Subpart 28.1 - Bonds and Other Financial Protections

Parent topic: Part 28 - Bonds and Insurance

28.100 Scope of subpart.

This subpart prescribes requirements and procedures for the use of *bonds*, alternative payment protections, and all types of *bid guarantees*.

28.101 Bid guarantees.

28.101-1 Policy on use.

(a) A *contracting officer shall* not require a *bid guarantee* unless a performance *bond* or a performance and payment *bond* is also required (see 28.102 and 28.103). Except as provided in paragraph (c) of this subsection, *bid guarantees shall* be required whenever a performance *bond* or a performance and payment *bond* is required.

(b) All types of *bid guarantees* are acceptable for supply or service contracts (see annual *bid bonds* and annual performance *bonds* coverage in 28.001). Only separate *bid guarantees* are acceptable in connection with *construction* contracts. Agencies *may* specify that only separate *bid bonds* are acceptable in connection with *construction* contracts.

(c) The chief of the *contracting office may* waive the requirement to obtain a *bid guarantee* when a performance *bond* or a performance and payment *bond* is required if it is determined that a *bid guarantee* is not in the best interest of the Government for a specific *acquisition* (*e.g.,* overseas *construction*, *emergency acquisitions*, sole-source contracts). Class waivers *may* be authorized by the *agency head* or designee.

28.101-2 Solicitation provision or contract clause.

(a) The *contracting officer shall* insert a provision or clause substantially the same as the provision at 52.228-1, *Bid Guarantee*, in *solicitations* or contracts that require a *bid guarantee* or similar guarantee. For example, the *contracting officer may* modify this provision-

(1) To set a period of time that is other than 10 days for the return of executed *bonds*;

(2) For use in connection with *construction solicitations* when the agency has specified that only separate *bid bonds* are acceptable in accordance with 28.101-1(b);

(3) For use in *solicitations* for negotiated contracts; or

(4) For use in service contracts containing *options* for extended performance.

(b) The *contracting officer shall* determine the amount of the *bid guarantee* for insertion in the provision at 52.228-1 (see 28.102-2(a)). The amount *shall* be adequate to protect the Government from loss *should* the successful *bidder* fail to execute further contractual documents and *bonds* as required. The *bid guarantee* amount *shall* be at least 20 percent of the *bid* price but *shall* not exceed $3 million. When the *penal sum* is expressed as a percentage, a maximum dollar limitation *may* be stated.

28.101-3 Authority of an attorney-in-fact for a bid bond.

(a) Any person signing a *bid bond* as an *attorney-in-fact shall* include with the *bid bond* evidence of authority to bind the *surety*.

(b) An original, or a photocopy or facsimile of an original, *power of attorney* is sufficient evidence of such authority.

(c) For purposes of this section, electronic, mechanically-applied and printed *signatures*, seals and dates on the *power of attorney shall* be considered original *signatures*, seals and dates, without regard to the order in which they were affixed.

(d) The *contracting officer shall*-

(1) Treat the failure to provide a signed and dated *power of attorney* at the time of *bid* opening as a matter of responsiveness; and

(2) Treat questions regarding the authenticity and enforceability of the *power of attorney* at the time of *bid* opening as a matter of responsibility. These questions are handled after *bid* opening.

(e)

(1) If the *contracting officer* contacts the *surety* to validate the *power of attorney*, the *contracting officer shall* document the file providing, at a minimum, the following information:

(i) Name of person contacted.

(ii) Date and time of contact.

(iii) Response of the *surety*.

(2) If, upon investigation, the *surety* declares the *power of attorney* to have been valid at the time of *bid* opening, the *contracting officer may* require correction of any technical error.

(3) If the *surety* declares the *power of attorney* to have been invalid, the *contracting officer shall* not allow the *bidder* to substitute a replacement *power of attorney* or a replacement *surety*.

(f) Determinations of non-responsibility based on the unacceptability of a *power of attorney* are not subject to the Certificate of Competency process of subpart 19.6 if the *surety* has disavowed the validity of the *power of attorney*.

28.101-4 Noncompliance with bid guarantee requirements.

(a) In sealed bidding, noncompliance with a *solicitation* requirement for a *bid guarantee* requires rejection of the *bid*, except in the situations described in paragraph (c) of this subsection when the noncompliance *shall* be waived.

(b) In negotiation, noncompliance with a *solicitation* requirement for a *bid guarantee* requires rejection of an initial proposal as unacceptable, if a determination is made to award the contract based on initial proposals without discussion, except in the situations described in paragraph (c) of this subsection when noncompliance *shall* be waived. (See 15.306(a)(2) for conditions regarding making awards based on initial proposals.) If the conditions for awarding based on initial proposals are not met, deficiencies in *bid guarantees* submitted by *offerors* determined to be in the competitive range *shall* be addressed during discussions and the *offeror shall* be given an opportunity to correct the deficiency.

(c) Noncompliance with a *solicitation* requirement for a *bid guarantee shall* be waived in the following circumstances unless the *contracting officer* determines *in writing* that acceptance of the *bid* would be detrimental to the Government's interest when-

(1) Only one *offer* is received. In this case, the *contracting officer may* require the furnishing of the *bid guarantee* before award;

(2) The amount of the *bid guarantee* submitted is less than required, but is equal to or greater than the difference between the *offer* price and the next higher acceptable *offer*;

(3) The amount of the *bid guarantee* submitted, although less than that required by the *solicitation* for the maximum quantity offered, is sufficient for a quantity for which the *offeror* is otherwise eligible for award. Any award to the *offeror shall* not exceed the quantity covered by the *bid guarantee*;

(4) The *bid guarantee* is received late, and late receipt is waived under 14.304;

(5) A *bid guarantee* becomes inadequate as a result of the correction of a mistake under 14.407 (but only if the *bidder* will increase the *bid guarantee* to the level required for the corrected *bid*);

(6) An otherwise acceptable *bid bond* was submitted with a signed *offer*, but the *bid bond* was not signed by the *offeror*;

(7) An otherwise acceptable *bid bond* is erroneously dated or bears no date at all; or

(8) A *bid bond* does not list the *United States* as obligee, but correctly identifies the *offeror*, the *solicitation* number, and the name and location of the project involved, so long as it is acceptable in all other respects.

28.102 Performance and payment bonds and alternative payment protections for construction contracts.

28.102-1 General.

(a) 40 U.S.C. chapter 31, subchapter III, *Bonds* (formerly known as the Miller Act), requires performance and payment *bonds* for any *construction* contract exceeding $150,000, except that this requirement *may* be waived-

(1) By the *contracting officer* for as much of the work as is to be performed in a foreign country upon finding that it is impracticable for the contractor to furnish such *bond*; or

(2) As otherwise authorized by the *Bonds* statute or other law.

(b)

(1) Pursuant to 40 U.S.C. 3132, for *construction* contracts greater than $35,000, but not greater than $150,000, the *contracting officer shall* select two or more of the following payment protections, giving particular consideration to inclusion of an *irrevocable letter of credit* as one of the selected alternatives:

(i) A payment *bond*.

(ii) An *irrevocable letter of credit* (ILC).

(iii) *A tripartite escrow agreement*. The prime contractor establishes an escrow account in a federally insured financial institution and enters into a tripartite escrow agreement with the financial institution, as escrow agent, and all of the suppliers of labor and material. The escrow agreement *shall* establish the terms of payment under the contract and of resolution of disputes among the parties. The Government makes payments to the contractor's escrow account, and the escrow agent distributes the payments in accordance with the agreement, or triggers the disputes resolution procedures if required.

(iv) *Certificates of deposit*. The contractor deposits certificates of deposit from a federally insured financial institution with the *contracting officer*, in an acceptable form, executable by the *contracting officer*.

(v) A deposit of the types of security listed in 28.204-1 and 28.204-2.

(2) The contractor *shall* submit to the Government one of the payment protections selected by the *contracting officer*.

(c) The contractor *shall* furnish all *bonds* or alternative payment protection, including any necessary *reinsurance* agreements, before receiving a notice to proceed with the work or being allowed to start work.

28.102-2 Amount required.

(a) *Definition*. As used in this subsection-

Original contract price means the award price of the contract; or, for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. *Original contract price* does not include the price of any *options*,

except those *options* exercised at the time of contract award.

(b) Contracts exceeding $150,000-

(1) *Performance bonds*. Unless the *contracting officer* determines that a lesser amount is adequate for the protection of the Government, the penal amount of performance *bonds must* equal-

(i) 100 percent of the *original contract price*; and

(ii) If the contract price increases, an additional amount equal to 100 percent of the increase.

(2) Payment *bonds*.

(i) Unless the *contracting officer* makes a written determination supported by specific findings that a payment *bond* in this amount is impractical, the amount of the payment *bond must* equal-

(A) 100 percent of the *original contract price*; and

(B) If the contract price increases, an additional amount equal to 100 percent of the increase.

(ii) The amount of the payment *bond must* be no less than the amount of the performance *bond*.

(c) *Contracts exceeding $35,000 but not exceeding $150,000*. Unless the *contracting officer* determines that a lesser amount is adequate for the protection of the Government, the penal amount of the payment *bond* or the amount of alternative payment protection *must* equal-

(1) 100 percent of the *original contract price*; and

(2) If the contract price increases, an additional amount equal to 100 percent of the increase.

(d) *Securing additional payment protection*. If the contract price increases, the Government *must* secure any needed additional protection by directing the contractor to-

(1) Increase the *penal sum* of the existing *bond*;

(2) Obtain an additional *bond*; or

(3) Furnish additional alternative payment protection.

(e) *Reducing amounts*. The *contracting officer may* reduce the amount of security to support a *bond*, subject to the conditions of 28.203-3(c) or 28.204(b).

28.102-3 Contract clauses.

(a) Insert a clause substantially the same as the clause at 52.228-15, Performance and Payment *Bonds-Construction*, in *solicitations* and contracts for *construction* that contain a requirement for performance and payment *bonds* if the resultant contract is expected to exceed $150,000. The *contracting officer may* revise paragraphs (b)(1) and/or (b)(2) of the clause to establish a lower percentage in accordance with 28.102-2(b). If the provision at 52.228-1 is not included in the *solicitation*, the *contracting officer must* set a period of time for return of executed *bonds*.

(b) Insert the clause at 52.228-13, Alternative Payment Protections, in *solicitations* and contracts for *construction*, when the estimated or actual value exceeds $35,000 but does not exceed $150,000. Complete the clause by specifying the payment protections selected (see 28.102-1(b)(1)) and the deadline for submission. The *contracting officer may* revise paragraph (b) of the clause to establish a lower percentage in accordance with 28.102-2(c).

28.103 Performance and payment bonds for other than construction contracts.

28.103-1 General.

(a) Generally, agencies *shall* not require performance and payment *bonds* for other than *construction* contracts. However, performance and payment *bonds may* be used as permitted in 28.103-2 and 28.103-3.

(b) The contractor *shall* furnish all *bonds* before receiving a notice to proceed with the work.

(c) No *bond shall* be required after the contract has been awarded if it was not specifically required in the contract, except as *may* be determined necessary for a *contract modification*.

28.103-2 Performance bonds.

(a) Performance *bonds may* be required for contracts exceeding the *simplified acquisition threshold* when necessary to protect the Government's interest. The following situations *may* warrant a performance *bond*:

(1) Government property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (as in retention of salvaged material).

(2) A contractor sells assets to or merges with another concern, and the Government, after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.

(3) Substantial progress payments are made before delivery of end items starts.

(4) Contracts are for dismantling, demolition, or removal of improvements.

(b) The Government *may* require additional performance *bond* protection when a contract price is increased.

(c) The *contracting officer must* determine the contractor's responsibility (see subpart 9.1) even though a *bond* has been or can be obtained.

28.103-3 Payment bonds.

(a) A payment *bond* is required only when a performance *bond* is required, and if the use of payment

bond is in the Government's interest.

(b) When a contract price is increased, the Government *may* require additional *bond* protection in an amount adequate to protect suppliers of labor and material.

28.103-4 Contract clause.

The *contracting officer shall* insert a clause substantially the same as the clause at 52.228-16, Performance and Payment *Bonds*-Other than *Construction,* in *solicitations* and contracts that contain a requirement for both payment and performance *bonds*. The *contracting officer shall* determine the amount of each *bond* for insertion in the clause. The amount *shall* be adequate to protect the interest of the Government. The *contracting officer shall* also set a period of time (normally 10 days) for return of executed *bonds*. AlternateI *shall* be used when only performance *bonds* are required.

28.104 Annual performance bonds.

(a) Annual performance *bonds* only apply to nonconstruction contracts. They *shall* provide a gross *penal sum* applicable to the total amount of all covered contracts.

(b) When the *penal sums* obligated by contracts are approximately equal to or exceed the *penal sum* of the annual performance *bond,* an additional *bond* will be required to cover additional contracts.

28.105 Other types of bonds.

The *head of the contracting activity may* approve using other types of *bonds* in connection with acquiring particular *supplies* or services. These types include advance payment *bonds* and patent infringement *bonds*.

28.105-1 Advance payment bonds.

Advance payment *bonds may* be required only when the contract contains an advance payment provision and a performance *bond* is not furnished. The *contracting officer shall* determine the amount of the advance payment *bond* necessary to protect the Government.

28.105-2 Patent infringement bonds.

(a) Contracts providing for patent indemnity *may* require these *bonds* only if-

(1) A performance *bond* is not furnished; and

(2) The financial responsibility of the contractor is unknown or doubtful.

(b) The *contracting officer shall* determine the *penal sum*.

28.106 Administration.

28.106-1 Bonds and bond-related forms.

The following Standard Forms (SF's) and Optional Forms (OF's), *shall* be used, except in foreign countries, when a *bid bond*, performance or payment *bond*, or an individual *surety* is required. The *bond* forms *shall* be used as indicated in the instruction portion of each form:

(a) SF 24, *Bid Bond* (see 28.101).

(b) SF 25, Performance *Bond* (see 28.102-1 and 28.106-3(b)).

(c) SF 25A, Payment *Bond* (see 28.102-1 and 28.106-3(b)).

(d) SF 25B, Continuation Sheet (for SF's 24, 25, and 25A).

(e) SF 28, Affidavit of Individual *Surety* (see 28.203).

(f) SF 34, Annual *Bid Bond* (see 28.001).

(g) SF 35, Annual Performance *Bond* (see 28.104).

(h) SF 273, *Reinsurance* Agreement for a *Bonds* Statute Performance *Bond* (see 28.202(a)(4)).

(i) SF 274, *Reinsurance* Agreement for a *Bonds* Statute Payment *Bond* (see 28.202(a)(4)).

(j) SF 275, *Reinsurance* Agreement in Favor of the *United States* (see 28.202(a)(4)).

(k) SF 1414, *Consent of Surety* (see 28.106-5).

(l) SF 1415, *Consent of Surety* and Increase of Penalty (see 28.106-3).

(m) SF 1416, Payment *Bond* for Other Than *Construction* Contracts (see 28.103-3 and 28.106-3(b)).

(n) SF 1418, Performance *Bond* for Other Than *Construction* Contracts (see 28.103-2 and 28.106-3(b)).

(o) OF 91, Release of *Personal Property* from Escrow (see 28.203-3).

28.106-2 Substitution of surety bonds.

(a) A new *surety bond* covering all or part of the obligations on a *bond* previously approved *may* be substituted for the original *bond* if approved by the *head of the contracting activity*, or as otherwise specified in agency regulation.

(b) When a new *surety bond* is approved, the *contracting officer shall* notify the principal and *surety* of the original *bond* of the effective date of the new *bond*.

28.106-3 Additional bond and security.

(a) When additional *bond* coverage is required and is secured in whole or in part by the original *surety* or *sureties*, agencies *shall* use Standard Form1415, *Consent of Surety* and Increase of Penalty. Standard Form1415 is authorized for local reproduction.

(b) When additional *bond* coverage is required and is secured in whole or in part by a new *surety* or by one of the alternatives described in 28.204 in lieu of corporate or individual *surety*, agencies *shall* use Standard Form25, Performance *Bond*; Standard Form1418, Performance *Bond* for Other Than *Construction* Contracts; Standard Form25A, Payment *Bond*; or Standard Form1416, Payment *Bond* for Other Than *Construction* Contracts.

28.106-4 Contract clause.

(a) The *contracting officer shall* insert the clause at 52.228-2, Additional *Bond* Security, in *solicitations* and contracts when *bonds* are required.

(b) In accordance with secti on 806(a)(3) of Public Law 102-190, as amended by sections 2091 and 8105 of Public Law 103-355 (10 U.S.C. 4601 note prec.), the *contracting officer shall* insert the clause at 52.228-12, Prospective Subcontractor Requests for *Bonds*, in *solicitations* and contracts with respect to which a payment *bond* will be furnished pursuant to 40 U.S.C chapter 31, subchapter III, *Bonds* (see 28.102-1), except for contracts for the *acquisition* of *commercial products* or *commercial services* as defined in subpart 2.1.

28.106-5 Consent of surety.

(a) When any contract is modified, the *contracting officer shall* obtain the *consent of surety* if-

(1) An additional *bond* is obtained from other than the original *surety*;

(2) No additional *bond* is required and-

(i) The modification is for new work beyond the scope of the original contract; or

(ii) The modification does not change the contract scope but changes the contract price (upward or downward) by more than 25 percent or $50,000; or

(3) *Consent of surety* is required for a *novation agreement* (see subpart 42.12).

(b) When a contract for which performance or payment is secured by any of the types of security listed in 28.204 is modified as described in paragraph (a) of this subsection, no *consent of surety* is required.

(c) Agencies *shall* use Standard Form 1414, *Consent of Surety*, for all types of contracts.

28.106-6 Furnishing information.

(a) The *surety* on the *bond*, upon its written request, *may* be furnished information on the progress

of the work, payments, and the estimated percentage of completion, concerning the contract for which the *bond* was furnished.

(b) When a payment *bond* has been provided, the *contracting officer shall*, upon request, furnish the name and address of the *surety* or *sureties* to any subcontractor or supplier who has furnished or been requested to furnish labor or material for the contract. In addition, general information concerning the work progress, payments, and the estimated percentage of completion *may* be furnished to persons who have provided labor or materials and have not been paid.

(c) When a payment *bond* has been provided for a contract, the *head of the agency* or designee *shall* furnish a certified copy of the *bond* and the contract for which it was given to any person who makes a request therefor and who furnishes an affidavit that the requestor has supplied labor or materials for such work and payment therefor has not been made or that the requestor is being sued on such *bond*. The person who makes the request *shall* be required to pay such costs of preparation as determined by the *head of the agency* or designee to be reasonable and appropriate (see 40 U.S.C. 3133).

(d) Section 806(a)(2) of Public Law 102-190, as amended by sections 2091 and 8105 of Public Law 103-355 (10 U.S.C. 4601 note prec.), requires that the Federal Government provide information to subcontractors on payment *bonds* under contracts for other than *commercial products* or *commercial services* as defined in subpart 2.1. Upon the written or oral request of a subcontractor/supplier, or prospective subcontractor/supplier, under a contract with respect to which a payment *bond* has been furnished pursuant to the *Bonds* statute, the *contracting officer shall* promptly provide to the requester, either orally or *in writing*, as appropriate, any of the following:

(1) Name and address of the *surety* or *sureties* on the payment *bond*.

(2) Penal amount of the payment *bond*.

(3) Copy of the payment *bond*. The *contracting officer may* impose reasonable fees to cover the cost of copying and providing a copy of the payment *bond*.

28.106-7 Withholding contract payments.

(a) During contract performance, agencies *shall* not withhold payments due contractors or assignees because subcontractors or suppliers have not been paid.

(b) If, after completion of the contract work, the Government receives written notice from the *surety* regarding the contractor's failure to meet its obligation to its subcontractors or suppliers, the *contracting officer shall* withhold final payment. However, the *surety must* agree to hold the Government harmless from any liability resulting from withholding the final payment. The *contracting officer* will authorize final payment upon agreement between the contractor and *surety* or upon a judicial determination of the rights of the parties.

(c) For any withholding incident to the labor standards provisions of the contract, see part 22.

28.106-8 Payment to subcontractors or suppliers.

The *contracting officer* will only authorize payment to subcontractors or suppliers from an ILC (or

any other cash equivalent security) upon a judicial determination of the rights of the parties, a signed notarized statement by the contractor that the payment is due and owed, or a signed agreement between the parties as to amount due and owed.