

PERFORMANCE BOND INSTRUCTIONS (FEB 2015)

1. Introduction
 - a. Procurement Services Division has posted two distinct performance bond forms. One is an indemnity bond. The other is a completion bond. The nature and use of each, as envisioned by the Division, is outlined below. We believe each should be generally acceptable to the surety industry, but they have not been market-tested as of the date these forms were posted. Please note that we are unaware of any surety-industry standard, non-construction, performance bond forms.
2. Which Bond Form
 - a. Completion Bond
 - i. Use: This form is for use when the agency's solicitation requires every offeror to agree to provide a performance bond as part of its contract performance.
 - ii. Defined: "A bond given by a surety to ensure the timely performance of a contract." Black's Law Dictionary (9th ed. 2009)
 - iii. Note: The completion bond form is loosely fashioned after the standard AIA 312, which is a standard in the construction industry.
 - b. Indemnity Bond
 - i. Use: This form is for use by offerors to bolster their "financial responsibility" when the solicitation does not require each offeror to provide a performance bond.
 - ii. Nature: A bond to reimburse the holder for any loss caused by the contractor's conduct.
3. Evaluating Bonds
 - a. To confirm acceptability of any Performance Bond, the Procurement Officer should study the following publication, which is posted on the Division's website with the Performance Bond forms and instructions: [Bid, Payment, and Performance Bonds - What They Are, How They Work, and a Checklist of What You Need \(December 2009\)](#)
4. Completing the Form
 - a. Contractor
 - i. The name given for Contractor on the Performance Bond must match the name given for Name of Offeror, as it appears on the signed Cover Page that You submitted with Your Offer.
 - b. Surety
 - i. The full legal name of the Surety.
 - ii. The surety company must be licensed in South Carolina, with an "A" minimum rating of performance as stated in the most current publication of "Best's Key Rating Guide, Property Liability" which shall show a financial strength rating of at least five (5) times the contract amount.¹
 - c. Agency
 - i. The name given for Agency must match the name given for the Using Governmental Unit, as it appears on the Cover Page.
 - ii. If the Using Governmental Unit is "Statewide Term Contract" or "MultiAgency," consult legal counsel before issuing the solicitation or before offering to supply a bond.
 - d. Sum of the Bond
 - i. Indemnity Bond Submitted for Responsibility Determination
 1. This category applies only to a Performance Bond submitted by an Offeror in response to the provision titled Qualifications of Offeror (Feb 2015), not to a Bond submitted in response to a requirement of the Solicitation.

¹ Compare to Regulation 19-445.2145(M)(2)(c) ("Operations period performance bond shall be in a form to be specified in the Manual for Planning and Execution of State Permanent Improvement, Part II. Each bond shall be issued by a Surety Company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times the bond amount.")

2. Offeror's proposal should state its offer to provide a Performance Bond upon award and should also state the sum of the bond being offered. In determining responsibility, the Procurement Officer may consider the Sum of the Bond in determining responsibility. For maximum benefit, the Sum of the Bond, or Penal Sum, should equal the total contract price (i.e., the potential value) of the contract. The Procurement Officer should refuse any surety not licensed to operate in South Carolina. The Procurement Officer should also consider the financial condition of the Surety; to be acceptable, the surety should have at least an "A" rating of performance, as state in the most current publication of "Best Key Rating Guide, Property Liability," and show a financial strength rating of at least five times the bond amount.
- ii. Bond Required by Solicitation
 1. This category applies only if the Solicitation makes the Performance Bond a contractual performance obligation.
 2. The Sum of the Bond must equal the contract value of the contract solicited by the IFB or RFP. Typically, the Sum of the Bond will be an amount equal to the total potential price of the award, or more specifically, the total contract price offered by the offeror.
 3. Agencies should be mindful that contract amendments that increase the contract sum do not increase the Sum of the Bond.
- e. State Solicitation & Contract No.
 - i. State Solicitation Name - should match the "Description" appearing on the Cover Page of the Solicitation giving rise to the contract subject to the surety bond.
 - ii. State Solicitation Number – should match the "Solicitation Number" appearing on the Cover Page of the Solicitation giving rise to the contract subject to the surety bond.
 - iii. State Contract No. – should match the "contract number" appearing on the final statement of award for the contract subject to the surety bond.
- f. Bond Number
 - i. A number provided by the Surety to identify the Bond.
5. Statewide Term & Multi-Agency Contracts
 - a. Not for use with Statewide Term Contracts, as the Agency and applicable scope of work cannot be sufficiently defined. For Multi-Agency, every agency must be listed by name on the Bond form as an agency.

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS, that *(Insert full name or legal title and address of Contractor)*

Name: _____
Address: _____

Hereinafter referred to as "**Contractor**", and *(Insert full name and address of principal place of business of Surety)*

Name: _____
Address: _____

Hereinafter called the "**surety**", are jointly and severally held and firmly bound unto *(Insert full name and address of Agency)*

Name: _____
Address: _____

hereinafter referred to as "**Agency**", or its successors or assigns, in the sum of _____ (\$_____), being the **Sum of the bond** to which payment to be well and truly made, the Contractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Whereas, Contractor and Agency have entered into an agreement dated _____ and identified by one or more of the following:

State Solicitation Name: _____
State Solicitation No.: _____
State Contract No. _____

Which agreement is by reference made a part hereof, and is hereinafter referred to as the **Contract**.

1. The Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Agency for the full and faithful performance of the Contract, which is incorporated herein by reference.

2. If the Contractor performs the Contract, the Surety and the Contractor have no obligation under this Bond, except to participate in conferences as provided in paragraph 3.1.

3. The Surety's obligation to fulfill its duties under this Bond shall arise after:

3.1 The Agency has notified the Contractor and the Surety at the above address that the Agency is considering declaring a Contractor Default and has requested a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Contract. If the Agency, the

Contractor and the Surety agree, the Contractor may be allowed additional time to perform the Contract, but such an agreement shall not waive the Agency's right, if any, to subsequently declare a Contractor Default and formally terminate the Contractor's right to complete the Contract; or

3.2 The Agency has declared a Contractor Default and formally terminated the Contractor's right to complete the Contract.

4. The Surety shall, within fifteen days after receipt of notice of the Agency's declaration of a Contractor Default, and at the Surety's sole expense, take one of the following actions:

4.1 Arrange for the Contractor, with consent of the Agency, to perform and complete the Contract; or

4.2 Undertake to perform and complete the Contract itself, through its agents or through independent contractors; or

4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Agency (reference S.C. Code Ann. § 11-35-1810) for a contract for performance and completion of the Contract, arrange for a contract to be prepared for execution by the Agency and the contractor selected with the Agency's concurrence, to be secured with a performance bond equivalent to the Bond issued on the Contract and executed by a surety meeting the Agency's requirements, and pay to the Agency the amount of damages as described in paragraph 7 in excess of the Balance of the Contract Sum incurred by the Agency resulting from a Contractor Default; or

4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor, and:

4.4.1 After investigation, determine the amount for which it may be liable to the Agency and, within sixty days of waiving its rights under this paragraph, tender payment thereof to the Agency; or

4.4.2 Deny liability in whole or in part and notify the Agency, citing to and explaining all reasons therefore.

5. Provided Surety has proceeded under paragraphs 4.1, 4.2, or 4.3, the Agency shall pay the Balance of the Contract Sum, when due, to either:

5.1 Surety in accordance with the terms of the Contract; or

5.2 Another contractor selected pursuant to paragraph 4.3 to perform the Contract.

5.3 The Balance of the Contract Sum due either the Surety or another contractor shall be reduced by the amount of damages as described in paragraph 7.

6. If the Surety does not proceed expeditiously as provided in paragraph 4, the Surety shall be deemed to be in default on this Bond fifteen days after receipt of written notice from the Agency to the Surety demanding that the Surety perform its obligations under this Bond, and the Agency shall be entitled to enforce any remedy available to the Agency.

6.1 If the Surety proceeds as provided in paragraph 4.4, and the Agency refuses the payment tendered or the Surety has denied liability, in whole or in part, then without further notice the Agency shall be entitled to enforce any remedy available to the Agency.

7. After the Agency has terminated the Contractor's right to complete the Contract, and if

the Surety elects to act under paragraph 4.1, 4.2, or 4.3 above, then the responsibilities of the Surety to the Agency shall be those of the Contractor under the Contract, and the responsibilities of the Agency to the Surety shall those of the Agency under the Contract. To the limit of the amount of this Bond, but subject to commitment by the Agency of the Balance of the Contract Sum to mitigation of costs and damages on the Contract, the Surety is obligated to the Agency for:

7.1 The responsibilities of the Contractor for correction of defective Work and completion of the Contract; and

7.2 Additional legal, design, and delay costs resulting from a Contractor Default, and resulting from the actions or failure to act of the Surety under paragraph 4; and

7.3 Damages caused by delayed performance or non-performance by the Contractor.

8. The Surety shall not be liable to the Agency or others for obligations of the Contractor that are unrelated to the Contract, and the Balance of the Contract Sum shall not be reduced or set-off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the Agency or its heirs, executors, administrators, or successors.

9. Definitions

9.1 Balance of the Contract Sum means the total amount payable by the Agency to the Contractor under the Contract after all proper adjustments have been made, including allowance to the Contractor of any amounts to be received by the Agency in settlement of insurance or other claims for damages to which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Contract.

9.2 Contractor Default means a failure of the Contractor, which has neither been remedied nor waived in writing by the authorized Agency representative, to perform the Contract or otherwise to comply with the terms of the Contract.

9.3 Work shall have the meaning that term is given by the Contract.

* * * * *

10. Surety, for the value received hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract or to work to be performed thereunder or the specifications accompanying same shall in any way affect its obligation on this bond, and it does hereby waive notice of any such change, extension

of time, alteration or addition to the terms of the contract or to the work or to the specifications.

immunity or immunity under the Eleventh Amendment of the U.S. Constitution.

11. This bond, any dispute relating to this bond, and all the rights and obligations of the parties shall, in all respects, be interpreted, construed, enforced and governed by and under the laws of the State of South Carolina, except its choice of law rules.

13. Agency and Surety consent that any process necessary or proper for the initiation or continuation of any administrative proceedings relating to this bond may be served by certified mail addressed to the address shown on the signature page. Process is deemed complete upon deposit with the United States Postal Service. Notice to the Surety, the Agency or the Contractor shall be mailed or delivered to the address shown on the signature page. Notice shall be deemed to have been made upon deposit with the United States Postal Service or upon actual delivery if delivery is made by hand.

12. All disputes relating to this bond shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina. Surety may join in any proceeding brought under the Contract and shall be bound by the results thereof. Surety agrees that any act by either the Agency or the State of South Carolina regarding this bond is not a waiver of either the Agency's or the State of South Carolina's sovereign

14. In the event of Surety's default on its obligations under this bond, Agency may recover from the Surety all costs, including reasonable attorney's fees, expenses and costs, incurred in enforcing the bond or collecting any amounts due Agency.

IN WITNESS WHEREOF, Surety and Contractor, intending to be legally bound hereby, subject to the terms stated herein, do each cause this Performance Bond to be duly signed and sealed on its behalf by its authorized officer, agent or representative.

DATED this _____ day of _____, 2_____ BOND NUMBER _____
(shall be no earlier than date of contract formation, usually date of the final Statement of Award)

CONTRACTOR

SURETY

By: _____
(Seal)

By: _____
(Seal)

Print Name: _____

Print Name: _____

Print Title: _____

Print Title: _____
(Power of Attorney MUST be attached.)

Witness: _____
(Additional Signatures, if any, appear on attached page)

Witness: _____

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS, that *(Insert full name or legal title and address of Contractor)*

Name: _____

Address: _____

Hereinafter referred to as "**Contractor**", and *(Insert full name and address of principal place of business of Surety)*

Name: _____

Address: _____

Hereinafter called the "**surety**", are jointly and severally held and firmly bound unto *(Insert full name and address of Agency)*

Name: _____

Address: _____

hereinafter referred to as "**Agency**", or its successors or assigns, in the sum of _____ (\$ _____), being the **Penal Sum** of the bond. For payment of the penal sum, the Contractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The Condition of this obligation is that Contractor and Agency have entered into an agreement dated _____ and identified by one or more of the following:

State Solicitation Name: _____

State Solicitation No.: _____

State Contract No. _____

Which agreement is by reference made a part hereof, and is hereinafter referred to as the **Contract**.

1. If Contractor shall well, truly and faithfully perform its duties, all the undertakings, covenants, terms, conditions, and agreements of the Contract during the original term thereof, and any extensions thereof which may be granted by the Agency, with or without notice to the Surety, and if the Contractor shall satisfy all claims and demands incurred under such contract, and shall fully indemnify and save harmless the Agency from all costs and damages which it may suffer by reason of failure to do so, including without limitation attorneys' and consultants' fees, and shall

reimburse and repay the Agency all outlay and expense which the Agency without limitation, may incur in making good any failure to perform, then this obligation shall be void, otherwise to remain in full force and effect.

* * * * *

2. Surety, for the value received hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract or to work to be performed thereunder or the specifications accompanying same shall in any way affect its obligation on this bond, and it does hereby waive notice of

any such change, extension of time, alteration or addition to the terms of the contract or to the work or to the specifications.

Carolina' sovereign immunity or immunity under the Eleventh Amendment of the U.S. Constitution.

3. This bond, any dispute relating to this bond, and all the rights and obligations of the parties shall, in all respects, be interpreted, construed, enforced and governed by and under the laws of the State of South Carolina, except its choice of law rules.

5. Agency and Surety consent that any process necessary or proper for the initiation or continuation of any administrative proceedings relating to this bond may be served by certified mail addressed to the address shown on the signature page. Process is deemed complete upon deposit in the United States mail. Notice to the Surety, the Agency or the Contractor shall be mailed or delivered to the address shown on the signature page. Notice shall be deemed to have been made upon deposit with the United States Postal Service or upon actual delivery if delivery is made by hand.

4. All disputes relating to this bond shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina. Surety may join in any proceeding brought under the Contract and shall be bound by the results thereof. Surety agrees that any act by either the Agency or the State of South Carolina regarding this bond is not a waiver of either the Agency's or the State of South

6. In the event of Surety's default on its obligations under this bond, Agency may recover from the Surety all costs, including reasonable attorney's fees, incurred in enforcing the bond or collecting any amounts due Agency.

IN WITNESS WHEREOF, Surety and Contractor, intending to be legally bound hereby, subject to the terms stated herein, do each cause this Performance Bond to be duly signed and sealed on its behalf by its authorized officer, agent or representative.

DATED this _____ day of _____, 20____ BOND NUMBER _____
(shall be no earlier than date of contract formation, usually date of the final Statement of Award)

CONTRACTOR

SURETY

By: _____
(Seal)

By: _____
(Seal)

Print Name: _____

Print Name: _____

Print Title: _____

Print Title: _____
(Power of Attorney MUST be attached.)

Witness: _____
(Additional Signatures, if any, appear on attached page)

Witness: _____