his/her name before execution of the assignment.

(16) When should a surety be released?

DPR will release a surety after performance conditions have been fully satisfied, upon execution of an assigned contract, or thirty (30) days after the contract terminates, if all conditions are satisfied.

(17) How can the Department collect on an expired surety if it finds that a violation occurred when the surety was in effect?

The *California Code of Civil Procedure* permits collection from a surety company if the violation occurred when the performance bond was in effect. The Department should not return securities until satisfied that no violations have occurred.

(18) How long does a surety remain in effect?

A surety remains in force and effect until the earliest of the following events: (a) the surety companies withdraw from or cancel the surety, or a new surety is issued in place of the original surety; (b) the purpose for which the surety was issued is satisfied, or the purpose is abandoned without any liability having been incurred; (c) a judgment of liability on the surety that exhausts the amount of the surety is satisfied; or (d) the term of the surety expires.

(19) What happens when a new surety has been issued and a violation is discovered under the original surety?

Depending on the terms of the surety, the original surety remains in full force and effect for all liabilities incurred before, and of acts, omissions, or causes existing or which arose before, the new surety became effective *(California Code of Civil Procedures)*. However, terms must be reviewed for special claim requirements, and review by legal counsel should be obtained.

(20) When should a concessionaire submit a surety to the Department?

DPR requires a concessionaire to submit a surety thirty (30) days after the award of the contract, and before execution of the contract. The Department of General Services requires proof of the fulfillment of the surety requirement before contract approval.