



Protecting our Roads Bonding Work in the ROW

Liability

Strategic Risk Management Guideline

Issue SRM201903-10

When awarding contracts and approving permits for work in the right-of-way, county road commissions are often advised to secure a Bond. What does that mean?

Surety Bonds

A Surety Bond is a three-party contract comprised of the Surety, the Principal (contractor) and the Obligor (road commission) where the Principal promises to perform in accordance with its contract obligations.

While most surety companies are subs or divisions of insurance companies, insurance policies are designed to compensate against unforeseen adverse events. Surety Bonds are designed to guarantee the contractor's contractual obligations. The Surety company prequalifies the contractor based on financial strength and construction expertise. Most bonds are underwritten with little expectation of loss. On public projects, surety bonds support prequalification of contractors, payment protection for subcontractors and contract completion protection for the public.

For contractors to qualify for a bond, they must first prove that they are capable of performing the work and completing the job.

Once this is proven, they must show that they qualify for the bond. The bond producer wants to know that they have the assets to pay for a claim should things go awry. A surety company will write a bond if these two criteria are met.

The surety has the authority to step in to avoid default on the contract. They may use any means necessary to complete the work and expire the bond.

Surety companies have the means to underwrite a Bond Form provided by the contracting party.

Attached, is a Bond Form Template developed by our insurance and legal partners and specially designed to protect our Members in the event of a contract failure, and to provide a reasonable means to collect on the Bond's guarantee. This Bond Form Template has been reviewed and accepted by several National Surety Underwriters who have all indicated they would have no problem accepting it.

Surety Bonds v Letter of Credit

Surety bonds and letters of credit are similar in that both involve third parties acting as a guarantor for transactions. Letters of credit (LoC) are considered interest-bearing debt for accounting purposes, while surety bonds are a form of insurance. LoCs are issued by commercial or merchant banks and guarantee payments to the beneficiaries (road commissions) on behalf of the applicants (contractors).

There are two types of letters of credit: A commercial letter of credit is a contractual agreement in which the issuing bank authorizes another bank to make payment on behalf of its client. A standby letter of credit is issued by a bank to a beneficiary to demonstrate the applicant's ability to make payments.



Letter of Credit Information

Letter of Credit Forms come from a bank, and the verbiage in these will differ from bank to bank, somewhat. ***Attached, is a Standby Letter of Credit Template*** developed for your use by our Legal team. This template contains the elements we want you to look for in the letter, but if the Bank issues their own letter, you should look for the following:

1. The LOC must be irrevocable.
2. The Beneficiary (Obligee) of all LOCs must be the Road Commission.
3. The bank issuing the LOC must be located within the US.
4. The LOC can be drawn on more than once, up to its total value.
5. LOCs are not required to have an expiration date. If it has an expiration date, make sure that it is an acceptable date, or has an evergreen clause.

Cash Bonds

Some of our Members have had success using Cash Bonds to protect their Road Commission from contract problems and damage to county road infrastructure. We have also ***Attached a Cash Bond Template*** developed for your use by our Legal team.

Whichever vehicle you choose to use to Protect your Roads, we recommend that you make it a part of your permit application package when contractors are looking to work in the county road rights-of-way, and to also make it a required part of your contract bid packages.

If you have any questions, please let us know.....

Guidance on Bond, Insurance and LOC Requirements

The Surety Bond, Irrevocable Letter of Credit or Cash Bond must be in amounts sufficient to finish any contract work outstanding. We recommend the full contract price be Bonded.

The General and Automobile Liability Insurance coverages need to be in an amount sufficient to repair any damages made to the road and appurtenances, and to cover exposure to third party lawsuits in the event of a loss. We recommend \$2 Million as a minimum for each type of coverage.

The Road Commission should be named additional insured (see SRM Guidelines 20181-8) when they are contracting work out to a private contractor, or when permitting work in the travelled portion of the road.

Remember to require that all contractors or permittees must Indemnify and Hold Harmless the Road Commission and its commissioners, officers, agents, volunteers and employees from and against any and all claims, allegations, actions, proceedings, liabilities, judgments, losses, costs, expenses (including attorney's fees) and damages.



BOND FOR WORK IN THE RIGHTS-OF-WAY

KNOW ALL MEN BY THESE PRESENTS, that

(complete name of Permittee/Principal)

(complete address of Permittee/Principal) (the "Principal"), and

(complete name of Surety Company)

(complete address of Surety Company) (the "Surety")

for value received, are held and firmly bound unto the Board of County Road Commissioners of the County of *[Name of County]*, State of Michigan, as Obligees, hereinafter referred to as *[Name of Road Commission, e.g., KCRC]*, in the sum of \$_____ dollars lawful money of the United States of America to be paid to the *[Name of Road Commission]*, to which payment, the Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly and irrevocably by this bond.

WHEREAS, Principal has been issued a Permit(s) by the *[Name of Road Commission]* permitting it to work within certain public rights-of-way in the County of *[Name of County]*;

WHEREAS, a surety bond from a surety licensed to transact business in the State of Michigan and rated no less than A.M. Best A minus VII is required to guarantee the proper performance and completion of the work, and also restoration and repair of the rights-of-way to the *[Name of Road Commission]*'s satisfaction, all within the time specified in the Permit(s) for such completion.

THE CONDITION OF THIS BOND is such that if the Principal, to the satisfaction of the *[Name of Road Commission]*, shall in all particulars promptly and faithfully perform all obligations of the Permit including restoration and repair of all affected rights-of-way, including the surface, subsurface, and all adjacent structures and appurtenances no matter by whom owned, then this obligation shall become void, except as provided in paragraph (4) above, upon receipt by Surety of a notice of termination of performance obligations from the *[Name of Road Commission]*; otherwise, this obligation shall remain in full force and effect. Regardless of the number of years this bond shall continue in full force and effect, and of the number of premiums that shall be payable or paid, the Surety shall not be liable hereunder for a larger amount, in the aggregate, than the penal amount of this bond. The Surety may terminate its liability hereunder as to future acts of the Principal at any time by giving 60 days written notice of such termination to the Obligees.

WHEREFORE, the Surety hereby stipulates and agrees that:

1. No change, extension of time, alteration or addition to the terms of the Permit(s) or the work to be performed thereunder shall in any way affect its obligation on this bond, and it does hereby waive notice of any such event.
2. Wherever Principal shall be, as declared solely by the *[Name of Road Commission]*, in default under the Permit(s) or this bond, the Surety shall promptly remedy the default within thirty (30) days after receiving notice from the *[Name of Road Commission]* of said default. The default may be remedied by completion of any required permit work, as directed and approved solely by the *[Name of Road Commission]*, or by payment to the *[Name of Road Commission]* of costs and damages incurred by the *[Name of Road Commission]* to correct said default, including materials, labor, costs associated with bidding the work or any part of the work, and all costs associated with enforcing the Principal's or Surety's obligations under the Permit or this bond. In no event shall Surety incur or pay any costs or expenses in excess of the penal sum of this bond.
3. Its obligations assumed herein remain in full force and effect until notice of termination of such obligations is given to Surety by the *[Name of Road Commission]*.
4. The Surety guarantees all construction and/or restoration work required by the Permit against defective workmanship or materials for a period of one (1) calendar year from the date of acceptance of such work by the *[Name of Road Commission]*. All claims for defective workmanship or materials must be made against the Principal and the Surety no later than thirty (30) calendar days after the expiration of the one (1) calendar year period from the date of the acceptance of the work.

THIS BOND EXPIRES ON _____, 20 ____

Signed and sealed this _____ day of _____, 20 ____

(Witness)

(Permittee and Title)

(Witness)

(Surety and Title)

IRREVOCABLE STANDBY LETTER OF CREDIT
{Number of LOC}

Beneficiary:

[Name of Road Commission]
[First line of address]
[Second line of address]
[Third line of address]

Applicant:

[Name of Applicant]
[First line of address]
[Second line of address]
[Third line of address]

Amount: [Amount of LOC]

We hereby establish our Irrevocable Standby Letter of Credit [Number of LOC] in your favor and authorize you to draw on us, for the account of [Name of applicant] up to an aggregate amount of [Amount of LOC].

In accordance with Michigan law, this Letter of Credit is issued in connection with an application for [Name of Road Commission] Right-of-Way Work Permit Number [Permit Number].

Payment under this Letter of Credit is available by your draft at sight, drawn on [name and address of bank] to be accompanied by original beneficiary's statement purportedly signed by an authorized representative of [Name of Road Commission] certifying that:

"Applicant has failed to complete the proposed work in a manner sufficiently consistent with the permit requirements, and the amount drawn is required to complete the unfinished or unsatisfactory work."

Partial drawings are allowed.

This Letter of Credit sets forth in full the terms of our undertaking which shall not in any way be modified, amended, amplified or limited by reference to any document, instrument, or agreement, whether or not referred to herein.

We hereby agree that drawings under this Letter of Credit will be duly honored upon presentation and shall state that they are drawn under [name of Bank], [Bank address], Letter of Credit # _dated ____.

This original Letter of Credit must be submitted to us together with any drawings hereunder for our endorsement of any payments effected by us and/or for cancellation.

This Letter of Credit shall be deemed automatically extended without amendment for one year from the expiration date hereof or any future expiration date unless at least sixty (60) days prior to any expiration date, we notify beneficiary in writing by certified mail that this Letter of Credit will terminate.

Except so far as otherwise stated, this Letter of Credit is subject to the "Uniform Customs and Practice for Documentary Credit (2007 Revision)," International Chamber of Commerce Publication No. 600.

This is an operative instrument and no confirmation to follow.

(Authorized Bank Signature)

(Typed Name and Title)

[ROAD COMMISSION LETTERHEAD]

CASH BOND

GUARANTEEING COMPLIANCE WITH THE TERMS AND CONDITIONS OF [NAME OF ROAD COMMISSION]'S PERMIT NUMBER [PERMIT NUMBER]

I hereby establish a bond in the form of cash or check/money order made payable to the [Name of Road Commission] at the request and for the account of:

Permit Applicant's Name _____
Please Print

Permit Applicant's Address _____
Please Print

to provide financial assurance for the satisfactory performance of [Name of Road Commission]'s Permit Number [Permit Number], in the amount of [Amount of Bond]. Provided herein is the aggregate amount of U.S. Dollars \$_____. The bond shall be deposited with the [Title of Road Commission Official, e.g., Clerk, Finance Director, etc.].

This cash bond shall be effective as of _____ and shall remain in full force and effect until such time as the Permit Applicant submits a written request for refund to the [Title of Road Commission Official] of the [Name of Road Commission] and Permit Applicant's performance under Permit Number [Permit Number] is deemed full and complete in the sole discretion of the [Name of Road Commission]. The [Name of Road Commission] reserves the right to return the bond to the Permit Applicant at any time and for any reason. The Permit Applicant agrees, in exchange for [Name of Road Commission]'s costs in administering and managing the bond funds, that it forfeits any accrued interest on the bond funds at the time of refund.

Name of Permit Applicant's Representative

Signature of Permit Applicant's Representative

Date

Acknowledgement of Receipt:

[Name of Road Commission Official]

Title of Road Commission Official

Date