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48 CFR Part 28

Federal Acquisition Regulation; Powers of Attorney for Bid Bonds; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 28

FAR Case 2003–029

RIN 9000–AK01

Federal Acquisition Regulation; Powers of Attorney for Bid Bonds

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

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to establish that a copy of an original power of attorney, including a photocopy or facsimile copy, when submitted in support of a bid bond, is sufficient evidence of the authority to bind the surety. The authenticity and enforceability of the power of attorney at the time of the bid opening will be treated as a matter of responsibility.

DATES: Interested parties should submit comments in writing on or before October 22, 2004, to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2003–029 by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web Site: *http://www.acqnet.gov/far/ProposedRules/proposed.htm*. Click on the FAR case number to submit comments.
- E-mail: *farcase.2003–029@gsa.gov*. Include FAR case 2003–029 in the subject line of the message.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (V), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2003–029 in all correspondence related to this case. All comments received will be posted without change to *http://www.acqnet.gov/far/ProposedRules/proposed.htm*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219–0202. Please cite FAR case 2003–029.

SUPPLEMENTARY INFORMATION:

A. Background

This FAR rule proposes to revise the policy relating to acceptance of copies of powers of attorneys accompanying bid bonds. There has been a significant level of controversy surrounding contracting officers' decisions regarding the evaluation of bid bonds and accompanying powers of attorney.

Since 1999, a series of GAO decisions has rejected telefaxed as well as photocopied powers of attorney. Then in *All Seasons Construction, Inc.*, B–291166.2, Dec. 6, 2002, GAO sustained the Government's decision to reject a low bidder's power of attorney because the signatures were generated by computer as part of the document. This decision has been interpreted by industry and procuring agencies to require a contracting officer to inspect the power of attorney at bid opening to ascertain that the signatures are original. The requirement for an original power of attorney, combined with the requirement for an original ''wet'' signature after the generation of the document, has become costly and unworkable for the surety industry.

Furthermore, most recently, on January 9, 2004, the U.S. Court of Federal Claims (COFC), in *Hawaiian Dredging Constr., Co. v. U.S.*, No. 03–2763C, issued a ruling opposing the Government's decision to reject a low bidder's power of attorney because the signatures were not original. In this decision, the COFC indicated that the FAR does not require an original signature on the document that serves as evidence of authority to bind the surety. Moreover, the COFC held that the contracting officer was unreasonable in relying on *All Seasons* to require original signatures and was critical of certain aspects of GAO's reasoning in the decision. The *Hawaiian Dredging* case has created a division of opinion in the bid protest forums in regards to the standards for acceptability of powers of attorney.

Another problem is that it has become even more difficult for the contracting officer to determine at bid opening the authenticity and enforceability of the power of attorney. Commercial practice would permit a quick check to determine if the power of attorney was in fact authentic and enforceable. However, in our current procurement process, if the contracting officer is unable to determine with unequivocal certainty that the surety would be bound by the bid bond and associated documents, then the bid must be rejected as nonresponsive. This may not be in the best interest of the Government, if the power of attorney was actually authentic and enforceable. Only after the rejected bidder challenges the contracting officer decision in a bid protest are the facts established through testimony and representations of the surety company as to whether the document was indeed authentic. If doubt about the power of attorney becomes a matter of responsibility rather than responsiveness, then the surety can confirm whether the attorney-in-fact is actually authorized to represent the company before the contracting officer rejects the bid.

The objective of the proposed rule is to establish clear and uniform standards for powers of attorney accompanying bid bonds that safeguard the integrity of the procurement process but are not unduly onerous to both industry and Government. Accordingly, the Councils propose a rule that will allow a copy of an original power of attorney, including a photocopy or facsimile copy, as sufficient evidence of authority for a person signing a bid bond to bind the surety as an attorney-in-fact. Providing the bid bond with evidence of power of attorney is still a matter of responsiveness, but if there is any reason to doubt the authenticity and enforceability of a power of attorney at the time of the bid opening, the rule provides that the contracting officer will handle this after the bid opening as a matter of responsibility. The proposed rule is consistent with commercial practices, decreases the burden on industry, and will allow the contracting officer to make more informed decisions that are in the best interest of the Government.

This is not a significant regulatory action and, therefore, was not subject to 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 Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, applies to this rule, because the proposed change to FAR Part 28 may have a significant beneficial economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This rule establishes very simple and uniform standards for providing evidence of

powers of attorney, which remove a costly and unworkable requirement from all sureties and attorneys-in-fact. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

The objective of this proposed rule is to establish clear and uniform standards for powers of attorney accompanying bid bonds and to allow the contracting officer to make more informed decisions that are in the best interest of the Government. The proposed rule applies to all offerors in Federal acquisitions that require bid bonds, and the associated sureties and attorneys-in-fact. The proposed rule will reduce the information collection requirement by simplifying the standards for an acceptable evidence of power of attorney in support of a bid bond. There are no significant alternatives to the proposed rule that accomplish the stated objectives. This rule will have a beneficial impact on small entities, which are offerors in Federal acquisitions that require bid bonds, as well as the associated sureties and attorneys-in-fact.

A copy of the IRFA has been submitted to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy of the IRFA from the FAR Secretariat. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Part in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq*. FAR case 2003–029, in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0045. The Councils estimate that this revision will decrease the actual burden because it will reduce the number of hours that industry must expend in providing original powers of attorney.

List of Subjects in 48 CFR Part 28

Government procurement.

Dated: August 17, 2004.

Laura Auletta,

Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR part 28 as set forth below:

PART 28—BONDS AND INSURANCE

1. The authority citation for 48 CFR part 28 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Add section 28.101–3 to read as follows:

28.101–3 Authority of an Attorney-in-Fact for a Bid Bond.

(a) Any person signing a bid bond as an attorney-in-fact shall include with the bid bond evidence of authority to bind the surety.

(b) An original or photocopy, or facsimile of an original power of attorney is sufficient evidence of such authority.

(c) The contracting officer shall—

(1) Treat the failure to provide a signed and dated power of attorney at the time of bid opening as a matter of responsiveness; and

(2) Treat questions regarding the authenticity and enforceability of the power of attorney at the time of bid opening as a matter of responsibility. These questions are handled after bid opening.

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