



H.R 3534 – “Security in Bonding Act of 2011”

TESTIMONY OF
KAREN PECORA-BARBOUR

PRESIDENT, THE BARBOUR GROUP, LLC
A SMALL BUSINESS – WOMAN OWNED FIRM

U.S. SBA SMALL BUSINESS PERSON OF THE YEAR (MD) 2008

SERVICING CONTRACTORS IN NEED OF CONSTRUCTION BONDS
AND COMMERCIAL INSURANCE

BEFORE THE
HOUSE JUDICIARY SUBCOMMITTEE ON
COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

March 5, 2012



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Chairman Coble, Ranking Member Cohen and distinguished Members of the House Judiciary subcommittee, thank you for the opportunity to present my views on suretyship and the benefits of individual sureties.

I am Karen Barbour, owner and founder of The Barbour Group. Established in 2002 as an independent insurance agency, our focus is on construction bonding and commercial insurance. The Barbour Group primarily services the surety needs of a wide range of construction clientele, from startups to medium-sized companies (\$50M - \$100M) to large firms with more than \$100M in annual gross revenue, including Fortune 1000 companies. We are nationally known as one of the most knowledgeable and creative brokers in the business, providing a comprehensive suite of surety bonds for the construction industry, from Alaska to Puerto Rico.

Prior to starting my agency, I was a partner of Barbour Construction Corp. (trading as Specialized Metals) for 10 years. The company performed work throughout the Mid-Atlantic region as a steel erection and metal fabrication subcontractor. I am proud to state that we fabricated and installed all the metal work in the Washington Monument, including the steel casings to house the glass membrane.

Serving as an underwriter for two leading carriers for 9 years, an agent for 8 years for two brokerage firms in the DC Metropolitan Area, my experience developed relationships with key strategic partners and industry leaders. At times the Army Corps of Engineers has asked for my consultation on small business issues. In 1998, I formed the Professional Council of General Construction – a forum, lasting two years, consisting of key personnel of the Baltimore Army Corps of Engineers and key members of various construction trade associations to openly discuss and resolve issues surrounding certain procurement models negatively impacting small businesses.

My insurance agency has received numerous awards and distinctions for our contributions to the success of contractors in the building industry, including selection as one of nine women entrepreneurs to participate in the 2009 Ernst & Young Entrepreneurial Winning Women™ program. I was named 2008 Maryland Small Business Person of the Year by the U.S. Small Business Administration (SBA) – the first surety agent to receive this SBA top honor. I was also honored as one of The Daily Record's 2010 Innovators of the Year for enabling success for small businesses nationwide.



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The Governor of Maryland has appointed me his Co-Chair for The Governor's Commission on Small Business. I also serve as Vice Chair on the Advisory Board for the Small Business Development Center (SBDC) for the State of Maryland, while representing my community as a Board Member for the Economic Development Commission for Carroll County, Maryland.

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TESTIMONY:

HR 3534's intent is notable. As the National Association of Surety Producers has stated in their media release: "Individual sureties will have to prove that the assets which back their bonds are real, tangible assets and submit those assets to the care and custody of the federal government until the completion of the obligation."

However, HR 3534 may have flaws, unintentional I am sure, that would eviscerate individual sureties. According to Gerald Zaffros, past Director of the Contract Policy Division, Chief Acquisition Officer, General Services Administration:

"...if this bill is passed, a change to the FAR (Federal Acquisition Regulation) requirements for individual surety (FAR 28.203) would need to be proposed. Assuming a change is implemented, it would effectively kill individual sureties on FAR contracts. As it stands now, the current language in the code prohibits a contracting officer from requiring a bond issued by a corporate surety. The proposed change would give contracting officers the authority to require the use of a corporate surety bond. Because it is easier for a contracting officer to simply determine if the corporate surety is listed on the Treasury Circular than to investigate the existence and value of the assets being proposed by an individual surety, it would be to the benefit of the contracting officer to simply require the corporate surety.

The problem would be that the corporate sureties, unintentionally, would control who can get a construction contract when they deny bonds to small and minority and veteran owned businesses who do not meet their more stringent qualification requirements."

(See attached FAR 28.203.)

That is the effect of H.R. 3534 --- So where would those small businesses turn to for a bond?

Individual surety has helped many. In fact, there are over 7,000 success stories. Individual surety as allowed by FAR 28.203 gives contractors an option. However, it is interesting to note that many individual surety bonds were not accepted by contracting officers where the contractor was a minority or women owned firm. No such bond was denied to a non-minority firm.



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FAR 28.203 states that a contractor can seek advice from the U.S. Treasury and even their own legal counsel before they elect to accept an individual surety bond. In fact, I have attached a letter from the US Treasury providing guidance to contracting officers for your review.

I recently provided an individual surety bond to a veteran owned company. The owner had poor credit with his house foreclosed on; he was denied corporate surety credit.

Many veterans returning home have poor credit due to absence from the country to manage domestic financial affairs or inability to find work. On the million dollar contract that the individual surety bonded, the veteran will be making enough money to heal him financially and gain back a notable reputation. This bill will effectively end that opportunity to get back into the U.S. economy after serving our country.

You may hear that individual sureties charge exuberant fees for their bonds. The fees that I have seen ranged in the 3 to 4% of the contract value. I have corporate sureties that charge up to 5%. Not all surety companies are members of the Surety Fidelity Association of America. Also, corporate sureties that are AM Best rated and Treasury listed have not returned premiums even when a replacement bond was provided. I contacted the Maryland Insurance Administration about this and their reply was that a bond premium is an underwriting fee and fully earned. While this is a state agency, I don't know what the Federal Government guidelines are with regard to return premiums. There needs to be specific rules for premium returns noted in the FAR regulation.

There are many interpretations of the FAR and they vary with every contracting officer and/or agency. This makes it very difficult to provide predictability and assurance to contractors that the individual surety bonds will be accepted. So, I agree that Individual Sureties should be pre-approved by either a FAR council or the U.S. Treasury. Those that pass the FAR requirements should be enrolled on a list of acceptable individual sureties. The individual surety should be able to provide their data and have their attorneys present to address any legal issues with regard to FAR compliance. There should also be an appeal process if the individual surety believes that they were not treated fairly. This will also alleviate any concerns that bonding agents will have with regard to FAR compliance.

But if such a system is adopted, how long will the process take? Would time be of the essence?

Regulation does not guaranty against insolvency:

In the summer of 2005, five corporate sureties closed down their bond operations within 30 days of each other. Those sureties were Atlantic Mutual, Harleysville, Frontier, XL Surety, and Crum and Foster. Roughly three weeks ago, a corporate surety who focused on serving small business declared bankruptcy. One day it was rated ~~A+~~^{A-} by AM Best and nearly the next day it was rated C+. The company is now in bankruptcy. Since most sureties who service small business contractors are small themselves in comparison to the top ten sureties, they often require collateral and/or funds control to hedge bond losses. Today, many agents and contractors can't get information on how to get their collateral back from First Sealord Surety, the recently bankrupt corporate surety. Total missing is roughly \$8 million. And, owners of the projects are requesting new replacement bonds as the surety no longer meets the contractual requirements, an additional premium that the contractor and/or its agent may have to absorb and many cannot afford. Today, many contractors are in breach of their contracts as they no longer have valid bonds. And, they are unable to get paid on current invoices for work performed and accepted until a replacement bond is provided.



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Surety Bonds are waived for mega projects:

It may be important to note that for contracts in excess of \$300,000,000, a federal agency allowed the bonds to be phased during the duration of the project, or incremental phasing. On one project exceeding \$650,000,000, the contractor's surety would not provide a bond even though initially it said it would. The contractor asked the federal agency to accept sub-guard in lieu of a bond. Sub-guard is a product of Zurich Insurance. It provides protection to General Contractors against subcontractor failure. However, it offers no protection for the subcontractors against non-performance of the General Contractor. However some owners will waive the General Contractor's bond if they feel comfortable with the blanket protection against subcontractor failure afforded by sub-guard. Additionally, it is not uncommon to hear in my industry that the federal agency took the contractor's corporate guaranty in lieu of a bond on mega projects (\$1 billion or more). Here there is no Miller Act protection for small business contractors.

- Support legislation for federal contracting officers to disclose what type of security was provided by the General Contractor and accepted by the contracting officer in support of the contract award: performance and payment bond, performance bond only, payment bond only, letter of credit, corporate guarantee or sub-guard.

Individual surety is a tool to groom contractors back into corporate surety credit. Those who have "graduated" from individual surety bonds now enjoy preferred rates from leading surety companies. With the harsh economic times that we are in, small business contractors' financial conditions will not be stellar. For those that can weather the storm, an excess lines market for bonding needs to exist—individual surety. It is the only method to keep small businesses that have credit issues, often because of no fault of their own, in business.

. Due to the Miller Act limits, surety bonding often has broad reach in becoming a barrier to small construction businesses obtaining work. The Miller Act requires bonds for projects \$150,000 and higher. This limit has been adopted by many states. However, many states are now raising the threshold so more contractors can gain access to work. The Miller Act limit of \$100,000 was set in 1934 when \$100,000 was a significant sum of money. Today, that number would most likely be \$1,000,000 (most likely more) given inflation. But it has only increased to \$150,000.

Mr. Chairman and Member of the Committee, this concludes my testimony. I thank you for your time and consideration. I have provided in my submitted testimony other great ideas for small business legislative reform.

Thank you.



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Small Business Administration's (SBA) Bond Guaranty Program:

The American Recovery Reinvestment Act when passed included an amendment that increased the ability of the SBA to guaranty up to 90% of performance and payment bond for a participating surety company for construction projects having a contract value of \$2 million to projects having a contract value of \$5 million, with discretionary authority to cover individual contracts up to \$10 million. ARRA also increased the SBA bond program eligibility standards from \$7 million in sales (average over three years) to that of the NAICS codes for small business. With the sunset of ARRA, the project cap for SBA is back to \$2 million. Thankfully, however, the sales cap under ARRA remains.

SBA Sales Cap is a Disconnect with Set Aside Programs

Much of the set aside contracts for 8(a)s, WOSBs, SDBs, HUB Zone, VOBs and/or SDVOBs are too large for SBA consideration now. Currently, The Veterans First Contracting Program, Department of Veterans Affairs (VA), is the only sole-source contract acquisition program that enables non-competitively bid contracts for Veterans. **This program authorizes VA contracting officers to sole-source projects up to \$5 million to VOB and SDVOBs** (http://www1.va.gov/oamm/_bf/oa/i107-08.pdf).

However, many veterans coming back from Iraq are not in the best financial health and have credit scores that are below the comfort level of many corporate sureties. Unless the ceiling cap for SBA is raised to at least \$5 million, bonding capacity will not be enabled for the sole source projects above as the current SBA cap is set at \$2 million. As for the 8(a) program, the Federal Government can sole source projects up to \$4 million. However, few 8(a) contractors can obtain bonding at this level without SBA assistance and SBA currently cannot help due to its current \$2 million contract ceiling price.

- Reinstatement of the bond limits for the SBA Bond Program under ARRA to enable SBA to consider projects up to \$5 million with discretionary authority to consider individual projects up to \$10 million.

Understanding MATOC and shortcomings of SBA

MATOC, Multiple Award Task Order Contract, is a common contract delivery vehicle used by Department of Defense agencies. It is established for small business contractors. Here, the Government will typically make 1 to 7 contract awards to separate contractors based on the agency's "best interests." Such contracts typically have a base year and 4 options years to be exercised unilaterally by the Government. Winning such a contract at the end of fifth term as an 8(A) contractor can maintain an 8(A) contractor for an additional five years in the program.

Under the MATOC, each contractor could receive up to \$10 million in awards annually. The timing of and amount of the awards are not certain and subject to the ongoing needs of the agency. The contractor is not guaranteed any task orders under the MATOC. The problem arises when the contractor's surety treats the full \$10 million contract award as



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committed-project- backlog, irrespective of actual MATOC awards. This underwriting approach significantly reduces a contractor's capacity for additional bonding.

Many MATOC vehicles require that the contractor need only post a \$1 million bond each year at the onset of each term. If the contractor performs more than \$1 million in projects for the year, then additional bond premium is billed against any additional work.

The \$1 million bond is not an issue for many small businesses. **The issue is that MATOCs require the following:**

"Contractor shall furnish proof in writing from their certified bonding company that they can obtain \$10,000,000 dollars' worth of bonds each year. The Contractor's proposal shall include a letter from his/her bonding company, which certifies the contractor's ability to obtain bonding up to the Maximum Award Amount of \$10,000,000 each year. Failure to provide said letter with the contractor's proposal will make the offeror ineligible for award."

The SBA cannot help. They cannot provide such a \$10 million bond support letter even though the initial bond is for \$1 million as stated above.

AGAIN, REINSTATE THE BOND LIMITS FOR SBA BOND PROGRAM UNDER ARRA TO ALLOW SBA TO PROVIDE \$10 MILLION BOND CAPACITY LETTERS

- If SBA could have discretionary authority to consider projects up to \$10 million as they did under ARRA, they could approve bond support letters for MATOCs and avoid the need of the disadvantaged contractor from partnering with big business and foregoing 50% or more of the profit.

One SBA Program – Don't Consolidate – Allow Only Plan A

At present, there are two programs/plans for bonding with the SBA:

- Prior Approval Program (Sec 411 (a) Small Business Investment Act) – Plan A
- Preferred Program (Sec 411 (a) (3) Small Business Investment Act) – Plan B

PLAN A requires that each contract bond submission is reviewed and approved either by the Denver or Seattle Office of the SBA and simultaneously with the participating surety. (Office location is determined by physical location of the contractor.) I work with both offices of SBA.

PLAN B allows a surety company to authorize and issue bonds and pay claims without SBA's prior approval and review. The SBA will perform audits of the surety underwriting and bond files at least once every three years.

Unlike Plan A, Under PLAN B, it is typical for the corporate sureties not to implement all of the underwriting caveats the SBA Bond Guaranty Program has to offer. For example, the SBA will include the unused portion of a contractor's bank line of credit as a current asset to the current financial statement and often extend up to 10 times working capital (current assets minus current



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liabilities) to compute the contractors aggregate bond limit. Working capital is key to setting bonding capacity limits for a contractor. **For example, if a contractor only has \$10,000 in working capital but a \$100,000 unused line of credit, the contractor can receive under SBA \$1,100,000 in bond capacity versus \$100,000!!**

As an industry standard, corporate sureties will not consider a line of credit as additional working capital.

Under PLAN A, the bonding agent has direct access to the SBA offices. The SBA offices will go above and beyond to help agents and contractors in the program succeed and will provide guidance to the agent on enabling more capacity for the contractor.

Further, the differences between PLAN A and PLAN B, as addressed in this letter, are not clearly evident to contractors. Contractors are not aware that PLAN B may not provide as much bonding capacity as Plan A. (Plan B typically does not weigh in the unused portion of the bank line to increase working capital). When a contractor is declined surety credit under PLAN B, he or she may not know that they can resubmit their bond request under PLAN A. Having one SBA Plan would eliminate this precarious issue.

SBA and the hindering of Joint Ventures

The SBA can consider joint ventures (JV) but the new ceiling cap for annual sales cannot breach the NAICs limitation. While the sales cap is generous, the SBA will add in the sales of the non-SBA JV partner which could be in the hundreds of millions. This add-in will preclude the bonding for the JV entity with SBA. As an aside, few corporate sureties will support JV relationships for small business. Also, with a project cap of \$2 million, the pluses to JV make no sense.

- Change the regulation to only bond the small business contractor under the SBA and have the larger JV partner provide a bond from their surety (co-surety relationship).
- Allow regulation to only consider the sales of the SBA bond client so as not to disallow the JV's total sales of the two parties from exceeding the size standards.
- Again, reinstate the limits provided by ARRA for SBA - \$5 million single with discretionary authority to consider \$10 million projects – as anything less would not be conducive to JV.

SBA and Teaming Agreements

The SBA Bond Guaranty Program cannot accept teaming agreements, such as those found at www.sba.gov. Such agreements delineate the responsibilities of each partner and outline their working relationship per project. Here, the small business contractor is the prime or general contractor and typically partners or teams with a major (big business) subcontractor. The subcontractor can indemnify the prime contractor against any and all loss or provide subcontractor performance and payment bonds to the prime contractor.



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Current regulation prohibits the SBA from discounting the teaming partner's sales and amount of work they are performing as a subcontractor to the small business contractor. Unlike joint ventures agreements, there is no joint and several liability with a teaming agreement if the big

business teaming partner bonds back their portion of work (typically 80%) in lieu of joint indemnification.

Example: Small Business Prime has a \$5 million project but needs support in performing the work. He/She teams with a larger business and subcontracts out 80% of the work to the subcontractor. The subcontractor provides a bond back to the small business prime. Small Business prime is self-performing \$1 million dollars or work. This \$1 million is under the current bond cap of \$2 million. With such an arrangement in place, an exception could be made to consider larger work outside the current SBA limits.

Reducing Cost and Increasing Efficiencies for Surety Agents

The SBA Bond Program is an expensive program for agents to utilize. It is primarily the small, independent bonding agencies that broker SBA bonds. And, such agents have limited resources. It takes 1.0 to 1.5 hours to input an underwriting file into the SBA's electronic system by experienced personnel. A hard copy of the file must be sent to the SBA and to the surety. More often than not, we are given last minute notification from the contractor that a bond is needed. The federal government requires that performance and payment bonds be supplied within 10 days after contract award.

- It would be more cost effective if the SBA forms could be scanned and emailed with acceptance of electronic signatures.

Moreover, an approval for a performance and payment bond cannot be obtained without the SBA having a check made payable to the SBA in the amount of \$7.29 per thousand of the contract value.

- It would be more cost effective to have the contractor to "pay by fax." This process of payment is common and used by my agency as an option for payment on non SBA accounts. The check is received via fax and sent to our bank electronically. Another option would be to wire the money to SBA.

De-Bundling/De-Consolidation of Federal Contracts

Much of the stimulus funds received for federal construction contracts from the eyes of a small business contractor fueled large construction projects, such as hospitals and new construction ranging from \$450,000,000 to over \$1 billion in value. Very little **meaningful** work trickled down to small businesses. By the time the large general contractors had their out-reach sessions for small business, most all of the major sub-trade work was already under contract, leaving just "crumbs" for minority and small business firms.

One such small business emailed me the following:

"Please see the item regarding bundling for Federal Contracts. This is very important for our small construction businesses to respond to as for the past eight years almost all jobs in this marketplace have been bundled. When this happens small business does not have a chance and the larger contractors bid (price) shop the projects again and again. In addition, they are only required to give out 27% of the jobs to small business by law. . Since the majority of the companies in this country are small and because small business employs more people than large businesses, this has been very unfairly skewed and our small business community has gotten largely nothing. Senator Cardin sponsored a bill a year ago to ask Contracting Officers for reasoning for doing this when letting out projects. I think now their reasoning is



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that they can save 10% overall on the contracts. We must fight this as a group. The General Contractors mark up their jobs a few percentage points after they have covered all expenses on the jobs. This is the same thing that the smaller companies do. There is less need for Federal Contracting Officers when the jobs are bundled but the overhead is shifted to the General Contractors as they need personnel to run the jobs for them. The Largest General Contractors that get these bundled contracts may not even have offices in this area and then take the revenues earned out of this market place and spend it elsewhere even though our taxes support their initiatives. We need to employ our local workforce in this time of recession and support our small business community. This must now be responded to timely as our businesses in this marketplace have not been given the opportunities that are available. I have counted 67 billion dollars in construction bundled jobs in this region this year alone. Almost nothing has been given to the small business community in construction per Federal Biz Ops. Imagine how we could grow with these opportunities as a group. Bundling has been done by the Army Corp of Engineers in two large Contracts that have tied up the majority of repair and small construction work in the next three years to only one or two General Contractors. This involves work in virtually every trade. If work is needed on these bases, it goes through the General Contractor or perhaps they will self-perform only. The largest companies get bigger and bigger and the small ones go out of business. With numbers, we may be successful. Thank you for your time and help. It was good seeing you last week at another successful function. Cheryl London Chereco Co., Inc.”

(Chereco is a woman owned firm in Maryland that performs glass and glazing work)

Above is just one example of the many emails I received regarding bundling. The new term small business contractors are hearing is consolidation in lieu of bundling. The effect is nonetheless the same. Bundling or consolidating contracts is an obstacle for small businesses.

- Support legislation that will prevent unnecessary bundling/consolidation of federal construction projects to allow more small business participation at the prime level.

Credit Inquiries and Impact on Bonding

Owners and spouses of small businesses are required to provide personal and corporate indemnity to surety companies in order to be extended any form of bonding credit. Surety is not insurance. If a contractor defaults and the surety makes any payments to suppliers and/or the project owner, the surety will seek subrogation against the owners, spouses and principal on the bond (the small business) to be made whole. This is why you will often hear surety companies say that they underwrite risks based on a zero loss ratio. As I am sure you are aware, sureties have losses and often there is very little left to recoup of the small business and its owners.

Before a small business can be considered for bonding, the surety company will pull a credit report on the owners and spouses. If the corporate surety for some reason does not find this contractor a fit for their company, the surety broker will send the contract file to another market, which in turn, will also pull credit. In some cases, several tries may be needed before a solid proposal can be provided by the broker. In the meantime, for every report pulled, the credit scoring companies will deduct points, anywhere from 4 to 10 points, for each credit inquiry.



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Not only do corporate sureties pull credit reports on owners and spouses of small businesses, but so do vendors and banks. While owners and spouses may have fair credit, hovering around 700, by the time outside parties pull credit, the inquiries alone could drop the score to unfavorable levels.

Each time a personal credit is pulled, the company making the inquiry is listed. So, if I, as the broker, send a small business account to Surety A and they decline, the next surety, Surety B will see that Surety A pulled credit and wonder why Surety A did not approve the account. Disclosing the name of the company making the inquiry on the credit report is a Privacy Act issue. Disclosing the inquirer should be made only to the individual under credit investigation, no one else.

Big business does not have this issue. Most large companies do not personally indemnify. Sureties here rely on the credit reports such as Dunn and Bradstreet.

- Support legislation to stop credit reporting authorities from deducting any points for inquiries from personal credit scores when the inquiry was made for the risk evaluation of the small business.
- Support legislation not to openly disclose and name the entity making the inquiry on the personal credit report for any individual/consumer.

Retention Reform for FAR

At present there are three FAR clauses found that address retention. 32.102 gives reason why retention can be withheld from general contractors by contracting officers, 52.232-5 provides the amount that can be withheld by the contracting officer for poor performance, and 52-232-27 that allows a flow down to subcontractors to allow subcontractors to withhold retention from their subcontractors. See below

32.103 Progress payments under construction contracts.

When satisfactory progress has not been achieved by a contractor during any period for which a progress payment is to be made, a percentage of the progress payment may be retained. **Retainage should not be used as a substitute for good contract management, and the contracting officer should not withhold funds without cause. Determinations to retain and the specific amount to be withheld shall be made by the contracting officers on a case-by-case basis. Such decisions will be based on the contracting officer's assessment of past performance and the likelihood that such performance will continue.** The amount of retainage withheld shall not exceed 10 percent of the approved estimated amount in accordance with the terms of the contract and may be adjusted as the contract approaches completion to recognize better than expected performance, the ability to rely on alternative safeguards, and other factors. Upon completion of all contract requirements, retained amounts shall be paid promptly.



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52.232-5 Payments under Fixed-Price Construction Contracts.

(e) *Retainage*. If the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer shall authorize payment to be made in full. **However, if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved.** When the work is substantially complete, the Contracting Officer may retain from previously withheld funds and future progress payments that amount the Contracting Officer considers adequate for protection of the Government and shall release to the Contractor all the remaining withheld funds. Also, on completion and acceptance of each separate building, public work, or other division of the contract, for which the price is stated separately in the contract, payment shall be made for the completed work without retention of a percentage.

52.232-27 Prompt Payment for Construction Contracts.

(1) *Retainage permitted*. Permit the Contractor or a subcontractor to retain (without cause) a specified percentage of each progress payment otherwise due to a subcontractor for satisfactory performance under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties deem appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond.

While general contractors may not have any retention withheld by the contracting officer, they will nonetheless hold retention from their subcontractor's payments, up to 10% without cause. And, the general contractors will not release any retention to the subcontractor until all the work is completed. Given the extreme size of many federal projects, the subcontractors may not see that retention (profit) for several years.

- Support legislation to change FAR retention clauses to disallow any retention to be withheld from the subcontractor (if performing satisfactorily) by the general contractor if no retention was withheld from the general contractor by the contracting officer or if the subcontractor has posted a bond.
- Support legislation to mandate that the general contractor must release the subcontractors' retention upon successful completion of the subcontractor's work.

Very truly yours



Karen Pecora-Barbour
President



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**SPECIAL INFORMATIONAL NOTICE TO ALL BOND-APPROVING
(CONTRACTING) OFFICERS**

Important Information Regarding the Use of Individual Sureties on Federal Bonds

Subchapter E, Part 28 of the Federal Acquisition Regulation (FAR) provides guidance as to the acceptability of sureties and other security for Federal bonds. Acceptable security on Federal bonds include, but are not limited to, both corporate and individual sureties. FAR § 28.201. Acceptable corporate sureties must appear on the Department of Treasury's Circular 570. Treasury's Financial Management Service, Surety Bond Branch (FMS), publishes Department Circular 570 in the Federal Register.

Contracting officers determine the acceptability of individual sureties and ensure that the individual surety's pledged assets are sufficient to cover the bond obligation in accordance with the guidance outlined in the FAR § 28.203.

Although FMS is not substantively responsible for approving individual sureties, we believe it prudent to issue this Special Informational Notice on a FYI basis to Agency Bond-Approving (Contracting) Officers who do have that responsibility under the FAR.

Recently, FMS has been made aware of instances where **individual sureties are listing corporate debenture notes and other questionable assets on their "Affidavit of Individual Surety"**, Standard Form 28. In some instances, the individual sureties used a form other than the Standard Form 28 as their affidavit. **FAR § 28.203(b) specifically requires the use of the Standard Form 28.** In addition, FAR § 28.203-2(a) states that **"the Government will accept only cash, readily marketable assets, or irrevocable letters of credit from a federally insured financial institution from individual sureties to satisfy the underlying bond obligations."**

FAR § 28.203-2(b) includes **examples of acceptable assets**, such as:

- cash, or certificates of deposit, or other cash equivalents with a federally insured financial institution
- United State Government securities
- stocks and bonds actively traded on a national U.S. security exchange
- real property owned fee simple by the surety subject to certain conditions (refer to FAR 28.203-2(b)(4))
- irrevocable letters of credit issued by a federally insured financial institution in the name of the contracting agency and which identify the agency and solicitation or contract number.

Furthermore, FAR § 28.203-2(c) lists **unacceptable assets**, but indicates that the list is not all-inclusive. The following are listed as unacceptable assets:

- notes or account receivable
- foreign securities

- real property located outside the United States, its territories or possessions
- real property used as the principal residence of the surety
- real property owned concurrently
- life estates, leasehold estates, or future interest in real property
- personal property except as listed in FAR 28.203-2(b)
- stocks and bonds of the individual surety in a controlled, affiliated or closely held concern of the offeror/contractor
- corporate assets
- speculative assets
- letters of credit except as provided in FAR 28.203(b)(5)

The FAR also requires that the Government be given a security interest in any acceptable assets pledged by an individual surety. FAR § 28.203-1(a).

Prior to acceptance of an individual surety, FAR guidelines require contracting officers to obtain the opinion of their legal counsel as to the adequacy of the documentation pledging assets. FAR § 28.203(f).

If you have any questions, please feel free to contact this office at the above number.

Sincerely,

/Signed/ Rose Miller

Rose Miller
Manager
Surety Bond Branch

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

- (1) Corporate or individual sureties; or
- (2) Any of the types of security authorized in lieu of sureties by 28.204.

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

28.202 Acceptability of corporate sureties.

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

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

- (i) The amount which exceeds the specified limit is coinsured or reinsured; and
- (ii) The amount of coinsurance or reinsurance does not exceed the underwriting limit of each coinsurer or reinsurer.

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

(4) When specified in the solicitation, the contracting officer may accept a bond from the direct writing company in satisfaction of the total bond requirement of the contract. This is permissible until necessary reinsurance agreements are executed, even though the total bond requirement may exceed the insurer's underwriting limitation. The contractor shall execute and submit necessary reinsurance agreements to the contracting officer within the time specified on the bid form, which may not exceed 45 calendar days after the execution of the bond. The contractor shall use Standard Form 273, Reinsurance Agreement for a Miller Act Performance Bond, and Standard Form 274, Reinsurance Agreement for a Miller Act Payment Bond, when reinsurance is furnished with Miller Act bonds. Standard Form 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) The Department of the Treasury issues supplements to Circular 570, notifying all Federal agencies of (1) new approved corporate surety companies and (2) the termination of the authority of any specific corporate surety to qualify as a surety on Federal bonds. Upon receipt of notification of termination of a

company's authority to qualify as a surety on Federal bonds, the contracting officer shall review the outstanding contracts and take action necessary to protect the Government, including, where appropriate, securing new bonds with acceptable sureties in lieu of outstanding bonds with the named company.

(d) The Department of the Treasury Circular 570 may be obtained from the—

U.S. Department of the Treasury
Financial Management Service
Surety Bond Branch
3700 East West Highway, Room 6F01
Hyattsville, MD 20782.
Or via the Internet at <http://www.fms.treas.gov/c570/>.

28.203 Acceptability of individual sureties.

(a) An individual surety is acceptable for all types of bonds except position schedule bonds. The contracting officer shall determine the acceptability of individuals proposed as sureties, and shall ensure that the surety's pledged assets are sufficient to cover the bond obligation. (See 28.203-7 for information on excluded individual sureties.)

(b) An individual surety must execute the bond, and the unencumbered value of the assets (exclusive of all outstanding pledges for other bond obligations) pledged by the individual surety, must equal or exceed the penal amount of each bond. The individual surety shall execute the Standard Form 28 and provide a security interest in accordance with 28.203-1. One individual surety is adequate support for a bond, provided the unencumbered value of the assets pledged by that individual surety equal or exceed the amount of the bond. An offeror may submit up to three individual sureties for each bond, in which case the pledged assets, when combined, must equal or exceed the penal amount of the bond. Each individual surety must accept both joint and several liability to the extent of the penal amount of the bond.

(c) If the contracting officer determines that no individual surety in support of a bid guarantee is acceptable, the offeror utilizing the individual surety shall be rejected as nonresponsible, except as provided in 28.101-4. A finding of nonresponsibility based on unacceptability of an individual surety, need not be referred to the Small Business Administration for a competency review. (See 19.602-1(a)(2)(i) and 61 Comp. Gen. 456 (1982).)

(d) A contractor submitting an unacceptable individual surety in satisfaction of a performance or payment bond requirement may be permitted a reasonable time, as determined by the contracting officer, to substitute an acceptable surety for a surety previously determined to be unacceptable.

(e) When evaluating individual sureties, contracting officers may obtain assistance from the office identified in 28.202(d).

(f) Contracting officers shall obtain the opinion of legal counsel as to the adequacy of the documents pledging the assets prior to accepting the bid guarantee and payment and performance bonds.

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

28.203-1 Security interests by an individual surety.

(a) An individual surety may be accepted only if a security interest in assets acceptable under 28.203-2 is provided to the Government by the individual surety. The security interest shall be furnished with the bond.

(b) The value at which the contracting officer accepts the assets pledged must be equal to or greater than the aggregate penal amounts of the bonds required by the solicitation and may be provided by one or a combination of the following methods:

(1) An escrow account with a federally insured financial institution in the name of the contracting agency. (See 28.203-2(b)(2) with respect to Government securities in book entry form.) Acceptable

securities for deposit in escrow are discussed in 28.203-2. While the offeror is responsible for establishing the escrow account, the terms and conditions must be acceptable to the contracting officer. At a minimum, the escrow account shall provide for the following:

(i) The account must provide the contracting officer the sole and unrestricted right to draw upon all or any part of the funds deposited in the account. A written demand for withdrawal shall be sent to the financial institution, after obtaining the concurrence of legal counsel, by the contracting officer with a copy to the offeror/contractor and to the surety. Within the time period specified in the demand, the financial institution would pay the Government the amount demanded up to the amount on deposit. If any dispute should arise between the Government and the offeror/contractor, the surety, or the subcontractors or suppliers with respect to the offer or contract, the financial institution would be required, unless precluded by order of a court of competent jurisdiction, to disburse monies to the Government as directed by the contracting officer.

(ii) The financial institution would be authorized to release to the individual surety all or part of the balance of the escrow account, including any accrued interest, upon receipt of written authorization from the contracting officer.

(iii) The Government would not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the account.

(iv) The financial institution would not be liable or responsible for the interpretation of any provisions or terms and conditions of the solicitation or contract.

(v) The financial institution would provide periodic account statements to the contracting officer.

(vi) The terms of the escrow account could not be amended without the consent of the contracting officer.

(2) A lien on real property, subject to the restrictions in 28.203-2 and 28.203-3.

28.203-2 Acceptability of assets.

(a) The Government will accept only cash, readily marketable assets, or irrevocable letters of credit from a federally insured financial institution from individual sureties to satisfy the underlying bond obligations.

(b) Acceptable assets include—

(1) Cash, or certificates of deposit, or other cash equivalents with a federally insured financial institution;

(2) United States Government securities at market value. (An escrow account is not required if an individual surety offers Government securities held in book entry form at a depository institution. In lieu thereof, the individual shall provide evidence that the depository institution has—

(i) Placed a notation against the individual's book entry account indicating that the security has been pledged in favor of the respective agency;

(ii) Agreed to notify the agency prior to maturity of the security; and

(iii) Agreed to hold the proceeds of the security subject to the pledge in favor of the agency until a substitution of securities is made or the security interest is formally released by the agency.);

(3) Stocks and bonds actively traded on a national U.S. security exchange with certificates issued in the name of the individual surety. National security exchanges are—(i) the New York Stock Exchange; (ii) the American Stock Exchange; (iii) the Boston Stock Exchange; (iv) the Cincinnati Stock Exchange; (v) the Midwest Stock Exchange; (vi) the Philadelphia Stock Exchange; (vii) the Pacific Stock Exchange; and (viii) the Spokane Stock Exchange. These assets will be accepted at 90 percent of their 52-week low, as reflected at the time of submission of the bond. Stock options and stocks on the over-the-counter (OTC) market or NASDAQ Exchanges will not be accepted. Assistance in evaluating the acceptability of securities may be obtained from the—

(4) Real property owned in fee simple by the surety without any form of concurrent ownership, except as provided in paragraph (c)(3)(iii) of this subsection, and located in the United States or its outlying areas. These assets will be accepted at 100 percent of the most current tax assessment value (exclusive of encumbrances) or 75 percent of the properties' unencumbered market value provided a current appraisal is furnished (see 28.203-3).

(5) Irrevocable letters of credit (ILC) issued by a federally insured financial institution in the name of the contracting agency and which identify the agency and solicitation or contract number for which the ILC is provided.

(c) Unacceptable assets include but are not limited to—

- (1) Notes or accounts receivable;
- (2) Foreign securities;
- (3) Real property as follows:
 - (i) Real property located outside the United States and its outlying areas.
 - (ii) Real property which is a principal residence of the surety.
 - (iii) Real property owned concurrently regardless of the form of co-tenancy (including joint tenancy, tenancy by the entirety, and tenancy in common) except where all co-tenants agree to act jointly.
 - (iv) Life estates, leasehold estates, or future interests in real property.
- (4) Personal property other than that listed in paragraph (b) of this subsection (e.g., jewelry, furs, antiques);
- (5) Stocks and bonds of the individual surety in a controlled, affiliated, or closely held concern of the offeror/contractor;
- (6) Corporate assets (e.g., plant and equipment);
- (7) Speculative assets (e.g., mineral rights);
- (8) Letters of credit, except as provided in 28.203-2(b)(5).

28.203-3 Acceptance of real property.

(a) Whenever a bond with a security interest in real property is submitted, the individual surety shall provide—

- (1) A mortgagee title insurance policy, in an insurance amount equal to the amount of the lien, or other evidence of title that is consistent with the requirements of Section 2 of the United States Department of Justice Title Standards at <http://www.usdoj.gov/enrd/2001 Title Standards.html>. This title evidence must show fee simple title vested in the surety along with any concurrent owners; whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including the lien filed in favor of the Government under paragraph (d) of this subsection. Agency contracting officers should request the assistance of their designated agency legal counsel in determining if the title evidence is consistent with the Department of Justice standards;
- (2) Evidence of the amount due under any encumbrance shown in the evidence of title;
- (3) A copy of the current real estate tax assessment of the property or a current appraisal dated no earlier than 6 months prior to the date of the bond, prepared by a professional appraiser who certifies that the appraisal has been conducted in accordance with the generally accepted appraisal standards as reflected in the Uniform Standards of Professional Appraisal Practice as promulgated by the—

Appraisal Foundation
1029 Vermont Avenue, NW
Washington, DC 20005.

(b) Failure to provide evidence that the lien has been properly recorded will render the offeror nonresponsible.

(c) The Individual surety is liable for the payment of all administrative costs of the Government, including legal fees, associated with the liquidation of pledged real estate.

(d) The following format, or any document substantially the same, shall be signed by all owners of the property and used by the surety and recorded in the local recorder's office when a surety pledges real estate on Standard Form 28, Affidavit of Individual Surety.

LIEN ON REAL ESTATE

I/we agree that this instrument constitutes a lien in the amount of \$_____ on the property described in this lien. The rights of the United States Government shall take precedence over any subsequent lien or encumbrance until the lien is formally released by a duly authorized representative of the United States. I/we hereby grant the United States the power of sale of subject property, including the right to satisfy its reasonable administrative costs, including legal fees associated with any sale of subject property, in the event of contractor default if I/we otherwise fail to satisfy the underlying () bid guarantee, () performance bond, () or payment bond obligations as an individual surety on solicitation/contract number _____. The lien is upon the real estate now owned by me/us described as follows:

(legal description, street address and other identifying description)

In witness hereof, I/we have hereunto affixed my/our hand(s) and seal(s) this ___ Day of _____ 20__.

Witness:

_____ (Seal)

_____ (Seal)

I, _____, a Notary Public in and for the (City) _____, (State) _____, do hereby certify that _____, a party or parties to a certain Agreement bearing the date ___ day of _____ 20__, and hereunto annexed, personally appeared before me, the said _____ being personally well known to me as the person(s) who executed said lien, and acknowledged the same to be his/her/their act and deed.

Given under my hand and seal this ___ day of ___ 20__.

Notary Public, State

My commission expires:

28.203-4 Substitution of assets.

An individual surety may request the Government to accept a substitute asset for that currently pledged by submitting a written request to the responsible contracting officer. The contracting officer may agree to the substitution of assets upon determining, after consultation with legal counsel, that the substitute assets to be pledged are adequate to protect the outstanding bond or guarantee obligations. If acceptable, the substitute assets shall be pledged as provided for in Subpart 28.2.

28.203-5 Release of lien.

(a) After consultation with legal counsel, the contracting officer shall release the security interest on the individual surety's assets using the Optional Form 90, Release of Lien on Real Property, or Optional

Form 91, Release of Personal Property from Escrow, or a similar release as soon as possible consistent with the conditions in paragraphs (a)(1) and (2) of this subsection. 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 Miller Act.* The security interest shall be maintained for the later of—
(i) 1 year following final payment;
(ii) Until completion of any warranty period (applicable only to performance bonds); or
(iii) Pending resolution of all claims filed against the payment bond during the 1-year period following final payment.

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

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

(b) Upon written request, 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 paragraphs (a)(1) through (3) of this subsection. In making this determination, the contracting officer will give consideration as to whether the unreleased portion of the lien is sufficient to cover the remaining contract obligations, including payments to subcontractors and other potential liabilities. The individual surety shall, as a condition of the partial release, furnish an affidavit agreeing that the release of such assets does not relieve the individual surety of its obligations under the bond(s).

28.203-6 Contract clause.

Insert the clause at 52.228-11 in solicitations and contracts which require the submission of bid guarantees, performance, or payment bonds.

28.203-7 Exclusion of individual sureties.

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

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

- (1) Failure to fulfill the obligations under any bond.
- (2) Failure to disclose all bond obligations.
- (3) Misrepresentation of the value of available assets or outstanding liabilities.
- (4) Any false or misleading statement, signature or representation on a bond or affidavit of individual suretyship.
- (5) Any other cause affecting responsibility as a surety of such serious and compelling nature as may be determined to warrant exclusion.

(c) An individual surety excluded pursuant to this subsection shall be included in the Excluded Parties List System. (See 9.404.)

(d) Contracting officers shall not accept the bonds of individual sureties whose names appear in the Excluded Parties List System (see 9.404) unless the acquiring agency's head or a designee states in writing the compelling reasons justifying acceptance.

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

28.204 Alternatives In lieu of corporate or individual sureties.

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

(b) Upon written request by any contractor securing a performance or payment bond by any of the types of security listed in 28.204-1 through 28.204-3, the contracting officer may release a portion of the security only when the conditions allowing the partial release of lien in 28.203-5(c) are met. The contractor shall, as a condition of the partial release, furnish an affidavit agreeing that the release of such security does not relieve the contractor of its obligations under the bond(s).

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

28.204-1 United States bonds or notes.

Any person required to furnish a bond to the Government has the option, instead of furnishing a surety or sureties on the bond, of depositing certain United States bonds or notes in an amount equal at their par value to the penal sum of the bond (the Act of February 24, 1919 (31 U.S.C. 9303) and Treasury Department Circular No. 154 dated July 1, 1978 (31 CFR Part 225)). In addition, a duly executed power of attorney and agreement authorizing the collection or sale of such United States bonds or notes in the event of default of the principal on the bond shall accompany the deposited bonds or notes. The contracting officer may—

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

(b) Deposit them with the Treasurer of the United States, a Federal Reserve Bank (or branch with requisite facilities), or other depository designated for that purpose by the Secretary of the Treasury, under procedures prescribed by the agency concerned and Treasury Department Circular No. 154 (exception: The contracting officer shall deposit all bonds and notes received in the District of Columbia with the Treasurer of the United States).

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

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

28.204-3 Irrevocable letter of credit (ILC).

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

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

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

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

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

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

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

(2) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or an ILC with an initial expiration date that is a minimum period of 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 the Miller Act, 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 Miller Act, 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 or higher shall issue or confirm the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.

(1) The offeror/contractor shall provide the contracting officer a credit rating from a recognized commercial rating service as specified in Office of Federal Procurement Policy Pamphlet No. 7 (see 28.204-3(h)) that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.

(2) If the contracting officer learns that a financial institution's rating has dropped below the required level, the contracting officer shall give the contractor 30 days to substitute an acceptable ILC or shall draw on the ILC using the sight draft in paragraph (g) of the clause at 52.228-14.

(h)(1) Additional information on credit rating services and investment grade ratings is contained within Office of Federal Procurement Policy Pamphlet No. 7, Use of Irrevocable Letters of Credit. This pamphlet may be obtained by calling the Office of Management and Budget's publications office at (202) 395-7332.

(2) A copy of the Uniform Customs and Practice (UCP) for Documentary Credits, 1993 Revision, International Chamber of Commerce Publication No. 500, is available from:

ICC Publishing, Inc.
156 Fifth Avenue
New York NY 10010

Telephone: (212) 206-1150
Telefax: (212) 633-6025
E-mail: iccpub@interport.net.

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.
