

Proposed Revisions to FAR Subpart 28.203

- A. PROPOSAL: To revise FAR Subpart 28.203 to remove ambiguities in the language.
- B. PROPOSAL DESCRIPTION: This proposal seeks to revise Subpart 28.203 by removing ambiguities in the language, particularly at 28.203-2(b) and (c), to clarify the types of assets that an individual surety can pledge in support of bid guarantees and performance and payment bonds, and to make the FAR provisions, clauses and forms harmonious.
- C. AFFECTED PARTS/SUBPART: FAR Subpart 28.203.
- D. BACKGROUND: FAR Subpart 28.203 establishes the criteria that a contracting officer uses in determining the acceptability of an individual surety and the pledged assets. Because of problems contracting officers experienced with individual sureties in the past, the FAR was revised in 1988 (53 FR 44564, dated November 3, 1988) to restrict the types of assets that individual sureties could pledge in support of their bonds. A new FAR section, entitled "Acceptability of Individual Sureties," was added. Included in the section was a list of assets that an individual surety could pledge in support of a bond; a list of assets that were unacceptable, and a requirement that pledged assets (other than real property and certain Government securities) be placed in an escrow account. The revision also gave the surety (but not the bidder) the opportunity to request the substitution of assets and the contracting officer the authority to accept the substitute assets.

Unfortunately, some of the language in the revision became problematic. For example, Subsection 28.203-2(b), states:

- (b) Acceptable assets include—
- (1) Cash, or certificates of deposit, or other cash equivalents with a federally insured financial institution;
 - (2) United States Government securities at market value. (An escrow account is not required if an individual surety offers Government securities held in book entry form at a depository institution. In lieu thereof, the individual shall provide evidence that the depository institution has—
 - (i) Placed a notation against the individual's book entry account indicating that the security has been pledged in favor of the respective agency;
 - (ii) Agreed to notify the agency prior to maturity of the security; and
 - (iii) Agreed to hold the proceeds of the security subject to the pledge in favor of the agency until a substitution of securities is made or the security interest is formally released by the agency.);
 - (3) Stocks and bonds actively traded on a national U.S. security exchange with certificates issued in the name of the individual surety. National security exchanges are—(i) the New York Stock Exchange; (ii) the American Stock Exchange; (iii) the Boston Stock Exchange; (iv) the Cincinnati Stock Exchange; (v) the Midwest Stock Exchange; (vi) the Philadelphia Stock Exchange; (vii) the Pacific Stock Exchange; and (viii) the Spokane Stock Exchange. These assets will be accepted at 90 percent of their 52-week low, as reflected at the time of submission of the bond. Stock options and stocks on the over-the-counter (OTC) market or NASDAQ Exchanges will not be accepted. Assistance in evaluating the acceptability of securities may be obtained from the—

Securities and Exchange Commission
Division of Enforcement
450 Fifth Street NW
Washington, DC 20549.

(4) Real property owned in fee simple by the surety without any form of concurrent ownership, except as provided in paragraph (c)(3)(iii) of this subsection, and located in the United States or its outlying areas. These assets will be accepted at 100 percent of the most current tax assessment value (exclusive of encumbrances) or 75 percent of the properties' unencumbered market value provided a current appraisal is furnished (see 28.203-3).

(5) Irrevocable letters of credit (ILC) issued by a federally insured financial institution in the name of the contracting agency and which identify the agency and solicitation or contract number for which the ILC is provided.

The following subsection states:

- (c) Unacceptable assets include but are not limited to—
- (1) Notes or accounts receivable;
 - (2) Foreign securities;
 - (3) Real property as follows:
 - (i) Real property located outside the United States and its outlying areas.
 - (ii) Real property which is a principal residence of the surety.
 - (iii) Real property owned concurrently regardless of the form of co-tenancy (including joint tenancy, tenancy by the entirety, and tenancy in common) except where all co-tenants agree to act jointly.
 - (iv) Life estates, leasehold estates, or future interests in real property.
 - (4) Personal property other than that listed in paragraph (b) of this subsection (*e.g.*, jewelry, furs, antiques);
 - (5) Stocks and bonds of the individual surety in a controlled, affiliated, or closely held concern of the offeror/contractor;
 - (6) Corporate assets (*e.g.*, plant and equipment);
 - (7) Speculative assets (*e.g.*, mineral rights);
 - (8) Letters of credit, except as provided in 28.203-2(b)(5).

The use of the word “include” in subsection (b) and a separate listing of unacceptable assets in subsection (c), implies that there are assets not listed in (b) and not excluded by (c) that can be pledged in support of a bond. Whether or not this is a correct reading of the FAR has been the source of considerable dispute. Indeed, in its decision in Tip Top Construction, Inc. v. United States, No. 08-352C, August 1, 2008, the Court of Federal Claims repeatedly noted the ambiguities in this section of the FAR:

Because of the convoluted manner in which the disputed FAR provisions were drafted, they are arguably open to different interpretations

(at 25).

The court acknowledges that the various related sections of these particular provisions of the FAR are convoluted and not easily followed. The manner in which these provisions have been worded has brought a lengthy debate between the protester and defendant over the issue of what constitutes an acceptable asset as opposed to a speculative asset

(at 30).

The court's decision does not reach the issue of whether the list of acceptable assets set forth in FAR 28.203-2(b) is clearly exclusive or whether the list simply sets forth examples of the types of assets which are acceptable. Indeed the unfortunate wording of the provisions controlling that specific issue is so ambiguous as to serve to make the undertaking of such an endeavor daunting, indeed, and the court counts itself fortunate not to have to reach that issue

(at 31.)

The court acknowledges that the use of the phrase "may be provided" [in FAR 28.203-1(b)] permits some degree of ambiguity with regards to whether other measures [i.e., other than establishing an escrow account] might suffice for the security interest required

(at 31).

The court earlier observed the issue regarding the exclusivity of the list of acceptable assets was one which, in the court's opinion, was highly susceptible to more than one interpretation and that the issue regarding the requirement of an escrow account for personal property was difficult, as well, again due to the FAR provisions which were written in a convoluted manner

(at 34).

Finally, in its opinion denying Tip Top's motion for reconsideration, the court again emphasized "the fact" that the FAR provisions were "convoluted and not easily followed." Tip Top Construction, Inc., No. 08-352C, motion for reconsideration denied, September 12, 2008, at 10.

Although the court ruled against Tip Top and denied the motion for reconsideration, the court noted that, “if had de novo authority in this case,” it might have reached a different conclusion (at 10.)

Because of this “convoluted” language, individual sureties have found the same types of pledged assets being accepted by some contracting officers and rejected by others, sometimes within the same agency. Unfortunately, as was the case in Tip Top, this sometimes has resulted in the Government rejecting an otherwise acceptable offer and paying more to fulfill its requirements.

In addition to the need to eliminate convoluted language, FAR 28.203 needs to be revised to delete language that is either no longer valid or was incorrect at the time of the 1988 revision. For example, 28.203-2(b)(3) lists a number of security exchanges that no longer exist and prohibits the acceptance of stock on security exchanges that are now considered on par with the New York Stock Exchange (e.g., NASDAQ). In addition, Subpart 28.203(d) states that contracting officers can obtain assistance from the Treasury Department’s Financial Management Service; however, that office does not provide assistance in evaluating individual sureties.

Finally, FAR Subpart 28.203 needs to be revised to recognize changes in the bonding industry and the economy that have taken place since 1988. Of paramount importance is the difficulty small business concerns have been facing in obtaining bonds from corporate sureties in recent years.

E. RATIONALE/VALUE/BENEFIT: The proposed revisions would eliminate the ambiguities in the current FAR language and bring all of the parts (provisions, clauses and forms) into harmony, thereby significantly reducing the rejection of otherwise acceptable bids. This, in turn, would reduce disputes and costly litigation. It would also recognize the changes in the bonding environment that have taken place over the past twenty years, assist small businesses in obtaining the bonding necessary to bid on larger dollar construction contracts (and thereby increase the Government’s ability to achieve its socio-economic goal), and potentially reduce the Government’s costs by increasing competition.

F. STAKEHOLDER POSITIONS IF KNOWN: If more individual sureties are allowed to provide bonds, corporate sureties could lose some business. Therefore, it is likely that corporate sureties would oppose some of the changes that would allow more individual sureties to provide bonds. For example, the National Association of Surety Bond Producers (NASBP) recently indicated its intention to advocate a FAR change that would “tighten regulations governing the assets pledged by individuals issuing bid, payment, and performance bonds on federal construction project” (<http://www.nasbp.org/pipeline/08-11/2.htm>). Federal agencies that have had problems with individual sureties in the past might also be opposed to some of the proposed

changes, although the changes would, in fact, make it easier for Federal agencies to determine the acceptability of assets being pledged by individual sureties.

G. RECOMMENDATION: We recommend that FAR Part 28 be revised as follows:

- a. 28.203(b) would be revised to allow an attorney-in-fact to execute the bond for an individual surety as long as the attorney-in-fact attached evidence of authority to the bond. This would apply the same legal representation for individual sureties that now applies to corporate sureties. The section would also be revised to clarify that the security interest is in the asset(s) being pledged.
- b. 28.203(c) would be revised to require the contracting officer, prior to rejecting an otherwise acceptable bid or proposal because of an unacceptable individual surety, to give the offeror an opportunity to submit an acceptable individual surety or asset. This would eliminate situations such as in Tip Top, where the court found that the contracting officer did not abuse his/her discretion in failing to give the individual surety an opportunity to substitute pledged assets, but also found that this failure resulted in the Government rejecting an otherwise qualified bidder and paying a considerably higher price for the services than it would have had Tip Top not been rejected.
- c. 28.203(d) would be revised to replace the word "may" with "shall." This change would require the contracting officer to give a contractor submitting an unacceptable individual surety on a performance or payment bond a reasonable time to substitute an acceptable individual surety or, if the pledged asset was found to be unacceptable, an acceptable asset. Under the current language, the contracting officer can simply deny a contractor the ability to substitute an acceptable surety or asset. While the revision would not require the contracting officer to accept a substitute surety, it would require the contracting officer to at least consider a substitute. This change could prevent the unnecessary defaulting of an otherwise capable contractor who could, if given the opportunity, provide an acceptable substitute individual surety or pledged asset.
- d. 28.203(e) would be deleted because the Department of Treasury Financial Management Service (i.e., "the office identified in 28.202(d)") does not provide assistance in determining the acceptability of individual sureties. See, for instance, FMS's February 3, 2006 "SPECIAL INFORMATIONAL NOTICE TO ALL BOND-APPROVING (CONTRACTING) OFFICERS," which states, in part, "FMS is not substantively responsible for approving individual sureties." Deletion of this section would eliminate confusion regarding the role of FMS in determining the acceptability of an individual surety.
- e. 28.203-1(b)(1) would be revised to recognize financial institutions that are insured or protected by the Securities Investor Protection Corporation (SIPC), the Small Business Investment Company program (SBICP) in addition to institutions insured by the FDIC, and their trust departments and affiliates; and recognize that an asset can be held in escrow but not necessarily deposited in an escrow account.

The purpose of this revision is to clarify that the Federal Deposit Insurance Corporation is not the only insurer of federal financial institutions. For example, the SIPC protects investments with brokerage firms.

- f. 28.203-1(b)(1)(iii) would be moved to new paragraph 28.203-1(b)(1)(i) to emphasize that the government would not be responsible for the cost of the escrow account.
- g. 28.203-1(b)(1)(i) would be renumbered as 28.203-1(b)(1)(ii) and would be revised to replace references to “funds being deposited in an escrow account” with “assets being placed in escrow.” This change is necessary to recognize that assets other than funds may be placed in escrow and to differentiate between placing assets in an escrow account and making a deposit with a financial institute. The revision would also clarify that a contracting officer could not draw against the assets held in escrow unless the contracting officer first gives the surety notice of the contractor’s default and an opportunity to exercise its options as allowed by law. Finally, the revision would also clarify that the contracting officer can only draw against the assets up to the penal amount of the bond in lieu of the total amount a surety may be holding in escrow (as it now implies).
- h. 28.203-1(b)(1)(v) would be revised to require the financial institution to provide the contracting officer with an account statement only upon the request of the contracting officer. As currently written, the escrow agreement would have to require financial institutions to provide periodic account statements to the contracting officer without any guidance regarding frequency or need.
- i. The current 28.203-1(b)(2) would be renumbered as 28.203-1(b)(3) and a new paragraph 28.203-1(b)(2) would be added. The new section would allow an individual surety to provide a security interest in accordance with Article 9 of the Uniform Commercial Code, provided that the security interest gives the contracting officer the same rights as in paragraph 28.203-1(b)(1). This revision would recognize that there are assets that cannot be physically placed in an escrow account in a financial institution but which are commonly used in the commercial marketplace.
- j. 28.203-2(b) would be revised to clarify that the types of assets listed in paragraphs (1) through (6) are examples and are not exclusive. This would resolve the ambiguity that vexed the Court of Federal Claims in Tip Top, and which has caused confusion elsewhere. See, for example, the FMS Special Information Bulletin referenced in paragraph c. above, which says that “FAR § 28.203-2(b) includes **examples of acceptable assets**, such as[]”, suggesting that the list at (b) is not exclusive and “FAR § 28.203-2(c) lists **unacceptable assets**, but indicates that the list is not all-inclusive” (emphasis in the original).
- k. 28.203-2(b)(3) would be revised to delete references to specific security exchanges (some of which are no longer in existence). The revision would also recognize changes in the securities industry over the past twenty years by deleting

the prohibition from accepting stocks traded on the NASDAQ exchange. The revision would also delete the reference to obtaining assistance from the SEC because the SEC is not able to provide assistance on all security matters and the inability of the SEC to provide "approval" of a specific security could be construed as prohibiting the contracting officer from exercising his or her discretion to accept the asset.

- l. A new 28.203-2(b)(4) would add commodities to the list of acceptable assets as long as such commodities are regularly traded at an established market price (such as by evidence of prior or pending sales, a spot price published by the U.S. Government, or a spot price on a national U.S. commodity exchange). This revision would recognize the value of commodities other than stocks and bonds in a time of a highly volatile stock market. It would also recognize that a number of companies whose stocks are traded on the New York Stock Exchange are valued based on the commodity holdings (e.g., oil companies such as Exxon-Mobil).
- m. 28.203-2(c)(2) would be revised to clarify that only those foreign securities not traded on a U.S. security exchange would be unacceptable. This would prevent contracting officers from inadvertently rejecting stocks in such major companies as Toyota.
- n. 28.203-2(c)(7) would be revised to clarify that an example of a speculative asset would be "unmined minerals." The clarification would eliminate confusion over what "mineral rights" are, so that minerals that have already been mined and stockpiled would not be rejected. It would also help eliminate the confusion that "mineral rights" means the right to sell mined minerals.
- o. 28.203-39(a)(3) would be revised to correct the address of The Appraisal Foundation.
- p. 28.203-4 would be revised to clarify that this subsection applies after contract award and that the request to substitute an asset can come from either the individual surety or the offeror and, by replacing "may" with "shall" require the contracting officer to consider the substitute asset.
- q. 28.203-5 would be revised to renumber paragraph (a) as paragraph (d). The requirement that the security interest be maintained for one year after final payment would be deleted because the following paragraphs, which require the security interest be maintained until completion of the warranty period or pending the resolution of all claims filed against a payment bond during the one year after final payment should provide sufficient protection to the Government. Additional protections are provided in new paragraphs (c)(1) and (2).
- r. 28.203-5(c) would be deleted and replaced by new paragraphs (c)(1) and (2). Paragraph (c)(1) would authorize the contracting officer, upon written request of the individual surety, to release that portion of the security interest that exceeds the amount necessary to cover the surety's remaining obligation under a

performance bond; and paragraph (c)(2) would provide for the same authority regarding a payment bond, provided that the surety provide an affidavit agreeing that the release of the assets does not release the surety from its obligation under the payment bond(s).

- s. 52.228-11 would be revised to add a new paragraph (2) that would explicitly allow a surety to pledge assets in the form of a security interest in accordance with Article 9 of the Uniform Commercial Code, thereby bringing the clause in conformity with the change in 28.203-1(b)(2).
- t. Standard Form 28 would be changed to revise the wording in Block 7(b) to add a allow the individual surety to add a description of a security interest other than an escrow account.

28.203 Acceptability of individual sureties.

(a) An individual surety is acceptable for all types of bonds except position schedule bonds. The contracting officer shall determine the acceptability of individuals proposed as sureties, and shall ensure that the surety's pledged assets are sufficient to cover the bond obligation. (See 28.203-7 for information on excluded individual sureties.)

(b) An individual surety **[or attorney-in-fact (with evidence of such authority attached)]** must execute the bond, and the unencumbered value of the assets (exclusive of all outstanding pledges for **[any]** other bond obligations) pledged by the individual surety must equal or exceed the penal amount of each bond. The individual surety **[or attorney-in-fact]** shall execute the Standard Form 28 and provide ~~a~~**[the]** security interest **[in the assets pledged]** in accordance with 28.203-1. One individual surety is adequate support for a bond, provided the unencumbered value of the assets pledged by that individual surety equal or exceed the penal amount of the bond. An offeror may submit up to three individual sureties for each bond, in which case the pledged assets, when combined, must equal or exceed the penal amount of the bond. Each individual surety must accept both joint and several liability to the extent of the penal amount of the bond.

(c) 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; **provided that, prior to rejecting an otherwise acceptable bid or proposal, the contracting officer gives the offeror an opportunity to provide an acceptable surety in substitution for a surety previously determined to be unacceptable or an acceptable asset for one determined to be unacceptable]**. A finding of nonresponsibility

based on unacceptability of an individual surety need not be referred to the Small Business Administration for a competency review. (See 19.602-1(a)(2)(i) and 61 Comp. Gen. 456 (1982).)

(d) A contractor submitting an unacceptable individual surety in satisfaction of a performance or payment bond requirement ~~may~~**[shall]** be permitted a reasonable time, as determined by the contracting officer, to substitute an acceptable surety for a surety previously determined to be unacceptable~~], or an asset for an asset previously determined to be unacceptable].~~

~~(e) When evaluating individual sureties, contracting officers may obtain assistance from the office identified in 28.202(d).~~

~~(f)~~ **[(e)]** Contracting officers shall obtain the opinion of legal counsel as to the adequacy of the documents pledging the assets prior to accepting the bid guarantee and payment and performance bonds.

~~(g)~~ **[(f)]** Evidence of possible criminal or fraudulent activities by an individual surety shall be referred to the appropriate agency official in accordance with agency procedures.

28.203-1 Security interests by an individual surety.

(a) An individual surety may be accepted only if a security interest in assets acceptable under 28.203-2 is provided to the Government by the individual surety. The security interest shall be furnished with the bond.

(b) The value at which the contracting officer accepts the assets pledged must be equal to or greater than the aggregate penal amounts of the bonds required by the solicitation and may be provided by one or a combination of the following methods:

(1) An escrow account with a ~~federally insured~~ financial institution **[insured by or protected under the Federal Deposit Insurance Corporation, the Securities Investor Protection Corporation, or a trust department or affiliate of the same,]** in the name of the

contracting agency. (See 28.203-2(b)(2) with respect to Government securities in book entry form.) Acceptable securities ~~for deposit~~ **[to be held]** in escrow are discussed in 28.203-2. While the offeror is responsible for establishing the escrow account, the terms and conditions must be acceptable to the contracting officer. At a minimum, the escrow account shall provide for the following:

[(i) The Government would not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the account.]

~~(i)~~**[(ii)]** The account must provide the contracting officer the sole and unrestricted right to draw upon all or any part of the ~~funds~~**[assets]** deposited **[placed]** in the ~~account~~ **[escrow upon default of the contractor and surety. Upon the contractor's termination for default, the contracting officer shall give the surety notice. The surety shall be provided a period of time not less than 30 days in which to exercise a surety's options as allowed by law. If the surety fails to take action (i.e., the surety defaults), a]** ~~A~~**written demand for withdrawal [and evidence of the surety's default]** shall be sent to the financial institution, after obtaining the concurrence of legal counsel, by the contracting officer with a copy to the offeror/contractor and to the surety. Within the time period specified in the demand, the financial institution would pay the Government the amount demanded up to the amount ~~on deposit~~ **[of the escrow account but not to exceed the penal sum of the bond]**. If any dispute should arise between the Government and the offeror/contractor, the surety, or the subcontractors or suppliers with respect to the offer or contract, the financial institution would be required, unless precluded by order of a court of competent jurisdiction, to disburse monies to the Government as directed by the contracting officer.

~~(ii)~~**(iii)** The financial institution would be authorized to release to the individual surety all or part of the balance of the escrow account, including any accrued interest, upon receipt of written authorization from the contracting officer.

~~(iii) The Government would not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the account.~~

(iv) The financial institution would not be liable or responsible for the interpretation of any provisions or terms and conditions of the solicitation or contract.

(v) The financial institution would provide periodic account statements ~~to~~**[upon request by]** the contracting officer.

(vi) The terms of the escrow account could not be amended without the consent of the contracting officer;

~~(2) A lien on real property, subject to the restrictions in 28.203-2 and 28.203-3.~~

[(2) A security interest in accordance with Article 9 of the Uniform Commercial Code for assets that cannot be physically placed in an escrow account in a financial institution (e.g., commodities). The security interest must provide the contracting officer with the same rights as in 28.203-1(b)(1), and the document providing the security interest must be provided to the contracting officer with the bond; or]

[(3) A lien on real property, subject to the restrictions in 28.203-2 and 28.203-3.]

28.203-2 Acceptability of assets.

(a) The Government will accept only cash, readily marketable assets, or irrevocable letters of credit from a federally insured financial institution from individual sureties to satisfy the underlying bond obligations.

(b) Acceptable assets include **[but are not limited to]**—

(1) Cash, or certificates of deposit, or other cash equivalents with a federally insured financial institution;

(2) United States Government securities at market value. (An escrow account is not required if an individual surety offers Government securities held in book entry form at a depository institution. In lieu thereof, the individual shall provide evidence that the depository institution has—

(i) Placed a notation against the individual's book entry account indicating that the security has been pledged in favor of the respective agency;

(ii) Agreed to notify the agency prior to maturity of the security; and

(iii) Agreed to hold the proceeds of the security subject to the pledge in favor of the agency until a substitution of securities is made or the security interest is formally released by the agency.);

(3) Stocks and bonds actively traded on a national U.S. security exchange with certificates issued in the name of the individual surety. ~~National security exchanges are—(i) the New York Stock Exchange; (ii) the American Stock Exchange; (iii) the Boston Stock Exchange; (iv) the Cincinnati Stock Exchange; (v) the Midwest Stock Exchange; (vi) the Philadelphia Stock Exchange; (vii) the Pacific Stock Exchange; and (viii) the Spokane Stock Exchange.~~ These assets will be accepted at 90 percent of their 52-week low, as reflected at the time of submission of the bond. ~~Stock options and stocks on the over-the-counter (OTC) market or NASDQ Exchanges will not be accepted. Assistance in evaluating the acceptability of securities may be obtained from the—~~

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Division of Enforcement~~

450 Fifth Street NW
Washington, DC 20549.

[(4) Commodities, including but not limited to precious metals (e.g., gold, silver, platinum) and energy products (e.g., coal, oil) owned or controlled by the surety that are traded at an established market price (e.g., spot price published by the U.S. Government, spot price on national U.S. commodities exchanges, or price as established by prior or pending sales). These assets will be accepted at 90 percent of their current price.]

~~(4)~~**[(5)]** Real property owned in fee simple by the surety without any form of concurrent ownership, except as provided in paragraph (c)(3)(iii) of this subsection, and located in the United States or its outlying areas. These assets will be accepted at 100 percent of the most current tax assessment value (exclusive of encumbrances) or 75 percent of the properties' unencumbered market value provided a current appraisal is furnished (see 28.203-3).

~~(5)~~ **[(6)]** Irrevocable letters of credit (ILC) issued by a federally insured financial institution in the name of the contracting agency and which identify the agency and solicitation or contract number for which the ILC is provided.

(c) Unacceptable assets include but are not limited to—

(1) Notes or accounts receivable;

(2) Foreign securities **[not traded on a U.S. security exchange];**

(3) Real property as follows:

(i) Real property located outside the United States and its outlying areas.

(ii) Real property which is a principal residence of the surety.

(iii) Real property owned concurrently regardless of the form of co-tenancy (including joint tenancy, tenancy by the entirety, and tenancy in common) except where all co-tenants agree to act jointly.

(iv) Life estates, leasehold estates, or future interests in real property.

(4) Personal property other than that listed in paragraph (b) of this subsection (*e.g.*, jewelry, furs, antiques);

(5) Stocks and bonds of the individual surety in a controlled, affiliated, or closely held concern of the offeror/contractor;

(6) Corporate assets (*e.g.*, plant and equipment);

(7) Speculative assets (*e.g.*, ~~mineral~~ rights [**to unmined minerals**]);

(8) Letters of credit, except as provided in 28.203-2(b)(5)[(6)].

28.203-3 Acceptance of real property.

(a) Whenever a bond with a security interest in real property is submitted, the individual surety shall provide—

(1) Evidence of title in the form of a certificate of title prepared by a title insurance company approved by the United States Department of Justice. This list entitled List of Approved Attorneys, Abstracters, and Title Companies is available from the—

Title Unit, Land Acquisition Section
Land and Natural Resource Division
Department of Justice
Washington, DC 20530.

This title evidence must show fee simple title vested in the surety along with any concurrent owners; whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including the lien filed in favor of the Government under paragraph (d) of this subsection;

(2) Evidence of the amount due under any encumbrance shown in the evidence of title;

(3) A copy of the current real estate tax assessment of the property or a current appraisal dated no earlier than 6 months prior to the date of the bond, prepared by a professional appraiser who certifies that the appraisal has been conducted in accordance with the generally accepted appraisal standards as reflected in the Uniform Standards of Professional Appraisal Practice as promulgated by the—

[The] Appraisal Foundation
~~1029 Vermont Avenue, NW~~ [1155 15th Street NW, Suite 1111]
Washington, DC 20005.

(b) Failure to provide evidence that the lien has been properly recorded will render the offeror nonresponsible.

(c) The individual surety is liable for the payment of all administrative costs of the Government, including legal fees, associated with the liquidation of pledged real estate.

(d) The following format, or any document substantially the same, shall be used by the surety and recorded in the local recorder's office when a surety pledges real estate on Standard Form 28, Affidavit of Individual Surety.

LIEN ON REAL ESTATE

I/we agree that this instrument constitutes a lien in the amount of \$_____ on the property described in this lien. The rights of the United States Government shall take precedence over any subsequent lien or encumbrance until the lien is formally released by a duly authorized representative of the United States. I/we hereby grant the United States the power of sale of subject property, including the right to satisfy its reasonable administrative costs, including legal fees associated with any sale of subject property, in the event of contractor default if I/we otherwise fail to satisfy the underlying () bid guarantee, ()

performance bond, () or payment bond obligations as an individual surety on solicitation/contract number _____. The lien is upon the real estate now owned by me/us described as follows:

(legal description, street address and other identifying description)

In witness hereof, I/we have hereunto affixed my/our hand(s) and seal(s) this ____ Day of _____ 20 ____.

Witness:

_____ (Seal)

_____ (Seal)

I, _____, a Notary Public in and for the (City) _____, (State) _____, do hereby certify that _____, a party or parties to a certain Agreement bearing the date ____ day of _____ 20 __, and hereunto annexed, personally appeared before me, the said _____ being personally well known to me as the person(s) who executed said lien, and acknowledged the same to be his/her heir act and deed.

Given under my hand and seal this ____ day of ____ 20 ____.

Notary Public, State

My commission expires:

28.203-4 Substitution of assets.

[After award a] An individual surety [either directly or through the offeror] may request the Government to accept a substitute asset for that currently pledged by submitting a written request to the responsible contracting officer. The contracting officer may [shall] agree to the substitution of assets upon determining, after consultation with legal counsel, that the substitute assets to be pledged are adequate to protect the outstanding bond or guarantee obligations. If acceptable, the substitute assets shall be pledged as provided for in Subpart 28.2.

28.203-5 Release of lien.

(a) ~~After consultation with legal counsel, the contracting officer shall release the security interest on the individual surety's assets using the Optional Form 90, Release of Lien on Real Property, or Optional Form 91, Release of Personal Property from Escrow, or a similar release as soon as possible consistent with the conditions in paragraphs (a)(1) and (2) of this subsection. 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 Miller Act.* The security interest shall be maintained for the later of—

- (i) ~~1-year following final payment;~~
- (ii) [(i)] Until completion of any warranty period (applicable only to performance bonds); or
- (iii) [(ii)] 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 (28.102-1(b)(1))*. The security interest shall be maintained for the full contract performance period plus one year.

(3) *Other contracts not subject to the Miller Act*. 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, 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 paragraphs (a)(1) through (3) of this subsection. In making this determination, the contracting officer will give consideration as to whether the unreleased portion of the lien 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).~~

[(c) (1) Upon written request by the individual surety, the contracting officer shall release a portion of the security interest on the individual surety's assets based upon substantial completion of the contractor's obligations under its performance bond; provided, that a sufficient security interest on the individual surety's assets remains to cover any outstanding obligation(s).

[(2) Release of the security interest in support of a payment bond must comply with paragraph (a)(1) (ii) of this subsection. Before releasing the security interest, the contracting officer will give consideration as to whether the unreleased portion of the lien 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 release of such assets does not relieve the individual surety of the obligations under the bond(s).]

(d) After consultation with legal counsel, the contracting officer shall release the security interest on the individual surety's assets using the Optional Form 90, Release of Lien on Real Property, or Optional Form 91, Release of Personal Property from Escrow, or a similar release as soon as possible consistent with the conditions in paragraphs (a)(1) and (2) of this subsection. 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.

52.228-11 Pledges of Assets.

As prescribed in 28.203-6, insert the following clause:

PLEDGES OF ASSETS (~~XXX-XXXX~~)

(a) Offerors shall obtain from each person acting as an individual surety on a bid guarantee, a performance bond, or a payment bond—

- (1) Pledge of assets; and
- (2) Standard Form 28, Affidavit of Individual Surety.

(b) Pledges of assets from each person acting as an individual surety shall be in the form of—

(1) Evidence of an escrow account containing cash, certificates of deposit, commercial or Government securities, or other assets described in FAR 28.203-2 (except see 28.203-2(b)(2) with respect to Government securities held in book entry form [and 28.203-2(b)(4) with respect to commodities]) and/or;

[(2) A security interest in accordance with Article 9 of the Uniform Commercial Code for assets that cannot be physically placed in an escrow account in a financial institution (e.g., commodities); and/or]

(2~~3~~) A recorded lien on real estate. The offeror will be required to provide—

(i) Evidence of title in the form of a certificate of title prepared by a title insurance company approved by the United States Department of Justice. This title evidence must show fee simple title vested in the surety along with any concurrent owners; whether any real estate taxes are due and payable; and any recorded encumbrances against the property, including the lien filed in favor of the Government as required by FAR 28.203-3(d);

(ii) Evidence of the amount due under any encumbrance shown in the evidence of title;

(iii) A copy of the current real estate tax assessment of the property or a current appraisal dated no earlier than 6 months prior to the date of the bond, prepared by a professional appraiser who certifies that the appraisal has been conducted in accordance with the generally accepted appraisal standards as reflected in the Uniform Standards of Professional Appraisal Practice, as promulgated by the Appraisal Foundation.

(End of clause)

SF 28, Affidavit of Individual Surety.

Revise the text at Block 7(b) to read as follows: "*(b) Assets other than real estate (describe the assets, the details of the escrow account [for other security interest], and attach certified evidence thereof).*"