

1 **(October 3, 2022)**

2 **Escrow Bid Documentation**

3 **Scope and Purpose**

4 The purpose of this specification is to preserve the Contractor's bid documentation  
5 for use by the Contracting Agency in any litigation between the Contracting Agency  
6 and Contractor arising out of this Contract.

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8 The Contractor shall submit a legible copy of all documentation used to prepare the  
9 Bid for this Contract to a escrow institution designated by the Contracting Agency.  
10 Such documentation shall be placed in escrow with the escrow institution and  
11 preserved by that institution as specified in the following sections of this  
12 specification.

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14 **Bid Documentation**

15 The term "bid documentation" as used in this specification means any writings,  
16 working papers, computer printouts, charts, and any other data compilations which  
17 contain or reflect all information, data, and calculations used by the Contractor to  
18 determine the Bid in bidding for this project. The Contractor shall submit its  
19 documentation in whatever format it was created and shall also provide electronic  
20 copies. The term "bid documentation" includes but is not limited to Contractor  
21 equipment rates, Contractor overhead rates, labor rates, efficiency or productivity  
22 factors, arithmetic extensions, and quotations from subcontractors and material  
23 providers to the extent that such rates and quotations were used by the Contractor  
24 in formulating and determining the amount of the bid. The term "bid documentation"  
25 also includes any manuals which are standard to the industry used by the  
26 Contractor in determining the bid for this project. Such manuals (including year of  
27 publication) may be included in the Bid Documentation by reference. The term does  
28 not include bid documents provided by the Contracting Agency for use by the  
29 Contractor in bidding on this project.

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31 **Submittal of Bid Documentation**

32 The Contractor shall submit the bid documentation to the escrow institution. The bid  
33 documentation shall be submitted to the escrow institution within seven calendar  
34 days after the Contract for this project has been executed by the Contracting  
35 Agency. The bid documentation shall be submitted in a sealed container. The  
36 container shall be clearly marked "Bid Documentation" and shall also show on the  
37 face of the container the Contractor's name, the date of submittal, the project title,  
38 and the contract number.

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40 **Affidavit**

41 The sealed container shall contain, in addition to the bid documentation, an affidavit  
42 signed under oath by an individual authorized by the Contractor to execute bidding  
43 proposals. The affidavit shall list each bid document with sufficient specificity so a  
44 comparison can be made between the list and the bid documentation to ensure that  
45 all of the bid documentation listed in the affidavit has been enclosed in the sealed  
46 container. The affidavit shall show that the affiant has personally examined the bid  
47 documentation and that the affidavit lists all of the documents used by the  
48 Contractor to determine the Bid for this project and that all such bid documentation  
49 has been enclosed in the sealed container.

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### **Verification**

The escrow institution upon receipt of the sealed container shall place the container in a safety deposit box, vault, or other secure place, and immediately notify the Contracting Agency in writing that the container has been received. Upon receipt of such notice, the Contracting Agency will promptly notify the Contractor in writing that the Contracting Agency will open the sealed container to verify that the affidavit has been enclosed and to compare the bid documents listed in the affidavit with the bid documents enclosed in the container to ensure that all of the bid documentation has been submitted and that the copies are legible. The notification will advise the Contractor of the date and time the container will be opened and the name of the Contracting Agency employee who will verify the contents of the container. The Contracting Agency employee verifying the contents of the escrow container will not be involved or connected with the review, evaluation, or resolution of any claim by the Contractor made to the Contracting Agency in connection with the contract for which the verification was made. The Contractor may have representatives present at the opening.

### **Supplementation**

Documents listed in the affidavit but not enclosed in the sealed container through error or oversight shall be submitted in a sealed container within five calendar days after the opening of the original container. Also, any bid documentation that is illegible shall be replaced with legible copies and furnished within five calendar days after the opening of the original container. The face of the container shall show the same information as the original container except the container shall be marked "Supplemental Bid Documentation". The same procedure used in verifying the contents of the original container shall be used in verifying the contents of the supplemental submittal.

### **Duration and Use**

The bid documentation and affidavit shall remain in escrow during the life of the Contract and will be returned to the Contractor by the escrow institution, provided that the Contractor has signed the final contract voucher certification and has not reserved any claims on the final contract voucher certification against the Contracting Agency arising out of the Contract. In the event that claims against the Contracting Agency are reserved on the final contract voucher certification, the bid documentation and affidavit shall remain in escrow. If the claims are not resolved and litigation ensues, the Contracting Agency may serve a request upon the Contractor to authorize the escrow institution, in writing, to release the bid documentation and affidavit in escrow to the Contracting Agency. The Contractor shall respond to the request within 20 days after service of the request. If the Contractor objects or does not respond to the request within 20 days after service of the request, the Contracting Agency may file a motion under the Civil Rules requesting the court to enter an order directing the escrow institution to deliver the bid documentation and affidavit in escrow to the Contracting Agency. The Contractor shall respond to the request within the time required by the then applicable Civil Court Rules for the Superior Court of the State of Washington. If the Contractor objects or does not respond to the request within the time required by the then applicable Civil Rules, the Contracting Agency may file a motion pursuant to such rules requesting the court to enter an order directing the escrow institution to deliver the bid documentation and affidavit in escrow to the Contracting Agency. The escrow institution shall release the bid documentation and affidavit as follows:

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- 3 1. To the Contracting Agency upon receipt of a letter from the Contractor
- 4 authorizing the release;
- 5
- 6 2. To the Contracting Agency upon receipt of a certified copy of a court order
- 7 directing the release of the documents;
- 8
- 9 3. To the court for an in camera examination pursuant to a certified copy of a
- 10 court order;
- 11
- 12 4. The bid documentation and affidavit shall be returned to the Contractor if
- 13 litigation is not commenced within the time period prescribed by law.

14 The Contractor agrees that the sealed container placed in escrow and any  
15 supplemental sealed container placed in escrow contain all of the bid  
16 documentation used to determine the Bid and that no other bid documentation shall  
17 be utilized by the Contractor in litigation over Certified Claims brought by the  
18 Contractor arising out of this Contract unless otherwise ordered by the court.

#### 19 **Remedies for Refusal or Failure to Provide Bid Documentation**

20 Failure or refusal to provide bid documentation shall be deemed a material breach  
21 of this Contract. The Contracting Agency may at its option refuse to make payment  
22 for progress estimates under Section 1-09.9 until the Contractor has submitted the  
23 bid documentation required by this specification. The Contracting Agency may at its  
24 option terminate the contract for default under Section 1-08.10. These remedies are  
25 not exclusive and the Contracting Agency may take such other action as is  
26 available to it under the law.

#### 27 **Confidentiality of Bid Documentation**

28 The bid documentation and affidavit in escrow are and will remain the property of  
29 the Contractor. The Contracting Agency has no interest in or right to the bid  
30 documentation and affidavit other than to verify the contents and legibility of the bid  
31 documentation unless litigation ensues between the Contracting Agency and  
32 Contractor over Certified Claims brought by the Contractor arising out of this  
33 Contract. In the event of such litigation, the bid documentation and affidavit may  
34 become the property of the Contracting Agency for use in the litigation as may be  
35 appropriate subject to the provisions of any court order limiting or restricting the use  
36 or dissemination of the bid documentation and affidavit as provided in the  
37 preceding section entitled Duration and Use.

#### 38 **Cost and Escrow Instructions**

39 The cost of the escrow will be borne by the Contracting Agency. The Contracting  
40 Agency will provide escrow instructions to the escrow institution consistent with this  
41 specification.  
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