

T3.4.1 - Bonds and Insurance Revised 7/2008

A Bonds and Insurance

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## **A Bonds and Insurance**

### **1 General Requirements**

Bonds, guarantees and insurance requirements will:

- a. Comply with requirements of law found in the Miller Act;
- b. Provide methods to obtain financial protection against damages to the FAA in all forms of contracts including bid/proposal guarantees, bonds, sureties and insurance which are not covered by the Miller Act;
- c. Allow the contracting officer discretion to set appropriate bond levels to protect the FAA's interest;
- d. Establish contracts that allow the contracting officer flexibility to increase bond amounts based upon contract changes;
- e. Encourage the use of corporate, rather than individual, sureties;
- f. Allow flexibility in the types of security for bonds; encourage avoidance of termination for default through consideration of surety takeover when contractors are not performing;
- g. provide the CO flexibility to tailor clauses to the specific situation provided that they remain in compliance with the Miller Act.

### **2 Proposal Guarantees** Revised 7/2008

- a. Proposal guarantees (referred to as guarantee(s)) are relevant to performance bonds only. The Contracting Officer (CO) determines the applicability of a proposal guarantee based on the best interests of FAA.
- b. *Amount.* The CO should determine a guarantee amount that is adequate to protect the Government from loss should the successful offeror fail to sign the contract or obtain required bonds. The guarantee amount should be at least 20 percent of the proposal price and should not exceed \$3 million. When the penal sum is expressed as a percentage, a maximum dollar limitation may be stated. For indefinite delivery contracts, the amount of any guarantee should be a specific amount equal to the largest single order that the CO estimates will be placed under the contract, or another amount that the CO deems necessary to protect the interest of the FAA.
- c. *Failure to Submit Required Proposal Guarantee.* It is preferable for offerors to submit their guarantees with the proposals. However, the CO may determine the final cut-off for receipt of guarantees. Also, if a guarantee is proposed at an amount less than the solicitation specifies, but is equal to or greater than the difference between the proposal price and the

price of the next- higher proposal, the guarantee may be accepted.

d. *Screening Information Request (SIR) Requirements.* SIRs should describe guarantee requirements in sufficient detail for offerors to determine the amount of the required guarantee.

### **3 Bonds** Revised 10/2010

#### a. *General.*

(1) *Requirement* . Bonds are not generally applicable to non-construction contracts but may be used if the contracting officer determines that such bonds are necessary to protect the interests of the FAA. The Miller Act (40 U.S.C.A Section 3131) requires performance and payment bonds for construction contracts exceeding \$150,000. The contracting officer may waive performance and payment bonds as authorized by the Miller Act or other law if in the best interest of the Government.

(2) *SIR Requirements.* The SIR should describe the bond requirements.

(3) *Penal Amount.* The penal amount should reflect the minimum amount needed to protect the FAA's interests.

(4) *Additional Amounts of Protection.* The contracting officer may increase the bond requirements if the contract amount increases and the contracting officer deems it to be in the best interest of the FAA.

(5) *Notice to Proceed.* If the contract requires bonds, insurance, reinsurance or other forms of protection, the contractor must furnish them to the contracting officer in the time specified in the schedule. The contracting officer may consider these submissions in determining when to issue a notice to proceed.

(6) *Original Copy.* An original signed copy of any bond must be retained in the solicitation or contract file.

(7) *Authority of Agents.* Bonds signed by persons acting in a representative capacity must be accompanied by proof that the agent is authorized to act in that capacity. Proof may be a notarized power of attorney, or a properly executed corporate certificate or resolution, attested to by the corporate secretary.

(8) *Partnership as Principal.* When a partnership is a principal, the names of all members of the firm must be listed in the bond, following the trade name of the firm (if any) and the phrase "a partnership composed of ." When a corporation is a principal, the state of the incorporation should be listed.

(9) *Date.* Unless an annual bond is accepted, performance or payment bonds should be dated after the date of the contract.

(10) *Furnishing Information to Subcontractors and Suppliers Under Payment Bonds.* When a payment bond has been provided, the contracting officer may furnish the name and address of the surety or sureties to persons who have furnished, or have been requested to furnish, labor or materials for use in performing the contract. The contracting officer may furnish additional general information on such matters as the progress of work, the payments made, and the estimated percentage of completion.

(11) *Contract Increases.* When a contract price is increased or scope changes, the FAA may require additional bond protection in an amount adequate to protect suppliers of labor and material. Both the contractor and sureties should execute a consent of surety increasing the penal amount and submit it to the CO.

(12) *Surety Changes.* The original surety must execute a consent of surety in instances where an increased bond amount is obtained from a party other than the original surety.

(13) *Novations.* Novations require a consent of surety.

*b. Construction Contracts - Performance and Payment Bonds*

*(1) Penal Sums*

(a) *Requirements Contracts.* When determining the penal sum of bonds for requirements contracts, the contracting officer may consider the contract price to be the price payable for the estimated quantity.

(b) *Indefinite Quantity Contracts.* When determining the penal sum of bonds for indefinite-quantity contracts, the contracting officer should consider the contract price to be the price payable for the specified minimum quantity. When the minimum quantity is exceeded, additional amounts of performance and payment protection may be obtained as stated under performance and payment bond.

*(2) Performance Bonds*

(a) *Penal Amounts.* Penal amounts should generally be 100 percent of the original contract price, unless the contracting officer determines that a lesser amount would be adequate for the protection of the FAA. If a lesser amount is used, the clauses should be tailored to the situation. If the contract price increases, an additional amount equal to 100 percent of the increase shall be obtained.

(b) *Additional Amounts of Protection.* The contracting officer may increase the amount up to 100 percent of the increase in contract price.

*(3) Payment Bonds*

(a) *Requirement.* A payment bond is required only when a performance bond is required but may be used without a performance bond if the contracting officer

deems the use of payment bond to be in the FAA's interest. Examples of situations where a payment bond may be needed include:

- (i) Supplies or services are unique to the FAA that can be obtained only from a source that is not the producer of the supplies or services
- (ii) A contractor has sold all its assets to, or merged with, another firm and the FAA needs assurance of the new firm's responsibility
- (iii) Uninterrupted provision of the supplies or services is essential to the continued operation of FAA functions.

(b) *Penal Amounts.*

- (i) Unless the contracting officer makes a written determination supported by specific findings that a payment bond in this amount is impractical, the amount of the payment bond must equal:

(A) 100 percent of the original contract price; and

(B) If the contract price increases, an additional amount equal to 100 percent of the increase.

- (ii) The amount of the payment bond must be no less than the amount of the performance bond.

(c) *Furnishing Information to Subcontractors and Suppliers.* The contracting officer may furnish the name and address of the surety or sureties to persons who have furnished, or have been requested to furnish, labor or materials for use in performing the contract. The CO may furnish additional general information on such matters as the progress of work, the payments made and the estimated percentage of completion, if available.

c. *Other Than Construction Contracts -Performance and Payment Bonds*

(1) *Annual Performance Bonds (APB).* APB may be used for nonconstruction contracts only and should be applicable to the total of all covered contracts. The bond may be modified to cover new requirements.

(2) *Performance Bonds.* Performance bonds may be used if the contracting officers deem it necessary to protect the FAA's interest. The following situations may warrant a performance bond:

(a) FAA property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (as in retention of salvaged material).

(b) A contractor sells assets to or merges with another concern, and the FAA after recognizing the latter concern as the successor in interest, desires

assurance that it is financially capable.

(c) Substantial payments are made before delivery of end items starts.

(d) Contracts are for dismantling, demolition, or removal of improvements.

(3) *Payment Bonds*. A payment bond is required only when a performance bond is required and if the contracting officer deems the use of payment bond to be in the FAA's interest.

d. *Other Types of Bonds*. The contracting officer may use other types of bonds, such as patent infringement bonds (Clause 3.4.1-8, Patent Infringement Bond Requirements), deemed necessary to protect the interests of the FAA.

e. *Sureties*. This subsection describes the use of sureties to protect the Government from financial losses.

(1) *Requirements for Sureties*. Bonds must be supported by acceptable corporate sureties, or by assets acceptable as security for the contractor's obligation. The Contracting Officer should assure that adequate security for bonds is obtained to protect the interest of the FAA.

(2) *Corporate Sureties*. Corporate sureties must appear on the list contained in the Department of Treasury Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies." The amount of the bond may not exceed the underwriting limit stated for the surety in that list. Upon receipt of notification of termination of a company's authority to qualify as a surety on Federal bonds, the contracting officer shall review the outstanding contracts and take action necessary to protect the Government, including, where appropriate, securing new bonds with acceptable sureties in lieu of outstanding bonds with the named company.

(3) *Individual Sureties*. Individual sureties are discouraged.

(4) *Alternative Security*. Alternative security is not permitted for payment bonds for construction contracts. For other than payment bonds for construction contracts, the CO may accept the following alternative security in place of bonds and require the deposit of the assets as specified herein. Further, for bonds that do not use sureties as the security for the bond, the bond should include a statement pledging and identifying the security that will be used to support the bond. The contractor shall execute the bond form as the principal. Other types of alternative security than those described herein may not be used. The following are considered to be acceptable assets are:

(a) *Bonds or Notes*. U.S. bonds or notes maturing in less than 5 years from the date of contract, together with an agreement authorizing collection or sale in the event of default may be used. The par value of the bonds or notes must be at least equal to the penal amount of the bond. U.S. bonds or notes should be deposited in an amount equal at their par value to the penal sum of the bond

(the Act of February 24, 1919 (31 U.S.C. 9303) and Treasury Department Circular No. 154 dated July 1, 1978 (31 CFR Part 225)). The CO may turn the securities over to a designated agency official or deposit them with the Treasurer of the U.S. or other institution designated by the Treasurer.

(b) *Other Types of Assets.* Certified check, cashier's check, bank draft, postal money order, or an irrevocable, unconditional letter of credit (see OFPP Pamphlet No. 7 "Guidance for Implementing Policy Letter 91-4" as guidance for using irrevocable letters of credit) issued by a federally insured financial institution is another type of asset that may be used as security. The deposit must be at least equal to the penal amount of the surety bond, and payable solely to the order of the FAA. The CO must deposit checks and drafts made out to the FAA with the designated official in the FAA with instructions to hold the funds for the benefit of the contractor. The procuring activity should establish records to account for all deposited items, such as the requiring the senior CO of the procuring activity to keep a perpetual inventory of all deposited items.

(c) *Bond Representations.* When the contractor pledges assets instead of providing a surety bond, the contractor must complete the bond form as principal and the bond form must describe the assets pledged.

(5) *Contract Administration.*

(a) *Information and Notices to Surety(ies).* The CO may furnish the following information to each surety upon request:

(i) correspondence related to -terminations, renewals,-nonperformance;

(ii) information indicating the surety's potential liability for contractor's performance failure such as notice of impending termination, demand for adequate assurances, assessment of liquidated, or other damages;

(iii) claims against the surety based upon the contractor's failure to perform that addresses the reasons and amount of the claim. Legal assistance may be engaged if the surety fails to pay. The CO may also provide other information in response to requests related to contractor performance and payment.

(b) *Surety Takeover in Performance Failure.* The CO may consider any surety proposal to complete the work prior to terminating a contract. The CO may allow the surety to complete the work if the CO has reason to believe that the firms or individuals proposed by the surety are capable to perform the work.

(c) *Contract Completion.*

(i) *Certificate of Completion.* After the contractor has met all the

contractual obligations, the CO may issue a Certificate of Completion to any surety. The certificate's terms may not release the surety from obligation under a payment bond.

(ii) *Asset Refund*. If alternative security was furnished, the CO should refund the assets under a payment bond upon completion of the work and receipt of a contractor's release.

(iii) *Substantial Completion Under Construction Contracts*. Upon request, the CO should furnish a Certificate of Substantial Completion to sureties of a construction contractor if the project has been determined to be substantially complete.

## **4 Insurance**

a. *Requirement*. Contractors may be required to carry insurance when necessary to protect the interests of the FAA. The FAA CO must review insurance for use under the contract and may refuse insurance that is not in the FAA's interest. The CO should consider the insurance validation when issuing a Notice to Proceed. Examples that could require insurance are:

(1) Any contractor subject to Cost Accounting Standard (CAS) 416 (48 CFR 9004.416) is required to obtain insurance, by purchase or self-coverage, for the perils to which the contractor is exposed, except when (i) the Government agrees by contract to indemnify the contractor or relieves the contractor of liability for loss or damage to Government property.

(2) Contractors, whether or not their contracts are subject to CAS 416, are required by law and this regulation to provide insurance for certain types of perils (e.g., workers' compensation). Insurance is mandatory also when commingling of property, type of operation, circumstances of ownership, or condition of the contract make it necessary for the protection of the Government.

(3) Contractors awarded nonpersonal services contracts for health services are required to maintain medical liability insurance and indemnify the Government for liability producing acts or omissions by the contractor, its employees and agents. In addition, the CO may require other insurance as deemed necessary to protect the Government.

### **b. Insurance Under Fixed-Price**

(1) *General*. Although the FAA is not ordinarily concerned with the contractor's insurance coverage if the contract is a fixed-price contract, in special circumstances contracting officer may specify insurance requirements under fixed-price contracts. Examples of such circumstances include the following:

(a) The contractor is, or has a separate operation, engaged principally in FAA work.

(b) FAA property is involved.

(c) The work is to be performed on a FAA facility.

(d) The FAA elects to assume risks for which the contractor ordinarily obtains commercial insurance.

(2) *Work on a FAA Installation.* The CO may include contract clause 3.4.1-10, Insurance- Work on a Federal Aviation Administration Installation in a fixed-price contract for work to be performed on a Government installation unless:

(a) only a small amount of work is required on the FAA site

(b) all work on the FAA site is to be performed outside the United States. The coverage specified is the minimum insurance required and should be included in the contract schedule or elsewhere in the contract. The contracting officer may require additional coverage and higher limits. When the clause, Insurance-Work on a Federal Aviation Administration Facility, is not required but is included because the contracting officer considers it to be in the FAA's interest to do so, any of the types of insurance specified in d. below, Amounts and Types of Insurance, may be omitted or the limits may be lowered, if appropriate.

*c. Insurance Under Non-Fixed-Price Contracts.*

(1) *Coverage.* Insurance referred to below in d. Amounts and Types of Insurance, below, is required for non-fixed-price contracts in both prime and subcontracts. Cost-reimbursement contracts (and subcontracts, if the terms of the prime contract are extended to the subcontract) ordinarily require the types of insurance listed in d below.

(2) *Professional services contracts (PSC).* PSC should require errors and omissions insurance described below in f. Errors and Omissions Insurance .d. Amounts and Types of Insurance. (1) *Workers' Compensation and Employers' Liability Insurance.* Compliance with applicable workers' compensation and occupational disease statutes is required, and employers' liability coverage must be obtained when available. If occupational diseases are not compensable by law, the contractor must carry insurance for occupational disease under the employers' liability section of the insurance policy. Employer's liability coverage of at least \$100,000 is required where possible. The CO may modify recommended amounts stated herein, as deemed in the best interest of the FAA, if not in violation of statute and locality or governmental requirements.

(2) *General Liability Insurance.*

(a) *Bodily injury.* The contractor must carry bodily injury liability insurance, with minimum limits of \$100,000 per person and \$500,000 per occurrence.

(b) *Property.* The CO may require property damage liability in an amount to be determined by the contracting officer as deemed appropriate to the contract.

(3) *Automobile Liability Insurance.* The contracting officer shall require automobile liability insurance written on the comprehensive form of policy. The policy shall provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the contract. Policies covering automobiles operated in the United States shall provide coverage of at least \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage.

e. *Self-Insurance.* The CO may approve a qualified program of self-insurance covering any kind of liability in place of any type of insurance discussed above in d., Amounts and Types of Insurance, Paragraph 4, if it is in the best interest of the FAA. Self insurance shall not apply to catastrophic risk. In jurisdictions where workers' compensation does not completely cover employers' liability to employees, a program of self-insurance for workers' compensation may be approved if:

(1) the contractor also maintains an approved program of self-insurance for any employer's liability that is not covered; or

(2) the contractor has shown that the combined cost to the FAA of self-insurance for workers' compensation and commercial insurance for employers' liability should not exceed the cost of covering both kinds of risks by commercial insurance.

f. *Errors and Omissions Insurance.*

(1) *Professional Services Contractors.* The CO may require professional services contracts such as the following categories to have errors and omissions (malpractice) (E&O) insurance:

(a) accountants

(b) architects

(c) engineers

(d) fiscal agents

(e) medical doctors and dentists.

For other professional services besides those listed above, the CO may require E&O insurance when in the interest of the FAA.

(2) *Amount.* Insurance coverage should be at least \$200,000, unless the contracting officer determines that a different limit is needed in the interest of the FAA.

(3) *Waiver.* The CO may waive the requirement for errors and omissions insurance

in whole or in part, with the concurrence of assigned counsel.

(4) *Insurance Policies*. If an existing policy is amended to cover the FAA's requirements, the FAA shall be named as a loss payee.

(5) *Notice of Cancellation and Change*. Insurance policies other than E&O must contain an endorsement to the effect that a cancellation of or material change in policy that adversely affects the interest of the FAA should not be effective until at least 30 days after the written notice of cancellation or change is given to the CO.

g. *Notice to Proceed*. If the contract requires bonds, insurance, reinsurance or other forms of protection, the contractor must furnish them to the contracting officer in the time specified in the schedule. The contracting officer may consider these submissions in determining when to issue a notice to proceed.

## 5 Definitions

a. *'Attorney-in-fact,'* as used in this part, means an agent, independent agent, underwriter, or any other company or individual holding a power of attorney granted by a surety (see also 'power of attorney').

b. *'Bid guarantee'* means a form of security assuring that the bidder (a) will not withdraw a bid within the period specified for acceptance and will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time allowed, after receipt of the specified forms.

c. *'Bond'* means a written instrument executed by a bidder or contractor (the 'principal'), and a second party (the 'surety' or 'sureties'), to assure fulfillment of the principal's obligations to a third party (the 'obligee' or 'Federal Aviation Administration'), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligee. The types of bonds and related documents are as follows:

(1) An advance payment bond secures fulfillment of the contractor's obligations under an advance payment provision.

(2) An annual bid bond is a single bond furnished by a bidder, in lieu of separate bonds, which secure all bids (on other than construction contracts) requiring bonds submitted during a specific FAA fiscal year.

(3) An annual performance bond is a single bond furnished by a contractor, in lieu of separate performance bonds, to secure fulfillment of the contractor's obligations under contracts (other than construction contracts) requiring bonds entered into during a specific FAA fiscal year.

(4) A patent infringement bond secures fulfillment of the contractor's obligations under a patent provision.

(5) A payment bond assures payments as required by law to all persons supplying

labor or material in the prosecution of the work provided for in the contract.

(6) A performance bond secures performance and fulfillment of the contractor's obligations under the contract.

d. '*Consent of surety*' means an acknowledgment by a surety that its bond given in connection with a contract continues to apply to the contract as modified.

e. '*Insurance*,' as used in this part, means a contract which provides that for a stipulated consideration, one party undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event. f. '*Penal sum*' or '*penal amount*' means the amount of money specified in a bond (or a percentage of the bid price in a bid bond) as the maximum payment for which the surety is obligated.

g. '*Power of attorney*,' as used in this part, means the authority given one person or corporation to act for and obligate another, as specified in the instrument creating the power; in corporate suretyship, an instrument under seal which appoints an attorney-in-fact to act in behalf of a surety company in signing bonds (see also '*attorney-in-fact*').

h. '*Reinsurance*' means a transaction which provides that a surety for a consideration, agrees to indemnify another surety against loss which the latter may sustain under a bond which it has issued. '*Surety*' means an individual or corporation legally liable for the debt, default, or failure of a principal to satisfy a contract obligation. The types of sureties referred to are as follows:

(1) An individual surety is one person, as distinguished from a business entity, who is liable for the entire penal amount of the bond.

(2) A corporate surety is licensed under various insurance laws and, under its charter, has legal power to act as surety for others.

(3) A cosurety is one of two or more sureties that are jointly liable for the penal sum of the bond. A limit of liability for each surety may be stated.

## **B Clauses**

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## **C Forms**

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