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**Parent topic:** Federal Acquisition Regulation

## **28.000 Scope of part.**

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

## **28.001 Definitions.**

As used in this part-

*Attorney-in-fact* means an agent, independent agent, underwriter, or any other company or individual holding a *power of attorney* granted by a *surety* (see also "*power of attorney*" at 2.101).

*Bid* means any response to a *solicitation*, including a proposal under a negotiated *acquisition*. See the definition of "*offer*" at 2.101.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **28.100 Scope of subpart.**

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

### **28.101 Bid guarantees.**

#### **28.101-1 Policy on use.**

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

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

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

### **28.101-2 Solicitation provision or contract clause.**

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

- (1) To set a period of time that is other than 10 days for the return of executed *bonds*;
- (2) For use in connection with *construction solicitations* when the agency has specified that only separate *bid bonds* are acceptable in accordance with [28.101-1\(b\)](#);
- (3) For use in *solicitations* for negotiated contracts; or
- (4) For use in service contracts containing *options* for extended performance.

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

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

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

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

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

(d) The *contracting officer shall*-

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

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

(e)

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

(i) Name of person contacted.

(ii) Date and time of contact.

(iii) Response of the *surety*.

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

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

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

#### **28.101-4 Noncompliance with bid guarantee requirements.**

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

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

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

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

- (2) The amount of the *bid guarantee* submitted is less than required, but is equal to or greater than the difference between the *offer price* and the next higher acceptable *offer*;
- (3) The amount of the *bid guarantee* submitted, although less than that required by the *solicitation* for the maximum quantity offered, is sufficient for a quantity for which the *offeror* is otherwise eligible for award. Any award to the *offeror shall* not exceed the quantity covered by the *bid guarantee*;
- (4) The *bid guarantee* is received late, and late receipt is waived under 14.304;
- (5) A *bid guarantee* becomes inadequate as a result of the correction of a mistake under 14.407 (but only if the *bidder* will increase the *bid guarantee* to the level required for the corrected *bid*);
- (6) An otherwise acceptable *bid bond* was submitted with a signed *offer*, but the *bid bond* was not signed by the *offeror*;
- (7) An otherwise acceptable *bid bond* is erroneously dated or bears no date at all; or
- (8) A *bid bond* does not list the *United States* as obligee, but correctly identifies the *offeror*, the *solicitation* number, and the name and location of the project involved, so long as it is acceptable in all other respects.

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

### **28.102-1 General.**

- (a) 40 U.S.C. chapter 31, subchapter III, *Bonds* (formerly known as the Miller Act), requires performance and payment *bonds* for any *construction* contract exceeding \$150,000, except that this requirement *may* be waived-
- (1) By the *contracting officer* for as much of the work as is to be performed in a foreign country upon finding that it is impracticable for the contractor to furnish such *bond*; or
  - (2) As otherwise authorized by the *Bonds* statute or other law.
- (b)
- (1) Pursuant to 40 U.S.C. 3132, for *construction* contracts greater than \$35,000, but not greater than \$150,000, the *contracting officer shall* select two or more of the following payment protections, giving particular consideration to inclusion of an *irrevocable letter of credit* as one of the selected alternatives:
    - (i) A payment *bond*.
    - (ii) An *irrevocable letter of credit* (ILC).
    - (iii) A *tripartite escrow agreement*. The prime contractor establishes an escrow account in a federally insured financial institution and enters into a tripartite escrow agreement with the financial institution, as escrow agent, and all of the suppliers of labor and material. The escrow

agreement *shall* establish the terms of payment under the contract and of resolution of disputes among the parties. The Government makes payments to the contractor's escrow account, and the escrow agent distributes the payments in accordance with the agreement, or triggers the disputes resolution procedures if required.

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

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

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

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

### **28.102-2 Amount required.**

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

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

(b) Contracts exceeding \$150,000-

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

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

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

(2) *Payment bonds.*

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

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

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

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

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



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

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

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

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

(2) Obtain an additional *bond*; or

(3) Furnish additional alternative payment protection.

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

### **28.102-3 Contract clauses.**

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

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

### **28.103 Performance and payment bonds for other than construction contracts.**

#### **28.103-1 General.**

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

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

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

#### **28.103-2 Performance bonds.**

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

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

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

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

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

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

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

### **28.103-3 Payment bonds.**

(a) A payment *bond* is required only when a performance *bond* is required, and if the use of payment *bond* is in the Government's interest.

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

### **28.103-4 Contract clause.**

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

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

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

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

## **28.105 Other types of bonds.**

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

### **28.105-1 Advance payment bonds.**

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

### **28.105-2 Patent infringement bonds.**

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

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

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

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

## **28.106 Administration.**

### **28.106-1 Bonds and bond-related forms.**

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

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

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

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

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

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

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

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

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

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

- (j) SF 275, *Reinsurance Agreement in Favor of the United States* (see 28.202(a)(4)).
- (k) SF 1414, *Consent of Surety* (see 28.106-5).
- (l) SF 1415, *Consent of Surety and Increase of Penalty* (see 28.106-3).
- (m) SF 1416, *Payment Bond for Other Than Construction Contracts* (see 28.103-3 and 28.106-3(b)).
- (n) SF 1418, *Performance Bond for Other Than Construction Contracts* (see 28.103-2 and 28.106-3(b)).
- (o) OF 91, *Release of Personal Property from Escrow* (see 28.203-3).

### **28.106-2 Substitution of surety bonds.**

- (a) A new *surety bond* covering all or part of the obligations on a *bond* previously approved may be substituted for the original *bond* if approved by the *head of the contracting activity*, or as otherwise specified in agency regulation.
- (b) When a new *surety bond* is approved, the *contracting officer shall* notify the principal and *surety* of the original *bond* of the effective date of the new *bond*.

### **28.106-3 Additional bond and security.**

- (a) When additional *bond* coverage is required and is secured in whole or in part by the original *surety* or *sureties*, agencies shall use Standard Form1415, *Consent of Surety and Increase of Penalty*. Standard Form1415 is authorized for local reproduction.
- (b) When additional *bond* coverage is required and is secured in whole or in part by a new *surety* or by one of the alternatives described in 28.204 in lieu of corporate or individual *surety*, agencies shall use Standard Form25, *Performance Bond*; Standard Form1418, *Performance Bond for Other Than Construction Contracts*; Standard Form25A, *Payment Bond*; or Standard Form1416, *Payment Bond for Other Than Construction Contracts*.

### **28.106-4 Contract clause.**

- (a) The *contracting officer shall* insert the clause at 52.228-2, *Additional Bond Security*, in *solicitations* and contracts when *bonds* are required.
- (b) In accordance with section 806(a)(3) of Public Law 102-190, as amended by sections 2091 and 8105 of Public Law 103-355 (10 U.S.C. 4601 note prec.), the *contracting officer shall* insert the clause at 52.228-12, *Prospective Subcontractor Requests for Bonds*, in *solicitations* and contracts with respect to which a payment *bond* will be furnished pursuant to 40 U.S.C chapter 31, subchapter III, *Bonds* (see 28.102-1), except for contracts for the *acquisition of commercial products or commercial services* as defined in subpart 2.1.

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

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

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

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

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

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

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

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

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

### **28.106-6 Furnishing information.**

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

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

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

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

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

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

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

#### **28.106-7 Withholding contract payments.**

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

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

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

#### **28.106-8 Payment to subcontractors or suppliers.**

The *contracting officer* will only authorize payment to subcontractors or suppliers from an ILC (or any other cash equivalent security) upon a judicial determination of the rights of the parties, a signed notarized statement by the contractor that the payment is due and owed, or a signed agreement between the parties as to amount due and owed.

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

### **28.200 Scope of subpart.**

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

### **28.201 Requirements for security.**

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

(1) Corporate or individual *sureties*; or

(2) Any of the types of security authorized in lieu of *sureties* by [28.204](#).

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

## 28.202 Acceptability of corporate sureties.

(a)

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

(2) The penal amount of the *bond* should not exceed the *surety's* underwriting limit stated in the Treasury Department Circular 570. If the penal amount exceeds the underwriting limit, the *bond* will be acceptable only if-

(i) The amount which exceeds the specified limit is coinsured or reinsured; and

(ii) The amount of coinsurance or *reinsurance* does not exceed the underwriting limit of each coinsurer or reinsurer.

(3) Coinsurance or *reinsurance* agreements shall conform to the Department of the Treasury (Treasury) regulations in 31 CFR 223.10 and 223.11. When *reinsurance* is contemplated, the *contracting office* generally 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 (SF) 273, Reinsurance Agreement for a Bonds Statute Performance Bond, and SF 274, Reinsurance Agreement for a Bonds Statute Payment Bond, when *reinsurance* is furnished with the required performance or payment *bonds*. SF 275, Reinsurance Agreement in Favor of the United States, is used when *reinsurance* is furnished with *bonds* for other purposes.

(b) For contracts performed in a foreign country, *sureties* not appearing on Treasury Department Circular 570 are acceptable if the *contracting officer* determines that it is impracticable for the contractor to use Treasury listed *sureties*.

(c) Treasury issues supplements to Treasury Department Circular 570, notifying all *Federal agencies* of new approved corporate *surety* companies and the termination of the authority of any specific corporate *surety* to qualify as a *surety* on Federal *bonds*. Upon receipt of notification of termination of a company's authority to qualify as a *surety* on Federal *bonds*, the *contracting officer* 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) Treasury Department Circular 570 may be obtained from the U.S. Department of the Treasury, Bureau of the Fiscal Service, *Surety Bond* Branch, 3201 Pennsy Drive, Building E, Landover, MD 20785 or at <https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570.htm>.

## 28.203 Individual Sureties.

### 28.203-1 Acceptability of individual sureties.

(a) An individual *surety* is acceptable for all types of *bonds* except position schedule *bonds*. Assets pledged by an individual *surety* 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," may be accessed by going to <https://www.treasurydirect.gov/files/laws-and-regulations/collateral-programs/2018-final-225-list-of-acceptable-collateral.pdf> and clicking on "Acceptable Collateral for 31 CFR part 225".

(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](http://www.treasurydirect.gov). The net adjusted value of unencumbered assets pledged by the individual *surety* must equal or exceed the penal amount (i.e., face value) of each *bond*.

(3) The individual *surety* 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](mailto:BMT@fiscal.treasury.gov) or by phone at 888-568-7343, of the individual *surety*, the assets to be pledged, and the amount necessary to cover the individual *surety bond*, i.e., the required amount to be collateralized. Treasury will advise the *contracting officer* whether the assets are eligible to be pledged, consistent with 28.203-1(a), and of the valuation of the assets offered to be pledged, consistent with the valuation standards in 28.203-1(b)(2). If after 3 business days the *contracting officer* has not received a response from Treasury, the *contracting officer* may seek assistance from the Director, Bank Policy and Oversight, at 202-504-3502. The *contracting officer* 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 section 28.102-1, paragraph (a). The security interest shall be maintained for the later of—

(i) 1 year following final payment;

(ii) Until completion of any *warranty* period (applicable only to performance *bonds*); or

(iii) Pending resolution of all *claims* filed against the payment *bond* during the 1 year period following final payment.

(2) *Contracts subject to alternative payment protection.* See section 28.102-1, paragraph (b)(1). The security interest shall be maintained for the full contract performance period plus 1 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 52.228-17, Individual *Surety*—Pledge of Assets (*Bid Guarantee*), in *solicitations* that require the submission of a *bid guarantee*.

(b) Insert the clause at 52.228-11, Individual *Surety*—Pledge of Assets, in *solicitations* and contracts that require the submission of performance or payment *bonds*.

#### **28.203-5 Exclusion of individual sureties.**

(a) An individual may be excluded from acting as a *surety* on *bonds* submitted by *offerors* on *procurement* by the executive branch of the Federal Government, by the acquiring agency's head or designee utilizing the procedures in 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 Alternatives in lieu of corporate or individual sureties.**

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

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

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

### **28.204-1 United States bonds or notes.**

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

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

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

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

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

### **28.204-3 Irrevocable letter of credit.**

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

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

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

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

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

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

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

(2) If used as an alternative to corporate or individual *sureties* as security for a performance or payment *bond*, the *offeror/contractor may* submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC *shall* provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the *contracting officer* provides the financial institution with a written statement waiving the right to payment. The period of required coverage *shall* be:

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

(A) One year following the expected date of final payment;

(B) For performance *bonds* only, until completion of any *warranty* period; or

(C) For payment *bonds* only, until resolution of all *claims* filed against the payment *bond* during the one-year period following final payment.

(ii) For contracts not subject to the *Bonds* statute, the later of-

(A) 90 days following final payment; or

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

(g) Only federally insured financial institutions rated investment grade *shall* issue or confirm the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million *must* be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.

(1) The *offeror/contractor* is required by paragraph (d) of the clause at 52.228-14, *Irrevocable Letter of Credit*, to provide the *contracting officer* a credit rating from a recognized commercial rating service that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.

(2) To support the credit rating of the financial institution(s) issuing or confirming the ILC, the *contracting officer shall* verify the following information:

(i) Federal *insurance*: Each financial institution is federally insured. Verification of federal *insurance* is available through the Federal Deposit *Insurance* Corporation (FDIC) institution directory at the website <http://www2.fdic.gov/idasp/index.asp>.

(ii) Current credit rating. The current credit rating for each financial institution is investment grade and that the credit rating is from a Nationally Recognized Statistical Rating Organization (NRSRO). NRSROs can be located at the website <http://www.sec.gov/answers/nrsro.htm> maintained by the SEC.

(3) The rating services listed in the website <http://www.sec.gov/answers/nrsro.htm> use different rating scales (e.g., AAA, AA, A, BBB, BB, B, CCC, CC, C, and D; or Aaa, Aa, A, Baa, Ba, B, Caa, Ca, and C) to provide evaluations of institutional credit risk; however, all such systems specify the range of investment grade ratings (e.g., BBB-AAA or Baa-Aaa in the examples in this section) and permit evaluation of the relative risk associated with a specific institution. If the *contracting officer* learns that a financial institution's rating has dropped below investment grade level, the *contracting officer shall* give the contractor 30 days to substitute an acceptable ILC or *shall* draw on the ILC using the sight draft in paragraph (g) of the clause at 52.228-14.

(h) A copy of the Uniform Customs and Practice (UCP) for Documentary Credits, 2007 Edition, International Chamber of Commerce Publication No. 600, is available from:

ICC Books USA, 1212 Avenue of the Americas, 21 st Floor, New York, NY 10036;

Phone: 212-703-5078; Fax: 212-391-6568; E-mail: [iccbooks@uscib.org](mailto:iccbooks@uscib.org); Via the Internet at:<http://www.uscib.org/ucp-600-ud-4465/>.

#### **28.204-4 Contract clause.**

Insert the clause at 52.228-14, *Irrevocable Letter of Credit*, in *solicitations* and contracts for services, *supplies*, or *construction*, when a *bid guarantee*, or performance *bonds*, or performance and payment *bonds* are required.

## **Subpart 28.3 - Insurance**

## **28.301 Policy.**

Contractors *shall* carry *insurance* under the following circumstances:

- (a)
- (1) The Government requires any contractor subject to Cost Accounting Standard (CAS) 416 (48 CFR 9004.416) to obtain *insurance*, by purchase or self-coverage, for the perils to which the contractor is exposed, except when-
- (i) The Government, by providing in the contract in accordance with law, agrees to indemnify the contractor under specified circumstances; or
- (ii) The contract specifically relieves the contractor of liability for loss of or damage to Government property.
- (2) The Government reserves the right to disapprove the purchase of any *insurance* coverage not in the Government's interest.
- (3) Allowability of the *insurance* program's cost *shall* be determined in accordance with the criteria in [31.205-19](#).
- (b) Contractors, whether or not their contracts are subject to CAS 416, are required by law and this regulation to provide *insurance* for certain types of perils (*e.g.*, workers' compensation). *Insurance* is mandatory also when commingling of property, type of operation, circumstances of ownership, or condition of the contract make it necessary for the protection of the Government. The minimum amounts of *insurance* required by this regulation (see [28.307-2](#)) *may* be reduced when a contract is to be performed outside the *United States* and its *outlying areas*. When more than one agency is involved, the agency responsible for review and approval of a contractor's *insurance* program *shall* coordinate with other interested agencies before acting on significant *insurance* matters.
- (c) Contractors awarded nonpersonal services contracts for health care services are required to maintain medical liability *insurance* and indemnify the Government for liability producing acts or omissions by the contractor, its employees and agents (see [37.400](#)).

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

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

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

When the Government requires or approves *insurance* to cover loss of or damage to Government property (see [45.104](#), Responsibility and liability for Government property), it *may* be provided by

specific *insurance* policies or by inclusion of the risks in the contractor's existing policies. The policies *shall* disclose the Government's interest in the property.

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

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

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

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

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

(1) Public-work contracts; or

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

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

(ii) Contracts exclusively for materials or *supplies*.

(c) When the Defense Base Act applies (see [42 U.S.C.1651](#), *etseq.*) to these employees, the benefits of the Longshoremen's and Harbor Workers' Compensation Act are extended through operation of the War Hazards Compensation Act ([42 U.S.C.1701](#), *etseq.*) to protect the employees against the risk of war hazards (injury, death, capture, or detention). When, by means of an *insurance* policy or a *self-insurance* program, the contractor provides the workers' compensation coverage required by the Defense Base Act, the contractor's employees automatically receive war-hazard risk protection.

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

(e) If the Defense Base Act is waived for some or all of the contractor's employees, the benefits of the War Hazards Compensation Act are automatically waived with respect to those employees for whom the Defense Base Act is waived. For those employees, the contractor *shall* provide workers' compensation coverage against the risk of work injury or death and assume liability toward the employees and their beneficiaries for war-hazard injury, death, capture, or detention. The contract

*shall* provide either that the costs of this liability or the reasonable costs of *insurance* against this liability *shall* be allowed as a cost under the contract.

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

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

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

(b) Work on a Government installation.

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

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

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

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

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

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

(b) *Premium refunds or credits*. The plan *shall* provide for the Government to share in any premium refunds or credits paid or otherwise allowed to the contractor. In determining the extent of the Government's share in any premium refunds or credits, any special reserves and other refunds to



which the contractor *may* be entitled in the future *shall* be taken into account.

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

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

(b) General liability.

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

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

(c) *Automobile liability.* The *contracting officer shall* require automobile liability *insurance* written on the comprehensive form of policy. The policy *shall* provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the contract. Policies covering automobiles operated in the *United States shall* provide coverage of at least \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage. The amount of liability coverage on other policies *shall* be commensurate with any legal requirements of the locality and sufficient to meet normal and customary *claims*.

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

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

### **28.308 Self-insurance.**

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

applies and *shall* include-

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

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

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

(4) The contractor's latest financial statements;

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

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

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

(8) *Claims* administration policy, practices, and procedures;

(9) The method of calculating the *projected average loss*; and

(10) A disclosure of all captive *insurance* company and *reinsurance* agreements, including methods of computing cost.

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

(1) Maintains an approved program of *self-insurance* for any employer's liability not so covered; or

(2) Shows that the combined cost to the Government of *self-insurance* for workers' compensation and commercial *insurance* for employer's liability will not exceed the cost of covering both kinds of risk by commercial *insurance*.

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

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

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

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

- (1) The soundness of the contractor's financial condition, including available lines of credit.
  - (2) The geographic dispersion of assets, so that the potential of a single loss depleting all the assets is unlikely.
  - (3) The history of previous losses, including frequency of occurrence and the financial impact of each loss.
  - (4) The type and magnitude of risk, such as minor coverage for the deductible portion of purchased *insurance* or major coverage for hazardous risks.
  - (5) The contractor's compliance with Federal and State laws and regulations.
- (e) Agencies *shall* not approve a program of *self-insurance* for catastrophic risks (*e.g.*, see [50.104-3](#), Special procedures for unusually hazardous or nuclear risks). *Should* performance of Government contracts create the risk of catastrophic losses, the Government *may*, to the extent authorized by law, agree to indemnify the contractor or recognize an appropriate share of premiums for purchased *insurance*, or both.
- (f) *Self-insurance* programs to protect a contractor against the costs of correcting its own defects in materials or workmanship *shall* not be approved. For these purposes, normal rework estimates and *warranty* costs will not be considered *self-insurance*.

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

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

- (1) The contract will be a public-work contract performed outside the *United States*; or
- (2) The contract will be approved or financed under the Foreign Assistance Act of 1961 (Pub.L.87-195) and is not excluded by [28.305\(b\)\(2\)](#).

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

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

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

- (1) Only a small amount of work is required on the Government installation (*e.g.*, a few brief visits per month); or
- (2) All work on the Government installation will be performed outside the *United States* and its

outlying areas.

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

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

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

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

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

Agencies may prescribe their own *solicitation* provisions and *contract clauses* to implement the basic policies contained in this [subpart 28.3](#).

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

The *contracting officer* shall insert the clause at [52.228-8](#), *Liability and Insurance-Leased Motor Vehicles*, in *solicitations* and contracts for the leasing of motor vehicles (see [subpart 8.11](#)).

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

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

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