

Congress of the United States  
U.S. House of Representatives  
Committee on Small Business  
2361 Rayburn House Office Building  
Washington, DC 20515-6315

November 28, 2016

Ms. Lesley Field  
Acting Administrator for Federal Procurement Policy  
Office of Federal Procurement Policy  
Office of Management and Budget  
NEOB Room 9013  
Washington, DC 20503

Dear Acting Administrator Field:

I am writing you in my capacity as Ranking Member of the U.S. House of Representatives Committee on Small Business. The Committee has jurisdiction over federal procurement matters that impact small firms, including that of surety bonds. Recently, the Federal Acquisition Regulatory (FAR) Council released new regulations ranging from new authority for women-owned small businesses to restrictions on contractors with delinquent taxes. However, none of these revised the current FAR regulations for surety bonds in order to be consistent with statutory changes adopted in the National Defense Authorization Act (NDAA) for Fiscal Year 2016.

Specifically, Section 874 of the NDAA for FY 2016 amended Title 31 USCA § 9304 to require individual sureties to use only “eligible obligations” as collateral for their obligations to the federal agencies and to deposit such assets in the care and custody of the federal government. Yet, current Federal Acquisition Regulation (FAR) 28.203-2(b)(3) permits federal contracting officers to accept bonds from natural persons, not companies, if the bond is secured by an “acceptable asset,” which includes stocks, bonds, and real property. These individuals are neither subject to the same scrutiny and vetting given to corporate sureties nor are they required to provide physical custody of the asset to the government that they pledge to secure their bonds to the contracting authority.

The Office of Federal Procurement Policy’s (OFPP) inaction thus far to amend and revise these regulations is deeply troubling because it severely impacts not only a small business, but also taxpayers and the federal government.

This lack of thorough scrutiny of individual sureties and control over their pledged assets has resulted in a number of documented situations where assets pledged by individual sureties have proven to be illusory or insufficient, causing significant financial harm to the government and to subcontractors and suppliers, many of whom are small businesses wholly reliant on the protections of payment bonds to safeguard their businesses.

Additionally, under FAR requirements, the pledged assets are supposed to be placed in an escrow arrangement by the individual surety, subject to the approval of the contracting officer. The individual surety, however, is not required to turn the assets over to the physical care and custody of the contracting authority. Each contracting officer, not the Department of Treasury, shoulders the entire burden of determining the acceptability of the individual surety, its documentation, the escrow or security arrangement, as well as the value and adequacy of pledged assets must be done in relatively quickly to progress the contract procurement. A missed or incorrect step may mean the acceptance of a fraudulent or insufficient bond, rendering its apparent and much needed protection worthless.

The changes made in the NDAA were designed to streamline the procurement process for federal contracting officers. Under the new requirements, federal contracting officers will no longer have to determine whether the assets that individual sureties pledge actually exist and are worth the actual value claimed. After the changes are implemented in the FAR Regulations, federal contracting officers will receive known and reliable assets, backed by the federal government, with a known face value. They also will have such assets under their control for the duration of the construction contract, which will make Standard Form 28 (SF28-03a) obsolete. This makes it all the more important for the regulations to be revised in a timely manner.

Therefore, I request that OFPP implement these changes to amend the applicable sections of the FAR to conform with the effective statutory changes regarding assets backing individual surety bond assets by December 31, 2016. Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Nydia M. Velázquez", is written over the printed name.

Nydia M. Velázquez  
Ranking Member