February 10, 2015

The Honorable Anne Rung
Administrator for Federal Procurement Policy
Office of Management and Budget
Eisenhower Executive Office Building – Room 263
1650 Pennsylvania Avenue, NW
Washington, DC 20503

Dear Madam Administrator:

Pursuant to Sections 1302 and 1303 of Title 41, United States Code, we, on behalf of the members of the signatory associations, request that you initiate a modification to Part 28.203 (Acceptability of Individual Sureties) of the Federal Acquisition Regulation (FAR) to require that the assets pledged by an individual surety are real and readily available by requiring that such pledged assets meet the standards currently required by FAR Part 28.204.

The requirements of the Miller Act (41 USCA Section 3131 et seq) are designed to protect the interest of the federal contracting agencies, as stewards of taxpayer funds by requiring bid and performance bonds and the interests of subcontractors and suppliers by requiring payment bonds, which provide such downstream parties payment protection of last resort for work performed and supplies furnished.

The current coverage of the Government-wide Federal Acquisition Regulation (FAR) Subpart 28.2 (Sureties and Other Security for Bonds) provides the contracting officer guidance, but implementation can be compromised by the severe challenges faced by even the most seasoned construction contracting officer. A determined and unscrupulous individual surety can too readily pledge assets that provide only illusory or insufficient protection. The core challenge for the contracting officer relates to verifying the existence of and assessing the value of the assets being pledged by the individual

surety in support of the surety bonds being furnished to the Government. Those assets deemed “acceptable” under FAR 28.203-2(b)(3) and (4) include stocks, bonds, and real property owned in fee simple. The contracting officer faces several challenges in determining if the “acceptable assets” actually exist and can be readily liquidated to pay valid claims against a payment bond.

By training and experience, even the most seasoned contracting officer in the acquisition of construction is likely at a distinct disadvantage in making these determinations with regard to the broad array of assets acceptable under FAR Part 28.203-2. The challenge is presented not only with regard to real property often in locations remote from the contracting officer’s location, but also interpreting the sufficiency of documentation evidencing the asset and the security interest or escrow arrangement.

In today’s Federal procurement arena, the typical contracting officer has too many contract award and contract administration actions on-going simultaneously and too few supporting staff resources to adequately challenge the focused efforts of an unscrupulous individual surety determined to game the system. Feeling the pressure to move forward with a procurement, the contracting officer may be willing to cut short the necessary due diligence to protect the government, especially if the exposure to the Government is relatively remote. A payment bond from an individual surety that provides only illusory protection, however, can easily result in a catastrophic loss to a subcontractor or supplier even on the smallest contract.

In recent years, there have been numerous instances in which contracting officers have accepted individual sureties backed by assets that subsequently turned out to be illusory or unacceptable. For example, in *United States ex rel. J.Blanco Enterprises v. ABBA Bonding, Inc.*, ABBA claimed in its Standard Form 28, *Affidavit of Individual Surety,* to have a net worth of over $126 million. The General Services Administration accepted the individual bonds, although no assets were placed in escrow for the benefit of the government. ABBA eventually filed for Chapter 11 bankruptcy in the Southern District of Alabama.

In another example, Edmund Scarborough, the owner of IBCS Fidelity, another individual surety, filed for bankruptcy in Tampa, Florida. ICBS issued countless individual surety bonds on federal, state and private construction projects using suspect assets. This individual surety previously had listed $4.5 million in assets and $16.2 million in assets; IBCS had used a commodity, mined coal waste, which it valued at

$191 million, to back its individual surety bonds. That mined coal waste was valued at $120,000 in the bankruptcy filing.[1]

The solution, we urge, is to simply modify FAR Part 28.203.2 (Acceptability of Assets) to conform to the existing standards of FAR Part 28.204. This would reduce the administrative burden on the contracting officer to assess the assets being pledged. The contracting officer would know that the assets pledged by an individual surety in support of its bonds are real, sufficient in amount, readily available and in the care and custody of the U.S. Government. It would assure the buying agency, on behalf of the taxpayers, that the bid and performance bonds provide reliable protection, as intended by the Miller Act. Subcontractors and suppliers would know that the payment bond provides practical payment protections of last resort for work performed or supplies furnished, as intended by the Miller Act.

On behalf the members of our respective associations, we would earnestly request that you, as Chair of the Federal Acquisition Regulatory Council, initiate a FAR Case to seek public comment on our proposal.

Respectfully submitted,

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[1] Richard Korman, *Controversial Individual Surety Files for Bankruptcy Protection*, ENGINEERING NEWS-RECORD, August 5, 2014 *available at*: http://enr.construction.com/business_management/finance/2014/0805-Outspoken-Individual-Surety-Files-for-Bankruptcy-Protection.asp?

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