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Comment On: FAR-2011-0079-0007
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General Comment

See attached file(s)

Attachments

SFAA.comments

The Surety & Fidelity Association of America

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June 21, 2011

Via eRulemaking Portal

General Services Administration
Regulatory Secretariat (MVCB)
1275 First Street, NE
Washington, DC 20417
Attn: Hada Flowers

Re: Comments of The Surety & Fidelity Association of America
Affidavit of Individual Surety
Information Collection 9000-0001

The Surety & Fidelity Association of America ("SFAA") is a trade association of approximately 450 insurance companies that are licensed to provide surety and fidelity bonds. SFAA member companies collectively account for the vast majority of performance and payment bonds that secure Federal construction projects. SFAA's member companies include virtually all of the companies on the Treasury Department's Listing of Approved Sureties (Circular 570 or the Treasury List).

We appreciate the opportunity to provide comment regarding the captioned notice, which pertains to the information collection requirement for the Affidavit of Individual Surety ("SF 28"). The information collected under the SF 28 assists contracting officers in determining the acceptability of individual sureties. The captioned notice seeks comment on whether the "collection of information is necessary for the proper performance of functions of the FAR." 76 Fed. Reg. 22706 (April 22, 2011). Whether the surety is a corporation or an individual, the Federal Government has an interest in accepting bonds only from sureties with financial resources that are sufficient to support their obligations. Therefore, the SF 28 serves a critical function that, at the very least, should not be revised and should continue to collect the same information that it collects currently.

The surety's role is to be a deep pocket unquestionably able to meet the obligations guaranteed by the bond. The surety, therefore, must itself be of unquestioned financial standing relative to the bond obligation. For bonds to the United States or required by Federal law, 31 U.S.C. §§9304, *et seq.* provide for oversight of potential corporate sureties by the Treasury Department. Corporate sureties are subject to extensive information requirements established by the Treasury Department, which issues certificates of authority to sureties eligible to write bonds to the United States. For example, sureties are required to file annually financial statements with Treasury, which, in turn, sets a limit of the size of bond an authorized surety can write. This limitation is based, in part, on Treasury's evaluation of the surety's financial condition. *See* 31 CFR 223.1 *et seq*. The Federal Acquisition Regulations ("FAR") address the acceptability of corporate sureties securing Federal construction contracts:

> (a)(1) Corporate sureties offered for bonds furnished with contracts performed in the United States or its outlying areas must appear on the list contained in the Department of the Treasury Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies."
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> (2) The penal amount of the bond should not exceed the surety's underwriting limit stated in the Department of the Treasury circular. If the penal amount exceeds the underwriting limit, the bond will be acceptable only if (i) the amount which exceeds the specified limit is coinsured or reinsured and (ii) the amount of coinsurance or reinsurance does not exceed the underwriting limit of each coinsurer or reinsurer.

48 CFR 28.202.

The FAR at 48 CFR 28.203 *et seq*. also addresses the acceptability of individual sureties. As to individual sureties, the regulations state:

> An individual surety must execute the bond, and the unencumbered value of the assets (exclusive of all outstanding pledges for other bond obligations) pledged by the individual surety, must equal or exceed the penal amount of each bond. The individual surety shall execute the Standard Form 28 and provide a security interest in accordance with 28.203-1

48 CFR 28.203(b). The information collected by the SF 28 is necessary to provide the contracting essential information regarding the soundness and liquidity of the asset underlying the bond. The SF 28 requests information concerning the assets behind the surety's obligation, any encumbrances of the assets and any other bonds for which those assets are pledged. In addition, the SF 28 requires supporting documentation evidencing that the asset has been pledged to support the bond.

At the very least, SF 28 should not be revised or "streamlined" to request less information. The Federal Government has already experienced the adverse effects of insufficient documentation from individual sureties. Prior to amendment in 1990, the FAR required only a sworn statement that the surety's net worth was sufficient to cover the bond obligations. The SF 28 presented only a general statement of the individual surety's financial position. This lack of any requirement to provide supporting documentation and any requirement to pledge the assets to the

United States led to several instances of uncollectible bonds backed by fraudulent or nonexistent assets. The proposed rulemaking that amended the individual surety requirements stated:

> Experience has shown that the information contained on the SF 28 is inadequate. The frequent result is that bonds submitted by individual sureties are uncollectable to the detriment of the Government and suppliers under Government contracts.

53 Fed. Reg. 44564 (November 3, 1988). The purpose of the SF 28 should be to obtain credible information, supported by documentation, that assets have been pledged to the United States, which the Government can access if necessary. Any reductions to the current requirements of the SF 28 would reduce the effectiveness of the form significantly.

Moreover, we encourage the General Services Administration to consider enhancements to the form that would further its purposes. As currently drafted, the SF 28 has not prevented instances of fraud against the United States. For example, the U.S. Department of Justice for the Southern District of Texas has charged an individual surety with mail fraud for writing $25 million of bonds based on a single piece of real estate valued at $130,000. Among the defrauded project owners was the U.S. Navy. Times Picayune, March 30, 2010.

We suggest that the form should specify the documentation that would be sufficient to demonstrate the value of the assets and to verify that it has been pledged to the United States. The form currently refers generally to "certified evidence." For assets other than real estate that must be placed in escrow, the form should require a copy of the escrow agreement with the federally insured financial institution that demonstrates unrestricted access by the Federal Government if necessary.

The form also should request information pertaining to other requirements under 48 CFR 28.203. For example, the SF 28 should include an acknowledgement that the individual surety accepts joint and several liability to the extent of the penal amount of the bond. 48 CFR 28.203(b). In addition, the SF 28 should include questions regarding the individual surety's criminal background, including any debarments and cease and desist orders issued by state insurance commissioners. 48 CFR 28.203(g).

We submit that these enhancements further the Federal Government's interest in ensuring the financial sufficiency of the bonds that it accepts to secure obligations to the United States. Thank you for your consideration.

Sincerely,

Robert J. Duke