

## Supplemental Specification

October 1, 2014

### **ESCROW BID DOCUMENTATION**

**Scope and Purpose:** The purpose of this specification is to preserve the bid documents of the successful bidder (Contractor) for use by the parties in any claims or litigation between the Department and Contractor arising out of this contract.

The Contractor shall submit bid documentation used to prepare the bid for this contract to the Department. Such documentation shall be placed in escrow with a banking institution or other bonded document storage facility and preserved by that institution/facility as specified in the following sections of this specification.

**Bid Documentation:** The term "bid documentation" as used in this specification means all writings, working papers, computer print outs, charts, and all other data compilations which contain or reflect information, data, and calculations used by the Contractor to determine the bid in bidding for this project. The term "bid documentation" includes, but is not limited to, Contractor equipment rates, Contractor overhead rates, labor rates, efficiency or productivity factors, arithmetic extensions, and quotations from subcontractors and material suppliers to the extent that such rates and quotations were used by the Contractor in formulating and determining the amount of the bid. The term "bid documentation" also includes any manuals which are standard to the industry used by the Contractor in determining the bid for this project. Such manuals may be included in the bid documentation by reference. Such reference shall include the name and date of the Publication and the Publisher. The term does not include bid documents provided by the Department for use by the Contractor in bidding on this project. The preferred formats of bid documentation are XML for born-digital records, PDF/A for text documents, and TIFF for images.

**Affidavit:** In addition to the bid documentation, an affidavit, signed under oath by an individual authorized by the Contractor to execute bidding proposals shall be included. The affidavit shall list each bid document with sufficient specificity so a comparison may be made between the list and the bid documentation to ensure that all of the bid documentation listed in the affidavit has been enclosed. The affidavit shall attest the following:

- (1) the affiant has personally examined the bid documentation,
- (2) the affidavit lists all of the documents used by the Contractor to determine the bid for this project, and
- (3) all such bid documentation has been included.

**Submittal of Bid Documentation:** The Contractor shall submit the bid documentation to the Department, in a container suitable for sealing, no later than ten calendar days following award of the Contract by the Department. The container shall be clearly marked "Bid Documentation" and shall also show on the face of the container the Contractor's name, the date of submittal, the File Number, the Project Number, and the County. The Department will, in the presence of the Contractor's representative, place the bid documentation and affidavit in the container and seal it. Both parties will deliver the sealed container to a banking institution or other bonded document storage facility selected by the Department for placement in a safety deposit box, vault or other secure accommodation.

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**Duration and Use:** The bid documentation and affidavit shall remain in escrow during the life of the Contract or until such time as the Contractor files a claim or initiates litigation against the Department related to the contract. Receipt of the Contractor's claim, or litigation against the Department, shall be sufficient evidence for the Department to obtain the release and custody of the bid documentation. If no such claim is received or litigation initiated, and the Final Estimate for the Contract has been paid, the Department shall instruct the banking institution or other bonded document storage facility to release the sealed container to the Contractor.

The Contractor agrees that the sealed container placed in escrow contains all of the bid documentation used to determine the bid and that no other bid documentation shall be utilized by the Contractor in litigation over claims brought by the Contractor arising out of this contract.

**Refusal or Failure to Provide Bid Documentation:** Failure or refusal to provide bid documentation shall be deemed either:

- (1) Failure to execute the Contract if the Contract has not yet been executed or,
- (2) Material breach of the Contract if the Contract has been executed.

Should the Contractor fail to execute the Contract as stated in (1) above, the Department will retain the bid bond. Refusal of the Contractor to provide adequate documentation after execution of the Contract will be considered material breach of the Contract and the Contractor will be declared in default of the Contract. The Department may, at its option, terminate the contract for default. These remedies are not exclusive and the Department may take such other action as is available to it under the law.

**Confidentiality of Bid Documentation:** The bid documentation and affidavit in escrow are, and will remain, the property of the Contractor. The Department has no interest in, or right to, the bid documentation and affidavit other than to verify the contents and legibility of the bid documentation unless a claim is received or litigation ensues between the Department and Contractor or the Contractor does not retrieve the bid documents within 30 days of the Final Estimate Payment Date. In the event of such claim or litigation, or the failure by the contractor to retrieve the bid documents after Final Estimate Payment, the bid documentation and affidavit shall become the property of the Department.

**Cost And Escrow Instructions:** The cost of escrow will be borne by the Department. The Department will provide escrow instructions to the banking institution or other bonded document storage facility consistent with this specification.

**Escrow Agreement:** A copy of the Escrow Agreement the successful bidder will be required to sign is attached. The successful bidder (contractor) agrees that it will sign the Escrow Agreement. Should the Contractor fail to sign the Escrow Agreement, when presented, the Department will retain the bid bond. If the Contract has been executed, and the Contractor fails to sign the Escrow Agreement, the Contractor may be declared in default of the Contract.

**Payment:** There will be no separate payment for compilation of the data, container or cost of verification of the bid documentation. All costs shall be included in the overall Contract bid price.

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**ESCROW AGREEMENT**  
**FOR**  
**CONTRACT BID DOCUMENTS**

THIS AGREEMENT is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and among the South Carolina Department of Transportation, an agency of the State of South Carolina, hereinafter called the "DEPARTMENT", \_\_\_\_\_ hereinafter called the "CONTRACTOR", and \_\_\_\_\_, hereinafter called the "ESCROW AGENT".

WHEREAS, the DEPARTMENT and the CONTRACTOR desire to enter into a Construction Contract for work in SC File No(s). \_\_\_\_\_, hereinafter called the "CONTRACT", pursuant to which the CONTRACTOR shall cause the work therein to be constructed; and

WHEREAS, the DEPARTMENT and CONTRACTOR desire to enter into an Escrow Agreement, to provide for specific contingencies governing the escrow and control of Contract bid documentation; hereinafter called "BID DOCUMENTS"; and

WHEREAS, the DEPARTMENT and CONTRACTOR desire the ESCROW AGENT to hold the BID DOCUMENTS of the CONTRACTOR;

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein, it is agreed by and between the parties hereto that:

ARTICLE I  
CONTRACT ESCROW BID DOCUMENTATION

The parties hereto agree to the establishment of Escrow of the BID DOCUMENTS for the CONTRACT pursuant to the DEPARTMENT'S Standard Specifications for Highway Construction (Edition of 2007), and Supplemental Specifications or Special Provisions pertaining to construction under the contract. It is the understanding of the parties hereto that the DEPARTMENT shall pay the ESCROW AGENT, as determined by separate agreement, for the escrow of the BID DOCUMENTS submitted to the ESCROW AGENT under the terms of this Agreement.

ARTICLE II  
ACKNOWLEDGEMENT

By its signature below, the ESCROW AGENT hereby acknowledges receipt from the DEPARTMENT and CONTRACTOR of a sealed container bearing the CONTRACTOR's name, address and CONTRACT File Number(s) assigned by the DEPARTMENT and containing the BID DOCUMENTS.

ARTICLE III  
DEPOSIT OF BID DOCUMENTS

The BID DOCUMENTS shall remain on deposit with the ESCROW AGENT until those conditions of release, as specified in ARTICLE IV "RELEASE FROM ESCROW", are met. As long as the BID DOCUMENTS remain in escrow with the ESCROW AGENT, the ESCROW AGENT shall not allow any person access, to gain possession, or to in any way interfere with the sealed BID DOCUMENTS container.

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### ARTICLE IV RELEASE FROM ESCROW

Upon being presented written documentation, signed by the DEPARTMENT's Contracts Administrator, the ESCROW AGENT will release to the DEPARTMENT the BID DOCUMENTS under the following conditions:

1. The CONTRACTOR has filed a claim against the DEPARTMENT related to the project.
2. The CONTRACTOR has initiated litigation against the DEPARTMENT relating to the CONTRACT.

The ESCROW AGENT is also authorized to release the BID DOCUMENTS to the CONTRACTOR or DEPARTMENT upon being presented written documentation, signed by the DEPARTMENT's Contracts Administrator, that the Final Estimate for the Contract has been paid to the CONTRACTOR

Upon any release from escrow of the BID DOCUMENTS container, the party receiving it shall sign Exhibit A, Escrow Release for BID DOCUMENTS, as attached hereto and incorporated herein as if fully contained, by the party receiving the BID DOCUMENTS container. The ESCROW AGENT will provide the DEPARTMENT's Contract Administrator and the CONTRACTOR with a copy of Exhibit A each time BID DOCUMENTS are released from Escrow.

### ARTICLE V INDEMNITY

The CONTRACTOR agrees to indemnify and hold the ESCROW AGENT harmless against any loss, claim, damage, liability or expenses incurred in connection with any action, suit, proceeding, claim or alleged liability arising from this Escrow Agreement, provided, however, that the ESCROW AGENT shall not be so indemnified or held harmless for its negligence or acts of bad faith by it or any of its agents or employees.

### ARTICLE VI NOTICES

All notices and other communication shall be in writing and shall be deemed to have been duly given and delivered if mailed by certified mail, return receipt requested, postage prepaid to the addresses stated herein:

DEPARTMENT:

CONTRACTOR:

ESCROW AGENT:

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ARTICLE VII  
DUTIES OF ESCROW AGENT

The duties and responsibilities of the ESCROW AGENT shall be limited to those expressly set forth herein and the ESCROW AGENT shall act only in accordance with this Escrow Agreement. Notwithstanding specific provisions hereunder, the ESCROW AGENT shall at all times act upon and in accordance with the joint written instructions of the DEPARTMENT and CONTRACTOR.

ARTICLE VIII  
LAWS

This Escrow Agreement shall be deemed to have been executed in Richland County, South Carolina and the laws of the State of South Carolina shall apply.

ARTICLE IX  
ASSIGNMENT

This Escrow Agreement shall not be assigned without the written consent of all the parties hereto.

ARTICLE X  
SURVIVAL OF CONTRACT

Except as may be expressly modified, all terms and conditions of this Escrow Agreement remain in full force and effect. The establishment of this Escrow Agreement is limited solely by the contingency of release of the BID DOCUMENTS by the CONTRACTOR to the DEPARTMENT, as established by ARTICLE IV, RELEASE FROM ESCROW. Nothing contained herein shall alter the rights of the parties hereto.

The covenants herein contained shall, except as otherwise provided, accrue to the benefit of and be binding upon the successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day above first written.

CONTRACTOR

ESCROW AGENT

By: \_\_\_\_\_ (Seal)

By: \_\_\_\_\_ (Seal)

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

DEPARTMENT

By: \_\_\_\_\_ (Seal)

\_\_\_\_\_  
Witness

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Exhibit A

**ESCROW RELEASE  
FOR  
CONTRACT BID DOCUMENTS**

This is to certify that on this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, the sealed container holding the BID DOCUMENTS for the following CONTRACT was released from escrow:

SC File No(s):

CONTRACTOR:

Address:

Date BID DOCUMENTS put into Escrow:

The Representative for the ESCROW AGENT identified below, personally transferred the sealed container holding the BID DOCUMENTS to the Representative for the CONTRACTOR or the DEPARTMENT upon presentation of the required documents pursuant to ARTICLE IV, RELEASE FROM ESCROW. The ESCROW AGENT hereby affirms that a copy of this Exhibit A was sent to the DEPARTMENT's Contract Administrator and CONTRACTOR so all parties are notified of this release.

ACKNOWLEDGMENT OF RELEASE BY ESCROW AGENT:

\_\_\_\_\_  
(Print Name)

\_\_\_\_\_  
*Signature of Representative for ESCROW AGENT*

The individual named below acknowledges receipt of the sealed container holding the bid documents.

ACKNOWLEDGMENT OF RECEIPT BY CONTRACTOR / DEPARTMENT:

\_\_\_\_\_  
(Print Name)

\_\_\_\_\_  
Signature of Representative for \_\_\_\_\_  
Company Name