

Chapter 24. Security

Summary

This chapter identifies the various forms of security that may be required as part of a procurement, when they are required, what form they must be in, and when they may be released. The forms of security considered in this section are bid bonds, performance bonds, payment bonds, and alternative forms of security such as certified checks, cash escrows, and letters of credit.

Essential Information in this Chapter

- A bid bond is required for all construction contracts whose cost is expected to exceed \$100,000 and may be required for any other procurement. A bid bond promises that the vendor and its surety are jointly and severally liable for the amount of the bond if the vendor refuses to honor the bid or proposal upon being tendered the contract.
- A performance bond is required for all construction contracts exceeding \$100,000 and may be required for any other procurement. A performance bond is a promise by the vendor and the surety to pay up to the sum of the bond unless there is satisfactory performance of the contract.
- A payment bond is required for all construction contracts exceeding \$100,000 and may be required for any other procurement. A payment bond protects subcontractors, materialmen, and suppliers because it is an agreement by the vendor and the surety to pay for material and labor supplied in the performance of the work.
- In lieu of a bid, performance, or payment bond, a vendor may furnish a certified check, cash escrow, or a bank or saving's institution's letter of credit, in the face amount required for the bond.

Key References to the Code of Virginia Applicable to this Chapter

Section 2.2-4336: Bid bonds
Section 2.2-4337: Performance and payment bonds
Section 2.2-4338: Alternative forms of security
Section 2.2-4339: Bonds on other than construction contracts
Section 2.2-4340: Action on performance bonds
Section 2.2-4341: Action on payment bonds

24-1 General

This chapter identifies the requirements for bid bonds, performance bonds, payment bonds, and alternative forms of security such as certified checks, cash escrows, and letters of credit.

24-2 Bid Bonds

A bid bond may be required to be submitted with a bid or proposal. A bid bond ensures that the vendor, if offered the contract: (1) will not withdraw its bid within the period specified for acceptance; (2) will execute a written contract; and (3)

will furnish other security such as performance and payment bonds, the certificate of insurance, or any other documents which are required by the invitation for bids or the request for proposals. A bid bond promises that the vendor and its surety are jointly and severally liable for the amount of the bond if the vendor refuses to honor the bid or proposal upon being tendered the contract. The bid bond contributes to the sanctity of the procurement process and leads to the certainty and reliability of bids and proposals.

24-2.1 When Required

Except in cases of emergency, all bids or proposals for construction contracts in excess of \$100,000 shall be accompanied by a bid bond.

The purchasing agent may require in the invitation for bids or request for proposals that any bid or proposal not expected to exceed \$100,000 be accompanied by a bid bond. In exercising this discretion, the purchasing agent shall consider the nature of the goods or services being procured and, where the competitive sealed bidding procedure is used, the likelihood of an apparent low bidder not being willing to execute a written contract.

24-2.2 The Form and Amount of the Bond

Each bid bond shall be in the form and amount as follows:

- **Issuer:** The bid bond shall be executed by a surety company selected by the vendor. The surety company shall be authorized to do business in the Commonwealth of Virginia, shall be registered with the Virginia State Corporation Commission Bureau of Insurance, and shall have a registered agent in Virginia.
- **Attorney-in-fact:** The bid bond shall identify the name and address of an attorney-in-fact who is appointed to act on behalf of the surety. The attorney-in-fact shall affix to the bond a certified and current copy of the power of attorney.
- **Amount:** The bid bond shall be written in an amount sufficient to cover the anticipated differential costs between the lowest and next lowest bidder, as well as the administrative costs associated with a possible re-advertisement of the invitation for bids or request for proposals. However, the amount of the bid bond shall not exceed five percent of the amount of the bid or proposal.
- **Obligee:** The obligee of a bid bond shall be either the "County of Albemarle, Virginia" or the "School Board of Albemarle County, Virginia," as the case may be.

In lieu of a bid bond and with the express permission of the purchasing agent, a vendor may submit an alternative form of security as provided in Section 24-5.

24-2.3 Amount of Forfeiture

The amount of a bid bond forfeiture shall not exceed the lesser of: (1) the difference between the bid or proposal for which the bond was written and the next low bid or proposal; or (2) the face amount of the bid bond.

24-3 Performance Bonds

A performance bond may be required to be submitted by the vendor upon the award of the contract. A performance bond is a promise by the vendor and the surety to pay up to the sum of the bond unless there is satisfactory performance of the contract.

24-3.1 When Required

Upon the award of a construction contract exceeding \$100,000 to any prime contractor, the contractor shall furnish to the County a performance bond.

For any other contract, regardless of cost, the purchasing agent may require in the invitation for bids or request for proposals that the vendor to whom the contract is awarded furnish a performance bond. In exercising this discretion, the purchasing agent shall consider the nature of the goods or services being procured.

If required, the performance bond shall be filed in the office of the purchasing agent.

24-3.2 The Form and Amount of the Bond

Each performance bond shall be in the form and amount as follows:

- Form of the bond: The performance bond shall be on the form prepared and approved by the county attorney's office or as otherwise approved by the county attorney to be substantially equivalent thereto.
- Original bond: The vendor shall provide an original bond.
- Delivery: Upon award of the contract, the vendor shall submit to the purchasing agent a sample performance bond. The original performance bond shall be submitted by the vendor and received by the purchasing agent within ten days after the contract is executed by the County.

- Issuer: The performance bond shall be executed by a surety company selected by the vendor. The surety company shall be authorized to do business in the Commonwealth of Virginia, shall be registered with the Virginia State Corporation Commission Bureau of Insurance, and shall have a registered agent in Virginia.
- Identify parties or contract: The performance bond shall refer to the contract to which it pertains, either by referring to the contract number or procurement number, or by identifying the parties to the contract.
- Attorney-in-fact: The performance bond shall identify the name and address of an attorney-in-fact who is appointed to act on behalf of the surety. The attorney-in-fact shall affix to the bond a certified and current copy of the power of attorney.
- Signature of bond company representative: The performance bond shall be signed by an authorized representative of the bond company.
- Date of bond: The performance bond shall be executed and dated the same date the vendor signs the contract, unless the purchasing agent, in consultation with the county attorney's office, permits submission after execution of the contract by the County.
- Term of bond: The performance bond shall have force and effect during the entire term of the contract, including any changes to the term pursuant to change orders, and until it is released upon determination that the vendor has acceptably completed performance under the terms of the contract.
- Condition: The performance bond shall be conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications, and conditions of the contract.
- Amount: The performance bond shall be written in the sum of the contract. If change orders are issued on a construction contract or amendments made to a non-construction contract, the bonds should be reviewed and, if determined by the purchasing agent to be necessary, reexecuted to reflect the changed amount.
- Obligee: The obligee of a performance bond shall be either the "County of Albemarle, Virginia" or the "School Board of Albemarle County, Virginia," as the case may be.

In lieu of a performance bond and with the express permission of the purchasing agent, a vendor may submit an alternative form of security as provided in Section 24-5.

24-4 Payment Bonds

A payment bond may be required to be submitted by the vendor upon the award of the contract. In the private sector, a subcontractor, materialman, or supplier can recover the cost of work or goods in a project even if the prime contractor goes bankrupt or refuses to pay. This is done by placing a lien upon the owner's property which is benefited by the goods or labor. Because a lien may not be placed on public property in Virginia, the payment bond is required instead. A payment bond protects subcontractors, materialmen, and suppliers because it is an agreement by the vendor and the surety to pay for material and labor supplied in the performance of the work.

24-4.1 When Required

Upon the award of a construction contract exceeding \$100,000 to any prime contractor, the contractor shall furnish to the county a payment bond.

For any other contract, regardless of cost, the purchasing agent may require in the invitation for bids or request for proposals that the vendor to whom the contract is awarded furnish a payment bond. In exercising this discretion, the purchasing agent shall consider the nature of the goods or services being procured.

If required, the payment bond shall be filed in the office of the purchasing agent.

24-4.2 The Form and Amount of the Bond

Each payment bond shall be in the form and amount as follows:

- Form of the bond: The payment bond shall be on the form prepared and approved by the county attorney's office or as otherwise approved by the county attorney to be substantially equivalent thereto.
- Original bond: The vendor shall provide an original bond.
- Delivery: Upon award of the contract, the vendor shall submit to the purchasing agent a sample performance bond. The original performance bond shall be submitted by the vendor and received by the purchasing agent within ten (10) days after the contract is executed by the County.

- Issuer: The payment bond shall be executed by a surety company selected by the vendor. The surety company shall be authorized to do business in the Commonwealth of Virginia, shall be registered with the Virginia State Corporation Commission Bureau of Insurance, and shall have a registered agent in Virginia.
- Identify parties or contract: The payment bond shall refer to the contract to which it pertains, either by referring to the contract number or procurement number, or by identifying the parties to the contract.
- Attorney-in-fact: The payment bond shall identify the name and address of an attorney-in-fact who is appointed to act on behalf of the surety. The attorney-in-fact shall affix to the bond a certified and current copy of the power of attorney.
- Signature of bond company representative: The payment bond shall be signed by an authorized representative of the bond company.
- Date of bond: The payment bond shall be executed and dated the same date the vendor signs the contract, unless the purchasing agent, in consultation with the county attorney's office, permits submission after execution of the contract by the County.
- Term of bond: The payment bond shall have force and effect during the entire term of the contract, including term extensions created by change order or by contract amendment, and until it is released upon determination that the vendor has acceptably completed performance under the terms of the contract.
- Condition: The payment bond shall be conditioned upon the prompt payment for all material furnished or labor supplied or performed in the prosecution of the work.
- Amount: The payment bond shall be written in the sum of the contract. If change orders are issued on a construction contract or amendments made to a non-construction contract, the bonds should be reviewed and, if determined by the purchasing agent to be necessary, reexecuted to reflect the changed amount.
- Obligee: The obligee of a performance bond shall be either the "County of Albemarle, Virginia" or the "School Board of Albemarle County, Virginia", as the case may be.

In lieu of a payment bond and with the express permission of the purchasing agent, a vendor may submit an alternative form of security as provided in Section 24-5.

24-5 Alternative Forms of Security

In lieu of a bid, performance, or payment bond, a vendor may furnish a certified check or cash escrow in the face amount required for the bond, or a bank or savings institution's letter of credit on certain funds in the face amount required for the bond. A letter of credit shall be in a form and substance that complies with provisions of the Uniform Commercial Code, as codified in the Code of Virginia, pertaining to letters of credit, and satisfy the following minimum requirements:

- Equivalent protection: The letter of credit shall afford protection to the County that is equivalent to or greater than a corporate surety's bond.
- Identify parties or contract: The letter of credit shall identify the contract to which it pertains by the names of the parties to the contract or by the contract number.
- Original letter of credit: The vendor shall provide an original letter of credit.
- Amount: The letter of credit shall be in an amount equal to the sum of the contract. If change orders are issued on a construction contract or amendments made to a non-construction contract, the alternative form of security should be reviewed and, if determined by the purchasing agent to be necessary, reexecuted to reflect the changed amount.
- Nominated person: The letter of credit shall designate as the nominated person the "County of Albemarle, Virginia" or the "School Board of Albemarle County, Virginia," as the case may be.
- Consent required to revoke, amend or cancel: The letter of credit shall not contain any provisions that make it revocable or that allow it to be amended or canceled without the prior written consent of the County.
- Date of letter: The letter of credit shall be executed and dated the same date the vendor executes the contract, unless the purchasing agent, in consultation with the county attorney's office, permits submission after execution of the contract by the County.
- Expiration and renewal: The letter of credit shall not have an expiration date of less than one year and shall provide that it shall be automatically renewed for at least an additional year.
- Form of demand document: The letter of credit shall specify the document by which a demand may be presented to the issuer.

The letter of credit shall be reviewed and approved by the county attorney before it is accepted as an alternative form of security.