



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

PROCUREMENT MEMORANDUM 2020-09

ACTION

MEMORANDUM FOR: Senior Bureau Procurement Officials

FROM: Barry E. Berkowitz
Senior Procurement Executive and
Director for Acquisition Management

SUBJECT: FAR Class Deviation to Eliminate Hard Copy Original Documents, Signatures, Notarization, Seals on Bonds and other Seals for Certain Contract Requirements:

Purpose

The Department of Commerce is authorizing this FAR deviation to allow greater flexibility by eliminating the requirement for hardcopy original documents, original signatures, notarization, seals on bonds and other scenarios confronting the acquisition workforce in connection with the COVID-19 pandemic.

Background

Civilian Agency Acquisition Council (CAAC) Letter 2020-04 was issued May 1, 2020, to serve as consultation in accordance with FAR 1.404, by allowing agencies to authorize a class deviation in response to the Coronavirus Disease 2019 (COVID-19) national emergency.

During times of emergency or crisis such as this, it becomes difficult or impossible to obtain the services of notaries public. Social distancing policies and shelter-in-place orders have forced public and private sector employees to work from home, making it difficult for notaries to be present to witness oaths and affirmations and to physically affix their signature and notary stamp on documents. 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 in the current environment. Equally difficult is for vendors and sureties to produce manual signatures and provide their seals on bonds.

The importance of original and notarized documents has dwindled in this electronic age. 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."

Required Action

Contracting officers shall use the following changes when: obtaining financial protection against losses under contracts per FAR part 28; processing assignment of claims per FAR subpart 32.8; and executing novation agreements and change-of-name agreements per FAR part 42.

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;
- 28.106-8 allowing a signed statement by the contractor that the payment is due and owed;
- 28.203(b) not requiring the Standard Form 28 to be sworn and notarized;
- 28.203-5 allowing a written authorization of the release signed by the surety saying that it approves of such release;
- 52.228-11, Pledges of Assets (Aug 2018)(DEVIATION APR 2020), 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 (OCT 2010)(DEVIATION APR 2020), 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 APR 2020), 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.

The attached FAR text (Attachment A) identifies the additions and deletions anticipated to implement the FAR changes.

Effective Date

This class deviation is effective upon issuance and remains in effect until cancelled.

Point of Contact

Questions regarding this class deviation may be directed to OAM_Mailbox@doc.gov.

Attachment A – FAR Deviation Text

Attachment A

FAR Deviation Text

Baseline is FAC 2020-05, effective on March 30, 2020.

Deviations are shown by **[bracketed bold additions]** and ~~strikeouts~~.

FAR text unchanged shown as asterisks *** or *****

* * * * *

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

* * * * *

28.101-3 Authority of an attorney-in-fact for a bid bond.

* * *

~~(c) For purposes of this section, electronic, mechanically-applied and printed signatures, seals and dates on the power of attorney shall be considered original signatures, seals and dates, without regard to the order in which they were affixed.~~

[(c)] ~~(d)~~ * * *

[(d)] ~~(e)~~ * * *

[(e)] ~~(f)~~ * * *

* * * * *

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 ~~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

* * * * *

28.203 Acceptability of individual sureties.

* * * (b) An individual surety must execute the bond, and the unencumbered value of the assets (exclusive of all outstanding pledges for other bond obligations) pledged by the individual surety, must equal or exceed the penal amount of each bond. The individual surety shall execute the Standard Form 28[, **except that the words "being duly sworn, depose and say" on the Standard Form 28 are replaced with the word "affirm" and such Standard Form 28 is not required to be sworn and notarized,**] and provide a security interest in accordance with 28.203-1. One individual surety is adequate support for a bond, provided the unencumbered value of the assets pledged by that individual surety equal or exceed the amount of the bond. An offeror may submit up to three individual sureties for each bond, in which case the pledged assets, when combined, must equal or exceed the

penal amount of the bond. Each individual must accept both joint and several liability to the extent of the penal amount of the bond.* * *

* * * * *

28.203-5 Release of lien.

(a) After consultation with legal counsel, the contracting officer shall release the security interest on the individual surety's assets using the Optional Form 90, Release of Lien on Real Property, or 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 subsection. 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~~ **[written]** authorization of the release **[signed]** by the surety saying 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 ~~true~~ 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) ~~Executed~~ **[Signed]** by an authorized representative;

(ii) ~~Attested~~ **[Signed]** by the secretary or the assistant secretary of the corporation; and

(iii) ~~Impressed with the corporate seal or accompanied~~ **[Accompanied]** by a true copy of the resolution of the corporation's board of directors authorizing the signing representative to **[sign]**~~execute~~ the assignment.

* * * (3) Assignments by an individual shall be signed by that individual~~[.] and the signature acknowledged before a notary public or other person authorized to administer oaths.~~

(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) ~~[.] an original and three copies of the notice of assignment, together with one true copy of the instrument of assignment. The true copy shall be a certified duplicate or photostat copy of the original assignment.~~

(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]**
~~Address to 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 ~~true~~ copy of the instrument of assignment executed by the Contractor on _____ [Date], is attached to the ~~original~~ **[this]** notice.

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

~~Please return to the undersigned the three enclosed copies of this notice with appropriate notations showing the date and hour of receipt, and signed by the person acknowledging~~
[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]**]

_____ Acknowledgement

_____ Receipt is acknowledged of the above notice and of a copy of the instrument of assignment. They were received _____ (a.m.) (p.m.) on _____, 20____.

{Signature}

_____ [Title]

On
behalf of

[Name
~~of Addressee of this Notice~~]

* * *

(e) Release of assignment.

* * * (2) The assignee, under a further assignment or reassignment, in order to establish a right to receive payment from the Government, must ~~file with~~ **[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]** ~~file~~ a written notice of release together with a ~~true~~ copy of the release of assignment instrument ~~with~~ **[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) ~~An authenticated~~ 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 ~~certified~~ copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets.

(3) A ~~certified~~ copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets.

(4) ~~An authenticated~~ 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)

* * *

NOVATION AGREEMENT

* * *

(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 _____

_____~~[Corporate Seal]~~

XYZ Corporation,

By _____

Title _____

_____~~[Corporate Seal]~~

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 ~~and the seal of this corporation~~ this day of _____ 20____.

By _____

_____~~[Corporate Seal]~~

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

~~and the seal of this corporation~~ this day of
_____20____.

By _____

_____~~[Corporate Seal]~~

* * *

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 _____

_____~~[Corporate Seal]~~

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 ~~and the seal of this corporation~~ this _____ day of _____ 20____.

By _____

_____~~[Corporate Seal]~~

* * * * *

Part 52 - Solicitation Provisions and Contract Clauses

* * * * *

52.228 [Reserved].

* * * * *

52.228-11 Pledges of Assets.

As prescribed in 28.203-6, insert the following clause:

Pledges of Assets (Aug 2018) **[(DEVIATION APR 2020)]**

(a) Offerors shall obtain from each person acting as an individual surety on a bid guarantee, a performance bond, or a payment bond -

(1) Pledge of assets; and

(2) 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) Pledges of assets from each person acting as an individual surety shall be in the form of - * * *

* * * * *

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 (OCT 2010) [(DEVIATION
APR 2020)]

* * * * *

(b) *Amount of required bonds.* Unless the resulting contract price is \$150,000 or less, 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 25A[, **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.

* * * * *

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 APR 2020)]

* * * * *

(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.

* * * * *

Alternate I (JUL 2000) [(DEVIATION APR 2020)]. 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.

* * * * *