



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

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June 14, 2011

Ms. Hada Flowers/IC 9000-0001
General Services Administration
Regulatory Secretariat (MVCB)
1275 First Street, NE
Washington, DC 20417

Re: Information Collection 9000-0001, Affidavit of Individual Surety, Standard Form 28

Dear Ms. Flowers:

On behalf of the National Association of Surety Bond Producers (NASBP), a national trade organization of professional surety bond producers, representing firms employing over 5,000 personnel who specialize in surety bonding, including issuing bid, performance, and payment bonds for construction projects, 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 surety's bond obligations on federal construction projects. SF 28 was revised significantly 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 pledged 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 identifies (1) the exact asset or assets that he or she is pledging that conform to the assets deemed acceptable under the FAR; (2) 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; and (3) the name, address, phone number, and the contact person employed by the federally insured financial institution which holds such asset in escrow. The attachment of a certified copy of the written escrow agreement with the federal insured financial institution, evidencing its exact terms and conditions and showing the contracting agency’s unrestricted access to such asset also should be required. Collection of this information would facilitate the verification procedures undertaken by contracting officers to assess the character of the individual surety and to ensure sufficiency, accessibility, and marketability of pledged assets.

Today’s difficult economic environment demands more thorough information collection on individual sureties, as fraudulent bond activity may increase. See, for example, *United States ex rel. JBlanco Enterprises Inc. v. ABBA Bonding, Inc.*¹, where an individual surety, Mr. Morris Sears, doing business as ABBA Bonding, was accepted as a surety on a federal project in Colorado. Mr. Sears submitted an SF 28 that stated a net worth of over \$126 million.² Yet, no assets were placed in an escrow account.³ Mr. Sears

¹ *The Importance of Surety Bond Verification*, Public Contract Law Journal, Vol. 39. No.1 Winter 2010, pg. 277, Gallagher, McCallum.

² Id.

³ Id.

failed to pay claims and eventually filed for Chapter 11 bankruptcy in the Southern District of Alabama. Apparently, most of the \$126 million never existed.⁴ It is noteworthy that Mr. Sears was the subject of at least one cease and desist order by a state insurance commissioner. Similarly, another individual surety, Mr. George Black Sr., doing business as Infinity Surety, is alleged to have sold \$25 million dollars of worthless surety bonds from 2009 to 2010, including to “defense businesses who did work for the military”.⁵ During that period, Mr. Black was enjoined from selling surety bonds by a state insurance commissioner.⁶ (See *attached Department of Justice release, March 26, 2010*)

For these reasons, NASBP recommends that the federal government consider expanding the information collected on SF 28. In Maryland, a law was enacted in 2006 to allow an individual surety to issue bonds on state public works projects. The Maryland law requires the use of a state equivalent to form SF 28. As a companion to the State of Maryland’s own “Affidavit of Individual Surety Form, (*see attached*)” Maryland also developed and adopted an “Attachment B,” titled “Surety Affidavit.” Among the information collected on Attachment B are sworn affirmations concerning certain convictions and debarments. Further, sworn affirmations about insolvency filings and cease and desist orders issued by state insurance commissioners would be helpful information for contracting officers making evaluations of the acceptability of an individual surety.

Contracting officers shoulder a substantial administrative burden to determine the acceptability of an individual surety and 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 and the proffered assets to protect government agencies and taxpayer funds. For these reasons, NASBP urges the federal government to approve an extension of this critical collection of information requirement and to consider ways in which to strengthen the collection of information through Standard Form 28.

Yours sincerely,



Larry LeClair
Director, Government Relations

⁴ Id.

⁵ Department of Justice release, “Fort Worth Man Arrested and Charged in Alleged \$25 Million Nationwide Scheme to Sell Fraudulent Securities,” U.S. Attorney’s Office, Southern District of Texas, March 26, 2010.

⁶ Id.