



Homeland Security

MEMORANDUM FOR: Heads of the Contracting Activities

FROM: Paul R. Courtney
Chief Procurement Officer

SUBJECT: **REVISION 1: Federal Acquisition Regulation (FAR) Class Deviation (Number 20-06) -Eliminate hard copy original documents, signatures, notarization, seals on bonds and other seals for certain contract requirements (FAR 28, 32.8, and 42)**

Background: CAAC letter 2020-04 was issued to serve as consultation in accordance with FAR 1.404, allowing agencies to authorize a class deviation in response to the Coronavirus Disease 2019 (COVID-19) national emergency. On Monday, April 10, 2023, the President signed into law Public Law 118-3, which had been House Joint Resolution 7, which terminates the national emergency related to the COVID-19 pandemic. Subsequently, the CAAC issued a supplement to CAAC letter 2020-04 on May 12, 2023.

In the supplement to CAAC letter 2020-04 the CAAC noted that the importance of original and notarized documents continues to dwindle in this electronic age, and the need to eliminate hard copy original documents, signatures, notarization, seals on bonds and other seals for certain contract requirements continues to exist. Remote online notarization is not approved in many states. Where approved, it requires prior certification of the notary, which requires additional time and money and may be difficult to obtain. Equally difficult is for vendors and sureties to produce manual signatures and provide their seals on bonds.

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration have undertaken rulemaking to formally incorporate these changes to the FAR via FAR case 2021-001, Increased Efficiencies with Regard to Certified Mail, In-person Business, Mail, Notarization, Original Documents, Seals, and Signatures.

Currently, FAR 2.101 defines “signature” or “signed” to include electronic signatures, and FAR 4.502(d) expressly authorizes agencies to “accept electronic signatures and records in connection with government contracts.”

Effective Date: Immediately.

Requirement: Contracting officers shall use the following changes in accordance with the class deviation:

- When obtaining financial protection against losses under contracts per FAR part 28:
 - 28.101-3(c) allowing the use of electronic means is moved to an added section at 28.002 to apply the same flexibilities to all of part 28;
 - 28.106-1 adding an exception to stamping a corporate seal on bonds;

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- 28.106-8 allowing a signed statement by the contractor that the payment is due and owed;
- 28.203-1(b) not requiring the Standard Form 28 to be sworn and notarized;
- 28.203-3 allowing a written authorization of the release signed by the surety saying that it approves of such release;
 - 52.228-11, Individual Surety- Pledge of Assets (Feb 2021)(DEVIATION MAY 2023), not requiring the Standard Form 28 to be sworn and notarized, in place of 52.228-11, Pledges of Assets (Aug 2018);
 - 52.228-15, Performance and Payment Bonds—Construction (JUN 2020)(DEVIATION MAY 2023), not requiring the seal when executing the standard forms required by the clause; and
 - 52.228-16, Performance and Payment Bonds—Other than Construction (NOV 2006)(DEVIATION MAY 2023), not requiring the seal when executing the standard forms required by the clause.
- When processing assignment of claims per FAR subpart 32.8:
 - 32.802(e) allowing the use of a copy of the assignment instrument; and
 - 32.805(a), (b), (c), and (e) allowing the use of electronically signed documents and a copy of the assignment instrument.
- When executing novation agreements and change-of-name agreements per FAR part 42:
 - 42.1204(f) allowing the use of a copy of the documents;
 - 42.1204(i) not requiring a seal on the Novation Agreement; and
 - 42.1205(b) not requiring a seal on the Change-of-Name Agreement.

DHS contracting officers shall insert the clauses as advised in Attachment 1 in all solicitations and contracts that are issued and awarded on or after the issuance date of this class deviation when contracting officers are obtaining financial protection against losses under contracts per FAR 28, when processing assignment of claims per FAR subpart 32.8, or executing novation agreements and change-of-name agreements per FAR 42. Solicitations issued on or after the issuance date of this class deviation shall be amended to include the modified clauses in the situations mentioned above.

The following are the modified clauses that can be found in Attachment 1:

- 52.228-11, Individual Surety- Pledge of Assets (Feb 2021)(DEVIATION MAY 2023);
- 52.228-15, Performance and Payment Bonds—Construction (JUN 2020)(DEVIATION MAY 2023); and
- 52.228-16, Performance and Payment Bonds—Other than Construction (NOV 2006) (DEVIATION MAY 2023)

Applicability: This class deviation is applicable to: (1) all solicitations and contracts, as defined in FAR 2.101, that are issued and awarded on or after the issuance date of this class deviation when contracting officers are obtaining financial protection against losses under

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contracts per FAR 28, when processing assignment of claims per FAR subpart 32.8, or executing novation agreements and change-of-name agreements per FAR 42; and (2) solicitations issued on or after the issuance date of this class deviation shall be amended to include the modified clauses in the situations mentioned above.

Expiration Date: FAR Case 2021-001 is currently in rulemaking to formally incorporate the changes of this class deviation into the FAR. This class deviation remains in effect until publication of the 2021-001 final FAR rule.

Additional Information: In order to provide access to clauses in Component Contract Writing Systems (CWS), Component Acquisition Policy Chiefs should coordinate with the appropriate Component CWS personnel to determine if the addition of the updated clauses to their CWS is possible.

Attachments:

Attachment 1: Conformed FAR Deviation Text and Updated Full Text Clauses

Attachment 2: Supplement 1 CAAC letter 2020-04 Class Deviation from the FAR to eliminate hard copy original documents, signatures, notarization, seals on bonds and other seals for certain contract requirements

Questions or comments about this class deviation may be directed to the Acquisition Policy Division at acquisition.policy@hq.dhs.gov.

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Attachment 1

Conformed FAR Deviation Text and Updated Full Clauses

Baseline is FAC 2023-04, effective on June 2, 2023.

Part 28 – Bonds and Insurance

28.002 Policy.

For purposes of this part, electronic, mechanically-applied and printed signatures, seals and dates may be used and shall be considered original signatures, seals and dates, without regard to the order in which they were affixed.

Subpart 28.1 – Bonds and Other Financial Protections

28.106 Administration.

28.106-1 Bonds and bond-related forms.

The following Standard Forms (SF's) and Optional Forms (OF's), shall be used, except in foreign countries, when a bid bond, performance or payment bond, or an individual surety is required. The bond forms shall be used as indicated in the instruction portion of each form, except that a seal is not required. For SF 28 also see 28.203(b).

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 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

28.203-1 Acceptability of individual sureties.

(b)

(1) An individual surety shall execute the bond (e.g., bid bond (SF 24), performance bond (SF 25), payment bond (SF 25A)).

(2) The net adjusted value of unencumbered assets is their market value minus the margin. The margin tables are available at www.treasurydirect.gov. The net adjusted value of unencumbered assets pledged by the individual surety must equal or exceed the penal amount (*i.e.*, face value) of each bond.

(3) The individual surety shall execute the SF 28 Affidavit of Individual Surety, except that the words “being duly sworn, depose and say” on the Standard Form 28 are replaced with

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the word “affirm” and such Standard Form 28 is not required to be sworn and notarized, and provide a security interest. One individual surety is adequate support for a bond, provided the net adjusted value of unencumbered assets pledged by that individual surety equals or exceeds the amount of the bond.

(4) An offeror or contractor may submit up to three individual sureties for each bond, in which case the net adjusted value of the pledged unencumbered assets, when combined, must equal or exceed the penal amount of the bond. Each individual surety is jointly and severally liable to the extent of the penal amount of the bond.

28.203-3 Release of security interest.

(a) After consultation with legal counsel, the contracting officer shall release the security interest on the individual surety's assets using the Optional Form 91, Release of Personal Property from Escrow, or a similar release as soon as possible consistent with the conditions in subparagraphs (a)(1) and (2) of this section. 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 written authorization of the release signed by the surety stating that it approves of such release.

Part 32 – Contract Financing

Subpart 32.8 – Assignment of Claims

32.802 Conditions.

(e) The assignee sends a written notice of assignment together with a copy of the assignment instrument to the-

- (1) Contracting officer or the agency head;
- (2) Surety on any bond applicable to the contract; and
- (3) Disbursing officer designated in the contract to make payment.

32.805 Procedure.

(a) Assignments.

- (1) Assignments by corporations shall be-
 - (i) Signed by an authorized representative;
 - (ii) Signed by the secretary or the assistant secretary of the corporation; and
 - (iii) Accompanied by a copy of the resolution of the corporation's board of directors authorizing the signing representative to sign the assignment.

- (3) Assignments by an individual shall be signed by that individual.

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(b) *Filing.* The assignee shall forward by email or other electronic means the notice of assignment and a copy of the instrument of assignment to each party specified in 32.802(e).

(c) *Format for notice of assignment.* The following is a suggested format for use by an assignee in providing the notice of assignment required by 32.802(e).

Notice of Assignment

To: _____ Name, address and email address for *one of the parties specified in 32.802(e)*.

This has reference to Contract No. _____ dated _____, entered into between ____ [*Contractor's name and address*] and ____ [*Government agency, name of office, and address*], for ____ [*Describe nature of the contract*].

Monies due or to become due under the contract described above have been assigned to the undersigned under the provisions of the Assignment of Claims Act of 1940, as amended, (31 U.S.C.3727, 41 U.S.C.6305).

A copy of the instrument of assignment executed by the Contractor on ____ [*Date*], is attached to this notice.

Payments due or to become due under this contract should be made to the undersigned assignee.

Please acknowledge receipt on behalf of the addressee by return email or other electronic means to the undersigned.

Very truly yours,

[*Name of Assignee*]

By _____ [*Signature of Signing Officer*]

[*Title of Signing Officer*]

[*Address of Assignee*]

[*Email Address of Assignee*]

(e) Release of assignment.

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(2) The assignee, under a further assignment or reassignment, in order to establish a right to receive payment from the Government, must send to the addressees listed in 32.802(e) a-

- (i) Written notice of release of the contractor by the assigning financing institution;
- (ii) Copy of the release instrument;
- (iii) Written notice of the further assignment or reassignment; and
- (iv) Copy of the further assignment or reassignment instrument.

(3) If the assignee releases the contractor from an assignment of claims under a contract, the contractor, in order to establish a right to receive payment of the balance due under the contract, must send a written notice of release together with a copy of the release of assignment instrument to the addressees noted in 32.802(e).

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 42.12—Novation and Change-of-Name Agreements

42.1204 Applicability of novation agreements.

(f) Except as provided in paragraph (g) of this section, the contractor shall submit to the responsible contracting officer one copy of each of the following documents, as applicable, as the documents become available:

- (1) A copy of the instrument effecting the transfer of assets; *e.g.*, bill of sale, certificate of merger, contract, deed, agreement, or court decree.
- (2) A copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets.
- (3) A copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets.
- (4) A copy of the transferee's certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the Government contracts.

(i) The responsible contracting officer shall use the following format for agreements when the transferor and transferee are corporations and all the transferor's assets are transferred. This format may be adapted to fit specific cases and may be used as a guide in preparing similar agreements for other situations.

NOVATION AGREEMENT

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(b)

(9) The contracts shall remain in full force and effect, except as modified by this Agreement. Each party has executed this Agreement as of the day and year first above written. United States of America,

By _____

Title _____

ABC Corporation,

By _____

Title _____

XYZ Corporation,

By _____

Title _____

Certificate

I, _____, certify that I am the Secretary of ABC Corporation, that _____, who signed this Agreement for this corporation, was then _____ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers. Witness my hand this day of _____ 20 ____.

By _____

Certificate

I, _____, certify that I am the Secretary of XYZ Corporation, that _____, who signed this Agreement for this corporation, was then _____ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers. Witness my hand this day of _____ 20 ____.

By _____

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42.1205 Agreement to recognize contractor's change of name.

(b)

CHANGE-OF-NAME AGREEMENT

(b) In consideration of these facts, the parties agree that-

(1) The contracts covered by this Agreement are amended by substituting the name "ABC Corporation" for the name "XYZ Corporation" wherever it appears in the contracts; and

(2) Each party has executed this Agreement as of the day and year first above written.

United States of America,

By _____

Title _____

ABC Corporation,

By _____

Title _____

Certificate

I, _____, certify that I am the Secretary of ABC Corporation; that _____, who signed this Agreement for this corporation, was then _____ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand this _____ day of _____ 20____.

By _____

Part 52 – Solicitation Provisions and Contract Clauses

52.228-11 Individual Surety—Pledge of Assets.

As prescribed in 28.203–4(b), insert the following clause:

Individual Surety—Pledge of Assets (Feb 2021) (DEVIATION MAY 2023)

(a) The Contractor shall obtain from each person acting as an individual surety on a performance bond or a payment bond—

(1) A pledge of assets that meets the eligibility, valuation, and security requirements described in the Federal Acquisition Regulation (FAR) 28.203-1; and

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(2) Standard Form 28, Affidavit of Individual Surety. (1) Standard Form 28, Affidavit of Individual Surety, except that the words “being duly sworn, depose and say” on the Standard Form 28 are replaced with the word “affirm” and the Standard Form 28 is not required to be sworn and notarized in block 12.

(b) 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. The security interest in support of a performance bond shall be maintained—

(1) Contracts for the construction, alteration, or repair of any public building or public work of the Federal Government exceeding \$150,000 (40 U.S.C. 3131). Until completion of any warranty period, or for 1 year following final payment, whichever is later.

(2) Contracts subject to alternative payment protection (see FAR 28.102-1(b)(1)). For the full contract performance period plus 1 year.

(3) Other contracts not subject to the requirements of paragraph (b)(1) of this clause. Until completion of any warranty period, or for 90 days following final payment, whichever is later.

(c) 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. The security interest on the individual surety's assets in support of a payment bond shall be maintained—

(1) Contracts for the construction, alteration, or repair of any public building or public work of the Federal Government exceeding \$150,000 which require performance and payment bonds (40 U.S.C. 3131). For 1 year following final payment, or until resolution of all pending claims filed against the payment bond during the 1-year period following final payment, whichever is later.

(2) Contracts subject to alternative payment protection (see FAR 28.102-1(b)(1)). For the full contract performance period plus 1 year.

(3) Other contracts not subject to the requirements of paragraph (c)(1) of this clause. For 90 days following final payment.

(d) The Contracting Officer may allow the Contractor to substitute an individual surety, for a performance or payment bond, after contract award. The Contractor shall comply with the requirements of paragraph (a) of this clause within the timeframe established by the Contracting Officer.

(End of clause)

52.228-15 Performance and Payment Bonds-Construction.

As prescribed in 28.102-3(a), insert a clause substantially as follows:

**PERFORMANCE AND PAYMENT BONDS-CONSTRUCTION (JUN 2020)
(DEVIATION MAY 2023)**

(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 total 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

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of contract award.

(b) Amount of required bonds. Unless the resulting contract price is valued at or below the threshold specified in Federal Acquisition Regulation 28.102-1(a) on the date of award of this contract, the successful offeror shall furnish performance and payment bonds to the Contracting Officer as follows:

(1) *Performance bonds* (Standard Form 25, except that a seal is not required). 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, except that a seal is not required). 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.

(c) Furnishing executed bonds. The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within the time period specified in the Bid Guarantee provision of the solicitation, or otherwise specified by the Contracting Officer, but in any event, before starting work.

(d) Surety or other security for bonds. The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. Treasury Circular 570 is published in the Federal Register or may be obtained from the U.S. Department of the Treasury, Financial Management, Service Surety Bond Branch, 3700 East West Highway, Room 6 F01, Hyattsville, MD 20782. Or via the internet at <http://www.fms.treas.gov/c570/>.

(e) Notice of subcontractor waiver of protection (40 U.S.C. 3133(c)). Any waiver of the right to sue on the payment bond is void unless it is in writing, signed by the person whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract.

(End of clause)

52.228-16 Performance and Payment Bonds-Other Than Construction. As prescribed in 28.103-4 , insert a clause substantially as follows:

PERFORMANCE AND PAYMENT BONDS-OTHER THAN CONSTRUCTION (NOV 2006)
(DEVIATION MAY 2023)

(a) Definitions. As used in this clause-

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"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) The Contractor shall furnish a performance bond (Standard Form 1418, except that a seal is not required) for the protection of the Government in an amount equal to _____ percent of the original contract price and a payment bond Standard Form 1416, except that a seal is not required) in an amount equal to _____ percent of the original contract price.

(c) The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within _____ days, but in any event, before starting work.

(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.

(e) The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. Treasury Circular 570 is published in the Federal Register, or may be obtained from the Financial Management Service, Surety Bond Branch, 3700 East West Highway, Room 6 F01, Hyattsville, MD 20782. Or via the internet at <http://www.fms.treas.gov/c570/>.

(End of clause)

Alternate I (JUL 2000)(DEVIATION MAY 2023). 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, except that a seal is not required) for the protection of the Government in an amount equal to ____ percent of the original 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.