Enterprise Services Policy No. POL-DES-190-00

Using Goods and Services Procurement Bonds

Applies to: Any state office or activity of the executive branch of state government, including state agencies, departments, offices, divisions, boards, commissions, institutions of higher education as defined in RCW 28B.10.016 and correctional and other types of institutions (RCW 39.26.010(1)) (RCW 39.26.100) (RCW 39.26.102).

Authorizing sources:

- State Law RCW 39.26.190
- State Law RCW 39.26.180 (1)
- State Law RCW 39.26.170
- State Law RCW 39.26.160
- State Law RCW 39.26.102
- State Law RCW 39.26.100
- State Law RCW 39.26.090 (1)
- State Law RCW 39.26.005

Effective date: April 26, 2021

Last update: N/A

Sunset review date: 5 years from Effective date

Approved by: Chris Liu, Director

Reason for Policy

This policy applies whenever an agency is deciding whether to use procurement bonds when acquiring goods and/or services under Chapter 39.26 RCW. The goal is to provide each agency with the knowledge needed to decide whether to use bonds when conducting a competitive procurement.

Policy

1. **Certain types of bonds may be used when procuring goods and/or services**:

    - **Bid Bond**: A bid bond is designed to insure good faith and firm bids for a competitive solicitation. The bond is an agreement between three parties: the Agency, the bidder, and a third party (the surety). The surety accepts liability and guarantees that the bidder will not withdraw the bidder's bid and, if the contract is awarded to the bonded bidder, the bidder will accept the contract as bid within the stipulated timeframe as specified in the competitive solicitation, or else the surety will pay the bid bond to the Agency. The Agency may sue the bidder and the surety to enforce the bond. If the apparent successful bidder (ASB) refuses to honor its bid, both the ASB and surety are liable on the bond for any additional costs the owner incurs in rebidding the contract.

- **Protest Bond**: A protest bond is designed to discourage disappointed bidders from imposing unnecessary costs on other bidders, procuring agencies, and taxpayers by filing an invalid protest. It is an agreement between a third party (the surety) and the bidder, with a monetary commitment. The surety accepts liability in the event the bidder files an invalid protest, in which case the surety pays the protest bond amount to the Agency.

- **Performance Bond**: A performance bond is designed to insure faithful performance of the obligations imposed on the contractor by the contract. It is an agreement between a third party (the surety) and the contractor, with a monetary commitment. The surety accepts liability in the event that the contractor fails to faithfully perform the contract, in which case the surety pays the performance bond amount to the Agency. Performance bonds typically are for 100% of the contract price.

2. **Agencies must use caution when deciding whether to require a bond in a goods and/or services procurement.**

   a. Caution is necessary because bonding requirements may:

      i. Present unnecessary impediments to open competition;
      ii. Restrict the number of available vendors who can bid on contracts to provide goods and services for the State; and
      iii. Have a disproportionate adverse impact on small businesses and start-up firms.

   b. A risk assessment for analyzing whether to use a bond is located in the associated procedure.

   c. Specific procedures for using Bid, Protest, and Performance Bonds are located in the associated procedure.

3. **Fulfilling financial requirements for bonds and alternative forms of security to a bond requirement.**

   a. Bidders shall be responsible for the cost of any required bond or alternative form of security.

   b. Prior to implementing bonds, the Agency should coordinate with its finance office to establish procedures for the receipt, retention, and dispersal of bonds.

   c. Bonds must be secured by appropriate sureties or insurance companies. Details on selecting appropriate bonding and/or insurance companies are included in the Bonds procedure.

   d. In lieu of any required bid, protest, or performance bond, a bidder may furnish a certified check or cash escrow in the face amount required for such bond made payable to the Agency. In addition, the Agency may accept an alternative form of security provided that such alternative form of security is (i) within the Agency's authority to accept; (ii) expressly set forth in the competitive solicitation; and (iii) affords protection to the Agency equivalent to a surety bond.

4. **Making a responsible bidder determination for a goods and/or services procurement is not met by using a bond.**

   - In competitive procurements, procuring agencies must not utilize a bond as a substitute for the Agency's statutory obligation to determine that the lowest responsive bidder is also a responsible bidder for the procurement. *See* RCW 39.26.160(2).

5. **Complying with this policy does not preclude bidders from raising complaints that a bond requirement, as set forth in a particular competitive procurement, unreasonably restricts competition.**

6. **In an effort to encourage participation from Washington small businesses, procuring agencies may, and are encouraged to, exempt Washington small businesses from the bid, protest, or performance bond requirement. See RCW 39.26.005.**

History

Adopted

April 26, 2021

Replaces

N/A