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Reforms Needed in the Federal Acquisition Regulation (FAR) on Sections Addressing the Acceptability of Bonds Issued by Individual Sureties

Background:

- FAR 28.203 permits contracting officers to accept bonds from individuals acting as sureties on federal construction projects, provided that the surety bond is backed by “acceptable assets” to secure the bond obligation.
- Unlike for corporate sureties, information about the financial strength of individual sureties is not available to contracting officers from independent third-party rating sources. Individual sureties neither are certified by the U.S. Department of Treasury nor are they rated by private rating organizations, such as AM Best or Moody’s, that assess financial strength.
- The U.S. Court of Federal Claims, in *Tip Top Construction v. United States*, 2008 WL 3153607, recently was confronted with a post-award bid protest on a federal transportation project involving a disappointed bidder whose bid was rejected because the bid bond was issued from an individual surety who pledged “unacceptable assets.” The individual surety asserted that the assets backing its bid bond were acceptable under the terms of the applicable FAR section.
- While the U.S. Court of Federal Claims denied the bid protest, it noted that some of the FAR sections addressing requirements pertaining to bonds from individual sureties, specifically those concerning acceptable and unacceptable assets, need redrafting or clarification to avoid differing interpretations and potential conflicts or ambiguities.

NASBP Message:

- Contracting officers shoulder a substantial administrative burden to determine (1) the acceptability of an individual surety and (2) the existence, authenticity, and sufficiency of assets pledged by the individual surety writing bonds on federal construction projects.
- Contracting officers must be afforded full information about the individual proposing to act as surety on federal construction projects to protect the government and taxpayer funds. Thus, in addition to requiring the submission of SF 28, Affidavit of Individual Surety, the government should require sworn, notarized statements from individual sureties that mandate disclosure of recent bankruptcy or insolvency filings and any criminal convictions for perjury, fraud, theft, conversion, etc.

NASBP GovRel
Position Brief
Vol I No 5
page 1 of 2



National Association of Surety Bond Producers—Professionals in Surety Bonding

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- When making determinations about the acceptability of assets backing individual surety bonds, contracting officers must be able to consult and to rely on FAR provisions that are explicit and not subject to differing interpretations by the courts. In light of the *Tip Top Construction* decision, the FAR should be amended to make clear that the list of “acceptable assets” constitutes an exclusive list (see FAR 28.203-2).
- In addition, “acceptable assets” should be solely limited to the following asset classes deposited directly with the US government or in an escrow account with a federal insured financial institution in the name of the federal contracting agency: cash, certificates of deposit, US government securities, or irrevocable letters of credit issued by a federally insured financial institution. Stocks, corporate bonds, and real estate should not be acceptable due to the likelihood of their misrepresentation, the volatility of their value, and the difficulty and timeliness of liquidating those assets to pay bond claims.
- By amending the FAR to limit assets to cash, certificates of deposit, US government securities, and irrevocable letters of credit, such regulatory change would be beneficial to (a) lessen the administrative burden of contracting officers, (b) help expedite procurements, (c) avoid instances where bonds mistakenly have been accepted with assets that are insufficient, inappropriate, or illusory, (d) ensure that the government receives assets that are in the control of the government and that can be timely and easily liquidated to pay valid bond claims.
- Significant harm may result from acceptance of individual surety bonds backed by unacceptable assets. Should those bond assets prove illusory or insufficient and the contractor defaults, the contracting agency will be denied the benefit of its performance guarantee, necessitating the use of additional taxpayer funds to complete unfinished construction projects, and subcontractors and suppliers who rely on the payment bond for their payment remedy in the event of contractor nonpayment or insolvency will go unpaid for their labor and materials supplied to the project, jeopardizing the viability of their businesses.

Who is the National Association of Surety Bond Producers (NASBP)?

Established in 1942, NASBP (<http://www.nasbp.org>) is a national organization of professional surety bond producers and brokers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, performance, and payment bonds for the Nation’s construction projects. Bond producers bring value to the contractor-surety relationship, and surety bonds bring value to the Nation’s construction projects. Bond producers virtually touch every contractor bidding or proposing on public works projects.

NASBP GovRel
Position Brief
Vol I No 5
page 2 of 2



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