

PN 110 - 4/15/2005 - ESCROW BID DOCUMENTS

1. Scope and Purpose. The purpose of this note is to preserve the Contractor's and subcontractors' Bid Documents for use by the parties in the settlement of disputes and claims.

The Department will not use Escrow Documents to assess the Contractor's or subcontractors' qualifications for performing the Work. The Escrow Documents are, and will always remain, the property of the Contractor or subcontractors, subject to joint review by the Department and Contractor or subcontractors, as provided below.

Escrow Documents consist of one copy of all documents generated in preparation of the Proposal. This includes handwritten notes, records of phone conversations and phone quotes, letters, faxes, e-mails both printed and electronically archived, formal quotations, calculations, work sheets, conceptual progress schedules, marked up plan sheets, and any other paper or electronic record of how the Work was originally bid. These documents will be held in escrow for the duration of the Contract.

2. Submittal. The low bidder and the second low bidder shall submit their Bid Documents for purposes of escrow by 4:00 p.m. in the Office of Contracts at 1980 West Broad Street, Columbus, Ohio the next business day after the bid opening. The Escrow Documents shall be submitted in a sealed container containing only the Escrow Documents. Clearly mark the container with the Contractor's and subcontractors' name, date of submittal, project name and number, and the words "Escrow Documents."

Submittal shall be in accordance with this note. Failure of the low bidder or the second low bidder to submit their Bid Documents for purposes of escrow in a timely manner as defined above will result in a determination by the Department that the bid submitted by that particular bidder is non-responsive and ineligible for award.

3. Stipulations and Acknowledgements. The Department stipulates and expressly acknowledges that the Escrow Documents constitute proprietary information. This acknowledgement is based on the Department's expressed understanding that the information contained in the Escrow Documents is not known outside the Contractor's or subcontractors' business, is known only to a limited extent and by a limited number of the Contractor's or subcontractors' employees, and is safeguarded while in the Contractor's or subcontractors' possession. The Department further acknowledges that the Escrow Documents and the information they contain are provided for the joint use of the Contractor or the subcontractors and the Department.

The Contractor and subcontractors agree, as a requirement of the Contract, that the Escrow Documents constitute all the information used in the preparation of the Bid, and that no other Bid preparation information will be considered in the resolution of disputes and claims. The Contractor and subcontractors also agree that nothing in the Escrow

Documentation shall change or modify the terms or conditions of the Contract Documents.

The Department further agrees to safeguard the Escrow Documents, and all information they contain, against disclosure to the fullest extent permitted by law.

4. Format and Contents. The Contractor and subcontractors may submit Escrow Documents in their usual cost estimating format. It is not the intention of this subsection to cause the Contractor to expend additional effort during Proposal preparation, but to ensure that the Escrow Documents are adequate to enable complete understanding and proper interpretation for their intended use.

Ensure that the Escrow Documents clearly itemize the estimated costs of performing the Work of each contract item in the Proposal. Separate contract items into such items necessary to present a complete and detailed estimate of all costs. Detail the plant, equipment, material, and indirect costs in the Contractor's usual format. Ensure that the allocation of contingencies, mark ups, and other items are identified for each contract item.

Identify all elements of pricing developed solely based on experience or market factors, and for which a detailed cost estimate does not exist.

Identify all costs. For contract items amounting to less than \$10,000, the Contractor may provide estimated costs without a detailed cost estimate.

Ensure that the Escrow Documents include all quantity take-offs, calculations of rates of production and progress, copies of quotes from subcontractors and suppliers, memoranda, narratives, add/deduct sheets, and all other information used by the Contractor to arrive at the prices contained in the Proposal.

5. Late Revisions. If the itemized cost breakdowns and allocations described elsewhere are not revised to reflect the final Bid prices, then submit information reconciling the Bid preparation documents and the Bid unit prices. Consider this reconciliation as a part of the Escrow Documents and include in the submittal.

6. Storage. The Department will acknowledge receipt of the Escrow Documents and place the Escrow Documents in an institution in Columbus, Ohio that is mutually agreed upon by both the Contractor and the Department for the life of the Contract. The Department will pay the cost of storage.

7. Examination. The Department, the Contractor, and when necessary, the applicable subcontractors will examine the Escrow Documents, at any time deemed necessary by either the Department or the Contractor, to assist in the negotiation of the settlement of disputes and claims; ensure that subcontractors are present if and when they are presenting a claim through the Contractor or when information is needed. The

Contractor, applicable subcontractors, and the Department will be present to review the Escrowed Documents.

Examination of the Escrow Documents is subject to the following conditions:

- a. The Escrow Documents are proprietary and confidential.
- b. Access to the documents will take place only in the presence of authorized representatives from the Department, Contractor, and the applicable subcontractors.
- c. The Contractor shall designate, in writing, the personnel from within the Contractor's organization who are authorized to examine the Escrow Documents. Submit this designation with the Escrow Documents. The Director or the designees may examine the Escrowed Documents.

8. Final Disposition. The Department will return the Escrow Documents to the Contractor and subcontractors after completion of the Contract and after all disputes and claims have been settled.

9. Escrow Agreement for Contract Bid Documents. The following Escrow Agreement shall be executed within ten (10) days after award of the Contract.

THIS AGREEMENT is made and entered into this ___th day of Month, ____, by and among the Ohio Department of Transportation, an agency of the State of Ohio, hereinafter called the "Department", _____ the "Contractor", and the _____, hereinafter called the "Escrow Agent".

WHEREAS, the Department and Contractor entered into that certain construction contract dated _____, hereinafter called the "Contract", for the construction of Project Number _____, pursuant to which the Contractor shall cause the work therein to be constructed; and

WHEREAS, the Department and Contractor are desirous of entering 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 specifications 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 - Acknowledgment

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 Project Number 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 Document container.

ARTICLE IV - Release from Escrow

Upon being presented, by the Department, with documentation that the Final Estimate for the Contract has been paid to the Contractor, the Escrow Agent shall deliver to the Contractor the sealed container bearing the Contractor's name, address and Contract Project Number on it. The Escrow Agent is also authorized to release the Bid Document sealed container to the Department without the Contractor's signed consent subject to the following conditions:

- * The Contractor has provided written notification to the Department of the Contractor's intention to file a claim related to the Contract; or
- * The Contractor has initiated litigation against the Department relating to the Contract.

Prior to any release from escrow to the Department, the Escrow Agent shall verify that either condition of release to the Department, as stated above, has been met by providing written notice to the Contractor of the Escrow Agent's intention to release the Bid Documents to the Department. Such written notice from the Escrow Agent shall be sent by overnight mail no less than ten (10) calendar days prior to release to the Department. Further, the written notice shall recite a date and time certain when the

escrow documents will be released to the Department. The Contractor may be present at the time of release and also while the Department reviews the documents. Upon any release from escrow of the Bid Document container, the Escrow Agent shall cause the execution of Exhibit A, "ESCROW RELEASE for Contract Bid Documents," as attached hereto and incorporate herein as if fully contained, by the party receiving the Bid Document container.

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.

The Escrow Agent shall have no responsibility as to the genuineness of the signature or the validity of any document deposited in the escrow, nor as to the legal capacity or identity of the parties to this escrow, and the Escrow Agent shall be justified in every act, omission or forbearance in reliance upon the Escrow Agreement so long as and to the extent that it shall act or have acted in good faith.

All of the terms and conditions in connection with the Escrow Agent's duties and responsibilities, and the rights of the undersigned parties are contained in the Escrow Agreement. The Trust Company is not required to be familiar with the provisions of any other instrument or agreement and shall not be charged with any responsibility or liability in connection with the observance or non-observance, by any person, of the provisions of any other such instrument or agreement.

The Escrow Agent shall not be responsible for the determination of any facts or conditions on which the parties may give notice, but the Escrow Agent may rely solely on the notice received from the parties as to the existence of such facts or conditions.

The Escrow Agent may act or refrain from acting in respect of any matter referred to in the Escrow Agreement or additional instructions received in the performance of its duties in full reliance upon the advice of counsel which may be selected by it, and shall be fully protected in so acting or refraining from acting upon the advice of such counsel.

The Escrow Agent may obey and comply with any order or process of a court (whether or not such court shall have jurisdiction) commanding it to do or to refrain from some act in relation to the subject matter of this escrow. It may rely and continue to rely conclusively upon such orders or process, notwithstanding that it may find subsequently to be void or voidable, until one of the Trust Officers of the Escrow Agent, shall have actual knowledge that such order or process shall have been modified, annulled, set aside, vacated or quashed.

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:

The Ohio Department of Transportation
Gordon Proctor, Director
1980 West Broad Street
Columbus, Ohio 43223

Contractor:

Escrow Agent:

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 Franklin County, Ohio and the laws of the State of Ohio 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.

The Contractor:

By: _____

(Title)

(Witness)

(Date)

The Ohio Department of Transportation:

By: _____

(Title)

(Witness)

(Date)

_____ **(Escrow Agent):**

By: _____

(Title)

(Witness)

(Date)

EXHIBIT A - ESCROW RELEASE for Contract Bid Documents

This is to certify that on this _____ day of _____, 20____, the sealed container identified as:

Bid Documentation

Contractor:

(Address)

Contract

Project Number:

Date of Submittal:

(Evidence by Agreement dated _____),

was released from escrow and personally handed to the below name individual acknowledging receipt, representing the Contractor/Department, by the Escrow Agent upon the presentation of the required documentation pursuant to Article IV, Release from Escrow, of that agreement dated _____, 20____, a copy of such documentation is attached hereto.

Acknowledgment of Receipt:

Acknowledgment of Release:

(Escrow Agent)

DESIGNER'S NOTE: For use with the 2008 C&MS. This note should be considered for use on all projects over \$30,000,000 and/or of a highly technical nature. In all cases consultation must be made with the Division of Contract Administration prior to a final determination. Any questions on this note should be directed to the Division of Contract Administration at 614-644-8390.