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## **28.000 Scope of part.**

This part prescribes requirements for obtaining financial protection against losses under contracts that result from the use of the sealed bid or negotiated methods. It covers bid guarantees, bonds, alternative payment protections, security for bonds, and insurance.

### **28.001 Definitions.**

As used in this part-

*Attorney-in-fact* means an agent, independent agent, underwriter, or any other company or individual holding a power of attorney granted by a surety.

*Bid* means any response to a solicitation, including a proposal under a negotiated acquisition.

*Bidder* means any entity that is responding or has responded to a solicitation, including an offeror under a negotiated acquisition.

*Bid guarantee* means a form of security assuring that the bidder-

(1) Will not withdraw a bid within the period specified for acceptance; and

(2) Will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time allowed, after receipt of the specified forms.

*Bond* means a written instrument executed by a bidder or contractor (the "principal"), and a second party (the "surety" or "sureties") (except as provided in [28.204](#)), to assure fulfillment of the principal's obligations to a third party (the "obligee" or "Government"), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligee. The types of bonds and related documents are as follows:

(1) An advance payment bond secures fulfillment of the contractor's obligations under an advance payment provision.

(2) An annual bid bond is a single bond furnished by a bidder, in lieu of separate bonds, which secure all bids (on other than construction contracts) requiring bonds submitted during a specific Government fiscal year.

(3) An annual performance bond is a single bond furnished by a contractor, in lieu of separate performance bonds, to secure fulfillment of the contractor's obligations under contracts (other than construction contracts) requiring bonds entered into during a specific Government fiscal year.

(4) A patent infringement bond secures fulfillment of the contractor's obligations under a patent provision.

(5) A payment bond assures payments as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract.

(6) A performance bond secures performance and fulfillment of the contractor's obligations under the contract.

*Consent of surety* means an acknowledgment by a surety that its bond given in connection with a contract continues to apply to the contract as modified.

*Penal sum* or "penal amount" means the amount of money specified in a bond (or a percentage of the bid price in a bid bond) as the maximum payment for which the surety is obligated or the amount of security required to be pledged to the Government in lieu of a corporate or individual surety for the bond.

*Reinsurance* means a transaction which provides that a surety, for a consideration, agrees to indemnify another surety against loss which the latter may sustain under a bond which it has issued.

# **Subpart 28.1 - Bonds and Other Financial Protections**

## **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 must 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 must 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 must 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 must determine the amount of the bid guarantee for insertion in the provision at 52.228-1 (see 28.102-2(a)). The amount must 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 must be at least 20 percent of the bid price but must 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 must 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 must be considered original signatures, seals and dates, without regard to the order in which they were affixed.

(d) The contracting officer must-

(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 must 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 must 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 part 19 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 must 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 must be waived. (See part 15) 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 must be addressed during discussions and the offeror must be given an opportunity to correct the deficiency.

(c) Noncompliance with a solicitation requirement for a bid guarantee must 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 must not exceed the quantity covered by the bid guarantee;

(4) The bid guarantee is received late, and late receipt is waived under part 14;

(5) A bid guarantee becomes inadequate as a result of the correction of a mistake under part 14 (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 must 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 must 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 must submit to the Government one of the payment protections selected by the contracting officer.

(c) The contractor must 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 must 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 must furnish all bonds before receiving a notice to proceed with the work.

(c) No bond must 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 part 9) 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 must 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 must determine the amount of each bond for insertion in the clause. The amount must be adequate to protect the interest of the Government. The contracting officer

must also set a period of time (normally 10 days) for return of executed bonds. *Alternate I* must be used when only performance bonds are required.

### **28.104 Annual performance bonds.**

(a) Annual performance bonds only apply to nonconstruction contracts. They must 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 must 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 must 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), must be used, except in foreign countries, when a bid bond, performance or payment bond, or an individual surety is required. The bond forms must 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 must 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 must insert the clause at 52.228-2, Additional Bond Security, in solicitations and contracts when bonds are required.

(b) In accordance with section 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 must 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 part 2.

#### **28.106-5 Consent of surety.**

(a) When any contract is modified, the contracting officer must 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 part 42).

(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 must 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 must, 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 must 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 must 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 part 2. 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 must 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 must 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 must 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.

## **Subpart 28.2 - Sureties and Other Security for Bonds**

### **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 must 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 must 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 must 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 must 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 must 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 must 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 must 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 must 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://fiscal.treasury.gov/tcmm/resources.html> and clicking on "31 CFR Part 225".

(b)

(1) An individual surety must 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](http://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 must 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 must notify the Treasury's collateral operations support team by email at [BMT@fiscal.treasury.gov](mailto: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 must 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 must 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 must 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 must 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 part 19 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 must 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 must 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 must 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 must be maintained for the full contract performance period plus 1 year.

(3) *Other contracts not subject to the Bonds statute.* The security interest must 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 must, 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 part 9. The exclusion must 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 must be entered as an exclusion in the System for Award Management (see part 9).

(d) Contracting officers must not accept the bonds of individual sureties whose names appear in an active exclusion record in SAM unless the acquiring agency's head or a designee state 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 part 9.

## **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 must be incorporated in the bond form pledging the security in lieu of execution of the bond form by corporate or individual sureties. The contractor must execute the bond forms as the principal. Agencies must establish safeguards to protect against loss of the security and must 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 must, 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 must 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 Circular No. 154 (exception: The contracting officer must 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 must 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 must 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 must 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 must 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 must 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 must 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 one year from the date of issuance. The ILC must 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 one year 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 must be:

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

(A) One year 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 must 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 must 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 must give the contractor 30 days to substitute an acceptable ILC or must 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 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](mailto: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.

## **Subpart 28.3 - Insurance**

### **28.301 Policy.**

Contractors must carry insurance under the following circumstances:

(a)



(1) The Government requires any contractor subject to Cost Accounting Standard (CAS) 416 (48 CFR 9004.416) to obtain insurance, by purchase or self-coverage, for the perils to which the contractor is exposed, except when-

(i) The Government, by providing in the contract in accordance with law, agrees to indemnify the contractor under specified circumstances; or

(ii) The contract specifically relieves the contractor of liability for loss of or damage to Government property.

(2) The Government reserves the right to disapprove the purchase of any insurance coverage not in the Government's interest.

(3) Allowability of the insurance program's cost must be determined in accordance with the criteria in 31.205-19.

(b) Contractors, whether or not their contracts are subject to CAS 416, are required by law and this regulation to provide insurance for certain types of perils (*e.g.*, workers' compensation). Insurance is mandatory also when commingling of property, type of operation, circumstances of ownership, or condition of the contract make it necessary for the protection of the Government. The minimum amounts of insurance required by this regulation (see 28.307-2) may be reduced when a contract is to be performed outside the United States and its outlying areas. When more than one agency is involved, the agency responsible for review and approval of a contractor's insurance program must coordinate with other interested agencies before acting on significant insurance matters.

(c) Contractors awarded nonpersonal services contracts for health care services are required to maintain medical liability insurance and indemnify the Government for liability producing acts or omissions by the contractor, its employees and agents (see part 37).

## **28.302 Notice of cancellation or change.**

When the Government requires the contractor to provide insurance coverage, the policies shall contain an endorsement that any cancellation or material change in the coverage adversely affecting the Government's interest shall not be effective unless the insurer or the contractor gives written notice of cancellation or change as required by the contracting officer. When the coverage is provided by self-insurance, the contractor shall not change or decrease the coverage without the administrative contracting officer's prior approval (see [28.308\(c\)](#)).

### **28.303 Insurance against loss of or damage to Government property.**

When the Government requires or approves insurance to cover loss of or damage to Government property (see part 45), it may be provided by specific insurance policies or by inclusion of the risks in the contractor's existing policies. The policies must disclose the Government's interest in the property.

### **28.304 Risk-pooling arrangements.**

Agencies may establish risk-pooling arrangements. These arrangements are designed to use the services of the insurance industry for safety engineering and the handling of claims at minimum cost to the Government. The agency responsible must appoint a single manager or point of contact for each arrangement.

### **28.305 Overseas workers' compensation and war-hazard insurance.**

(a) "Public-work contract," as used in this subpart, means any contract for a fixed improvement or for any other project, fixed or not, for the public use of the United States or its allies, involving construction, alteration, removal, or repair, including projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

(b) The Defense Base Act ( [42 U.S.C.1651](#), *etseq.*) extends the Longshoremen's and Harbor Workers' Compensation Act ( [33 U.S.C. 901](#)) to various classes of employees working outside the United States, including those engaged in performing-

(1) Public-work contracts; or

(2) Contracts approved or financed under the Foreign Assistance Act of 1961 (Pub.L.87-195) other than-

(i) Contracts approved or financed by the Development Loan Fund (unless the Secretary of Labor, acting upon the recommendation of a department or agency, determines that such contracts should be covered); or

(ii) Contracts exclusively for materials or supplies.

(c) When the Defense Base Act applies (see [42 U.S.C.1651](#), *etseq.*) to these employees, the benefits of the Longshoremen's and Harbor Workers' Compensation Act are extended through operation of the War Hazards Compensation Act ( [42 U.S.C.1701](#), *etseq.*) to protect the employees against the risk of war hazards (injury, death, capture, or detention). When,

by means of an insurance policy or a self-insurance program, the contractor provides the workers' compensation coverage required by the Defense Base Act, the contractor's employees automatically receive war-hazard risk protection.

(d) When the agency head recommends a waiver to the Secretary of Labor, the Secretary may waive the applicability of the Defense Base Act to any contract, subcontract, work location, or classification of employees.

(e) If the Defense Base Act is waived for some or all of the contractor's employees, the benefits of the War Hazards Compensation Act are automatically waived with respect to those employees for whom the Defense Base Act is waived. For those employees, the contractor must provide workers' compensation coverage against the risk of work injury or death and assume liability toward the employees and their beneficiaries for war-hazard injury, death, capture, or detention. The contract must provide either that the costs of this liability or the reasonable costs of insurance against this liability must be allowed as a cost under the contract.

## **28.306 Insurance under fixed-price contracts.**

(a) *General.* Although the Government is not ordinarily concerned with the contractor's insurance coverage if the contract is a fixed-price contract, in special circumstances agencies may specify insurance requirements under fixed-price contracts. Examples of such circumstances include the following:

- (1) The contractor is, or has a separate operation, engaged principally in Government work.
- (2) Government property is involved.
- (3) The work is to be performed on a Government installation.
- (4) The Government elects to assume risks for which the contractor ordinarily obtains commercial insurance.

(b) Work on a Government installation.

(1) When the clause at 52.228-5, Insurance—Work on a Government Installation, is required to be included in a fixed-price contract by 28.310, the coverage specified in 28.307 is the minimum insurance required and must be included in the contract Schedule or elsewhere in the contract. The contracting officer may require additional coverage and higher limits.

(2) When the clause at 52.228-5, Insurance—Work on a Government Installation, is not required by 28.310 but is included because the contracting officer considers it to be in the Government's interest to do so, any of the types of insurance specified in 28.307 may be omitted or the limits may be lowered, if appropriate.

## **28.307 Insurance under cost-reimbursement contracts.**

Cost-reimbursement contracts (and subcontracts, if the terms of the prime contract are extended to the subcontract) ordinarily require the types of insurance listed in 28.307-2, with the minimum amounts of liability indicated. (See [28.308](#) for self-insurance.)

### **28.307-1 Group insurance plans.**

(a) *Prior approval requirement.* Under cost-reimbursement contracts, before buying insurance under a group insurance plan, the contractor must submit the plan for approval, in accordance with agency regulations. Any change in benefits provided under an approved plan that can reasonably be expected to increase significantly the cost to the Government requires similar approval.

(b) *Premium refunds or credits.* The plan must provide for the Government to share in any premium refunds or credits paid or otherwise allowed to the contractor. In determining the extent of the Government's share in any premium refunds or credits, any special reserves and other refunds to which the contractor may be entitled in the future must be taken into account.

### **28.307-2 Liability.**

(a) *Workers' compensation and employer's liability.* Contractors are required to comply with applicable Federal and State workers' compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they must be covered under the employer's liability section of the insurance policy, except when contract operations are so commingled with a contractor's commercial operations that it would not be practical to require this coverage. Employer's liability coverage of at least \$100,000 must be required, except in States with exclusive or monopolistic funds that do not permit workers' compensation to be written by private carriers. (See 28.305(c) for treatment of contracts subject to the Defense Base Act.)

(b) General liability.

(1) The contracting officer must require bodily injury liability insurance coverage written on the comprehensive form of policy of at least \$500,000 per occurrence.

(2) Property damage liability insurance must be required only in special circumstances as determined by the agency.

(c) *Automobile liability.* The contracting officer must require automobile liability insurance written on the comprehensive form of policy. The policy must provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the contract. Policies covering automobiles operated in the United States must

provide coverage of at least \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage. The amount of liability coverage on other policies must be commensurate with any legal requirements of the locality and sufficient to meet normal and customary claims.

(d) *Aircraft public and passenger liability.* When aircraft are used in connection with performing the contract, the contracting officer must require aircraft public and passenger liability insurance. Coverage must be at least \$200,000 per person and \$500,000 per occurrence for bodily injury, other than passenger liability, and \$200,000 per occurrence for property damage. Coverage for passenger liability bodily injury must be at least \$200,000 multiplied by the number of seats or passengers, whichever is greater.

(e) *Vessel liability.* When contract performance involves use of vessels, the contracting officer must require, as determined by the agency, vessel collision liability and protection and indemnity liability insurance.

## **28.308 Self-insurance.**

(a) When it is anticipated that 50 percent or more of the self-insurance costs to be incurred at a segment of a contractor's business will be allocable to negotiated Government contracts, and the self-insurance costs at the segment for the contractor's fiscal year are expected to be \$200,000 or more, the contractor must submit, in writing, information on its proposed self-insurance program to the administrative contracting officer and obtain that official's approval of the program. The submission must be by segment or segments of the contractor's business to which the program applies and must include-

(1) A complete description of the program, including any resolution of the board of directors authorizing and adopting coverage, including types of risks, limits of coverage, assignments of safety and loss control, and legal service responsibilities;

(2) If available, the corporate insurance manual and organization chart detailing fiscal responsibilities for insurance;

(3) The terms regarding insurance coverage for any Government property;

(4) The contractor's latest financial statements;

(5) Any self-insurance feasibility studies or insurance market surveys reporting comparative alternatives;

(6) Loss history, premiums history, and industry ratios;

(7) A formula for establishing reserves, including percentage variations between losses paid and losses reserved;

- (8) Claims administration policy, practices, and procedures;
- (9) The method of calculating the projected average loss; and
- (10) A disclosure of all captive insurance company and reinsurance agreements, including methods of computing cost.

(b) Programs of self-insurance covering a contractor's insurable risks, including the deductible portion of purchased insurance, may be approved when examination of a program indicates that its application is in the Government's interest. Agencies must not approve a program of self-insurance for workers' compensation in a jurisdiction where workers' compensation does not completely cover the employer's liability to employees, unless the contractor-

- (1) Maintains an approved program of self-insurance for any employer's liability not so covered; or
- (2) Shows that the combined cost to the Government of self-insurance for workers' compensation and commercial insurance for employer's liability will not exceed the cost of covering both kinds of risk by commercial insurance.

(c) Once the administrative contracting officer has approved a program, the contractor must submit to that official for approval any major proposed changes to the program. Any program approval may be withdrawn if a contracting officer finds that either-

- (1) Any part of a program does not comply with the requirements of this subpart and/or the criteria at 31.205-19; or

(2) Conditions or situations existing at the time of approval that were a basis for original approval of the program have changed to the extent that a program change is necessary.

(d) To qualify for a self-insurance program, a contractor must demonstrate ability to sustain the potential losses involved. In making the determination, the contracting officer must consider the following factors:

- (1) The soundness of the contractor's financial condition, including available lines of credit.
- (2) The geographic dispersion of assets, so that the potential of a single loss depleting all the assets is unlikely.
- (3) The history of previous losses, including frequency of occurrence and the financial impact of each loss.
- (4) The type and magnitude of risk, such as minor coverage for the deductible portion of purchased insurance or major coverage for hazardous risks.
- (5) The contractor's compliance with Federal and State laws and regulations.

(e) Agencies must not approve a program of self-insurance for catastrophic risks (*e.g.*, see part 50, Special procedures for unusually hazardous or nuclear risks). Should performance of Government contracts create the risk of catastrophic losses, the Government may, to the extent authorized by law, agree to indemnify the contractor or recognize an appropriate share of premiums for purchased insurance, or both.

(f) Self-insurance programs to protect a contractor against the costs of correcting its own defects in materials or workmanship must not be approved. For these purposes, normal rework estimates and warranty costs will not be considered self-insurance.

### **28.309 Contract clauses for workers' compensation insurance.**

(a) The contracting officer must insert the clause at 52.228-3, Workers' Compensation Insurance (Defense Base Act), in solicitations and contracts when the Defense Base Act applies (see 28.305) and—

(1) The contract will be a public-work contract performed outside the United States; or

(2) The contract will be approved or financed under the Foreign Assistance Act of 1961 (Pub.L.87-195) and is not excluded by 28.305(b)(2).

(b) The contracting officer must insert the clause at 52.228-4, Workers' Compensation and War-Hazard Insurance Overseas, in solicitations and contracts when the contract will be a public-work contract performed outside the United States and the Secretary of Labor waives the applicability of the Defense Base Act (see 28.305(d)).

### **28.310 Contract clause for work on a Government installation.**

(a) Insert the clause at 52.228-5, Insurance—Work on a Government Installation, in solicitations and contracts if a fixed-price contract is contemplated, the contract amount is expected to exceed the simplified acquisition threshold, and the contract will require work on a Government installation, unless—

(1) Only a small amount of work is required on the Government installation (*e.g.*, a few brief visits per month); or

(2) All work on the Government installation will be performed outside the United States and its outlying areas.

(b) The contracting officer may insert the clause at 52.228-5 in solicitations and contracts described in paragraphs (a)(1) and (2) of this section if it is in the Government's interest to do so.

## **28.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.**

### **28.311-1 Contract clause.**

In accordance with agency acquisition regulations, the contracting officer must insert the clause at 52.228-7, Insurance—Liability to Third Persons, in solicitations and contracts, other than those for construction contracts and those for architect-engineer services, when a cost-reimbursement contract is contemplated.

### **28.311-2 Agency solicitation provisions and contract clauses.**

Agencies may prescribe their own solicitation provisions and contract clauses to implement the basic policies contained in this subpart 28.3.

## **28.312 Contract clause for insurance of leased motor vehicles.**

The contracting officer must insert the clause at 52.228-8, Liability and Insurance—Leased Motor Vehicles, in solicitations and contracts for the leasing of motor vehicles (see part 8).

## **28.313 Contract clauses for insurance of transportation or transportation-related services.**

(a) The contracting officer must insert the clause at 52.228-9, Cargo Insurance, in solicitations and contracts for transportation or for transportation-related services, except when freight is shipped under rates subject to released or declared value.

(b) The contracting officer must insert a clause substantially the same as that at 52.228-10, Vehicular and General Public Liability Insurance, in solicitations and contracts for transportation or for transportation-related services when the contracting officer determines that vehicular liability or general public liability insurance required by law is not sufficient.



# Part 52 - Solicitation Provisions and Contract Clauses

[52.228 \[Reserved\]](#)

[52.228-1 Bid Guarantee.](#)

[52.228-2 Additional Bond Security.](#)

[52.228-3 Workers' Compensation Insurance \(Defense Base Act\).](#)

[52.228-4 Workers' Compensation and War-Hazard Insurance Overseas.](#)

[52.228-5 Insurance-Work on a Government Installation.](#)

[52.228-6 \[Reserved\]](#)

[52.228-7 Insurance-Liability to Third Persons.](#)

[52.228-8 Liability and Insurance-Leased Motor Vehicles.](#)

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[52.228-15 Performance and Payment Bonds-Construction.](#)

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[52.228-17 Individual Surety—Pledge of Assets \(Bid Guarantee\).](#)

## **52.228 [Reserved]**

### **52.228-1 Bid Guarantee.**

As prescribed in 28.101-2 , insert a provision or clause substantially as follows:

## Bid Guarantee (Sept 1996)

(a) Failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

(b) The bidder shall furnish a bid guarantee in the form of a firm commitment, *e.g.*, bid bond supported by good and sufficient surety or sureties acceptable to the Government, postal money order, certified check, cashier's check, irrevocable letter of credit, or, under Treasury Department regulations, certain bonds or notes of the United States. The Contracting Officer will return bid guarantees, other than bid bonds-

(1) To unsuccessful bidders as soon as practicable after the opening of bids; and

(2) To the successful bidder upon execution of contractual documents and bonds (including any necessary coinsurance or reinsurance agreements), as required by the bid as accepted.

(c) The amount of the bid guarantee shall be \_\_\_\_ percent of the bid price or \$\_\_\_\_\_, whichever is less.

(d) If the successful bidder, upon acceptance of its bid by the Government within the period specified for acceptance, fails to execute all contractual documents or furnish executed bond(s) within 10 days after receipt of the forms by the bidder, the Contracting Officer may terminate the contract for default.

(e) In the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference.

(End of clause)

## **52.228-2 Additional Bond Security.**

As prescribed in 28.106-4(a), insert the following clause:

### Additional Bond Security (Oct 1997)

The Contractor shall promptly furnish additional security required to protect the Government and persons supplying labor or materials under this contract if-

(a) Any surety upon any bond, or issuing financial institution for other security, furnished with this contract becomes unacceptable to the Government;

(b) Any surety fails to furnish reports on its financial condition as required by the Government;

(c) The contract price is increased so that the penal sum of any bond becomes inadequate in the opinion of the Contracting Officer; or

(d) An irrevocable letter of credit (ILC) used as security will expire before the end of the period of required security. If the Contractor does not furnish an acceptable extension or replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the Contracting officer has the right to immediately draw on the ILC.

(End of clause)

### **52.228-3 Workers' Compensation Insurance (Defense Base Act).**

As prescribed in 28.309(a), insert the following clause:

Workers' Compensation Insurance (Defense Base Act) (Jul 2014)

(a) The Contractor shall

(1) Before commencing performance under this contract, establish provisions to provide for the payment of disability compensation and medical benefits to covered employees and death benefits to their eligible survivors, by purchasing workers' compensation insurance or qualifying as a self-insurer under the Longshore and Harbor Workers' Compensation Act ([33 U.S.C. 932](#)) as extended by the Defense Base Act ([42 U.S.C.1651](#), *etseq.*), and continue to maintain provisions to provide such Defense Base Act benefits until contract performance is completed;

(2) Within ten days of an employee's injury or death or from the date the Contractor has knowledge of the injury or death, submit Form LS-202 (Employee's First Report of Injury or Occupational Illness) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act ([33 U.S.C. 930\(a\)](#), 20 CFR 702.201 to 702.203);

(3) Pay all compensation due for disability or death within the time frames required by the Longshore and Harbor Workers' Compensation Act ([33 U.S.C. 914](#), 20 CFR 702.231 and 703.232);

(4) Provide for medical care as required by the Longshore and Harbor Workers' Compensation Act ([33 U.S.C. 907](#), 20 CFR 702.402 and 702.419);

(5) If controverting the right to compensation, submit Form LS-207 (Notice of Controversion of Right to Compensation) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act ([33 U.S.C. 914\(d\)](#), 20 CFR 702.251);

(6) Immediately upon making the first payment of compensation in any case, submit Form LS-206 (Payment Of Compensation Without Award) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act ([33 U.S.C. 914\(c\)](#), 20 CFR 702.234);

(7) When payments are suspended or when making the final payment, submit Form LS-208 (Notice of Final Payment or Suspension of Compensation Payments) to the Department of Labor in accordance with the Longshore and Harbor Workers' Compensation Act ( [33 U.S.C. 914\(c\)](#) and (g), 20 CFR 702.234 and 702.235); and

(8) Adhere to all other provisions of the Longshore and Harbor Workers' Compensation Act as extended by the Defense Base Act, and Department of Labor regulations at 20 CFR Parts 701 to 704.

(b) For additional information on the Longshore and Harbor Workers' Compensation Act requirements see <http://www.dol.gov/owcp/dlhwc/lbdba.htm>.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts to which the Defense Base Act applies.

(End of clause)

#### **52.228-4 Workers' Compensation and War-Hazard Insurance Overseas.**

As prescribed in 28.309(b), insert the following clause:

Workers' Compensation and War-Hazard Insurance Overseas (Apr 1984)

(a) This paragraph applies if the Contractor employs any person who, but for a waiver granted by the Secretary of Labor, would be subject to workers' compensation insurance under the Defense Base Act ( [42 U.S.C.1651](#), *etseq.*). On behalf of employees for whom the applicability of the Defense Base Act has been waived, the Contractor shall (1) provide, before commencing performance under this contract, at least that workers' compensation insurance or the equivalent as the laws of the country of which these employees are nationals may require, and (2) continue to maintain it until performance is completed. The Contractor shall insert, in all subcontracts under this contract to which the Defense Base Act would apply but for the waiver, a clause similar to this paragraph (a) (including this sentence) imposing upon those subcontractors this requirement to provide such workers' compensation insurance coverage.

(b) This paragraph applies if the Contractor or any subcontractor under this contract employs any person who, but for a waiver granted by the Secretary of Labor, would be subject to the War Hazards Compensation Act ( [42 U.S.C.1701](#), *etseq.*). On behalf of employees for whom the applicability of the Defense Base Act (and hence that of the War Hazards Compensation Act) has been waived, the Contractor shall, subject to reimbursement as provided elsewhere in this contract, afford the same protection as that provided in the War Hazards Compensation Act, except that the level of benefits shall conform to any law or international agreement controlling the benefits to which the employees may be entitled. In all other respects, the standards of the War Hazards

Compensation Act shall apply; *e.g.*, the definition of war-hazard risks (injury, death, capture, or detention as the result of a war hazard as defined in the Act), proof of loss, and exclusion of benefits otherwise covered by workers' compensation insurance or the equivalent.

Unless the Contractor elects to assume directly the liability to subcontractor employees created by this clause, the Contractor shall insert, in all subcontracts under this contract to which the War Hazards Compensation Act would apply but for the waiver, a clause similar to this paragraph (b) (including this sentence) imposing upon those subcontractors this requirement to provide war-hazard benefits.

(End of clause)

### **52.228-5 Insurance-Work on a Government Installation.**

As prescribed in 28.310 , insert the following clause:

Insurance-Work on a Government Installation (Jan 1997)

(a) The Contractor shall, at its own expense, provide and maintain during the entire performance of this contract, at least the kinds and minimum amounts of insurance required in the Schedule or elsewhere in the contract.

(b) Before commencing work under this contract, the Contractor shall notify the Contracting Officer in writing that the required insurance has been obtained. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the Government's interest shall not be effective-

(1) For such period as the laws of the State in which this contract is to be performed prescribe; or

(2) Until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer, whichever period is longer.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts under this contract that require work on a Government installation and shall require subcontractors to provide and maintain the insurance required in the Schedule or elsewhere in the contract. The Contractor shall maintain a copy of all subcontractors' proofs of required insurance, and shall make copies available to the Contracting Officer upon request.

(End of clause)

### **52.228-6 [Reserved]**

### **52.228-7 Insurance-Liability to Third Persons.**

As prescribed in 28.311-1 , insert the following clause:

Insurance-Liability to Third Persons (Mar 1996)

(a)

(1) Except as provided in paragraph (a)(2) of this clause, the Contractor shall provide and maintain workers' compensation, employer's liability, comprehensive general liability (bodily injury), comprehensive automobile liability (bodily injury and property damage) insurance, and such other insurance as the Contracting Officer may require under this contract.

(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program, provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All insurance required by this paragraph shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with insurers approved by the Contracting Officer.

(b) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other insurance that is maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement.

(c) The Contractor shall be reimbursed-

(1) For that portion-

(i) Of the reasonable cost of insurance allocable to this contract; and

(ii) Required or approved under this clause; and

(2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise without regard to and as an exception to the limitation of cost or the limitation of funds clause of this contract. These liabilities must arise out of the performance of this contract, whether or not caused by the negligence of the Contractor or of the Contractor's agents, servants, or employees, and must be represented by final judgments or settlements approved in writing by the Government. These liabilities are for-

(i) Loss of or damage to property (other than property owned, occupied, or used by the Contractor, rented to the Contractor, or in the care, custody, or control of the Contractor); or

(ii) Death or bodily injury.

(d) The Government's liability under paragraph (c) of this clause is subject to the availability of appropriated funds at the time a contingency occurs. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(e) The Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities)-

(1) For which the Contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract;

(2) For which the Contractor has failed to insure or to maintain insurance as required by the Contracting Officer; or

(3) That result from willful misconduct or lack of good faith on the part of any of the Contractor's directors, officers, managers, superintendents, or other representatives who have supervision or direction of-

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed; or

(iii) A separate and complete major industrial operation in connection with the performance of this contract.

(f) The provisions of paragraph (e) of this clause shall not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required in accordance with this clause; *provided*, that such cost is allowable under the Allowable Cost and Payment clause of this contract.

(g) If any suit or action is filed or any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the Contractor shall-

(1) Immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received;

(2) Authorize Government representatives to collaborate with counsel for the insurance carrier in settling or defending the claim when the amount of the liability claimed exceeds the amount of coverage; and

(3) Authorize Government representatives to settle or defend the claim and to represent the Contractor in or to take charge of any litigation, if required by the Government, when

the liability is not insured or covered by bond. The Contractor may, at its own expense, be associated with the Government representatives in any such claim or litigation.

(End of clause)

## **52.228-8 Liability and Insurance-Leased Motor Vehicles.**

As prescribed in 28.312 , insert the following clause:

Liability and Insurance-Leased Motor Vehicles (May 1999)

(a) The Government shall be responsible for loss of or damage to-

(1) Leased vehicles, except for-

(i) Normal wear and tear; and

(ii) Loss or damage caused by the negligence of the Contractor, its agents, or employees; and

(2) Property of third persons, or the injury or death of third persons, if the Government is liable for such loss, damage, injury, or death under the Federal Tort Claims Act ( [28 U.S.C. 2671- 2680](#)).

(b) The Contractor shall be liable for, and shall indemnify and hold harmless the Government against, all actions or claims for loss of or damage to property or the injury or death of persons, resulting from the fault, negligence, or wrongful act or omission of the Contractor, its agents, or employees.

(c) The Contractor shall provide and maintain insurance covering its liabilities under paragraph (b) of this clause, in amounts of at least \$200,000 per person and \$500,000 per occurrence for death or bodily injury and \$20,000 per occurrence for property damage or loss.

(d) Before commencing work under this contract, the Contractor shall notify the Contracting Officer in writing that the required insurance has been obtained. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the interests of the Government shall not be effective (1) for such period as the laws of the State in which this contract is to be performed prescribe or (2) until 30 days after written notice to the Contracting Officer, whichever period is longer. The policies shall exclude any claim by the insurer for subrogation against the Government by reason of any payment under the policies.

(e) The contract price shall not include any costs for insurance or contingency to cover losses, damage, injury, or death for which the Government is responsible under paragraph (a) of this clause.



(End of clause)

### **52.228-9 Cargo Insurance.**

As prescribed in 28.313(a), insert the following clause:

Cargo Insurance (May 1999)

(a) The Contractor, at the Contractor's expense, shall provide and maintain, during the continuance of this contract, cargo insurance of \$\_\_\_\_\_ per vehicle to cover the value of property on each vehicle and of \$\_\_\_\_\_ to cover the total value of the property in the shipment.

(b) All insurance shall be written on companies acceptable to \_\_\_\_\_ *[insert name of contracting agency]*, and policies shall include such terms and conditions as required by \_\_\_\_\_ *[insert name of contracting agency]*. The Contractor shall provide evidence of acceptable cargo insurance to \_\_\_\_\_ *[insert name of contracting agency]* before commencing operations under this contract.

(c) Each cargo insurance policy shall include the following statement:

"It is a condition of this policy that the Company shall furnish-

(1) Written notice to \_\_\_\_\_ *[insert name and address of contracting agency]*, 30 days in advance of the effective date of any reduction in, or cancellation of, this policy; and

(2) Evidence of any renewal policy to the address specified in paragraph (1) of this statement, not less than 15 days prior to the expiration of any current policy on file with \_\_\_\_\_ *[insert name of contracting agency]*."

(End of clause)

### **52.228-10 Vehicular and General Public Liability Insurance.**

As prescribed in 28.313(b), insert a clause substantially the same as the following in solicitations and contracts for transportation or for transportation-related services when the contracting officer determines that vehicular liability or general public liability insurance required by law is not sufficient:

Vehicular and General Public Liability Insurance (Apr 1984)

(a) The Contractor, at the Contractor's expense, agrees to maintain, during the continuance of this contract, vehicular liability and general public liability insurance with limits of liability for-

(1) Bodily injury of not less than \$\_\_\_\_\_ for each person and \$\_\_\_\_\_ for each occurrence; and

(2) Property damage of not less than \$\_\_\_\_\_ for each accident and \$\_\_\_\_\_ in the aggregate.

(b) The Contractor also agrees to maintain workers' compensation and other legally required insurance with respect to the Contractor's own employees and agents.

(End of clause)

## **52.228-11 Individual Surety—Pledge of Assets.**

As prescribed in 28.203-4 (b), insert the following clause:

Individual Surety—Pledge of Assets (Feb 2021)

(a) The Contractor shall obtain from each person acting as an individual surety on a performance bond or a payment bond—

(1) A pledge of assets that meets the eligibility, valuation, and security requirements described in the Federal Acquisition Regulation (FAR) 28.203-1; and

(2) Standard Form 28, Affidavit of Individual Surety.

(b) 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. The security interest in support of a performance bond shall be maintained—

(1) *Contracts for the construction, alteration, or repair of any public building or public work of the Federal Government exceeding \$150,000 (40 U.S.C. 3131).* Until completion of any warranty period, or for 1 year following final payment, whichever is later.

(2) *Contracts subject to alternative payment protection (see FAR 28.102-1(b)(1)).* For the full contract performance period plus 1 year.

(3) *Other contracts not subject to the requirements of paragraph (b)(1) of this clause.* Until completion of any warranty period, or for 90 days following final payment, whichever is later.

(c) 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. The security interest on the individual surety's assets in support of a payment bond shall be maintained—

(1) *Contracts for the construction, alteration, or repair of any public building or public work of the Federal Government exceeding \$150,000 which require performance and payment*

*bonds (40 U.S.C. 3131).* For 1 year following final payment, or until resolution of all pending claims filed against the payment bond during the 1-year period following final payment, whichever is later.

(2) *Contracts subject to alternative payment protection (see FAR 28.102-1(b)(1)).* For the full contract performance period plus 1 year.

(3) Other contracts not subject to the requirements of paragraph (c)(1) of this clause. For 90 days following final payment.

(d) The Contracting Officer may allow the Contractor to substitute an individual surety, for a performance or payment bond, after contract award. The Contractor shall comply with the requirements of paragraph (a) of this clause within the timeframe established by the Contracting Officer.

(End of clause)

## **52.228-12 Prospective Subcontractor Requests for Bonds.**

As prescribed in 28.106-4(b), use the following clause:

Prospective Subcontractor Requests for Bonds (Dec 2022)

In accordance with section 806(a)(3) of Pub. L. 102-190, as amended by sections 2091 and 8105 of Pub. L. 103-355 ( [10 U.S.C. 4601 note](#) prec.), upon the request of a prospective subcontractor or supplier offering to furnish labor or material for the performance of this contract for which a payment bond has been furnished to the Government pursuant to [40 U.S.C. chapter 31](#), subchapter III, Bonds, the Contractor shall promptly provide a copy of such payment bond to the requester.

(End of clause)

## **52.228-13 Alternative Payment Protections.**

As prescribed in 28.102-3(b), insert the following clause:

Alternative Payment Protections (July 2000)

(a) The Contractor shall submit one of the following payment protections:

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(b) The amount of the payment protection shall be 100 percent of the contract price.

(c) The submission of the payment protection is required within \_\_\_\_\_ days of contract award.

(d) The payment protection shall provide protection for the full contract performance period plus a one-year period.

(e) Except for escrow agreements and payment bonds, which provide their own protection procedures, the Contracting Officer is authorized to access funds under the payment protection when it has been alleged in writing by a supplier of labor or material that a nonpayment has occurred, and to withhold such funds pending resolution by administrative or judicial proceedings or mutual agreement of the parties.

(f) When a tripartite escrow agreement is used, the Contractor shall utilize only suppliers of labor and material that signed the escrow agreement.

(End of clause)

## **52.228-14 Irrevocable Letter of Credit.**

As prescribed in 28.204-4 , insert the following clause:

Irrevocable Letter of Credit (Nov 2014)

(a) "Irrevocable letter of credit" (ILC), as used in this clause, means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by the Government (the beneficiary) of a written demand therefor. Neither the financial institution nor the offeror/Contractor can revoke or condition the letter of credit.

(b) If the offeror intends to use an ILC in lieu of a bid bond, or to secure other types of bonds such as performance and payment bonds, the letter of credit and letter of confirmation formats in paragraphs (e) and (f) of this clause shall be used.

(c) The letter of credit shall be irrevocable, shall require presentation of no document other than a written demand and the ILC (including confirming letter, if any), shall be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (d) of this clause, and-

(1) If used as a bid guarantee, the ILC shall 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 may submit an ILC with an initial expiration date that is a minimum period of one year 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 one year 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 [40 U.S.C. chapter 31](#), subchapter III, Bonds, the later of-

(A) One year 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 [40 U.S.C. chapter 31](#), subchapter III, Bonds, the later of-

(A) 90 days following final payment; or

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

(d)

(1) Only federally insured financial institutions rated investment grade by a commercial rating service shall issue or confirm the ILC.

(2) 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.

(3) The Offeror/Contractor shall provide the Contracting Officer a credit rating that indicates the financial institutions have the required credit rating as of the date of issuance of the ILC.

(4) The current rating for a financial institution is available through any of the following rating services registered with the U.S. Securities and Exchange Commission (SEC) as a Nationally Recognized Statistical Rating Organization (NRSRO). NRSRO's can be located at the website <http://www.sec.gov/answers/nrsro.htm> maintained by the SEC.

(e) The following format shall be used by the issuing financial institution to create an ILC:

\_\_\_\_\_ [Issuing Financial Institution's Letterhead or Name  
and Address]

Issue Date \_\_\_\_\_

Irrevocable Letter of Credit No. \_\_\_\_\_

Account party's name \_\_\_\_\_

Account party's address \_\_\_\_\_

For Solicitation No. \_\_\_\_\_ (*for reference only*)

To: [*U.S. Government agency*]

[*U.S. Government agency's address*]

1. We hereby establish this irrevocable and transferable Letter of Credit in your favor for one or more drawings up to United States \$\_\_\_\_. This Letter of Credit is payable at [*issuing financial institution's and, if any, confirming financial institution's*] office at [*issuing financial institution's address and, if any, confirming financial institution's address*] and expires with our close of business on \_\_\_\_\_, or any automatically extended expiration date.

2. We hereby undertake to honor your or the transferee's sight draft(s) drawn on the issuing or, if any, the confirming financial institution, for all or any part of this credit if presented with this Letter of Credit and confirmation, if any, at the office specified in paragraph 1 of this Letter of Credit on or before the expiration date or any automatically extended expiration date.

3. [*This paragraph is omitted if used as a bid guarantee, and subsequent paragraphs are renumbered.*] It is a condition of this Letter of Credit that it is deemed to be automatically extended without amendment for One year from the expiration date hereof, or any future expiration date, unless at least 60 days prior to any expiration date, we notify you or the transferee by registered mail, or other receipted means of delivery, that we elect not to consider this Letter of Credit renewed for any such additional period. At the time we notify you, we also agree to notify the account party (and confirming financial institution, if any) by the same means of delivery.

4. This Letter of Credit is transferable. Transfers and assignments of proceeds are to be effected without charge to either the beneficiary or the transferee/assignee of proceeds. Such transfer or assignment shall be only at the written direction of the Government (the beneficiary) in a form satisfactory to the issuing financial institution and the confirming financial institution, if any.

5. This Letter of Credit is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No.

\_\_\_\_\_ (Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to the extent not inconsistent therewith, to the laws of \_\_\_\_\_ [State of confirming financial institution, if any, otherwise State of issuing financial institution].

6. If this credit expires during an interruption of business of this financial institution as described in Article 17 of the UCP, the financial institution specifically agrees to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Sincerely,

\_\_\_\_\_ [*Issuing financial institution*]

(f) The following format shall be used by the financial institution to confirm an ILC:

[*Confirming Financial Institution's Letterhead or Name and Address*]

\_\_\_\_\_

(Date) \_\_\_\_\_

Our Letter of Credit Advice Number \_\_\_\_\_

Beneficiary: \_\_\_\_\_ [*U.S. Government agency*]

Issuing Financial Institution: \_\_\_\_\_

Issuing Financial Institution's LC No.: \_\_\_\_\_

Gentlemen:

1. We hereby confirm the above indicated Letter of Credit, the original of which is attached, issued by \_\_\_\_\_ [*name of issuing financial institution*] for drawings of up to United States dollars \_\_\_\_\_/U.S. \$\_\_\_\_\_ and expiring with our close of business on \_\_\_\_\_ [*the expiration date*], or any automatically extended expiration date.

2. Draft(s) drawn under the Letter of Credit and this Confirmation are payable at our office located at \_\_\_\_\_.

3. We hereby undertake to honor sight draft(s) drawn under and presented with the Letter of Credit and this Confirmation at our offices as specified herein.

4. [*This paragraph is omitted if used as a bid guarantee, and subsequent paragraphs are renumbered.*] It is a condition of this confirmation that it be deemed automatically extended without amendment for One year from the expiration date hereof, or any automatically extended expiration date, unless:

(a) At least 60 days prior to any such expiration date, we shall notify the Contracting Officer, or the transferee and the issuing financial institution, by registered mail or other receipted means of delivery, that we elect not to consider this confirmation extended for any such additional period; or

(b) The issuing financial institution shall have exercised its right to notify you or the transferee, the account party, and ourselves, of its election not to extend the expiration date of the Letter of Credit.

5. This confirmation is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No. \_\_\_\_\_ (Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to the extent not inconsistent therewith, to the laws of \_\_\_\_\_ [State of confirming financial institution].

6. If this confirmation expires during an interruption of business of this financial institution as described in Article 17 of the UCP, we specifically agree to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Sincerely,

\_\_\_\_\_ [*Confirming financial institution*]

(g) The following format shall be used by the Contracting Officer for a sight draft to draw on the Letter of Credit:

Sight Draft

\_\_\_\_\_ [*City, State*]



(Date) \_\_\_\_\_ [Name and address of financial institution]

Pay to the order of \_\_\_\_\_ [Beneficiary Agency] \_\_\_\_\_ the sum of United States  
\$ \_\_\_\_\_. This draft is drawn under Irrevocable Letter of Credit No. \_\_\_\_\_.

\_\_\_\_\_ [Beneficiary Agency] \_\_\_\_\_ [By]

(End of clause)

## **52.228-15 Performance and Payment Bonds-Construction.**

As prescribed in 28.102-3(a), insert a clause substantially as follows:

Performance and Payment Bonds-Construction (Jun 2020)

(a) *Definitions.* As used in this clause-

*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) *Amount of required bonds.* Unless the resulting contract price is valued at or below the threshold specified in Federal Acquisition Regulation 28.102-1(a) on the date of award of this contract, the successful offeror shall furnish performance and payment bonds to the Contracting Officer as follows:

(1) *Performance bonds* ([Standard Form 25](#)). The penal amount of performance bonds at the time of contract award shall be 100 percent of the original contract price.

(2) *Payment Bonds* ([Standard Form 25A](#)). The penal amount of payment bonds at the time of contract award shall be 100 percent of the original contract price.

(3) Additional bond protection.

(i) The Government may require additional performance and payment bond protection if the contract price is increased. The increase in protection generally will equal 100 percent of the increase in contract price.

(ii) The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(c) *Furnishing executed bonds.* The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within the time period

specified in the Bid Guarantee provision of the solicitation, or otherwise specified by the Contracting Officer, but in any event, before starting work.

(d) *Surety or other security for bonds.* The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. Treasury Circular 570 is published in the *Federal Register* or may be obtained from the:

U.S. Department of the Treasury,

Financial Management,

Service Surety Bond Branch,

3700 East West Highway,

Room 6 F01,

Hyattsville, MD 20782.

Or via the internet at <http://www.fms.treas.gov/c570/>.

(e) *Notice of subcontractor waiver of protection* (40 U.S.C. 3133(c)). Any waiver of the right to sue on the payment bond is void unless it is in writing, signed by the person whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract.

(End of clause)

## **52.228-16 Performance and Payment Bonds-Other Than Construction.**

As prescribed in 28.103-4 , insert a clause substantially as follows:

Performance and Payment Bonds-Other Than Construction (Nov 2006)

(a) *Definitions.* As used in this clause-

"Original contract price" means the award price of the contract or, for requirements contracts, the price payable for the estimated 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) The Contractor shall furnish a performance bond ( [Standard Form 1418](#)) for the protection of the Government in an amount equal to \_\_\_\_\_ percent of the original contract

price and a payment bond [Standard Form 1416](#)) in an amount equal to \_\_\_\_ percent of the original contract price.

(c) The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within \_\_\_\_\_ days, but in any event, before starting work.

(d) The Government may require additional performance and payment bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bonds or to obtain additional bonds.

(e) The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. Treasury Circular 570 is published in the *Federal Register*, or may be obtained from the:

U.S. Department of the Treasury,

Financial Management Service,

Surety Bond Branch,

3700 East West Highway,

Room 6 F01

Hyattsville, MD 20782.

Or via the internet at <http://www.fms.treas.gov/c570/>.

(End of clause)

*Alternate I* (July2000). As prescribed in 28.103-4 , substitute the following paragraphs (b) and (d) for paragraphs (b) and (d) of the basic clause:

(b) The Contractor shall furnish a performance bond ( [Standard Form 1418](#)) for the protection of the Government in an amount equal to \_\_\_\_ percent of the original contract price.

(d) The Government may require additional performance bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

## **52.228-17 Individual Surety—Pledge of Assets (Bid Guarantee).**

As prescribed in 28.203-4 (a), insert the following provision:

Individual Surety—Pledge of Assets (Feb 2021)

(a) Offerors shall obtain from each person acting as an individual surety on a bid guarantee—

(1) A pledge of assets that meets the eligibility, valuation, and security requirements described in the Federal Acquisition Regulation (FAR) 28.203-1; and

(2) Standard Form 28, Affidavit of Individual Surety.

(b) The Offeror shall include with its offer the information required at paragraph (a) of this provision within the timeframe specified in the provision at FAR 52.228-1, Bid Guarantee, or as otherwise established by the Contracting Officer.

(c) 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.

(End of provision)