

August 5, 1996 (61 FR 40714). No comments were received in response to the interim FAR rule. Therefore, the interim FAR rule is being converted to a final rule without change.

### B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 this rule merely amends the FAR to conform to revisions to Department of Labor (DoL) regulations reflecting repeal of the "manufacturer" and "regular dealer" requirements under the Walsh-Healey Public Contracts Act. DoL has determined that the revisions to its regulations will not have a significant economic impact on a substantial number of small entities.

### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which 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 1, 9, 14, 19, 22, 33, and 52

Government procurement.

### Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR Parts 1, 9, 14, 19, 22, 33, and 52 which was published at 61 FR 67409, December 20, 1996, is adopted as a final rule without change.

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

Dated: August 7, 1997.

**Edward C. Loeb,**

*Director, Federal Acquisition Policy Division.*  
[FR Doc. 97-21487 Filed 8-21-97; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 1, 28, and 52

[FAC 97-01; FAR Case 95-301; Item III]

RIN 9000-AG99

#### Federal Acquisition Regulation; Irrevocable Letters of Credit and Alternatives to Miller Act Bonds

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

**ACTION:** Interim rule adopted as final with changes.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to adopt as final, with changes, the interim rule published as Item XVII of Federal Acquisition Circular 90-39 on June 20, 1996. The rule amends the Federal Acquisition Regulation (FAR) to address the use of irrevocable letters of credit in lieu of surety on Miller Act bonds (OFPP Policy Letter 91-4) and alternatives to Miller Act Bonds, as required by Section 4101(b) of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355). This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

**DATE:** Effective October 21, 1997.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jack O'Neill, Procurement Analyst, at (202) 501-3856. Please cite FAC 97-01, FAR case 95-301.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends FAR Parts 1, 28, and 52 to provide for use of Irrevocable Letters of Credit as substitutes for corporate or individual surety on Miller Act bonds, and provides alternatives to Miller Act payment bonds for construction contracts valued at \$25,000 to \$100,000, which are no longer subject to the Miller Act, in accordance with Section 4104(b)(1) of FASA. An interim rule with request for comment was

published in the **Federal Register** on June 20, 1996 (61 FR 31651). Comments were received from seven respondents. The final rule includes the following changes in response to public comments:

- Update of the references to reflect the current version of the Uniform Customs and Practice for Documentary Credits.
- Amendment of the definition of Irrevocable Letter of Credit (ILC). Deletion of application of the term "unconditional" to ILCs.
- Incorporation of requirements for a specific expiration date for ILCs used in lieu of surety on performance or payment bonds, with automatic extension for one-year periods, until the contracting officer notifies the financial institution that the Government is waiving the right to payment.
- Limitation of the requirement for confirmation of ILCs over \$5 million to those issued by financial institutions that had letter of credit business of less than \$25 million in the past year.
- Incorporation of an explicit requirement for credit rating service to be as specified in Office of Federal Procurement Policy Pamphlet No. 7.
- Amendment of the clause at 52.228-13, Alternative Payment Protections, to specify the amount of payment protection as 50 percent of the contract price, and to require payment protection within a certain number of days after contract award.

The Councils did not adopt a comment which recommended a change in the expiration date for ILCs from 60 to 75 days after the close of the bid acceptance period, as the comment appeared to be based on a misinterpretation of the rule. The recommended 75-day expiration period was based on the need for 60 days to cover the bid acceptance period, plus 10 days to cover the time necessary for submission of payment and performance bonds, and 5 additional days to cover mailing time. However, as written, the rule provides for 60 days in addition to the number of days required for the bid acceptance period; *i.e.*, if the bid acceptance period is 60 days, the rule requires the ILC to cover a total of 120 days before expiration.

##### B. Regulatory Flexibility Act

The final rule is expected to have a significant positive 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 provides alternatives to Miller Act bonds for construction contracts between \$25,000 and \$100,000, which may be beneficial to

construction contractors. A Final Regulatory Flexibility Analysis (FRFA) has, therefore, been prepared and will be provided to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the FRFA may be obtained from the FAR Secretariat. The analysis is summarized as follows:

This rule will apply to all businesses, large and small, which contract with the Government for construction. The objective is to make it easier for small construction contractors to provide payment protection, by providing alternatives for construction contracts valued between \$25,000 and \$100,000. In addition, the rule permits the use of Irrevocable Letters of Credit as security for Miller Act bonds, in lieu of corporate or individual sureties. The rule imposes no new recordkeeping or reporting requirements, and provides alternatives to Miller Act payment bonds for construction contracts which do not exceed \$100,000.

**C. Paperwork Reduction Act**

This rule will reduce the information collection requirements which the Office of Management and Budget (OMB) previously approved under 44 U.S.C. 3501, *et seq.* (OMB Control No. 9000-0045). The rule will reduce the number of respondents and responses by identifying and correcting an overlap in reporting of performance and payment and bid bonds.

**List of Subjects in 48 CFR Parts 1, 28, and 52**

Government procurement.

Dated: August 7, 1997.

**Edward C. Loeb,**

*Director, Federal Acquisition Policy Division.*

Accordingly, the interim rule amending 48 CFR Parts 28 and 52 which was published at 61 FR 31651, June 20, 1996, is adopted as final with changes as set forth below:

1. The authority citation for 48 CFR Parts 1, 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM**

2. The table in section 1.106 is amended by removing the entries for 28.106-1(b) and 52.228-3; revising the entry for 52.228-2; and adding entries in numerical order to read as follows:

**1.106 OMB Approval under the Paperwork Reduction Act.**

FAR seg- ment	OMB control No.				
	*	*	*	*	*
28.106-1(e).	9000-0001				
28.106-1(n).	9000-0119				
	*	*	*	*	*
52.228-2	9000-0045 and 9000-0119				
52.228-13	9000-0045				
52.228-15	9000-0045				
52.228-16	9000-0045 and 9000-0119				
	*	*	*	*	*

**PART 28—BONDS AND INSURANCE**

3. Section 28.000 is revised to read as follows:

**28.000 Scope of part.**

This part prescribes requirements for obtaining financial protection against losses under sealed bid and negotiated contracts. It covers bid guarantees, bonds, alternative payment protections, security for bonds, and insurance. The terms "bid" and "bidders" include "proposal" and "offerors."

4. Section 28.001 is amended by revising the definitions for "Irrevocable letter of credit" and "Penal sum" to read as follows:

**28.001 Definitions.**

\* \* \* \* \*

*Irrevocable letter of credit* (ILC) means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money until the expiration date of the letter, upon presentation by the Government (the beneficiary) of a written demand therefor. Neither the financial institution nor the offeror/contractor can revoke or condition the letter of credit.

*Penal sum or penal amount* means the amount of money specified in a bond (or a percentage of the bid price in a bid bond) as the maximum payment for which the surety is obligated or the amount of security required to be pledged to the Government in lieu of a corporate or individual surety for the bond.

\* \* \* \* \*

**Subpart 28.1—Bonds and Other Financial Protections**

5. The heading of Subpart 28.1 is revised to read as set forth above.

6. Section 28.100 is revised to read as follows:

**28.100 Scope of subpart.**

This subpart prescribes requirements and procedures for the use of bonds, alternative payment protections, and all types of bid guarantees.

7. Section 28.102-2 is amended by revising the introductory text of paragraph (b)(1) and paragraphs (b)(2), (c)(1), and (c)(2) to read as follows:

**28.102-2 Amount required.**

\* \* \* \* \*

(b) \* \* \* (1) The penal amount of payment bonds or the amount of alternative payment protection shall equal—

\* \* \* \* \*

(2) If the original contract price is \$5 million or less, the Government may require additional protection if the contract price is increased.

(i) The penal amount of the total protection as revised shall meet the requirement of paragraph (b)(1) of this subsection.

(ii) The Government shall secure the required additional protection by directing the contractor to increase the penal sum of the existing bond or to obtain an additional bond, or to furnish additional alternative payment protection.

\* \* \* \* \*

(c) \* \* \* (1) When determining the penal sum of bonds or the amount of alternative payment protection for requirements contracts, the contracting officer shall consider the contract price to be the price payable for the estimated quantity.

(2) When determining the penal sum of bonds or the amount of alternative payment protection for indefinite-quantity contracts, the contracting officer shall consider the contract price to be the price payable for the specified minimum quantity. When the minimum quantity is exceeded, paragraphs (a)(2) and (b)(2) of this subsection apply.

\* \* \* \* \*

8. Section 28.102-3 is amended by revising the section heading and the last sentence of paragraph (b) to read as follows:

**28.102-3 Contract clauses.**

\* \* \* \* \*

(b) \* \* \* Complete the clause by specifying the payment protections selected (see 28.102-1(b)(1)) and the deadline for submission.

9. Section 28.106-3 is revised to read as follows:

**28.106-3 Additional bond and security.**

(a) When additional bond coverage is required and is secured in whole or in part by the original surety or sureties, agencies shall use Standard Form 1415,

Consent of Surety and Increase of Penalty. Standard Form 1415 is authorized for local reproduction, and a copy of the form is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(b) When additional bond coverage is required and is secured in whole or in part by a new surety or by one of the alternatives described in 28.204 in lieu of corporate or individual surety, agencies shall use Standard Form 25, Performance Bond; Standard Form 1418, Performance Bond for Other Than Construction Contracts; Standard Form 25-A, Payment Bond; or Standard Form 1416, Payment Bond for Other Than Construction Contracts.

10. Section 28.106-8 is revised to read as follows:

**28.106-8 Payment to subcontractors or suppliers.**

The contracting officer will only authorize payment to subcontractors or suppliers from an ILC (or any other cash equivalent security) upon a judicial determination of the rights of the parties, a signed notarized statement by the contractor that the payment is due and owed, or a signed agreement between the parties as to amount due and owed.

**Subpart 28.2—Sureties and Other Security for Bonds**

11. The heading of Subpart 28.2 is revised as set forth above.

12. Section 28.200 is revised to read as follows:

**28.200 Scope of subpart.**

This subpart prescribes procedures for the use of sureties and other security to protect the Government from financial losses.

**28.201 Requirements for security.**

13. Section 28.201 is amended by revising the section heading as set forth above, and in paragraph (b) by inserting the word "other" after "or" the first time it appears.

14. Section 28.204 is amended in paragraph (a) by revising the second sentence to read as follows:

**28.204 Alternatives in lieu of corporate or individual sureties.**

(a) \* \* \* When any of those types of security are deposited, a statement shall be incorporated in the bond form pledging the security in lieu of execution of the bond form by corporate or individual sureties. \* \* \*

15. Section 28.204-3 is amended by revising paragraphs (b), (c), (f) introductory text, (f)(2) introductory

text, (f)(2)(ii)(B), (g) introductory text, (g)(1) and (h) to read as follows:

**28.204-3 Irrevocable letter of credit (ILC).**

\* \* \* \* \*

(b) The ILC shall be irrevocable, require presentation of no document other than a written demand and the ILC (and letter of confirmation, if any), expire only as provided in paragraph (f) of this subsection, and be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (g) of this subsection.

(c) To draw on the ILC, the contracting officer shall use the sight draft set forth in the clause at 52.228-14, and present it with the ILC (including letter of confirmation, if any) to the issuing financial institution or the confirming financial institution (if any).

\* \* \* \* \*

(f) The period for which financial security is required shall be as follows:

\* \* \* \* \*

(2) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC shall provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the contracting officer provides the financial institution with a written statement waiving the right to payment. The period of required coverage shall be:

\* \* \* \* \*

(ii) \* \* \*

(B) For performance bonds only, until completion of any warranty period.

(g) Only federally insured financial institutions rated investment grade or higher shall issue or confirm the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.

(1) The offeror/contractor shall provide the contracting officer a credit rating from a recognized commercial rating service as specified in Office of

Federal Procurement Policy Pamphlet No. 7 (see 28.204-3(h)) that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.

\* \* \* \* \*

(h)(1) Additional information on credit rating services and investment grade ratings is contained within Office of Federal Procurement Policy Pamphlet No. 7, Use of Irrevocable Letters of Credit. This pamphlet may be obtained by calling the Office of Management and Budget's publications office at (202) 395-7332.

(2) A copy of the Uniform Customs and Practice (UCP) for Documentary Credits, 1993 Revision, International Chamber of Commerce Publication No. 500, is available from: ICC Publishing, Inc., 156 Fifth Avenue, New York NY, 10010, Telephone: (212) 206-1150, Telefax: (212) 633-6025, E-mail: iccpub@interport.net

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

16. Section 52.228-2 is amended by revising the introductory text, the clause date, and paragraph (d) to read as follows:

**52.228-2 Additional Bond Security.**

As prescribed in 28.106-4(a), insert the following clause:

**Additional Bond Security (Oct 1997)**

\* \* \* \* \*

(d) An irrevocable letter of credit (ILC) used as security will expire before the end of the period of required security. If the Contractor does not furnish an acceptable extension or replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the Contracting officer has the right to immediately draw on the ILC.

(End of clause)

17. Section 52.228-13 is amended by revising the clause date and paragraphs (b), (c) and (f) to read as follows:

**52.228-13 Alternative Payment Protections.**

\* \* \* \* \*

**Alternative Payment Protections (Oct 1997)**

\* \* \* \* \*

(b) The amount of the payment protection shall be 50 percent of the contract price.

(c) The submission of the payment protection is required within \_\_\_\_\_ days of contract award.

\* \* \* \* \*

(f) When a tripartite escrow agreement is used, the Contractor shall utilize only suppliers of labor and material that signed the escrow agreement.

(End of clause)

18. Section 52.228-14 is amended by revising:

(a) The clause date and paragraphs (a), (b), (c) introductory text, (c)(2) introductory text, (c)(2)(ii)(B), and (d);

(b) Following paragraph (E) in the "Irrevocable Letter of Credit", paragraphs 1, 2, 4, and 6; and

(c) Following paragraph (f) in the ILC confirmation, paragraphs 3, 4(a), and 6. The revised sections read as follows:

**52.228-14 Irrevocable Letter of Credit.**

\* \* \* \* \*

**Irrevocable Letter of Credit (Oct 1997)**

(a) "Irrevocable letter of credit" (ILC), as used in this clause, means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by the Government (the beneficiary) of a written demand therefor. Neither the financial institution nor the offeror/Contractor can revoke or condition the letter of credit.

(b) If the offeror intends to use an ILC in lieu of a bid bond, or to secure other types of bonds such as performance and payment bonds, the letter of credit and letter of confirmation formats in paragraphs (e) and (f) of this clause shall be used.

(c) The letter of credit shall be irrevocable, shall require presentation of no document other than a written demand and the ILC (including confirming letter, if any), shall be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (d) of this clause, and—

\* \* \* \* \*

(2) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/Contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or may submit an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC shall provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the Contracting Officer provides the financial institution with a written statement waiving the right to payment. The period of required coverage shall be:

\* \* \* \* \*

(ii) \* \* \*

(B) For performance bonds only, until completion of any warranty period.

(d) Only federally insured financial institutions rated investment grade or higher shall issue or confirm the ILC. The offeror/Contractor shall provide the Contracting Officer a credit rating that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial

institution that had letter of credit business of at least \$25 million in the past year.

(e) \* \* \*

1. We hereby establish this irrevocable and transferable Letter of Credit in your favor for one or more drawings up to United States \$\_\_\_\_\_. This Letter of Credit is payable at [issuing financial institution's and, if any, confirming financial institution's] office at [issuing financial institution's address and, if any, confirming financial institution's address] and expires with our close of business on \_\_\_\_\_, or any automatically extended expiration date.

2. We hereby undertake to honor your or the transferee's sight draft(s) drawn on the issuing or, if any, the confirming financial institution, for all or any part of this credit if presented with this Letter of Credit and confirmation, if any, at the office specified in paragraph 1 of this Letter of Credit on or before the expiration date or any automatically extended expiration date.

\* \* \* \* \*

4. This Letter of Credit is transferable. Transfers and assignments of proceeds are to be effected without charge to either the beneficiary or the transferee/assignee of proceeds. Such transfer or assignment shall be only at the written direction of the Government (the beneficiary) in a form satisfactory to the issuing financial institution and the confirming financial institution, if any.

\* \* \* \* \*

6. If this credit expires during an interruption of business of this financial institution as described in Article 17 of the UCP, the financial institution specifically agrees to effect payment if this credit is drawn against within 30 days after the resumption of our business.

(f) \* \* \*

3. We hereby undertake to honor sight draft(s) drawn under and presented with the Letter of Credit and this Confirmation at our offices as specified herein.

4. \* \* \*

(a) At least 60 days prior to any such expiration date, we shall notify the Contracting Officer, or the transferee and the issuing financial institution, by registered mail or other receipted means of delivery, that we elect not to consider this confirmation extended for any such additional period; or

\* \* \* \* \*

6. If this confirmation expires during an interruption of business of this financial institution as described in Article 17 of the UCP, we specifically agree to effect payment if this credit is drawn against within 30 days after the resumption of our business.

\* \* \* \* \*

(End of clause)

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 1 and 31**

[FAC 97-01; FAR Case 96-010; Item IV]

RIN 9000-AH41

**Federal Acquisition Regulation; Automatic Data Processing Equipment Leasing Costs**

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

**ACTION:** Interim rule adopted as final.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to convert the interim rule published as Item I of Federal Acquisition Circular 90-44 on December 31, 1996, to a final rule without change. The rule amends the Federal Acquisition Regulation (FAR) to remove the cost principle on automatic data processing equipment (ADPE) leasing costs. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

**DATES:** Effective October 21, 1997.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson, Procurement Analyst, at (202) 501-3221. Please cite FAC 97-01, FAR case 96-010.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

An interim rule was published on December 31, 1996 (61 FR 69287). The interim rule deleted the ADPE definition at FAR 31.001, the cost principle at FAR 31.205-2, Automatic data processing equipment leasing costs, and references to the term ADPE found elsewhere in FAR Part 31. The interim rule is converted to a final rule without change.

Public comments were received from one source. The comments were considered in developing the final rule.

**B. Regulatory Flexibility Act**

The Department of Defense, the General Services Administration, and