

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 19, 28, 32, 52, and 53**

[FAR Case 2017–003; [Docket No. FAR–2017–0003, Sequence No. 1]

RIN 9000–AN39

**Federal Acquisition Regulation:
Individual Sureties**

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 to change the kinds of assets that individual sureties must pledge as security for their individual surety bonds.

DATES: Interested parties should submit comments to the Regulatory Secretariat Division at one of the addresses shown below on or before April 13, 2020 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments in response to FAR Case 2017–003 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering “FAR Case 2017–003” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Comment Now” that corresponds with “FAR Case 2017–003.” Follow the instructions provided on the screen. Please include your name, company name (if any), and “FAR Case 2017–003” on your attached document.
- *Mail:* General Services Administration, Regulatory-Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite “FAR case 2017–003” in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 or zenaida.delgado@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite “FAR Case 2017–003”.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to require that a pledge of assets given by an individual surety consist only of eligible obligations. This FAR change will implement section 874 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114–92), codified at 31 U.S.C. 9310, Individual Sureties.

The revisions modify existing coverage regarding the use of individual sureties in support of a Government bonding requirement. FAR subpart 28.2 requires agencies to obtain adequate security for bonds when bonds are used with a contract. A corporate or individual surety is an acceptable form of security for a bond. Corporate sureties are vetted by the Department of the Treasury to ensure they are sufficiently capitalized and are listed on Department of the Treasury’s Listing of Approved Sureties (Treasury Department Circular 570). Individual sureties are not listed on Treasury Department Circular 570; currently contracting officers determine if an individual surety is acceptable.

This FAR rule revises the types of acceptable assets an individual surety may pledge and requires the Department of the Treasury, Bureau of the Fiscal Service to review those assets to ensure they meet established eligibility requirements.

Under 31 U.S.C. 9310, when Federal law permits acceptance of a surety bond from a surety not subject to 31 U.S.C. 9305 and 9306 (*i.e.*, an individual surety that is not a corporate surety), the individual surety must pledge assets that are eligible obligations. Eligible obligations are public debt obligations of the United States Government. The requirements of 31 U.S.C. 9310 are intended to strengthen the assets pledged by individual sureties, thereby mitigating risk to the Government.

II. Discussion and Analysis

This rule proposes to amend FAR part 28, and its associated clause at 52.228–

11, and adds a new provision at 52.228–XX. The changes contained in the proposed rule are as follows:

1. A new section title is added at FAR 28.203, Individual sureties.

2. Existing section 28.203 is redesignated as 28.203–1, and revised as described below.

3. FAR 28.203–1(a). The language requiring contracting officers to determine the acceptability of individuals proposed as sureties is revised, and moved to FAR 28.203–1(c). The process oriented language at FAR 28.203–1(c), while not specifically required by section 874 of the NDAA for FY 2016, is necessary for its implementation under the FAR, and aligns well with the Department of the Treasury guidance and instructions. In addition, language is added to require that assets pledged by an individual surety meet eligibility requirements established by the Department of the Treasury, Bureau of the Fiscal Service. The revised text refers to the Department of the Treasury list of acceptable assets, available at [https://www.treasurydirect.gov/instit/statreg/collateral/2018Final225/ListofAcceptableCollateral.pdf](https://www.treasurydirect.gov/instit/statreg/collateral/2018Final225>ListofAcceptableCollateral.pdf).

4. FAR 28.203–1(b). The paragraph is revised, and broken out into four subparagraphs.

- 28.203–1(b)(1). The three types of bonds are specifically cited within the text: Bid bond (Standard Form 24), performance bond (Standard Form 25), and payment bond (Standard Form 25A). Though this addition is not related to section 874 of the NDAA for FY 2016 requirements, stating the three types of bonds enables the reader to quickly see the three bond types without having to look elsewhere.

- 28.203–1(b)(2). The existing text referring to the unencumbered value of the asset exclusive of all outstanding pledges for other bond obligations, is changed as follows: “The net adjusted value of unencumbered assets is their market value minus the margin.” This change clarifies the intent and context of the valuation requirement. The phrase “market value minus the margin” is added to clarify that pledged assets are subject to a percentage reduction (“margin”) from the market value to account for a risk premium. The new text refers to the Department of the Treasury margin tables, which can be viewed by accessing an added hyperlink at www.treasurydirect.gov. In addition, the text in this section is clarified to state that the net adjusted value of the pledged assets, when combined, must equal or exceed the penal amount (*i.e.*, face value) of each bond. Though not specifically required

by section 874 of the NDAA, this change aligns with the Department of the Treasury guidance and instructions.

- 28.203–1(b)(3). The name of the Standard Form 28, Affidavit of Individual Surety, is added. This is an administrative change made to meet FAR drafting conventions.

- 28.203–1(b)(4). The phrase “or contractor” is added to clarify when bonds are submitted postaward. The phrase “net adjusted value” of the assets is added to clarify what is to equal or exceed the penal amount of the bond.

5. New FAR 28.203–1(c) is added to clarify that the pledge of assets by an individual surety shall be submitted to the contracting officer, who will then notify the Department of the Treasury of the existence 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. 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. This section also requires contracting officers to 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 the Department of the Treasury. The contracting officer will then notify both the offeror or contractor and the individual surety of this determination. These process steps are integral to effective implementation of section 874 requirements in the FAR.

6. New FAR 28.203–1(d) is added to require the contracting officer to request the Department of the Treasury operations support team set up the individual surety asset collateral account for each contract. The requirements for contracting officers to contact the Department of the Treasury about individual sureties are additional responsibilities for contracting officers; however, the Department of the Treasury officials will be providing collateral eligibility and valuation assessment.

7. Current FAR 28.203 paragraphs (e) and (f) are deleted; paragraphs (c) and (d) are redesignated (e) and (f) under the now redesignated FAR section 28.203–1. The now redesignated paragraph 28.203–1(e) changes the text from “competency review” to “Certificate of Competency.” The now redesignated paragraph 28.203–1(f) allows the contracting officer to permit the contractor to substitute an acceptable surety when Treasury could

not assess the asset eligibility and valuation within a reasonable time.

8. Current sections 28.203–1, 28.203–2 and 28.203–3 are deleted; sections 28.203–4 through 28.203–7 are redesignated 28.203–2 through 28.203–5.

9. FAR 28.203–2, Acceptability of Assets, is deleted as the acceptability of assets is governed under the Department of the Treasury regulations and instructions.

10. FAR 28.203–3, Acceptance of Real Property, is deleted as real property is no longer an acceptable form of collateral. As stated previously, this FAR change will implement section 874 of the NDAA for FY 2016 (Pub L. 114–82), which adds 31 U.S.C. 9310, Individual Sureties. 31 U.S.C. 9310 limits the security required for an individual surety bond to eligible obligations, which are described under 31 U.S.C. 9303. Eligible obligations consist of acceptable collateral or eligible collateral. Real Property is not an eligible obligation under 31 U.S.C. 9301.

11. The now redesignated FAR section 28.203–2 adds the phrase “including a revised SF 28” to clarify that the form must be used when substituting assets. It also adds the phrase “Following the requirements set forth in 28.203–1” to make it clear that any substitution of assets is subject to the same requirements as on the assets originally pledged.

12. The now redesignated FAR section 28.203–3 deletes the reference to the Optional Form 90, Release of Lien on Real Property, as real property is not considered an eligible obligation under 31 U.S.C. 9301. At paragraph (a)(1), cross-references are added for the convenience of the reader.

13. The now redesignated FAR section 28.203–4 added at paragraph (a) the prescription for the new provision at 52.228–XX, and modified at paragraph (b) the prescription for the existing clause at 52.228–11 to add the title of the clause.

14. At FAR 28.204(b), the word “lien” is deleted and replaced with “security” to clarify the meaning of the transaction.

15. A new FAR provision at 52.228–XX is created to distinguish instructions to offerors from instructions to a contractor, by relocating the “offeror” language from the existing FAR clause at 52.228–11. The provision addresses the offeror requirements for using an individual surety for a bid guarantee consistent with the text in the now designated FAR 28.203–1.

16. FAR clause 52.228–11 is modified to address contractor requirements for using an individual surety for a

performance or payment bond consistent with the text in the now designated 28.203–1.

17. Optional Form 90, Release of Lien on Real Property, is removed as real property is not considered an eligible obligation under 31 U.S.C. 9301. These changes are noted at FAR 28.106–1, the now designated 28.203–3, 53.228, and 53.300(a).

18. Conforming and minor editorial changes were made elsewhere. Cross-references are revised at FAR 19.602–1, 28.102–2(e), 28.204(b), and 32.202–4(c).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

DoD, GSA, and NASA do not intend to change the current policy on the use of bonds for the acquisition of commercial items, including COTS, found at FAR 28.103. FAR 28.103–1(a) states that “Generally, agencies shall not require performance and payment bonds for other than construction contracts. However, performance and payment bonds may be used as permitted in 28.103–2 and 28.103–3.”

DoD, GSA, and NASA do intend to apply the requirements of this rule to solicitations for contracts valued at or below the SAT. FAR 28.102–1(b) gives an example of when a bond could be required for an acquisition under the SAT. As noted in FAR 28.102–1(b), 40 U.S.C. 3132 requires the contracting officer select two or more payment protections for construction contracts greater than \$35,000, but not greater than \$150,000, one of the possible protections being a payment bond. Individual sureties may provide security for a payment bond in this situation. DoD, GSA, and NASA intend to determine that it is not in the best interest of the Government to waive the applicability of section 874 below the SAT, because the new requirement will create greater certainty of payment for subcontractors. Applying the rule below the SAT will continue the FAR uniformity in the type of assets allowed to be pledged, whether the acquisition is above or below the SAT.

IV. Expected Impact on the Public

DoD, GSA, and NASA have preliminarily concluded that the proposed rule is regulatory because, as required by law, new requirements are imposed on individual sureties seeking to provide bonds to Federal Government contractors. However, DoD, GSA, and NASA also believe there may be some burden reduction associated with this rule. Because the Government has been

unable to identify other than anecdotal data on the use of individual sureties, public input is sought before a final determination is made on whether the rule is regulatory and whether there is burden reduction.

An individual surety must pledge public debt obligations of the United States Government. The individual surety no longer will be allowed to pledge real estate or assets such as stocks and bonds, as is currently permitted by the FAR. At least one surety company specializing in Federal small business contracting cautioned about the impact of reducing the availability of individual sureties, stating that the “individual surety is a tool to groom contractors back into corporate surety credit . . . it is the only method to keep small businesses that have credit issues . . . in business.” Testimony of the Barbour Group before the House Judiciary Subcommittee on Courts, Commercial, and Administrative Law, March 5, 2012.

Information on the use of individual and corporate sureties by Federal contractors and subcontractors is currently not centrally collected, so the percentage of these entities availing themselves of individual sureties that would no longer be accepted under this new rule is unclear. However, there is reason to believe the impact is small, relative to the total amount of construction contract spending for which individual sureties could be used historically. Specifically, DoD, GSA, and NASA attempted to determine all of the awards that contained the FAR clause at 52.228–11, Pledges of Assets, with a total obligated amount of over \$35,000. This clause, which would be amended by this rulemaking, has historically allowed pledges of assets from individual sureties. Only information from DoD was available to determine which contracts contained this particular FAR clause. This was thought to be a representative, if conservative, sample, as DoD contracts account for 63 percent of all Federal agencies’ obligated dollars in FY 2017, and DoD has a higher proportion of construction contracts that would likely contain this requirement.

Based on FY 2017 data contained in the Electronic Document Access (EDA) system (the DoD official contract file system), 8,603 DoD contracts contained the relevant FAR clause and a total obligated amount of over \$35,000, with a total award magnitude of \$12.8 billion (total dollars obligated on the 8,603 contracts). These awards account for 14 percent of the total number of FY 2017 DoD construction contract awards (8,603 ÷ 60,317 (according to data in the

Federal Procurement Data System (FPDS))) and 66 percent of the total construction dollars obligated for FY 2017 by DoD (\$12.8B ÷ \$19.3B (according to data in FPDS)). These contracts were awarded to 318 unique other than small businesses (1,195 awards), and 1,672 unique small businesses (7,408 awards). However, the impact is even smaller considering that these contractors could be using corporate sureties, individual sureties, or pledging their own assets as acceptable forms of security. DoD, GSA, and NASA interviewed operational contracting officers at the largest procurement offices engaged in construction contracting—the Naval Facilities Engineering Command, and GSA’s Public Building Service. Based on their responses, DoD, GSA, and NASA estimate that less than 0.1 percent of contractors, mostly small businesses, are using individual sureties to meet the required bonding under contracts. Accordingly, DoD, GSA, and NASA estimate about 9 (8,603 * 0.1 percent) FY 2017 DoD contract awards accounting for 0.015 percent (9 ÷ 60,317) of the total number of FY 2017 DoD construction contract awards and 0.066 percent (\$12.8M ÷ \$19.3B) of the total construction dollars obligated for FY17 by DoD, might be associated with individual sureties. Using data in FPDS and applying the same percentages to the 59,351 of FY 2017 other than DoD construction contract awards, and the \$12 billion construction dollars obligated for FY17 by other than DoD, DoD, GSA, and NASA find that 9 (59,351 * 0.00015) construction contract awards and \$7.9 million construction dollars (\$12 B * 0.00066) obligated for FY 2017 by other than DoD might be associated with individual sureties. In summary, DOD, GSA, and NASA found that this proposed rule is likely to impact about 18 contract awards, and \$20.7 million obligated dollars.

To the extent that this proposed rule reduces the pool of individual sureties from which a small business contractor or subcontractor may obtain a bond, these entities have the option of seeking bond assistance through the Surety Bond Guarantee (SBG) Program operated by the U.S. Small Business Administration (SBA). Under the SBG Program, SBA guarantees the bid, performance or payment bonds issued by participating surety companies to small business contractors. The SBA guarantee covers a certain percentage of any loss that the surety may incur on the bond. The SBG Program is intended to assist small business contractors who are unable to obtain a bond on reasonable terms and conditions

without the SBA guarantee. The SBA’s guarantee, therefore, encourages the surety company to issue a bond that it would not otherwise provide for a small business. SBA may guarantee bonds for contracts that do not exceed \$6.5 million, and up to \$10 million if a Federal contracting officer certifies that such a guarantee is necessary (see 13 CFR part 115). Public input is being sought to help evaluate whether the reduction in business opportunities for providers of individual sureties is likely to be offset by an increase in opportunities for providers of corporate sureties.

In addition, there are aspects of the rule that could reduce burden. For example, the new requirements will create greater certainty of payment for subcontractors, who are a key intended benefactor of the law and proposed rule. While DoD, GSA, and NASA lack data to quantify this benefit, this certainty should eliminate due diligence steps that Federal subcontractors have ostensibly been forced to take to ensure they will indeed be protected by a surety bond in the event of a prime contractor’s default. As described in one law review article, this due diligence includes verifying with the designated financial institution that it is holding cash or cash equivalents in an escrow account in the name of the contracting agency for use in meeting the surety’s promises. See Edward G. Gallagher & Mark H. McCallum, *The Importance of Surety Bond Verification*, 39 Public Contract Law Journal 269 at 283 (Winter 2010).

It is also anticipated that the Federal Government may experience reduced burden under the new rule. Contracting officers will no longer have to research individual sureties and make case-by-case determinations of whether securities pledged by individual sureties are suitable and can instead refocus their attention on higher value acquisition planning and management activities that take better advantage of their training as acquisition specialists.

Rates of default on individual and corporate sureties are currently unknown, but all other aspects of a construction contractor being equal, it is assumed that corporate sureties provide greater cost avoidance in the case of default by prime contractors to both subcontractors and the Government. These costs could include financial losses on Federal projects, loss of experienced subcontractors and workers when they are not paid, delays in a project’s completion, litigation costs, and additional expenses related to contract administrative actions to secure resources needed to continue the

construction project and make up for schedule delays. More information is needed to quantify these costs and the potential mitigating impacts of this rule.

DoD, GSA, and NASA welcome public input to help more fully understand the impact of this regulation on affected parties. DoD, GSA, and NASA lack data on individual sureties, but believe based on interviews of contracting officials of major construction operations at the Naval Facilities Engineering Command, and GSA's Public Building Service, DoD, and GSA that individual sureties are used far less frequently than corporate sureties. In addition to input from any subject matter experts, DoD, GSA, and NASA invite input from affected parties, including the following:

1. For subcontractors and suppliers on Federal construction and other projects that require prime contractors to obtain sureties—

a. What positive or negative impacts do you anticipate the new rules will have on your work?

b. To what extent might SBA's SBG Program provide an alternative option to individual sureties?

c. Do you agree that subcontractors may see reduced burden because they will not need to take the same level of precaution to protect against fraud and abuse by individual sureties, when individual sureties are used? If not, why not?

2. For individual sureties—

a. What additional burden may be created for individual sureties who decide to convert their assets into the kind that qualify under the new legislation?

b. What would be the impact, in terms of time, effort, and cost, for individual sureties to convert their assets into the kind that qualify under the new legislation?

3. For prime contractors that currently rely on individual sureties—

a. Do you anticipate greater difficulty obtaining necessary surety bonds? If so, why?

b. Have you experienced challenges with individual sureties? If so, what was the nature of the challenges?

c. Do you expect fees charged by individual sureties to be impacted under the new rule?

d. To what extent might SBA's SBG Program provide an alternative option to individual sureties?

DoD, GSA, and NASA have calculated the cost of regulatory familiarization with the new process, based on FPDS data for FY 2017, estimating that for the first year 5 entities will be subject to the new requirements, 1 hour per entity; and due to turnover and new entrants,

20 percent of that amount in subsequent years. The estimated public cost for familiarization, calculated in 2016 dollars at a 7 percent discount rate in perpetuity is as follows:

Annualized—\$40.75

Present Value—\$582.08

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is a significant regulatory action and therefore, this rule was subject to the review of the Office of Information and Regulatory Affairs under section 6(b) of E.O. 12866. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is considered an E.O. 13771 regulatory action. Details on the expected impact on the public can be found in Section IV of this preamble.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

The rule proposes to amend the Federal Acquisition Regulation (FAR) to change the kinds of assets that individual sureties must pledge as security for their individual surety bonds.

The objective of the FAR rule is to implement section 874 of the National Defense Authorization Act (NDAA) for Fiscal Year 2016 (FY16)(Pub. L. 114-92), which adds 31 U.S.C. 9310, Individual sureties, which limits the security for an individual surety bond to eligible obligations, *i.e.*, cash and/or Government obligations. This section was intended to strengthen coverage for individual sureties, thereby mitigating risk to the Government. The legal basis for this rule is 40 U.S.C. 121(c), 10 U.S.C. chapter 137, and 51 U.S.C. 20113.

The proposed rule applies to all offerors and contractors who wish to use an individual surety as security for bonds required under a solicitation/contract for supplies or services (including construction). The number of solicitations and contracts requiring the submission of bid guarantees,

performance, or payment bonds, correlate roughly to the number of contract awards containing FAR clause 52.228-11, Pledge of Assets. Based on FY 2017 data contained in EDA, 8,603 DoD contract awards, containing FAR clause 52.228-11 with an obligated amount of over \$35,000, were made to 1,990 unique vendors; of these 1,672 were small business entities. These contractors could be using corporate sureties under 28.202, individual sureties under 28.203, or pledging the contractor's own assets under 28.204; this FAR case only covers individual sureties under 28.203. Therefore, based on contracting officers' experience in the field DoD, GSA, and NASA estimate that less than 0.1 percent of contractors are using individual sureties to meet the required bonding under contracts.

The proposed rule does not include additional reporting or record keeping requirements. Although the proposed rule creates a new provision to distinguish instructions to offerors from instructions to a contractor by relocating the "offeror" language from the existing FAR clause at 52.228-11, Pledge of Assets, the net effect of projected reporting and recordkeeping is unchanged. The use of Standard Form 28, Affidavit of Individual Surety, an existing reporting requirement under 52.228-11, is covered under the Office of Management and Budget (OMB) Control No. 9000-0001. The SF 28 is revised as a result of this rule. However, this will have a negligible impact on offerors, contractors, and respondents.

The effect on small business is that individual sureties will no longer be able to pledge real property, corporate stocks, corporate bonds, or irrevocable letters of credit. DoD, GSA, and NASA anticipate that some individual sureties may not want to transform their assets into the kind that qualify under the new legislation, and so there will be fewer individual sureties available to meet the needs of small business offerors/contractors. This may mean that some small businesses that have been using individual sureties will have their costs change, as they go to a different individual surety, or to a corporate surety.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no available alternatives to the proposed rule to accomplish the desired objective of the statute. DoD, GSA, and NASA do not expect this proposed rule to have a significant economic impact on a substantial number of small entities because this only applies to (1) offerors and contractors who are using an individual surety as security for bonds required under a solicitation/contract for supplies or services (including construction), and (2) individual sureties, a small number of whom may not want to transform their assets into the kind that qualify under the new legislation.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA and NASA invite comments from small business concerns and other

interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2017-003) in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) does apply; however, the proposed changes to the FAR do not impose additional information collection requirements. This rule proposes to modify the Standard Form (SF) 28, which is used by all executive agencies to obtain information from individuals wishing to serve as sureties to Government bonds. However, the modification merely updates the language in the form to be consistent with the changes to the FAR text; it will have no impact on offerors or contractors. The modification of the SF 28 does not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000-0001, Standard Form 28, Affidavit of Individual Surety.

List of Subjects in 48 CFR Parts 19, 28, 32, 52, and 53

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 19, 28, 32, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 19, 28, 32, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 19—SMALL BUSINESS PROGRAMS

19.602-1 [Amended]

■ 2. Amend section 19.602-1 by removing from paragraph (a) “and 28.203(c)” and adding “and 28.203-1(e)” in its place.

PART 28—BONDS AND INSURANCE

28.102-2 [Amended]

■ 3. Amend section 28.102-2 by removing from paragraph (e) “of 28.203-5(c)” and adding “of 28.203-3(c)” in its place.

■ 4. Amend section 28.106-1 by removing paragraph (o); redesignating paragraph (p) as paragraph (o); and

revising the new redesignated paragraph (o) to read as follows.

28.106-1 Bonds and bond related forms.

* * * * *

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

- 5. Amend section 28.202 by—
- a. Revising paragraph (a)(1);
- b. Revising the first sentence of paragraph (a)(2);
- c. Removing from paragraph (a)(3) “Department of the Treasury regulations” and adding “Department of the Treasury (Treasury) regulations” in its place;
- d. Removing from paragraph (a)(4) “Standard Form 273”, “Standard Form 274” and “Standard Form 275” and adding “Standard Form (SF) 273”, “SF 274”, and “SF 275” in their places, respectively
- e. Revising the first sentence of paragraph (c); and
- f. Revising paragraph (d) to read as follows:

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.

* * *

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(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. * * *

(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 Pennys Drive, Building E, Landover, MD 20785. Or via the internet at <https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570.htm>.

■ 6. Revise the section 28.203 to read as follows:

28.203 Individual sureties.

28.203-1 Acceptability of individual sureties.

(a) An individual surety is acceptable for all types of bonds except position schedule bonds.

Assets pledged by an individual surety shall meet the eligibility requirements of Treasury’s Bureau of the Fiscal Service. Per 31 U.S.C. 9310, individual sureties must pledge eligible obligations, which Treasury refers to as acceptable collateral or eligible collateral. A list of acceptable assets, entitled “Acceptable Collateral for 31 CFR PART 225,” is available at [https://www.treasurydirect.gov/instit/statreg/collateral/2018Final225/ListofAcceptableCollateral.pdf](https://www.treasurydirect.gov/instit/statreg/collateral/2018Final225>ListofAcceptableCollateral.pdf).

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

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

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

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

(c) Using the information from the SF 28 submitted by the offeror or contractor, the contracting officer shall notify the Treasury’s collateral operations support team by email at BMT@fiscal.treasury.gov or by phone at 888-568-7343, of the individual surety, the assets to be pledged, and the amount necessary to cover the individual surety bond, i.e., the required amount to be collateralized. 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. 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). The contracting officer shall determine whether the individual surety bond is acceptable as to the amount necessary to

cover the individual surety bond based on the asset eligibility and valuation assessment from Treasury. The contracting officer shall notify both the offeror or contractor and the individual surety of this determination.

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

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

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

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

28.203-2 Substitution of assets.

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

28.203-3 Release of security interest.

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

supplier that the claim is correct along with a notarized authorization of the release by the surety stating that it approves of such release.

(1) *Contracts subject to the Bonds statute.* See section 1.110 and paragraph (a) of section 28.102-1. The security interest shall be maintained for the later of (i) one 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 paragraph (b)(1) of section 28.102-1. The security interest shall be maintained for the full contract performance period plus one year.

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

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

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

28.203-4 Solicitation provision and contract clause.

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

(b) Insert the clause at 52.228-11, Individual Surety—Pledge of Assets, in

solicitations and contracts which require the submission of performance, or payment bonds.

28.203-5 Exclusion of individual sureties.

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

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

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

(2) Failure to disclose all bond obligations.

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

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

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

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

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

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

28.204 [Amended]

7. Amend section 28.404 by removing from paragraph (b) "lien in 28.203-5(c)" and adding "security in 28.203-3(c)" in its place.

28.204-1 [Amended]

■ 8. Amend section 28.204-1 by removing from the first sentence of the text "dated July 1, 1978".

PART 32—CONTRACT FINANCING

32.202-4 [Amended]

■ 9. Amend section 32.202-4 by removing from paragraph (c) "28.203-2, 28.203-3, and" and adding "28.203 and" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Add section 52.228–XX to read as follows:

52.228–XX Individual Surety—Pledge of Assets (Bid Guarantee).

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

Individual Surety—Pledge of Assets (Bid Guarantee) (Date)

(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 time frame 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)

■ 11. Revise section 52.228–11 and section heading to read as follows:

52.228–11 Individual Surety—Pledges of Assets.

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

Individual Surety—Pledges of Assets (Date)

(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 one 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 one 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 one 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 one 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 time frame established by the Contracting Officer.

(End of clause)

PART 53—FORMS

53.228 [Amended]

■ 12. Amend section 53.228 by—

■ a. Removing from paragraph (e) “(Rev. 6/2003)” and “28.203(b).” and adding ““(Rev. Date)” and “28.203–1(b)(3).)” in their places, respectively;

■ b. Removing paragraph (o);

■ c. Redesignating paragraph (p) as paragraph (o); and

■ d. Removing from the newly redesignated paragraph (o) “(See 28.106–1(p) and 28.203–5(a).)” and adding “(See 28.106–1(o) and 28.203–3(a).)” in its place.

53.300 [Amended]

■ 13. Amend section 53.300 by removing from the table 53–1 in paragraph (a) “OF 90 Release of Lien on Real Property.”

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