



Nancy Kopp, Treasurer
Martin O'Malley, Governor
Peter Franchot, Comptroller



Board of Public Works



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Subject: Procurement — Bid, Performance,
and Payment Security

Effective: Immediately

Martin O'Malley
Governor

Nancy K. Kopp
Treasurer

Peter Franchot
Comptroller

Sheila McDonald
Executive Secretary

Purpose: To provide guidance to State agencies regarding the use of bid, performance, and payment security in procurement contracts.

Background: This Advisory provides guidance concerning when it is appropriate to require bid, performance, or payment security on State contracts. Overly stringent requirements for bid, performance or payment bonds may limit participation by small and minority businesses and increase contract costs for the State.

Bid, performance, and payment security is *required* only for construction contracts expected to exceed \$100,000. State procurement regulations authorize - but do not require - bid security for non-construction contracts expected to exceed \$50,000. State procurement regulations authorize - but do not require - performance and payment security on non-construction procurement contracts if the contract is expected to exceed \$100,000. COMAR 21.06.07.01. (See Attachment A for a full description). Acceptable security includes bid, performance, and payment bonds; irrevocable letters of credit; certified checks; and cashier's checks and bonds provided by an individual surety (see Board Advisory 2006-4 Individual Surety Bonds)

Determination: In considering whether to require security in any particular solicitation, the procurement officer should consider:

1. The degree of risk of contractor default;
2. The value of the contract and liability of the State if default would occur;
3. The added cost of bond premiums to the contract price;
4. Whether security requirements would impede participation in State procurement by small, minority, and start-up businesses;
5. Bonding requirements imposed by federal law or policy, if applicable; and

6. Security alternatives such as irrevocable letters of credit, liquidated damages clauses, and retainages.

A procurement officer who requires security on a procurement that is not required by State or federal law or regulation to have security must make a written determination that explains why the Procurement Officer has decided to require it. The determination should include complete discussion of the factors above.

All acceptable security listed in COMAR 21.06.07.01 should be permitted if the procurement officer requires bid, performance, or payment security. Procurement officers are encouraged to work with the Office of the Attorney General to develop specific guidelines for each category of acceptable security.

Before excluding acceptable forms of security in a solicitation, the procurement officer should consider:

1. Impact on participation by small and minority businesses;
2. Whether setting guidelines for the category of security is possible rather than excluding the security altogether; and
3. Degree of risk to the State if all acceptable security is permitted.

If a solicitation excludes any category of security, the procurement officer must make a written determination including a discussion of the factors above.

Notice of services provided by the Maryland Small Business Development Financing Authority (MSBDFA) (see below) **must** be placed in any solicitation that requires bid, performance, or payment security. Suggested solicitation language is included as Attachment B.

Format of the Bond - Although the Office of the Attorney General specifies the form of the bond, the procurement agency is responsible for maximizing competition for all State procurements. To that end, the procurement agencies must make every effort to minimize the number of otherwise responsive/responsible bidders who are ineligible for contact award because of defects or omissions in the bond. The procurement agencies should notify sureties throughout the State concerning:

1. The form of the bond, if the agency uses a format unique to the agency;
2. What bond forms are acceptable to the agency; and
3. What bond forms are unacceptable to the agency.

The procurement agency should also stress the importance of completeness and accuracy of the bond forms to all prospective bidders/offerors.

MSBDFA Bonding Assistance: Small businesses may qualify for assistance in obtaining bid, performance and payment bonds through the Maryland Small Business Development Financing Authority. MSBDFA directly issues bid, performance, or payment bonds up to \$5 million. MSBDFA may also guarantee up to 90% of a surety's losses resulting from a contractor's breach of a bid, performance, or payment bond (up to a maximum of \$1,350,000). Bonds issued directly by the MSBDFA Surety Bond Program remain in effect for the term of the contract. Bond guarantees remain in effect for the term of the bond.

To be eligible for MSBDFA bonding assistance, an applicant must: (1) have its principal place of business in Maryland or be a Maryland resident; (2) be denied bonding by at least one surety in both the standard and specialty markets within 90 days of submitting a bonding application to MSBDFA; (3) employ fewer than 500 full-time employees or have gross sales of less than \$50 million annually; (4) subcontract not more than 75% of the work; (5) have a reputation of good moral character and financial responsibility; (6) demonstrate that the contract will have a substantial economic impact; and (7) never have defaulted on any loan or financial assistance made or guaranteed by MSBDFA. Applicants must apply for MSBDFA assistance through their respective bonding agents.

Attachments:

Bid/Contract Security Guidelines (Attachment A)

Surety Bond Assistance Program - Suggested Language (Attachment B)

Questions concerning this Advisory may be addressed to:

Board of Public Works

80 Calvert Street, Room 117

Annapolis, Maryland 21401

410-260-7335 Toll Free: 877-591-7320

Fax: 410-974-5240

Mary Jo Childs, General Counsel

Email: mchilds@comp.state.md.us