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

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](http://apps.leg.wa.gov/RCW/default.aspx?cite=28B.10.016) and correctional and other types of institutions.

**Authorizing sources**:

* State Law [RCW 39.26.190](https://app.leg.wa.gov/RCW/default.aspx?cite=39.26.190)
* State Law [RCW 39.26.180](https://app.leg.wa.gov/RCW/default.aspx?cite=39.26.180) (1) & (2)
* State Law [RCW 39.26.090](https://app.leg.wa.gov/RCW/default.aspx?cite=39.26.090) (1)
* State Law [RCW 39.26.180](https://app.leg.wa.gov/RCW/default.aspx?cite=39.26.180)
* State Law [RCW 39.26.005](https://app.leg.wa.gov/RCW/default.aspx?cite=39.26.005)

**Effective date**: TBD

**Last update**: N/A

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**Approved by**: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Chris Liu, Director

# Reason for Policy

This policy establishes the requirements for the use of bid, protest, and performance bonds in competitive procurements for goods and services under Chapter 39.26 RCW.

# Policy

1. **Agency Discretion**:
   1. Procuring agencies may require bidders to provide a bid or protest bond.

* **Bid Bond**: A type of surety agreement, accompanied by a monetary commitment, by which a third party (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 procuring Agency. A bid bond is designed to insure good faith and firm bids for a period stated in the competitive solicitation.
* **Protest Bond**: A type of surety agreement, accompanied by a monetary commitment, by which a third party (the surety) accepts liability and guarantees that the bidder will not file a frivolous protest, or else the surety will pay the litigation/protest bond to the procuring Agency. A litigation/protest bond is designed to discourage disappointed bidders from imposing unnecessary costs on other bidders, procuring agencies, and taxpayers by filing a frivolous protest.
  1. Procuring agencies may require winning bidders to provide a performance bond.
* **Performance Bond**: A type of surety agreement, accompanied by a monetary commitment, by which a third party (the surety) accepts liability and agrees to be liable to pay a sum (not exceeding a stated maximum) of money in the event that the contractor fails to faithfully perform the contract. Performance bonds typically are for 100% of the contract price. A performance bond is designed to insure faithful performance of the obligations imposed on the contractor by the contract.
  1. Caution in deciding whether to use a bond is necessary. Bonding requirements may a) present unnecessary impediments to open competition, b) restrict the number of available vendors who can bid on contracts to provide goods and services for the State, and c) have a disproportionate adverse impact on small businesses and start-up firms.
  2. Before requiring a bond, procuring agencies must conduct a risk assessment to decide if a bond requirement is appropriate. The risk assessment must balance separate considerations concerning the costs and benefits of requiring a bond including:

1. Does the bond hinder or further the Agency’s operational need for cost-effective and efficient procurement;
2. Does the bond hinder or further bidder participation in fair and open procurements;
3. Does the bond hinder or further state procurement priorities; and
4. Does the bond hinder or further meaningful opportunities for innovative businesses, including small businesses, to participate in state procurement opportunities?
   1. Accordingly, in considering whether to require bonds, procuring agencies should evaluate alternative operational and contractual options to secure timely, faithful contractual performance.
5. **Bid Bonds**
   1. Inclusion in Solicitation If the procuring Agency requires a bid bond, the competitive solicitation must include a specific requirement for bidders to submit, as a responsive element, a bid bond.
   2. Time Period The competitive solicitation must specify the time period in which the bidder, if awarded, must execute the contract or forfeit the bid bond to the procuring Agency.
   3. Posting If such a bond is required, the competitive solicitation must be posted for a minimum of twenty-one (21) calendar days before bids are due.
   4. Amount The amount of any required bid bond must be stated in the competitive solicitation either as a specified amount in dollars or as a percentage of the bidder’s total bid, in dollars. Because bid bonds limit bidder participation and because the procuring Agency’s risk is limited (i.e., if the lowest responsive, responsible awarded bidder fails to enter into the contract and/or fails to timely provide a performance bond, if required, the procuring Agency may contract with the next eligible bidder), in no event shall a competitive solicitation require a bid bond that exceeds ten percent (10%) of the bidder’s bid or the stated contract value.
   5. Accompany the Bid If required, bid bonds must accompany the bid, reference the bid, and be made payable to the procuring Agency. The bid bond must be irrevocable for the period of time set forth in the competitive solicitation.
   6. Rejection Bids submitted without a required bid bond must be rejected.
   7. Forfeiture In the event the awarded bidder does not timely execute the contract or fails to timely provide a performance bond, if required, its bid bond shall be forfeited to and become the property of the procuring Agency.
   8. Possession The procuring Agency shall hold the bid bonds. The procuring Agency must promptly return all bid bonds to all bidders no later than the date of contract execution.
6. **Litigation/Protest Bonds**
   1. Inclusion in Solicitation If the procuring Agency requires a litigation/protest bond, the competitive solicitation must include a specific requirement for bidders to submit, as a responsive element, a litigation/protest bond.
   2. Posting If such a bond is required, the competitive solicitation must be posted for a minimum of twenty-one (21) calendar days before bids are due.
   3. Amount The amount of any required litigation/protest bond must be stated in the competitive solicitation as a specified amount, in dollars. In no event shall a competitive solicitation require a litigation/protest bond that exceeds two percent (2%) of the stated contract value.
   4. Accompany the Bid If required, the litigation/protest bond must accompany the bid, reference the competitive procurement, and be made payable to the procuring Agency. The litigation/protest bid bond must be irrevocable for the period of time set forth in the competitive solicitation.
   5. Rejection Bids submitted without a required litigation/protest bond must be rejected.
   6. Forfeiture Any bidder may protest a procurement decision for any valid basis. If, however, a bidder files a frivolous protest (i.e., a protest that is not based on the criteria for procurement protest set forth in the competitive solicitation and, at a minimum, the Enterprise Procurement Policy for Complaints and Protests, DES-170-00), the bidder’s litigation/protest bond shall be forfeited to the procuring Agency upon the Agency’s issuance of a protest decision finding that the bidder’s protest does not state a valid basis for protest.
   7. Possession The procuring Agency shall hold the litigation/protest bonds. Unless forfeited as set forth herein, the procuring Agency must promptly return all litigation/protest bonds to all bidders no later than the date of contract execution.
7. **Performance Bonds**
   1. Inclusion in Solicitation If the procuring Agency requires a performance bond, the competitive solicitation must include a specific requirement that, if awarded, the bidder must timely provide a performance bond in the amount specified in the competitive solicitation.
   2. Posting If such a bond is required, the competitive solicitation must be posted for a minimum of twenty-one (21) calendar days before bids are due.
   3. Proof of Ability If a performance bond is required, proof of ability to provide a performance bond must accompany the bid.
   4. Rejection Bids submitted without such confirmation must be rejected.
   5. Amount If required, the performance bond shall be in the amount of 100% of the bidder’s bid (the contract value) and, unless the procuring Agency makes a written determination that it is in the procuring Agency’s best interest to grant an extension, the performance bond must be in the possession of the procuring Agency, or its designee, at or before contract execution. The performance bond must reference the contract and be payable to the procuring Agency.
   6. Possession The procuring Agency must promptly return the performance bond upon satisfactory contract completion.
   7. Forfeiture In the event the contractor does not complete satisfactory performance, the Agency will give notice of its intent to terminate the contract, following the procedures as described in its contract. If the contractor still does not provide satisfactory performance, the agency may redeem the performance bond and the contract will be terminated.
8. **Bond Requirements & Alternative Forms of Security to a Bond Requirement**
   1. Bidders shall be responsible for the cost of any required bond or alternative form of security.
   2. If a bid, protest, or performance bond is required, it must be written by a surety or insurance company currently on the U.S. Department of the Treasury Financial Management service list of approved bonding companies which is published annually in the Federal Register, or by a Washington domiciled insurance company with at least an A- rating in the latest printing of the A.M. Best's Key Rating Guide licensed to write surety bonds. In addition, the bond must be written by a surety or insurance company that is currently licensed to do business in the State of Washington.
   3. 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 procuring Agency. In addition, the procuring Agency may accept an alternative form of security provided that such alternative form of security is (i) within the procuring Agency’s authority to accept; (ii) expressly set forth in the competitive solicitation; and (iii) affords protection to the procuring Agency equivalent to a surety bond.
9. **Responsible Bidder Determination**Bonds are one of many operational and contractual tools that procuring agencies may use to ensure performance or minimize financial risk to the Agency. In competitive procurements, however, procuring agencies must not utilize a bond as a substitute for the procuring Agency’s statutory obligation to determine that the lowest responsive bidder is a responsible bidder for the procurement. *See* RCW 39.26.160(2).
10. **Competitive Procurements**Compliance 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.

# History

## Adopted

TBD

## Replaces

N/A