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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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April 26, 1993

VIA HAND DELIVERY

Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: *General Docket No. 90-314, ET Docket No. 92-100* ✓
Notice of Ex Parte Presentation

Dear Ms. Searcy:

Today, Pendleton C. Waugh of Express Communications, Inc. ("Express") and the undersigned met with Robert E. Branson, Senior Advisor to Commissioner Andrew C. Barrett, to discuss Express' proposal for the licensing of Personal Communications Service system

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THE LOTTERY VS. AUCTION CONUNDRUM: A SIMPLE ANSWER FOR PCS LICENSING

As the Federal Communications Commission moves closer to the adoption of rules to govern Personal Communications Services ("PCS") licensing, the debate over the use of spectrum auctions has intensified. As Chairman Edward J. Markey made clear in his opening statement at the April 22, 1993 hearing of the House of Representatives Subcommittee on Telecommunications and Finance, the goals in structuring a licensing system must be to provide the Administration with much-needed revenue and to end the abuses that have tarnished the current lottery system, while still preserving an opportunity for innovative entrepreneurs to participate in the wireless communications industry. Express Communications, Inc. ("Express") has a suggestion as to how those oft-conflicting goals can be achieved.

A political consensus is developing that any auction system will have to be crafted to permit payments out of revenues so as not to foreclose small entrepreneurs from participation in the PCS industry. However, permitting entities to bid at auction with future revenues raises two fundamental problems.

First, how will the government determine which bidders are financially qualified to

construction,^{2/} (2) ban system sales until construction is well under way,^{3/} and most importantly (3) require applicants to post a performance bond. To raise revenues, require PCS licensees to pay a fixed percentage of gross revenues as a spectrum user fee, with the precise percentage to be determined by the FCC.

The primary benefits of Express' proposal are three.

1. The requirement of rapid system construction and a ban on sales until construction is substantially complete deters speculation, assures prompt service to the public, and guarantees that the government earns user fees quickly.
2. While the lottery system will be open to all, the requirement of a performance bond forces every applicant to demonstrate its *bona fides*. Express and others have previously proposed a variety of mechanisms for reforming the lottery system to deter speculation. The flaw in those proposals, however, is that they have required the FCC to make subjective judgements regarding the qualifications of each applicant. For example, many have proposed that applicants submit a business plan. Yet, anyone can prepare a business plan; what counts is whether the plan is realistic and can be implemented. Those will be difficult judgements for the FCC to make. The performance bond requirement effectively shifts that task to sureties, who will have a tremendous financial incentive to make certain that applicants are qualified and can develop the PCS systems they apply for. Sureties will either scrutinize the business and technical qualifications of their applicants, or will pay a heavy price. Speculators will be unable to meet the performance bond requirement, and will fall by the wayside. While the use of performance bonds may seem complex, there are extensive regulations in Part 28 of the Federal Acquisition Regulations System, 48 C.F.R. §28.000 *et seq.* that address virtually every issue that can arise regarding the use of performance bonds. A copy of the relevant portions of Part 28 is attached for convenience.
3. The government will realize substantial revenue from the user fee. Yet, if it ever turns out that the success of PCS in the marketplace is jeopardized because the FCC initially set the user fee too high, the fee can be adjusted in an equitable manner. While Express does not suggest that fees should be adjusted to accommodate the poor performance of any one company, an adjustment applicable to all similarly situated licensees would be appropriate if the FCC misjudged either the cost of providing PCS or marketplace demand in establishing its initial fees. Since the fees will be set by the FCC in the first instance, and not as a result of bidding, losing applicants would have no grounds for objection should the fee structure later be adjusted.

^{2/} Specifically, Express suggests that a PCS licensee be required to serve 20% of the area or population of its service area after one year, 50% after two years and 90% after three years.

^{3/} No system sale should be permitted until 90% of the area or population of the service area is served.

Subpart 27.5—[Reserved]**Subpart 27.6—Foreign License and Technical Assistance Agreements****27.601 General.**

Agencies shall provide all necessary rules and regulations as are required for the proper application of the laws and policies of the U.S. Government regarding—

(a) Elimination in agreements between domestic concerns and foreign governments or foreign concerns of charges for the use of patents in which the U.S. Government has a royalty-free license or of charges in agreements for the use of data that the U.S. Government has a right to use and disclose to others, that is in the public domain, or that was acquired by the U.S. Government with the unrestricted right to use, duplicate, or disclose and to have or permit others to do so;

(b) Foreign license and technical assistance agreements between the U.S. Government and United States domestic concerns;

(c) Guidance on negotiating contract prices and terms concerning patents and data, including royalties, in contracts between the U.S. Government and a foreign government or foreign concern; and

(d) Regulations and guidance on controls on the exportation of data relating to certain designated items, such as arms or munitions of war, and guidance on reviews of agreements involving such data (see 22 CFR part 124).

PART 28—BONDS AND INSURANCE**Sec.**

28.000 Scope of part.

28.001 Definitions.

Subpart 28.1—Bonds

28.100 Scope of subpart.

28.101 Bid guarantee.

28.101-1 Policy on use.

28.101-2 Amount required.

28.101-3 Contract clause.

28.101-4 Noncompliance with bid guarantee requirements.

28.102 Performance and payment bonds for construction contracts.

28.102-1 General.

Sec.

28.102-2 Amount required.

28.102-3 Solicitation requirements.

28.103 Performance and payment bonds for other than construction contracts.

28.103-1 General.

28.103-2 Performance bonds.

28.103-3 Payment bonds.

28.104 Annual performance bonds.

28.105 Other types of bonds.

28.105-1 Advance payment bonds.

28.105-2 Patent infringement bonds.

28.106 Administration.

28.106-1 Bonds and bond related forms.

28.106-2 Substitution of surety bonds.

28.106-3 Additional bond.

28.106-4 Contract clause.

28.106-5 Consent of surety.

28.106-6 Furnishing information.

28.106-7 Withholding contract payments.

Subpart 28.2—Sureties

28.200 Scope of subpart.

28.201 Requirements for sureties.

28.202 Acceptability of corporate sureties.

28.203 Acceptability of individual sureties.

28.203-1 Security interests by an individual surety.

28.203-2 Acceptability of assets.

28.203-3 Acceptance of real property.

28.203-4 Substitution of assets.

28.203-5 Release of lien.

28.203-6 Contract clause.

28.203-7 Exclusion of individual sureties.

28.204 Options in lieu of sureties.

28.204-1 United States bonds or notes.

28.204-2 Certified or cashiers checks, bank drafts, money orders, or currency.

Subpart 28.3—Insurance

28.301 Policy.

28.302 Notice of cancellation or change.

28.303 Insurance against loss of or damage to Government property.

28.304 Risk-pooling arrangements.

28.305 Overseas workers' compensation and war-hazard insurance.

28.306 Insurance under fixed-price contracts.

28.307 Insurance under cost-reimbursement contracts.

28.307-1 Group insurance plans.

28.307-2 Liability.

28.308 Self-insurance.

28.309 Contract clauses for workers' compensation insurance.

28.310 Contract clause for work on a Government installation.

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

28.311-1 Solicitation provision.

28.311-2 Contract clause.

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28.001

Sec.

28.311-3 Agency solicitation provisions and contract clauses.

28.312 Contract clause for insurance of leased motor vehicles.

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

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42286, Sept. 19, 1983, unless otherwise noted.

28.000 Scope of part.

This part prescribes requirements for obtaining financial protection against damages under sealed bid and negotiated contracts. It covers bid guarantees, bonds, sureties, and insurance. The terms *bid* and *bidder* include *proposal* and *offerors*.

[48 FR 42286, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

28.001 Definitions.

Attorney-in-fact, as used in this part, means an agent, independent agent, underwriter, or any other company or individual holding a power of attorney granted by a surety (see also *power of attorney*).

Bid guarantee means a form of security assuring that the bidder (a) will not withdraw a bid within the period specified for acceptance and (b) will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time is allowed, after receipt of the specified forms.

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

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

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

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

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

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

Insurance, as used in this part, means a contract which provides that for a stipulated consideration, one party undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event.

Penal sum or penal amount means the amount of money specified in a bond (or a percentage of the bid price

latter may sustain under a bond which it has issued.

Surety means an individual or corporation legally liable for the debt, default, or failure of a principal to satisfy a contractual obligation. The types of sureties referred to are as follows:

(a) An individual surety is one person, as distinguished from a business entity, who is liable for the entire penal amount of the bond.

(b) A corporate surety is licensed under various insurance laws and, under its charter, has legal power to act as surety for others.

(c) A cosurety is one of two or more sureties that are jointly liable for the penal sum of the bond. A limit of liability for each surety may be stated.

Subpart 28.1—Bonds

28.100 Scope of subpart.

This subpart prescribes requirements and procedures for the use of bonds and all types of bid guarantees.

28.101 Bid guarantees.

28.101-1 Policy on use.

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

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

(c) The chief of the contracting office may waive the requirement to obtain a bid guarantee when a performance bond or a performance and payment bond is required if it is determined that a bid guarantee is not in the best interest of the Government for a specific acquisition (e.g., overseas construction, emergency acquisitions).

Class waivers may be authorized by the agency head or designee.

[48 FR 42286, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986; 52 FR 19803, May 27, 1987; 52 FR 30076, Aug. 12, 1987; 54 FR 34755, Aug. 21, 1989]

28.101-2 Amount required.

The contracting officer shall determine a bid guarantee amount that is adequate to protect the Government from loss should the successful bidder fail to execute further contractual documents and bonds as required. The bid guarantee amount shall be at least 20 percent of the bid price but shall not exceed \$3 million. When the penal sum is expressed as a percentage, a maximum dollar limitation may be stated.

28.101-3 Contract clause.

(a) When a bid guarantee is required, the solicitation shall contain a statement to that effect, and provide sufficient details for bidders to determine the amount of the bid guarantee.

(b) The contracting officer shall insert the clause at 52.228-1, Bid Guarantee, in solicitations and contracts that contain a requirement for a bid guarantee. A clause substantially the same as this may be used for negotiated contracts. This clause may be appropriately modified for use in connection with construction solicitations and contracts when the agency has specified that only separate bid bonds are acceptable in accordance with 28.101-1(b).

[48 FR 42286, Sept. 19, 1983, as amended at 52 FR 19803, May 27, 1987]

28.101-4 Noncompliance with bid guarantee requirements.

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

(b) In negotiation, noncompliance with a solicitation requirement for a bid guarantee requires rejection of an initial proposal as unacceptable, if a determination is made to award the contract based on initial proposals

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without discussion, except in the situations described in paragraph (c) of this subsection when noncompliance shall be waived. (See 15.610(a) for conditions regarding making awards based on initial proposals.) If the conditions for awarding based on initial proposals are not met, deficiencies in bid guarantees submitted by offerors determined to be in the competitive range shall be addressed during discussions and the offeror shall be given an opportunity to correct the deficiency.

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

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

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

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

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

(5) A bid guarantee becomes inadequate as a result of the correction of a mistake under 14.406 (but only if the bidder will increase the bid guarantee to the level required for the corrected bid);

(6) A telegraphic offer modification is received without corresponding modification of the bid guarantee, if the modification expressly refers to the previous offer and the offeror corrects any deficiency in bid guarantee;

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

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

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

[54 FR 48985, Nov. 28, 1989]

28.102 Performance and payment bonds for construction contracts.

28.102-1 General.

(a) The Miller Act (40 U.S.C. 270a-270f) requires performance and payment bonds for any construction contract exceeding \$25,000, except that this requirement may be waived (1) by the contracting officer for as much of the work as is to be performed in a foreign country upon finding that it is impracticable for the contractor to furnish such bond, or (2) as otherwise authorized by the Miller Act or other law.

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

28.102-2 Amount required.

(a) *Performance bonds.* (1) The penal amount of performance bonds shall be 100 percent of the original contract price, unless the contracting officer determines that a lesser amount would be adequate for the protection of the Government.

(2) The Government may require additional performance bond protection when a contract price is increased. The increase in protection shall generally equal 100 percent of the increase in contract price. The Government may secure additional protection by directing the contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(b) *Payment bonds.* (1) The penal amount of payment bonds shall equal—

(i) Fifty percent of the contract price if the contract price is not more than \$1 million;

28.102-3

48 CFR Ch. 1 (10-1-92 Edition)

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(ii) Forty percent of the contract price if the contract price is more than \$1 million but not more than \$5 million; or

(iii) Two and one half million if the contract price is more than \$5 million.

(2) If the original contract price is \$5

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

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

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28.106-3

amount adequate to protect suppliers of labor and material.

28.104 Annual performance bonds.

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

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

28.105 Other types of bonds.

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

28.105-1 Advance payment bonds.

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

28.105-2 Patent infringement bonds.

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

(1) A performance bond is not furnished; and

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

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

28.106 Administration.

28.106-1 Bonds and bond related forms.

The following Standard Forms (SF's) and Optional Forms (OF's) shown in 53.301 and 53.302 shall be used, except in foreign countries, when a bid bond, performance or payment bond, or an individual surety is required. The bond forms shall be used as indicated in the instruction portion of each form.

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

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

(c) SF 25-A, Payment Bond (see 28.103-3 and 28.106-3(b)).

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

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

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

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

(h) SF 273, Reinsurance Agreement for a Miller Act Performance Bond (see 28.202(a)(4)).

(i) SF 274, Reinsurance Agreement for a Miller Act Payment Bond (see 28.202(a)(4)).

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

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

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

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

(n) OF 90, Release of Lien on Real Property (see 28.203-5).

(o) OF 91, Release of Personal Property from Escrow (see 28.203-5).

[48 FR 42286, Sept. 19, 1983, as amended at 54 FR 48986, Nov. 28, 1989]

28.106-2 Substitution of surety bonds.

(a) A new surety bond covering all or part of the obligations on a bond previously approved may be substituted for the original bond if approved by the head of the contracting activity.

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

28.106-3 Additional bond.

(a) When additional bond coverage is required and is furnished in whole or in part by the original surety or sureties, agencies shall use Standard Form 1415, Consent of Surety and Increase of Penalty. Standard Form 1415 is authorized for local reproduction, and a copy of the form is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(b) When additional coverage is furnished in whole or in part by a new surety, agencies shall use Standard Form 25, Performance Bond or Standard Form 25-A, Payment Bond.

[48 FR 42286, Sept. 19, 1983, as amended at 53 FR 43391, Oct. 26, 1988]

28.106-4 Contract clause.

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

28.106-5 Consent of surety.

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

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

(2) No additional bond is required and—

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

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

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

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

28.106-6 Furnishing information.

(a) The surety on the bond, upon its written request, may be furnished information on the progress of the work, payments, and the estimated percentage of completion, concerning the contract for which the bond was furnished.

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

(c) When a payment bond has been provided for a contract, the head of the agency or designee shall furnish a certified copy of the bond and the contract for which it was given to any person who makes a request therefor and who furnishes an affidavit that the requestor has supplied labor or materials for such work and payment therefor has not been made or that the requestor is being sued on such bond. The person who makes the request shall be required to pay such costs of preparation as determined by the head of the agency or designee to be reasonable and appropriate (see 40 U.S.C. 270(c)).

[48 FR 42286, Sept. 19, 1983, as amended at 50 FR 26903, June 28, 1985]

28.106-7 Withholding contract payments.

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

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

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

Subpart 28.2—Sureties

28.200 Scope of subpart.

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

28.201 Requirements for sureties.

(a) Agencies shall obtain adequate security for bonds (including coinsurance and reinsurance agreements) required or used with a contract for supplies or services (including construc-

Federal Acquisition Regulation

28.203

tion). 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 security permitted by this subpart, unless prohibited by law or regulation.

[48 FR 42286, Sept. 19, 1983, as amended at 55 FR 25530, June 21, 1990]

28.202 Acceptability of corporate sureties.

(a)(1) Corporate sureties offered for bonds furnished with contracts performed in the United States, its possessions, or Puerto Rico must appear on the list contained in the Department of the 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, 401 14th St., SW., 2nd Floor—West Wing, Washington, DC 20227.

[48 FR 42286, Sept. 19, 1983, as amended at 54 FR 48986, Nov. 28, 1989]

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.

[54 FR 48986, Nov. 28, 1989]

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 by the contracting officer, after obtaining the concurrence of legal counsel, 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

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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.

[54 FR 48986, Nov. 28, 1989]

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 NASDQ Exchanges will not be accepted. Assistance in evaluating the acceptability of securities may be obtained from the Securities and Exchange Commission, Division of Enforcement, 450 Fifth Street NW., Washington, DC 20549.

(4) Real property owned in fee simple by the surety without any form of concurrent ownership, except as provided in subdivision (c)(3)(iii) of this subsection, and located within the 50 United States, its territories, or possessions. 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, its territories, or possessions.

(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).

[54 FR 48987, Nov. 28, 1989]

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) Evidence of title in the form of a certificate of title prepared by a title insurance company approved by the United States Department of Justice. This list entitled List of Approved Attorneys, Abstracters, and Title Companies is available from the Title Unit, Land Acquisition Section, Land and Natural Resource Division, Department of Justice, Washington, DC 20530. 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;

(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 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 ---- 19--.

WITNESS:

(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 ---- 19--, 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 ---- 19--.

NOTARY PUBLIC, STATE

My Commission expires:

[54 FR 48987, Nov. 28, 1989]

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Federal Acquisition Regulation

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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.

[54 FR 48988, Nov. 28, 1989]

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 subparagraphs (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 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 subparagraphs (a) (1) and (2) 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).

[54 FR 48988, Nov. 28, 1989]

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.

[54 FR 48988, Nov. 28, 1989]

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 on the list entitled Parties Excluded from Procurement Programs. (See 9.404.)

(d) Contracting officers shall not accept the bonds of individual sureties whose names appear on the list entitled Parties Excluded from Procurement Programs (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.

[54 FR 48986, Nov. 28, 1989]

28.204 Options in lieu of sureties.

The contractor may deposit any of the types of security listed in this section instead of furnishing corporate or individual sureties on performance and payment bonds. When any of those types of security are deposited, a statement shall be incorporated in the bond form pledging the security. 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.

[48 FR 42286, Sept. 19, 1983. Redesignated at 54 FR 48986, Nov. 28, 1989]

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).

[48 FR 42286, Sept. 19, 1983. Redesignated and amended at 54 FR 48986, 48989, Nov. 28, 1989]

28.204-2 Certified or cashiers 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.

[48 FR 42286, Sept. 19, 1983. Redesignated at 54 FR 48986, Nov. 28, 1989]

Subpart 28.3—Insurance

28.301 Policy.

Contractors shall be required to carry insurance under the following circumstances:

(a) (1) The Government requires any contractor subject to Cost Accounting Standard (CAS) 416 (4 CFR part 416) to obtain insurance, by purchase or self-coverage, for the perils to which the contractor is exposed, except when (i) the Government, by providing in the contract in accordance with law, agrees to indemnify the contractor under specified circumstances or (ii) the contract specifically relieves the

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