



National Association of Surety Bond Producers

1140 19th Street NW, Suite 800. Washington, DC 20036-5104

Phone: (202)686-3700

Fax: (202)686-3656

Web Site: <http://www.nasbp.org>

E-mail: info@nasbp.org

Submitted via Regulations.gov and faxed to 202-501-4067

August 26, 2014

Ms. Hada Flowers
IC 9000-0001, SF 28, Affidavit of Individual Surety
General Services Administration
Regulatory Secretariat (MVCB)
1800 F Street, NW
Washington, DC 20405

RE: OMB Control No. 9000-0001; Docket No. 2014-0055; Sequence No. 18; Affidavit of Individual Surety, Standard Form 28

Dear Ms. Flowers:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade association whose membership includes firms employing licensed surety bond producers placing bid, performance, and payment bonds throughout the United States and its territories, I am writing you to express our recommendation that the Office of General Services (GSA) approve an extension to the current information collection requirement which provides that, in order to qualify as a surety, individuals must complete and furnish contracting officers with Standard Form 28, Affidavit of Individual Surety. NASBP also wishes to furnish suggestions for the purpose of enhancing the quality, utility, and clarity of the information to be collected through the use of Standard Form 28.

This information collection requirement serves to position the contracting officer with necessary information to evaluate the individual wishing to serve as surety and assets pledged to back the surety bond obligations on federal construction projects. SF 28 was revised significantly in 1989 with the goal to “strengthen procedures governing individual sureties,” as federal officials then were confronted with “widespread evidence of systematic problems” regarding methods of handling individual sureties (*see*, 53 *Federal Register* 44654-01 (1988)) and concerns that problems with individual sureties were compromising payment protections for subcontractors and small businesses providing labor and materials on federal construction projects (see report on Senate Hearing 100-384 before the Subcommittee on Federal Spending, Budget and Accounting of the Committee on Governmental Affairs entitled *Personal Sureties Under the Miller Act: Inadequate Payment Protection for Small Business Construction Subcontractors*).

Legal articles written at that time also echo these observations and concerns (see, e.g., “Christine S. McCommas, *New Developments in Fighting Individual Surety Bond Fraud* 1990-Jan. Army Law. 56). In the background section of the proposed rule published at 53 Fed. Reg. 44564 on November 3, 1987, it was stated that “[e]xperience has shown that the information contained on SF 28 is inadequate.” This section continues: “[t]he frequent result is that bonds submitted by individual sureties are uncollectable to the detriment of the Government and suppliers under government contracts. To that end, SF 28 was revised to reflect the new requirements imposed on individual sureties which include the following:

1. Require individual sureties to pledge specific assets to support the bond.
2. Identify and limit the types of assets which are acceptable for pledge based upon a standard of identifiable value and ready marketability.
3. Require objective evidence of asset ownership and unencumbered value.
4. Require a Government security interest in the pledged assets by means of a lien or real property or the establishment of an escrow account for acceptable personal property.
5. Provide for the Government wide suspension of debarment of sureties who commit serious improprieties.

Although improvements were made through incorporation of revisions to SF 28, the current edition still would benefit from greater specificity on the information required of individual sureties regarding pledging assets, especially information relating to assets other than real estate. For example, the instructions on the front, in the form of parenthetical information, of SF 28 pertaining to Section 7(b), “assets other than real estate” are not sufficiently explicit or directive. The need for such information was addressed as far back as February 2006 when the Surety Bond Branch, Financial Management Service, U.S. Department of Treasury, issued an Information Notice for contracting officers to be aware of instances where individual sureties were listing corporate debenture notes and other questionable assets on their Standard Form 28. The notice reminded officers of FAR requirements pertaining to acceptable vs. unacceptable assets and the necessity of the Government being given a security interest in acceptable assets.

Certainly, greater specificity in SF 28 would assist both contracting officers and individual sureties to understand what constitutes acceptable assets under Federal Acquisition Regulation (FAR) 28.203-2 and what constitutes “certified evidence thereof.” To that end, SF 28 could contain areas on the Form in which the individual surety checks off (1) the exact asset or assets that it is pledging that conform to the assets deemed acceptable under the FAR; (2) identifies the extent of the ownership interest of the individual surety in the asset or the legal right giving the individual surety the ability to pledge such asset to the United States and certified evidence of such; (3) identifies the name, address, phone number, and the contact person employed by the federally insured financial institution which holds such asset in escrow; and (4) requires that attachment of a certified copy of written escrow agreement with the federal insured financial institution, evidencing its exact terms and conditions, and showing the contracting agencies unrestricted access to such asset. Collection of this information would expedite the verification procedures undertaken by contracting officers to ensure sufficiency, accessibility, and marketability of pledged assets.

Further, consideration should be given to collection of additional information on SF 28 to assist contracting officers in their efforts to assess the acceptability of individual sureties. For example, SF 28 should provide for disclosure of federal tax liens against the individual surety as well as disclosure of personal insolvency proceedings, as such information is highly relevant to the individual surety’s character and the ability to perform its financial obligations.

There are several examples of contracting officers being misled into accepting what were believed to be acceptable assets for bonds that met FAR requirements, which later turned out to be illusory. Recently, the *Engineering News Record* (ENR) featured an article¹ describing the bankruptcy filing of an individual surety, Edmund Scarborough, who is known for placing surety bonds on countless federal projects while using mined coal waste as security. As indicated in the bankruptcy filing, according to ENR, a parcel of land in West Virginia was used as security to back several million dollars in surety bond guarantees but was only valued at \$120,000². According to Scarborough’s bankruptcy filing,³ his assets were estimated between \$1 and \$10 million compared to his estimated liabilities of between \$10 million and \$50 million. The number creditors Scarborough owed were estimated between 50-99, which included among those the

State Insurance Departments of Washington and Idaho (fines for placing surety bonds on state projects without a certificate of authority), the U.S. Army Corp of Engineers (amount of claim unknown), and the Internal Revenue Service in the amount of \$115, 800.

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. They must be afforded full information regarding the individual proposing to act as a surety to protect government and taxpayer funds.

For these reasons, we urge GSA in the strongest terms to approve an extension of this critical collection of information required and to consider ways in which to strengthen the collection of information through Standard Form 28.

NASBP would be happy to meet with you or members of your team in person to discuss any of the issues we raised.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Larry LeClair". The signature is fluid and cursive, with the first name "Larry" being more prominent than the last name "LeClair".

Larry LeClair
Director, Government Relations

¹ *Controversial Individual Surety Files for Bankruptcy Protection*, ENR.com, August 5, 2014

² Ibid, pg.2

³ United States Bankruptcy Court, Middle District of Florida, Case 8:14-bk-08222-KRM, July 7, 2014

cc. Cecelia.davis@gsa.gov
Mark McCallum, NASBP