

# NEBRASKA

DEPT. OF ENVIRONMENT AND ENERGY

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## Guidance Document for Surety Bonds

Surety bonds represent agreements between three parties: the principal (i.e., the owner/ operator of the facility); the obligee who is the party to whom the principal promises to complete a specific act (i.e., the Department of Environment and Energy); and the surety, the party that assures the obligee that the principal will fulfill his promise and, if the principal fails, that the surety will fulfill the obligation to the obligee. A surety bond that guarantees the principal will perform a certain act defined in the bond or pay for someone to satisfy the terms of the bond is referred to as a performance bonds. Surety bonds that guarantee payment from one party to another under the conditions set forth in the bond, rather than performance of a specific act, are known as payment bonds.

The monetary liability of a surety company is defined in the bond as the "penal sum" which must be equal to the facility specific cost estimates. Most payment bonds contain a provision that expressly discharges the surety's liability under the bond once the surety has paid a sum equal to the penal sum if the bond. Under a performance bond, the surety's obligation is limited to the penal sum if it chooses to pay under the bond; however, if the surety chooses to perform the required activities to satisfy its obligation until the performance is complete.

A surety is "jointly and severally" liable for the guaranteed payment or performance, which means that the surety assumes the principal's obligation as its own and can be sued jointly with the principal, as a codefendant, for such obligation. Consequently, most surety bonds include an indemnification provision that requires the principal to reimburse the surety for costs incurred to satisfy the principal's obligation under the bond.

Surety companies must be listed in Circular 570 of the U.S. Department of the Treasury to ensure that the surety bond provides an adequate guarantee of funds. Circular 570 is a list of surety companies which have been approved for writing construction bonds and other surety bonds for federal projects. Circular 570 can be found at <http://www.bea.doc.gov/>.

Please note that a performance bond cannot be combined with other financial assurance mechanisms. Only mechanisms that require payment may be combined. In cases of default, it would be difficult to enforce a combination of a performance guarantee or a performance bond with another mechanism due to the potential complexity of dividing the required obligation to perform closure or post- closure care.