



AcQUISITION AND
TECHNOLOGY
DP (DAR)

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000

February 1, 1996



"In reply refer to
DFARS Case: 95-D305
D. L. 96-001

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,
ASN(RD&A) /ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DIRECTOR, PROCUREMENT POLICY, ASA(RD&A) /SARD-PP
DEPUTY DIRECTOR (ACQUISITION), DEFENSE LOGISTICS AGENCY

SUBJECT: Alternatives to Miller Act Bonds

We have amended the Defense Federal Acquisition Regulation Supplement (DFARS) to revise the interim rule which was issued on August 31, 1995, as Departmental Letter 95-018, providing alternative payment protections for construction contracts between \$25,000 and \$100,000, pending implementation of Section 4104(b) (2) of the Federal Acquisition Streamlining Act of 1994 in the Federal Acquisition Regulation.

This revised interim DFARS rule is effective immediately and will be included in a future Defense Acquisition Circular-

Eleanor R. Spector
Director, Defense procurement

Attachment

cc: DSMC, Ft. Belvoir



DFARS Case 95-D305, Alternatives to Miller Act Bonds
Revised Interim Rule

PART 228--BONDS AND INSURANCE

* * * * *

228.171 Alternative payment protections in construction contracts between \$25,000 and \$100,000.

228.171-1 General.

[(a)] For construction contracts greater than \$25,000, but not greater than \$100,000, the contracting officer shall select ~~one~~ **[two]** or more of the following payment protections[, giving particular consideration to inclusion of an irrevocable letter of credit as one of the selected alternatives:] ~~which the contractor may submit to the Government for the protection of suppliers of labor and material~~

(a[1]) A payment bond. "

(33[2]) An irrevocable letter of credit.

(e[3]) A tripartite escrow agreement. The prime contractor establishes an escrow account in a Federally insured financial institution and enters into a tripartite escrow agreement with the financial institution, as escrow agent, and all of the suppliers of labor and material. The escrow agreement shall establish the terms of payment under the contract and of resolution of disputes among the parties. The Government makes payments to the contractor's escrow account, and the escrow agent distributes the payments in accordance with the agreement, or triggers the disputes resolution procedures if required.

(d[4]) Certificates of deposit. The contractor deposits certificates of deposit **[from a federally insured financial institution]** with the contracting officer, in an acceptable form, executable by the contracting officer, ~~and immediately fundable in an amount equal to the penal amount of the payment bond waived.~~

(e[5]) A deposit of the types of security listed in **[FAR]** 28.204.

[(b)] The contractor shall submit to the Government one of the payment protections selected **by the contracting officer.**]

228.171-2 Amount required.

(a) The requirements at FAR 28.102-2(b), for the amount of payment bonds, also apply to the alternative payment protections described in 228.171-1. ~~In addition, the payment protection must provide protection for the full contract performance period plus~~

~~one year, and must authorize the contracting officer to immediately access funds at any time within the contracting officer's discretion.~~

(b) The requirements at FAR 28.102-2(c), for the penal sum of bonds for requirements and indefinite-quantity contracts, also apply to the alternative payment protections described in 228.171-1.

228.171-3 Contract clause.

Use the clause at 252.228-7007, Alternative Payment protections, in solicitations and contracts for construction, when the estimated or actual value exceeds \$25,000 but does not exceed \$100,000. Complete the clause by specifying the payment ~~protection or~~ protections selected (see 228.171-1[(a)]), the penal amount required, and the deadline for submission.

* * * * *

PART 252--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

SUBPART 252.2--TEXTS OF PROVISIONS AND CLAUSES

* * * * *

252.228-7007 Alternative Payment Protections.

As prescribed in 228.171-3, use the following clause:

ALTERNATIVE PAYMENT PROTECTIONS (~~AUG 1995~~ **[FEB 1996]**)

(a) The Contractor shall submit one of the following payment protections:

(b) The penal sum of the payment protection shall be in the amount of \$_____.

(c) The submission of the payment protection is required "by_____."

(d) The payment protection shall provide protection for the full contract performance period plus a one-year period, ~~and shall authorize the Contracting Officer to immediately access funds at any time and withhold funds pending resolution by administrative or judicial proceedings or mutual agreement of the parties, except for escrow agreements which provide for a disputes resolution procedure~~

(e) Except for escrow agreements [and payment **bonds,**] which provide their own protection procedures, the Contracting Officer is authorized to access funds under the payment protection when it has been alleged in writing by a supplier of labor or material that a nonpayment has occurred[, and to **withhold funds pending resolution by** administrative or judicial proceedings or mutual **agreement of the parties**] .

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

(End of clause)