



DEPARTMENT OF VETERANS AFFAIRS
DEPUTY ASSISTANT SECRETARY FOR ACQUISITION AND MATERIEL MANAGEMENT
WASHINGTON DC 20420

IL 049-05-11

OFFICE OF ACQUISITION AND MATERIEL MANAGEMENT INFORMATION LETTER

TO: Under Secretaries for Health, Benefits, and Memorial Affairs; Assistant Secretary for Management; Chief Facilities Management Officer, Office of Facilities Management; Veterans Integrated Service Network Directors; Directors, VA Medical Center Activities, Domiciliaries, Outpatient Clinics, Medical and Regional Office Centers, and Regional Offices; Directors, Denver Distribution Center, Austin Automation Center, Records Management Center, VBA Benefits Delivery Centers, and VA Health Administration Center; and the Executive Director and Chief Operating Officer, VA National Acquisition Center

ATTN: Heads of the Contracting Activity, VA Contracting Officers

SUBJ: Surety Bonds (Bid, Payment, Performance, and Payment Protection) on Construction Solicitations and Contracts

1. This Information Letter (IL) provides guidance to contracting officers on the review of corporate surety bonds. The Federal Acquisition Regulation (FAR) authorizes either corporate surety bonds, individual surety bonds, or the furnishing by the bidder/contractor of alternatives in lieu of corporate or individual sureties. In addition, for contracts valued between \$25,000 and \$100,000, other types of payment protection are authorized (see FAR 28.102-1(b)). This IL primarily addresses corporate surety bonds.
2. Bonds protect the Government, the prime contractor's employees, and the subcontractors and suppliers who provide goods or services to the prime contractor. The bid bond, Standard Form (SF) 24 (on solicitations with cost estimates exceeding \$100,000), ensures that if awarded a contract, the bidder will furnish acceptable payment and performance bonds. The performance bond (SF 25) protects the Government from loss in the event the contractor fails to complete the contract or fails to pay its taxes. The payment bond (SF 25-A) protects the prime contractor's employees in the event the contractor fails to pay salaries and the subcontractors and suppliers in the event the contractor fails to pay its bills. Subcontractors, suppliers, and the prime contractor's employees are precluded from filing liens against Federal Government property as they can against private property and the payment bond may be their only avenue for collection of unpaid bills or salaries. It is imperative that contracting officers ensure that valid and enforceable bonds are provided by bidders and contractors.

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3. Contracting officers are responsible for ensuring that the bond documents that they accept and approve are authentic and valid. Bonds can cost bidders/contractors from a few hundreds of dollars for bid bonds to many tens of thousands of dollars for payment and performance bonds, depending on the size of the contract. Perhaps due to difficulty in obtaining valid corporate surety bonds or to the profits that can be made from the sale of fraudulent bonds, there have been instances where forged or fraudulent corporate surety bonds have been submitted on VA projects and at least one case where a VA contracting officer accepted such a bond. Fraudulent bonds can cost both the Government and contractors significant sums of money for worthless paper and leave the Government, subcontractors, suppliers, and prime contractor employees unprotected.

4. To be acceptable, the corporate surety bond must contain the name of a corporation in the "SURETY(IES)" block of the form and the named corporation must be listed in the Department of the Treasury's Listing of Approved Sureties (Department Circular 570) located at <http://www.fms.treas.gov/c570/c570.html#certified>. If the named surety (other than an individual named person) is not listed in Department of the Treasury Circular 570, the bond must be rejected in accordance with FAR 28.202. This does not apply if an individual is shown on the bond as the surety in the "SURETY(IES)" block. If that block contains anything other than the name of a Department of the Treasury Circular 570-listed corporate surety or an individual person's name, the bond should be rejected.

5. The contracting officer must check and verify that the "PENAL SUM OF BOND" amount shown on the bond complies with the requirements of FAR 28.101-2(b) or 28.102-2. If the amount on a bid bond is not sufficient, contracting officers must comply with and follow the guidance at FAR 28.101-4. There may also be other circumstances allowing acceptance of a bid bond that does not specify a value in this block. In the event that such a bid bond is received, the contracting officer must consult with the Office of the General Counsel (OGC) Professional Group V. If the amount on the payment or performance bond is not sufficient, the contracting officer must return the bonds to the contractor for correction. In certain circumstances, prior to bid opening on a competitive solicitation or at any time on a sole source negotiation, it may be possible to reduce the dollar value of the required payment or performance bonds (see FAR 28.102-2.) However, contracting officers must seriously consider the potential negative impact on subcontractors and suppliers that a reduction in the amount required for the payment bond would have and must obtain the concurrence of OGC Professional Group V prior to authorizing any reduction.

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6. The correct "INVITATION NO." or "CONTRACT NO." must be shown in the applicable block on the bond. An incorrect invitation number on a bid bond makes the bid bond invalid and the bid should be rejected. Contracting officers must reject payment or performance bonds that have an incorrect contract number and return the bonds to the contractor for correction.

7. The named "PRINCIPAL" on the bond (the bidder or contractor) must be the same name as the named bidder/offeror or contractor as shown on the Standard Form (SF) 1442 and the type of organization shown on the bond must match the type of organization shown in the solicitation offer representations and certifications or in the Online Representations and Certifications Applications (ORCA) data base for that company.

8. The bond forms may not be modified from the standard form formats (ref. FAR 28.106-1) (except as provided in FAR 28.204). In addition, an addendum adding a rider on terrorism coverage is acceptable, but other addendums or riders usually are not acceptable. Any addendum or rider other than a terrorism rider must be approved by OGC Professional Group V. Only standard, non-modified United States Government forms should be accepted. Bond forms from other organizations such as the American Institute of Architects (AIA) may not be accepted. Bonds forms that contain added terms and conditions (except as provided in FAR 28.204 or a terrorism rider) should not be accepted.

9. The bonds must be original documents or at least contain original signatures, must not contain any "white-out" corrections, and must be signed by both an authorized representative of the Principal (the bidder or contractor) and by an individual who has been delegated by the surety corporation with the power and authority to sign bonds on behalf of the corporation (the "attorney-in-fact"). Under certain circumstances (contracting officer to check with OGC Professional Group V), the lack of signature of the Principal may be waived as a minor informality and the defect may be corrected after receipt of the bond, but the lack of signature of the attorney-in-fact on a corporate surety bond may not be waived and renders the bond unacceptable. Regarding authorization to sign the bond, generally a corporate seal is sufficient evidence that the representative of the Principal (the bidder or contractor) (but not the surety) has authority to sign. However, the absence of the corporate seal of the Principal or the surety does not necessarily make the bond invalid. The bidder or contractor can furnish evidence after the fact that the person signing the bond on behalf of the Principal is authorized to do so. A corporate seal of the surety is not sufficient evidence that the attorney-in-fact is authorized to sign the bond. The bond must also be accompanied by a valid power of attorney from the surety corporation granting the attorney-in-fact authority to sign the bond.

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10. The name of the surety corporation in the "NAME & ADDRESS" block under "CORPORATE SURETY(IES)" at the bottom of the bond form must match the name of the surety corporation as listed in Department of the Treasury Circular 570. If there is any difference or any misspelling, the bond should be rejected.

11. The address of the surety corporation shown in the "NAME & ADDRESS" block under "CORPORATE SURETY(IES)" at the bottom of the bond form does not necessarily have to be identical to the address listed in Department of the Treasury Circular 570 for the surety corporation. If the address is clearly that of the attorney-in-fact (the agent representing the surety corporation), the bond can be accepted. However, if the address is only slightly different from the address for the surety corporation listed in Department of the Treasury Circular 570, that is sufficient reason to suspect that the bond may be fraudulent. The contracting officer should verify the validity of such a bond with the surety corporation (not with the attorney-in-fact) (see paragraph 15 below).

12. The "STATE OF INC." and the "LIABILITY LIMIT" blocks should be filled in, but failure of the bond to reflect the surety's liability limit in the "LIABILITY LIMIT" block may be waived as a minor informality. However, a liability limit stated in this block that is less than the amount required by FAR 28.101-2(b) or 28.102-2 may render the bond unacceptable. The liability limit figure shown for the surety corporation in Department of the Treasury Circular 570 represents the dollar value of each surety bond that the corporation is authorized to issue. If the liability limit is listed as \$3,000,000, the corporation is authorized to issue bonds valued at up to \$3,000,000 for each bond. Bonds that exceed that value should be rejected unless accompanied by co-insurance or reinsurance. Treasury requirements do not limit the penal sum (face amount) of bonds which surety companies may provide. However, when the penal sum exceeds a company's underwriting limitation, the excess must be protected by co-insurance, reinsurance, or other methods in accordance with Treasury Circular 297, Revised September 1, 1978 (31 CFR Section 223.10, Section 223.11) (see Department of the Treasury Circular 570 Notes, paragraph (b)).

13. Selling bonds is similar to selling insurance and the surety corporation can only sell bonds in States in which it is licensed to do so. Those States are listed in Department of the Treasury Circular 570. The contracting officer must ensure that the surety corporation is licensed to issue bonds in the State in which the attorney-in-fact is located. The power of attorney usually states where the attorney-in-fact is located or the address of the attorney-in-fact may be shown in the "NAME AND ADDRESS" block under "CORPORATE SURETY(IES)" at the bottom of the bond.

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The contracting officer must match the State where the attorney-in-fact is located with the list of States shown for that particular surety corporation in Department of the Treasury Circular 570. The States listed in the Circular are the States in which the surety is licensed to sell bonds, but the list may not be current. If the attorney-in-fact is located in a State that is not shown in Department of the Treasury Circular 570 for that surety, the contracting officer should verify with the surety corporation (not with the attorney-in-fact) whether or not the surety corporation is licensed to issue surety bonds in the State in which the attorney-in-fact is located. The contracting officer can also verify with the State insurance commissioner (information on such offices can usually be located on the Web or can be found at the end of Department of Treasury Circular 570) that the surety corporation is licensed to conduct surety business in that State. If the surety corporation is not licensed to issue bonds in the State in which the attorney-in-fact is located, the bonds should be rejected. The location of the construction project or the location of the bidder/contractor has no impact on the States in which the surety is licensed; the State relates only to the location of the attorney-in-fact who signed the bonds (see Notes (c) and (f) in Circular 570).

14. A valid power of attorney is critical to the validity of the corporate surety bond. The contracting officer must read the power of attorney and assess its validity. It should be a professional document with no misspellings. If the document says that it is only valid if it contains a corporate water mark or a particular color, it must contain the required water mark or color. If it doesn't, the bond should be rejected. The power of attorney must state that the person who signed the bond is authorized to do so and the name on the power of attorney must match the name shown on the bond. If the power of attorney places any limits on the dollar value or on the type of bonds that the named attorney-in-fact can execute, the bonds signed by that attorney-in-fact must be within those limits. If the power of attorney contains any signatures that are printed copies or facsimiles of signatures rather than original signatures, the document must contain a statement that printed copies or facsimiles of signatures are authorized. The document must contain a statement with a current date attesting that the power of attorney is still valid. If there is any question as to the validity of the power of attorney, the validity of the bond should be verified with the corporate surety office (see paragraph 15 below). The contracting officer may consult with OGC Professional Group V and the Acquisition Assistance Division for guidance in determining the adequacy and acceptability of powers of attorney.

15. The Surety Association of America (see <http://www.surety.org/>) has established a Bond Authenticity Program (see <http://www.surety.org/content.cfm?lid=10&catid=2>). Not all corporate sureties listed in Department of the Treasury Circular 570 participate in this program, but those that do participate are listed on this Web site (see

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<http://www.surety.org/pdf/2002obligelist.pdf>). If contracting officers have any question as to the validity of a corporate surety, they should validate the bond with the surety corporation by following the guidance provided on these Web pages. For corporate sureties that do not participate in the Bond Authenticity Program, contracting officers should contact such sureties via the telephone numbers listed in Circular 570 to verify bonds, if verification is considered necessary.

16. For contracts between \$25,000 and \$100,000, a bid bond is not required, but the contractor must be required to provide payment protection after award. The solicitation should authorize the contractor to select from at least two of the types of payment protection authorized by FAR 28.102-1(b). More than two options can be provided to the bidders/contractors, but we recommend that bidders/contractors be given at least the option of providing either a payment bond or an irrevocable letter of credit (ILC). If the contractor elects to furnish anything other than a corporate surety bond, as addressed above, the contracting officer must work with OGC Professional Group V and the Acquisition Assistance Division to determine the validity and acceptability of the payment protection provided.

17. A bidder or contractor may furnish alternatives in lieu of a corporate or individual surety in support of a bond (see FAR 28.204). In such cases, the bidder or contractor must submit a completed bond form or forms containing a statement pledging security as provided in FAR 28.204-1 through 28.204-3 in lieu of execution of the bond form by a corporate or individual surety. Acceptable forms of security are strictly limited as provided in FAR 28.204-1 to 28.204-3. If an ILC is offered as an alternative security, the contracting officer must consult with OGC Professional Group V and the Acquisition Assistance Division for guidance in determining the adequacy and acceptability of the ILC. Note that the ILC must strictly comply with the requirements of FAR 28.204-3 and FAR 52.228-14.

18. If an offeror or contractor provides an individual surety bond, the contracting officer must obtain the opinion of OGC Professional Group V as to the adequacy of the documents pledging the assets of the individual surety prior to accepting the bond (see FAR 28.203(f)). In addition, the contracting officer must consult with the Acquisition Assistance Division for guidance in reviewing the bond and the supporting documents for compliance with FAR requirements. The types of assets of an individual surety that are acceptable are listed in FAR 28.203-2(a) and 28.203-2(b) and contracting officers must ensure that only those types of assets are accepted. Recent experience has been that very few individual sureties comply with FAR requirements. Under no circumstances should a contracting officer accept an individual surety bond without clearing the bond with OGC Professional Group V and the Acquisition Assistance Division.

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19. While it is not mandatory that contracting officers require bid bonds from offerors on 8(a) sole source negotiated construction contracts valued in excess of \$100,000, we recommend that bid bonds be required in such circumstances. If the offeror can provide an acceptable bid bond, it is highly likely that the offeror will also be able to furnish acceptable payment and performance bonds after contract award. This requirement will help avoid the necessity of terminating an awarded contract if the contractor is unable to provide acceptable payment and performance bonds. If the offeror can provide an acceptable bid bond and is subsequently awarded a contract, VA would and should cover the cost of the bid bond in the negotiated award price. The contractor would be reimbursed for the cost of the bid bond and requiring a bid bond will result in only a minimal cost to the Government. However, in such circumstances, it is imperative that the contracting officer ensure that the offered bid bond is acceptable prior to making award of the contract. A contractor on an 8(a) or any other type of contract should not be placed into a situation where the contractor is subject to termination of the contract for failure to provide acceptable payment and performance bonds if that situation could have been avoided through the rejection of a defective bid bond. However, under no circumstances should contracting officers accept defective payment and performance bonds just because a defective bid bond was accepted.

20. While the issues involving bonds can be complicated, it is imperative that contracting officers ensure that each and every bond that they approve and accept is valid. In limited circumstances (see FAR 28.101-4(c)), deficiencies in a bid bond can be corrected. If contracting officers have any doubts or questions concerning the validity of bonds, the contracting officers should verify the validity of any corporate surety bonds with the surety corporation that issued the bond. Contracting officers should contact OGC Professional Group V and the Acquisition Assistance Division for help and advice on questionable corporate surety bonds and on all individual surety bonds, ILCs, and on payment protection other than corporate surety bonds. Questions regarding bonds or this IL may also be directed to Don Kaliher, Acquisition Policy Division (049A5A), at 202-273-8819 or via e-mail.



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