

1979 WL 52531 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 17, 1979

Re: Performance Bonds

*1 Mr. E. S. Coffey
State Highway Engineer

In your memorandum of July 6, 1979, you had asked as to whether a contractor could be allowed to deposit a sum of money equal to 100% of any contract he bid into an escrow account in lieu of furnishing a performance bond. [Code of Laws of South Carolina §57-5-1660](#) requires contractors for public highway construction projects which exceed \$10,000 dollars in value to secure:

- a. A performance and indemnity bond equal to the full amount of the contract; and
- b. A payment bond of at least 50% of the contract value for materials and labor.

These bonds are compulsory. [Bartell v. Willis Construction Co.](#), 259 S.C. 20, 190 S.E.2d 461 (1972). They are required as a statutory minimum although other bonds, instruments or sureties may also be required. [Rish v. Theo Bros. Construction Co.](#), 269 S.C. 226, 237 S.E.2d 61 (1977). This section also requires a “surety or sureties, satisfactory to the awarding authority”.

A bond is an obligation in writing, usually under seal, binding the obligor to pay a sum of money to the holder of the instrument. A minimum of two parties are required to create a bond. [U.S. Rubber Products v. City of Batesburg](#), 183 S.C. 49, 190 S.E. 120 (1937). (Please note: [§57-5-1660](#) requires a surety or a third party).

An escrow is a written instrument which imports a legal obligation. A sum is deposited by a grantor, promisor or obligor or his agent, with a third party who is not a party to the instrument, which is to be kept by the third party until the performance of a certain event or condition, and then to be delivered over or to take effect. [Brinkington v. Lynch](#), 119 S.C. 273, 112 S.E. 94 (1922).

A surety is one who binds himself for payment of a sum of money or for performance of something else for another who is already bound for such payment or performance. [Philco Finance Corp. v. Mehlman](#), 245 S.C. 139, 139 S.E.2d 475 (1964).

Since the Highway Department is a statutory creature deriving its power from the legislature, and having no inherent power, whatever action it exercises must be found in some statute. [Southern Railway Co. v. South Carolina Highway Department](#), 237 S.C. 75, 115 S.E.2d 685 (1960). Since [Code of Laws of South Carolina §57-5-1660](#) requires a “surety or sureties”, there is no authority for the department to use any other method, even though that method may be advantageous to both parties.

I also foresee practical problems with the use of an escrow as opposed to a bond with surety. It is my understanding that the responsibility of the sureties in any case where the contractor defaults on his obligation would be to obtain contractors to complete the work subject to the approval of the Highway Department. The escrow method proposed by the contractor would be lacking this additional obligation and leave the Department with the burden of reletting the contract with these funds placed into escrow.

*2 It should be also noted that the 1952 Code §33-224 allowed the use of corporate surety, cash or security bonds. In 1963 this law was changed and the current Code section deleted the portion of the law allowing for cash or security bonds and added the requirement for “surety or sureties”. Finally, it should be noted that the construction of the bond may be determined by reference to the statute, for its interpretation whereas the terms of the statute cannot be read into another instrument, such as an escrow instrument. See [Thomas Sommerville Co. v. Broyhill](#), 200 Va. 358, 105 S.E.2d 824 (1958).

In summary, the Department by statute is prohibited from entering into such an escrow arrangement as you proposed. Furthermore, even if the statute did not prohibit such an arrangement, it may have practical problems which should be considered before entering into such an agreement.

If I can be of any further assistance on this matter, please let me know.

Richard D. Bybee
Assistant Attorney General

Approved By:

Victor S. Evans
Deputy Attorney General

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