

48 CFR Parts 28 and 52

Tuesday
December 28, 1999

Part IX

**Department of Defense
General Services
Administration**

**National Aeronautics and
Space Administration**

48 CFR Parts 28 and 52
Federal Acquisition Regulation;
Construction Industry Payment Protection
Act of 1999; Proposed Rule

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 28 and 52**

[FAR Case 1999-302]

RIN 9000-A160

**Federal Acquisition Regulation;
Construction Industry Payment
Protection Act of 1999**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement the Construction Industry Payment Protection (CIPP) Act of 1999. The CIPP Act amends the Miller Act to provide that the amount of a payment bond must equal the total amount payable by the terms of the contract, unless the contracting officer determines that a payment bond in that amount is impractical. The proposed rule also provides enhanced payment protection for Government contracts not subject to the Miller Act. This added protection is not required by the CIPP but is considered beneficial to add consistency to the rule and to afford added protection to subcontractors and suppliers on contracts less than \$100,000.00.

DATES: Interested parties should submit comments in writing on or before February 28, 2000 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRs), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Address e-mail comments submitted via the Internet to: *farcase.1999-302@gsa.gov*. Please submit comments only and cite FAR case 1999-302 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ralph O'Neill, Procurement

Analyst, at (202) 501-3856. Please cite FAR case 1999-302.

SUPPLEMENTARY INFORMATION:**A. Background**

This proposed rule revises FAR 28.102 and the clauses at 52.228-13, 52.228-15, and 52.228-16 to implement the CIPP Act (Pub. L. 106-49) and to enhance payment protection for Government contracts not subject to the Miller Act.

The Miller Act (40 U.S.C. 270a, *et seq.*) requires contractors performing Government construction contracts that exceed \$100,000 to furnish performance and payment bonds. Previously, the required payment bond did not exceed 50 percent of contract price, and was capped at a ceiling of \$2.5 million.

The CIPP Act substitutes a requirement that the payment bond generally must equal the contract price. In addition, the CIPP Act makes two procedural changes to the Miller Act, adding a requirement regarding subcontractor waiver of the right to sue on the payment bond, and modernizing the requirements for the delivery of notice by subcontractors having right of action on the payment bond.

The proposed rule amends the clause at FAR 52.228-15 to address the statutory requirement regarding waiver of the right to sue on the payment bond. The delivery of notice by subcontractors having right of action on the payment bond is not an issue addressing either the contracting officer or the contractor, and is not addressed in the proposed rule.

This rule was not subject to Office of Management and Budget review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule requires prime contractors to provide increased payment protection for subcontractors that furnish labor or materials on Federal construction projects. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. The analysis is summarized as follows:

The primary objective of this rule is to enhance payment protection for subcontractors that furnish labor or materials on Federal construction projects. The rule will require all contractors to which the

Government awards construction contracts exceeding \$25,000 to obtain a payment bond equal to the contract price, unless the contracting officer determines that to be impractical or unnecessary. The rule is expected to benefit subcontractors seeking payment, without resulting in substantial price increases for the prime contractor obtaining the increased payment protection. We estimate that the Executive branch annually awards 54,000 construction contracts exceeding \$25,000, of which half (27,000 contracts) are awarded to approximately 7,500 small business firms. We estimate that approximately 60,000 small business subcontractors could benefit from increased payment protection.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR subparts 28 and 52 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 1999-302), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 28 and 52

Government procurement.

Dated: December 17, 1999.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 28 and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts 28 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 28—BONDS AND INSURANCE

2. Revise section 28.102-2 to read as follows:

28.102-2 Amount required.

(a) *Definition.* As used in this subsection—

Original contract price means the award price of the contract; or, for requirements contracts, the price payable for the estimated quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract

price does not include the price of any options, except those options exercised at the time of contract award.

(b) Contracts exceeding \$100,000 (Miller Act).

(1) *Performance bonds.* Unless the contracting officer determines that a lesser amount is adequate for the protection of the Government, the penal amount of performance bonds must equal—

(i) 100 percent of the original contract price; and

(ii) If the contract price increases, an additional amount equal to 100 percent of any such increase.

(2) *Payment bonds—*

(i) Unless the contracting officer makes a written determination supported by specific findings that a payment bond in this amount is impractical, the amount of the payment bond must equal—

(A) 100 percent of the original contract price; and

(B) If the contract price increases, an additional amount equal to 100 percent of any such increase.

(ii) The amount of the payment bond must be no less than the amount of the performance bond.

(c) *Contracts exceeding \$25,000 but not exceeding \$100,000.* Unless the contracting officer determines that a lesser amount is adequate for the protection of the Government, the penal amount of the payment bond or the amount of alternative payment protection must equal—

(1) 100 percent of the original contract price; and

(2) If the contract price increases, an additional amount equal to 100 percent of any such increase.

(d) *Securing additional payment protection.* If the contract price increases, the Government must secure any needed additional protection by directing the contractor to—

(1) Increase the penal sum of the existing bond;

(2) Obtain an additional bond; or

(3) Furnish additional alternative payment protection.

(e) *Reducing amounts.* The contracting officer may reduce the amount of security to support a bond, subject to the conditions of 28.203-5(c) or 28.204(b).

3. Revise the section heading and paragraph (a) of section 28.102-3; and add a sentence at the end of paragraph (b) to read as follows:

28.102-3 Contract clauses.

(a) Insert a clause substantially the same as the clause at 52.228-15, Performance and Payment Bonds—Construction, in solicitations and contracts for construction that contain a requirement for performance and payment bonds if the resultant contract is expected to exceed \$100,000. The contracting officer may decrease the penal amount of the performance or payment bonds in accordance with 28.102-2(b). If the provision at 52.228-1 is not included in the solicitation, the contracting officer must set a period of time for return of executed bonds.

(b) * * * The contracting officer may decrease the required percentage in paragraph (b) of the clause in accordance with 28.102-2(c).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.228-13 [Amended]

4. Amend section 52.228-13 by revising the date of the clause; and in paragraph (b) of the clause by removing “50” and adding “100” in its place.

5. In section 52.228-15, revise the date of the clause, paragraph (a), and paragraph (b); and add paragraph (e) to read as follows:

52.228-15 Performance and Payment Bonds— Construction.

* * * * *

Performance and Payment Bonds— Construction (Date)

(a) *Definitions.* As used in this clause—
Original contract price means the award price of the contract; or, for requirements contracts, the price payable for the estimated quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) Unless the resulting contract price is \$100,000 or less, the successful offeror shall furnish performance and payment bonds to the Contracting Officer as follows:

(1) *Performance bonds* (Standard Form 25): The penal amount of performance bonds at the time of contract award shall be 100 percent of the original contract price.

(2) *Payment Bonds* (Standard Form 25-A): The penal amount of payment bonds at the time of contract award shall be 100 percent of the original contract price.

(3) *Additional bond protection.* (i) The Government may require additional performance and payment bond protection if

the contract price is increased. The increase in protection generally will equal 100 percent of the increase in contract price.

(ii) The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

* * * * *

(e) Any subcontractor waiver of the right to sue on a payment bond is subject to 40 U.S.C. 270b(c).

(End of clause)

6. In section 52.228-16, revise the date of the clause and paragraph (a); in paragraph (b) add “original” before “contract”, twice; and revise paragraph (d) and Alternate I to read as follows:

52.228-16 Performance and Payment— Bonds Other Than Construction.

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Performance and Payment—Bonds Other Than Construction (Date)

(a) *Definitions.* As used in this clause—
Original contract price means the award price of the contract or, for requirements contracts, the price payable for the estimated quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

* * * * *

(d) The Government may require additional performance and payment bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bonds or to obtain additional bonds.

* * * * *

(End of clause)

Alternate I (Date). As prescribed in 28.103-4, substitute the following paragraphs (b) and (d) for paragraphs (b) and (d) of the basic clause:

(b) The Contractor shall furnish a performance bond (Standard Form 1418) for the protection to the Government in an amount equal to ___ percent of the contract price.

(d) The Government may require additional performance bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

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