Subpart 28.2 - Sureties and Other Security for Bonds

Parent topic: Part 28 - Bonds and Insurance

28.200 Scope of subpart.

This subpart prescribes procedures for the use of *sureties* and other security to protect the Government from financial losses.

28.201 Requirements for security.

(a) Agencies *shall* obtain adequate security for *bonds* (including coinsurance and *reinsurance* agreements) required or used with a contract for *supplies* or services (including *construction*). Acceptable forms of security include-

(1) Corporate or individual *sureties*; or

(2) Any of the types of security authorized in lieu of *sureties* by 28.204.

(b) *Solicitations shall* not preclude *offerors* from using the types of *surety* or other security permitted by this subpart, unless prohibited by law or regulation.

28.202 Acceptability of corporate sureties.

(a)

(1) Corporate *sureties* offered for *bonds* furnished with contracts performed in the *United States* or its *outlying areas must* appear on the list contained in the Department of the Treasury's Listing of Approved *Sureties* (Treasury Department Circular 570), “Companies Holding Certificates of Authority as Acceptable *Sureties* on Federal *Bonds* and as Acceptable Reinsuring Companies.”

(2) The penal amount of the *bond should* not exceed the *surety*'s underwriting limit stated in the Treasury Department Circular 570. If the penal amount exceeds the underwriting limit, the *bond* will be acceptable only if-

(i) The amount which exceeds the specified limit is coinsured or reinsured; and

(ii) The amount of coinsurance or *reinsurance* does not exceed the underwriting limit of each coinsurer or reinsurer.

(3) Coinsurance or *reinsurance* agreements *shall* conform to the Department of the Treasury (Treasury) regulations in 31 CFR 223.10 and 223.11. When *reinsurance* is contemplated, the *contracting office* generally *shall* require *reinsurance* agreements to be executed and submitted with

the *bonds* before making a final determination on the *bonds*.

(4) When specified in the *solicitation*, the *contracting officer may* accept a *bond* from the direct writing company in satisfaction of the total *bond* requirement of the contract. This is permissible until necessary *reinsurance* agreements are executed, even though the total *bond* requirement *may* exceed the insurer's underwriting limitation. The contractor *shall* execute and submit necessary *reinsurance* agreements to the *contracting officer* within the time specified on the *bid* form, which *may* not exceed 45 calendar days after the execution of the *bond*. The contractor *shall* use Standard Form (SF) 273, *Reinsurance* Agreement for a *Bonds* Statute Performance *Bond*, and SF 274, *Reinsurance* Agreement for a *Bonds* Statute Payment *Bond*, when *reinsurance* is furnished with the required performance or payment *bonds*. SF 275, *Reinsurance* Agreement in Favor of the *United States*, is used when *reinsurance* is furnished with *bonds* for other purposes.

(b) For contracts performed in a foreign country, *sureties* not appearing on Treasury Department Circular 570 are acceptable if the *contracting officer* determines that it is impracticable for the contractor to use Treasury listed *sureties*.

(c) Treasury issues supplements to Treasury Department Circular 570, notifying all *Federal agencies* of new approved corporate *surety* companies and the termination of the authority of any specific corporate *surety* to qualify as a *surety* on Federal *bonds*. Upon receipt of notification of termination of a company’s authority to qualify as a *surety* on Federal *bonds*, the *contracting officer shall* review the outstanding contracts and take action necessary to protect the Government, including, where appropriate, securing new *bonds* with acceptable *sureties* in lieu of outstanding *bonds* with the named company.

(d) Treasury Department Circular 570 *may* be obtained from the U.S. Department of the Treasury, Bureau of the Fiscal Service, *Surety Bond* Branch, 3201 Pennsy Drive, Building E, Landover, MD 20785 or at https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570.htm.

28.203 Individual Sureties.

28.203-1 Acceptability of individual sureties.

(a)An individual *surety* is acceptable for all types of *bonds* except position schedule *bonds*. Assets pledged by an individual *surety shall* meet the eligibility requirements of Treasury's Bureau of the Fiscal Service. Per 31 U.S.C. 9310, individual *sureties must* pledge eligible obligations, which Treasury refers to as acceptable collateral or eligible collateral. A list of acceptable assets, entitled “Acceptable Collateral for 31 CFR part 225,” *may* be accessed by going to https://www.treasurydirect.gov/files/laws-and-regulations/collateral-programs/2018-final-225-list-of-acceptable-collateral.pdf and clicking on “Acceptable Collateral for 31 CFR part 225”.

(b)

(1)An individual *surety shall* execute the *bond* (*e.g.*, *bid bond* (SF 24), performance *bond* (SF 25), payment *bond* (SF 25A)).

(2)The net adjusted value of unencumbered assets is their market value minus the margin. The margin tables are available at www.treasurydirect.gov. The net adjusted value of unencumbered assets pledged by the individual *surety must* equal or exceed the penal amount (*i.e.*, face value) of each *bond*.

(3)The individual *surety shall* execute the SF 28, Affidavit of Individual *Surety*, and provide a security interest. One individual *surety* is adequate support for a *bond*, provided the net adjusted value of unencumbered assets pledged by that individual *surety* equals or exceeds the amount of the *bond*.

(4)An *offeror* or contractor *may* submit up to three individual *sureties* for each *bond*, in which case the net adjusted value of the pledged unencumbered assets, when combined, *must* equal or exceed the penal amount of the *bond*. Each individual *surety* is jointly and severally liable to the extent of the penal amount of the *bond*.

(c)Using the information from the SF 28 submitted by the *offeror* or contractor, the *contracting officer shall* notify the Treasury's collateral operations support team by email at BMT@fiscal.treasury.gov or by phone at 888-568-7343, of the individual *surety*, the assets to be pledged, and the amount necessary to cover the individual *surety bond*, *i.e.*, the required amount to be collateralized. Treasury will advise the *contracting officer* whether the assets are eligible to be pledged, consistent with 28.203-1(a), and of the valuation of the assets offered to be pledged, consistent with the valuation standards in 28.203-1(b)(2). If after 3 business days the *contracting officer* has not received a response from Treasury, the *contracting officer may* seek assistance from the Director, Bank Policy and Oversight, at 202-504-3502. The *contracting officer shall* determine whether the individual *surety bond* is acceptable as to the amount necessary to cover the individual *surety bond* based on the asset eligibility and valuation assessment from Treasury. The *contracting officer shall* notify both the *offeror* or contractor and the individual *surety* of this determination.

(d)If the *contracting officer* determines the individual *surety* is acceptable, the *contracting officer shall* request the Treasury's collateral operations support team set up the necessary individual *surety* pledged asset collateral account.

(e)If the *contracting officer* determines that no individual *surety* in support of a *bid guarantee* is acceptable, the *offeror* utilizing the individual *surety shall* be rejected as nonresponsible, except as provided in 28.101-4. A finding of nonresponsibility based on unacceptability of an individual *surety*, need not be referred to the Small Business Administration for a Certificate of Competency. (See 19.602-1(a) and 61 Comp. Gen. 456 (1982).)

(f)If a contractor submits an unacceptable individual *surety*, or one that Treasury could not assess the asset eligibility and valuation within a reasonable time, then the *contracting officer may* permit the contractor to substitute an acceptable *surety* within a reasonable time.

(g)Evidence of possible criminal or fraudulent activities by an individual *surety shall* be referred to the appropriate agency official in accordance with agency procedures.

28.203-2 Substitution of assets.

An individual *surety may* request the Government to accept a substitute asset for that currently pledged by submitting a written request, including a revised SF 28, to the responsible *contracting officer*. Following the requirements set forth in 28.203-1, the *contracting officer may* agree to the substitution of assets upon determining that the substitute assets to be pledged are adequate to protect the outstanding *bond* or guarantee obligations.

28.203-3 Release of security interest.

(a)After consultation with legal counsel, the *contracting officer shall* release the security interest on the individual *surety*'s assets using the Optional Form 91, Release of *Personal Property* from Escrow, or a similar release as soon as possible consistent with the conditions in subparagraphs (a)(1) and (2) of this section. A *surety*'s assets pledged in support of a payment *bond may* be released to a subcontractor or supplier upon Government receipt of a Federal district court judgment, or a sworn statement by the subcontractor or supplier that the *claim* is correct along with a notarized authorization of the release by the *surety* stating that it approves of such release.

(1) *Contracts subject to the Bonds statute.* See section 1.110 and section 28.102-1, paragraph (a). The security interest *shall* be maintained for the later of—

(i)1 year following final payment;

(ii)Until completion of any *warranty* period (applicable only to performance *bonds*); or

(iii)Pending resolution of all *claims* filed against the payment *bond* during the 1 year period following final payment.

(2) *Contracts subject to alternative payment protection.* See section 28.102-1, paragraph (b)(1). The security interest *shall* be maintained for the full contract performance period plus 1 year.

(3) *Other contracts not subject to the Bonds statute.* The security interest *shall* be maintained for 90 days following final payment or until completion of any *warranty* period (applicable only to performance *bonds*), whichever is later.

(b)Upon written request by the individual *surety*, the *contracting officer may* release the security interest on the individual *surety*'s assets in support of a *bid guarantee* based upon evidence that the *offer* supported by the individual *surety* will not result in contract award.

(c)Upon written request by the individual *surety*, the *contracting officer may* release a portion of the security interest on the individual *surety*'s assets based upon substantial performance of the contractor's obligations under its performance *bond*. Release of the security interest in support of a payment *bond must* comply with the subparagraphs (a)(1) through (3) of this section. In making this determination, the *contracting officer* will give consideration as to whether the unreleased portion of the security is sufficient to cover the remaining contract obligations, including payments to subcontractors and other potential liabilities. The individual *surety shall*, as a condition of the partial release, furnish an affidavit agreeing that the release of such assets does not relieve the individual *surety* of its obligations under the *bond*(s).

28.203-4 Solicitation provision and contract clause.

(a)Insert the provision at 52.228-17, Individual *Surety*—Pledge of Assets (*Bid Guarantee*), in *solicitations* that require the submission of a *bid guarantee*.

(b)Insert the clause at 52.228-11, Individual *Surety*—Pledge of Assets, in *solicitations* and contracts that require the submission of performance or payment *bonds*.

28.203-5 Exclusion of individual sureties.

(a)An individual *may* be excluded from acting as a *surety* on *bonds* submitted by *offerors* on *procurement* by the executive branch of the Federal Government, by the acquiring agency's head or designee utilizing the procedures in subpart 9.4. The exclusion *shall* be for the purpose of protecting the Government.

(b)An individual *may* be excluded for any of the following causes:

(1)Failure to fulfill the obligations under any *bond*.

(2)Failure to disclose all *bond* obligations.

(3)Misrepresentation of the value of available assets or outstanding liabilities.

(4)Any false or misleading statement, *signature* or representation on a *bond* or affidavit of individual suretyship.

(5)Any other cause affecting responsibility as a *surety* of such serious and compelling nature as *may* be determined to warrant exclusion.

(c)An individual *surety* excluded pursuant to this section *shall* be entered as an exclusion in the *System for Award Management* (see 9.404).

(d)*Contracting officers shall* not accept the *bonds* of individual *sureties* whose names appear in an active exclusion record in the *System for Award Management* (see 9.404) unless the acquiring agency's head or a designee states *in writing* the compelling reasons justifying acceptance.

(e)An exclusion of an individual *surety* under this section will also preclude such party from acting as a contractor in accordance with subpart 9.4.

28.204 Alternatives in lieu of corporate or individual sureties.

(a) Any person required to furnish a *bond* to the Government *may* furnish any of the types of security listed in 28.204-1 through 28.204-3 instead of a corporate or individual *surety* for the *bond*. When any of those types of security are deposited, a statement *shall* be incorporated in the *bond* form pledging the security in lieu of execution of the *bond* form by corporate or individual *sureties*. The contractor *shall* execute the *bond* forms as the principal. Agencies *shall* establish safeguards to protect against loss of the security and *shall* return the security or its equivalent to the contractor when the *bond* obligation has ceased.

(b) Upon written request by any contractor securing a performance or payment *bond* by any of the types of security listed in 28.204-1 through 28.204-3, the *contracting officer may* release a portion of the security only when the conditions allowing the partial release of security in 28.203-3(c) are met. The contractor *shall*, as a condition of the partial release, furnish an affidavit agreeing that the release of such security does not relieve the contractor of its obligations under the *bond*(s).

(c) The contractor *may* satisfy a requirement for *bond* security by furnishing a combination of the types of security listed in 28.204-1 through 28.204-3 or a combination of *bonds* supported by these types of security and additional *surety bonds* under 28.202 or 28.203. During the period for which a *bond* supported by security is required, the contractor *may* substitute one type of security listed in 28.204-1 through 28.204-3 for another, or *may* substitute, in whole or combination, additional *surety bonds* under 28.202 or 28.203.

28.204-1 United States bonds or notes.

Any person required to furnish a *bond* to the Government has the *option*, instead of furnishing a *surety* or *sureties* on the *bond*, of depositing certain *United States bonds* or notes in an amount equal at their par value to the *penal sum* of the *bond* (the Act of February 24,1919 (31 U.S.C.9303) and Treasury Department Circular No.154 (31 CFR Part 225)). In addition, a duly executed *power of attorney* and agreement authorizing the collection or sale of such *United States bonds* or notes in the event of default of the principal on the *bond shall* accompany the deposited *bonds* or notes. The *contracting officer may*-

(a) Turn securities over to the finance or other authorized agency official; or

(b) Deposit them with the Treasurer of the *United States*, a Federal Reserve Bank (or branch with requisite facilities), or other depository designated for that purpose by the Secretary of the Treasury, under procedures prescribed by the agency concerned and Treasury Department CircularNo.154 (exception: The *contracting officer shall* deposit all *bonds* and notes received in the District of Columbia with the Treasurer of the *United States*).

28.204-2 Certified or cashier’s checks, bank drafts, money orders, or currency.

Any person required to furnish a *bond* has an *option* to furnish a certified or cashier’s check, bank draft, Post Office money order, or currency, in an amount equal to the *penal sum* of the *bond*, instead of furnishing *surety* or *sureties* on the *bonds*. Those furnishing checks, drafts, or money orders *shall* draw them to the order of the appropriate *Federal agency*.

28.204-3 Irrevocable letter of credit.

(a) Any person required to furnish a *bond* has the *option* to furnish a *bond* secured by an *irrevocable letter of credit* (ILC) in an amount equal to the *penal sum* required to be secured (see 28.204). A separate ILC is required for each *bond*.

(b) The ILC *shall* be irrevocable, require presentation of no document other than a written demand and the ILC (and letter of confirmation, if any), expire only as provided in paragraph (f) of this subsection, and be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (g) of this subsection.

(c) To draw on the ILC, the *contracting officer shall* use the sight draft set forth in the clause at 52.228-14, and present it with the ILC (including letter of confirmation, if any) to the issuing financial institution or the confirming financial institution (if any).

(d) If the contractor does not furnish an acceptable replacement ILC, or other acceptable substitute, at least 30 days before an ILC’s scheduled expiration, the *contracting officer shall* immediately draw on the ILC.

(e) If, after the period of performance of a contract where ILCs are used to support payment *bonds*, there are outstanding *claims* against the payment *bond*, the *contracting officer shall* draw on the ILC prior to the expiration date of the ILC to cover these *claims*.

(f) The period for which financial security is required *shall* be as follows:

(1) If used as a *bid guarantee*, the ILC *should* expire no earlier than 60 days after the close of the *bid* acceptance period.

(2) If used as an alternative to corporate or individual *sureties* as security for a performance or payment *bond*, the *offeror*/contractor *may* submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or an ILC with an initial expiration date that is a minimum period of oneyear from the date of issuance. The ILC *shall* provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for oneyear from the expiration date, or any future expiration date, until the period of required coverage is completed and the *contracting officer* provides the financial institution with a written statement waiving the right to payment. The period of required coverage *shall* be:

(i) For contracts subject to the *Bonds* statute, the later of-

(A) Oneyear following the expected date of final payment;

(B) For performance *bonds* only, until completion of any *warranty* period; or

(C) For payment *bonds* only, until resolution of all *claims* filed against the payment *bond* during the one-year period following final payment.

(ii) For contracts not subject to the *Bonds* statute, the later of-

(A) 90 days following final payment; or

(B) For performance *bonds* only, until completion of any *warranty* period.

(g) Only federally insured financial institutions rated investment grade *shall* issue or confirm the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least $25 million in the past year, ILCs over $5 million *must* be confirmed by another acceptable financial institution that had letter of credit business of at least $25 million in the past year.

(1) The *offeror*/contractor is required by paragraph (d) of the clause at 52.228-14. *Irrevocable Letter of Credit*, to provide the *contracting officer* a credit rating from a recognized commercial rating service that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.

(2) To support the credit rating of the financial institution(s) issuing or confirming the ILC, the *contracting officer shall* verify the following information:

(i) Federal *insurance*: Each financial institution is federally insured. Verification of federal *insurance* is available through the Federal Deposit *Insurance* Corporation (FDIC) institution directory at the website http://www2.fdic.gov/idasp/index.asp.

(ii) Current credit rating. The current credit rating for each financial institution is investment grade and that the credit rating is from a Nationally Recognized Statistical Rating Organization (NRSRO). NRSROs can be located at the website http://www.sec.gov/answers/nrsro.htm maintained by the SEC.

(3) The rating services listed in the website http://www.sec.gov/answers/nrsro.htm use different rating scales (e.g., AAA, AA, A, BBB, BB, B, CCC, CC, C, and D; or Aaa, Aa, A, Baa, Ba, B, Caa, Ca, and C) to provide evaluations of institutional credit risk; however, all such systems specify the range of investment grade ratings (e.g., BBB-AAA or Baa-Aaa in the examples in this section) and permit evaluation of the relative risk associated with a specific institution. If the *contracting officer* learns that a financial institution's rating has dropped below investment grade level, the *contracting officer shall* give the contractor 30 days to substitute an acceptable ILC or *shall* draw on the ILC using the sight draft in paragraph (g) of the clause at 52.228-14.

(h) A copy of the Uniform Customs and Practice (UCP) for Documentary Credits, 2007 Edition, International Chamber of Commerce Publication No. 600, is available from:

ICC Books USA, 1212 Avenue of the Americas, 21 st Floor, New York, NY 10036;

Phone: 212-703-5078; Fax: 212-391-6568; E-mail: iccbooks@uscib.org; Via the Internet at:http://www.uscib.org/ucp-600-ud-4465/.

28.204-4 Contract clause.

Insert the clause at 52.228-14, *Irrevocable Letter of Credit*, in *solicitations* and contracts for services, *supplies*, or *construction*, when a *bid guarantee*, or performance *bonds*, or performance and payment *bonds* are required.