



DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Parts 844 and 845

RIN 2900-AQ05

Revise and Streamline VA Acquisition Regulation – Parts 844 and 845

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend and update its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy that has been superseded by changes in the Federal Acquisition Regulation (FAR), to remove any procedural guidance that is internal to the VA into the VA Acquisition Manual (VAAM), and to incorporate new regulations or policies. These changes seek to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors. The VAAM incorporates portions of the removed VAAR as well as other internal agency acquisition policy. VA will rewrite certain parts of the VAAR and VAAM, and as VAAR parts are rewritten, we'll publish them in the Federal Register. VA will combine related topics, as appropriate. In particular, this rulemaking revises VAAR Parts 844 – Subcontracting Policies and Procedures, and Part 845 – Government Property.

DATES: Comments must be received on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER] to be considered in the formulation of the final rule.

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to Director, Regulation Policy and Management (00REG),

Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AQ05 – Revise and Streamline VA Acquisition Regulation Parts 844 and 845.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov. FOR FURTHER INFORMATION CONTACT: Rafael Taylor, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 425 I Street, NW, Washington, DC 20001, (202) 382-2787. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

Background

This rulemaking is issued under the authority of the Office of Federal Procurement Policy (OFPP) Act, which provides the authority for an agency head to issue agency acquisition regulations that implement or supplement the FAR.

VA is proposing to revise the VAAR to add new policy or regulatory requirements and to remove any redundant guidance and guidance that is applicable only to VA’s internal operating processes or procedures. Codified acquisition regulations may be amended and revised only through rulemaking. All amendments, revisions, and

removals have been reviewed and concurred with by VA's Integrated Product Team of agency stakeholders

The VAAR uses the regulatory structure and arrangement of the FAR and headings and subject areas are consistent with FAR content. The VAAR is divided into subchapters, parts (each of which covers a separate aspect of acquisition), subparts, sections, and subsections.

The Office of Federal Procurement Policy Act, as codified in 41 U.S.C. 1707, provides the authority for the Federal Acquisition Regulation and for the issuance of agency acquisition regulations consistent with the FAR.

When Federal agencies acquire supplies and services using appropriated funds, the purchase is governed by the FAR, set forth at Title 48 Code of Federal Regulations (CFR), chapter 1, parts 1 through 53, and the agency regulations that implement and supplement the FAR. The VAAR is set forth at Title 48 CFR, chapter 8, parts 801 to 873.

Discussion and Analysis

The VA proposes to make the following changes to the VAAR in this phase of its revision and streamlining initiative. For procedural guidance cited below that is proposed to be deleted from the VAAR, each section cited for removal has been considered for inclusion in VA's internal agency operating procedures in accordance with FAR 1.301(a)(2). Similarly, delegations of authorities that are removed from the VAAR will be included in the VA Acquisition Manual (VAAM) as internal agency guidance. The VAAM is being created in parallel with these revisions to the VAAR and is not subject to the rulemaking process as they are internal VA procedures and

guidance. Therefore, the VAAM will not be finalized until corresponding VAAR parts are finalized, and is not yet available on line.

VAAR PART 844—SUBCONTRACTING POLICIES AND PROCEDURES

We propose to add part 844 to the VAAR. The authorities to be cited are: 40 U.S.C. 121(c) and 41 U.S.C. 1702, which address the overall direction of procurement policy, acquisition planning and management responsibilities of VA's Chief Acquisition Officer; and 48 CFR 1.301-1.304, which is the delegation of authority for agencies to issue regulations that implement and supplement the FAR.

This new part 844, Subcontracting Policies and Procedures, implements FAR part 44 by making public VA's additional requirements for providing its consent to subcontract, items that should be evaluated as a part of a Contractor's Purchasing Systems Review (CPSR), and establishing that contractors should determine whether subcontract items meet the FAR definition of a commercial item. Under this new part, we propose to add subpart 844.2, Consent to Subcontracts, and section 844.202-2, Considerations. We propose to add one paragraph to this section, (a)(14), which would require, before a contracting officer consents to a subcontract where other than the lowest price is the basis for selection, that the contractor has substantiated the selection as being fair, reasonable, and representing the best value to the Government.

We propose to add subpart 844.3, Contractor's Purchasing Systems Reviews, and section 844.303, Extent of review. We included three paragraphs to this section, paragraphs (f), (l), and (m). The paragraphs included in this section would require that contractor purchasing system reviews focus special attention, respectively, on:

Policies and procedures pertaining to the use of VA-verified Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs) and utilization in accordance with subpart 819.70 and the Veterans First Contracting Program;

Documentation of commercial item determinations to ensure compliance with the definition of “commercial item” in FAR 2.101; and

For acquisitions involving electronic parts, whether the contractor has implemented a counterfeit electronic part detection and avoidance system to ensure that counterfeit electronic parts do not enter the supply chain.

We propose to add subpart 844.4, Subcontracts for Commercial Items and Commercial Components, and section 844.402, Policy requirements. Under section 844.402, we add paragraph “(a)(3)” which would require that contractors determine whether a particular subcontract item meets the FAR definition of a commercial item. This requirement does not affect the contracting officer’s responsibilities or determinations made under FAR 15.403-1(c)(3).

VAAR PART 845—GOVERNMENT PROPERTY

We propose to add subpart 845.4, Title to Government Property. The authorities to be cited are: 40 U.S.C. 121(c) which provides that the Administrator of the General Services Administration may prescribe regulations to carry out responsibilities under the Federal Property and Administrative Services subtitle of Title 40, and, additionally, that the head of each executive agency shall issue orders and directives that the agency head considers necessary to carry out the prescribed regulations issued by the

Administrator; and 41 U.S.C. 1702, which address the overall direction of procurement policy, acquisition planning and management responsibilities of VA's Chief Acquisition Officer; and 48 CFR 1.301-1.304, which is the delegation of authority for agencies to issue regulations that implement and supplement the FAR.

We propose to add section 845.402, Title to contractor-acquired property (no text), and section, 845.402-70, Policy. This implements and supplements the FAR by addressing procedures for contractors to document their acquisition of property for use in the service of VA contracts; to address the transfer of title to the Government of contractor-acquired property; and to outline the procedures for the use of such property on a successor contract. This new section proposes the following:

Paragraph (a) would provide that, for other than firm-fixed-price contracts, contractor-acquired property items not anticipated at time of contract award, or not otherwise specified for delivery on an existing line item, would be delivered to the Government on a contract line item. The value of that item would be recorded at the original purchase cost or best estimate.

Paragraph (b) would provide that, upon delivery and acceptance by the Government of contractor-acquired property items, and when retained by the contractor for continued use under a successor contract, such items would become Government-furnished property (GFP). The items would be added to the successor contract as GFP by contract modification.

Paragraph (c) would provide that individual contractor-acquired property items would be recorded in the contractor's property management system at the contractor's original purchase cost or best estimate.

Paragraph (d) would provide that all other contractor inventory that is excess to the needs of the contract would be disposed of in accordance with FAR subpart 45.6.

Effect of Rulemaking

Title 48, Federal Acquisition Regulations System, Chapter 8, Department of Veterans Affairs, of the Code of Federal Regulations, as proposed to be revised by this rulemaking, would represent VA's implementation of its legal authority and publication of the Department of Veterans Affairs Acquisition Regulation (VAAR) for the cited applicable parts. Other than future amendments to this rule or governing statutes for the cited applicable parts, or as otherwise authorized by approved deviations or waivers in accordance with Federal Acquisition Regulation (FAR) subpart 1.4, Deviations from the FAR, and as implemented by VAAR subpart 801.4, Deviations from the FAR or VAAR, no contrary guidance or procedures would be authorized. All existing or subsequent VA guidance would be read to conform with the rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking as pertains to the cited applicable VAAR parts.

Executive Orders 12866, 13563 and 13771

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits of reducing

costs, of harmonizing rules, and of promoting flexibility. E.O. 12866, Regulatory Planning and Review, defines "significant regulatory action" to mean any regulatory action that is likely to result in a rule that may: "(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action, and it has been determined not to be a significant regulatory action under E.O. 12866.

VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www.va.gov/orpm> by following the link for VA Regulations Published from FY 2004 Through Fiscal Year to Date.

This proposed rule is not expected to be an EO 13771 regulatory action because this proposed rule is not significant under EO 12866.

Paperwork Reduction Act

This proposed rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

This proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The overall impact of the proposed rule would be of benefit to small businesses owned by Veterans or service-disabled Veterans as the VAAR is being updated to remove extraneous procedural information that applies only to VA’s internal operating procedures. VA is merely adding existing and current regulatory requirements to the VAAR and removing any guidance that is applicable only to VA’s internal operation processes or procedures. VA estimates no cost impact to individual business would result from these rule updates. This rulemaking does not change VA’s policy regarding small businesses, does not have an economic impact to individual businesses, and there are no increased or decreased costs to small business entities. On this basis, the proposed rule would not have an economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, under 5 U.S.C. 605(b), this regulatory action is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any

rule that may result in the expenditure by State, local, and tribal Governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal Governments or on the private sector.

List of Subjects

48 CFR Part 844

Government procurement

Reporting and recordkeeping requirements

48 CFR Part 845

Government procurement

Government property

Reporting and recordkeeping requirements

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs approved this document on October 20, 2017, for publication.

Dated: February 22, 2018

Consuela Benjamin
Office of Regulation Policy & Management
Office of the Secretary
Department of Veterans Affairs

For the reasons set out in the preamble, VA proposes to amend 48 CFR, chapter 8 by adding parts 844 and 845 to read as follows:

PART 844—SUBCONTRACTING POLICIES AND PROCEDURES

Sec.

Subpart 844.2—Consent to Subcontracts

844.202-2 Considerations.

Subpart 844.3—Contractors' Purchasing Systems Reviews

844.303 Extent of review.

Subpart 844.4—Subcontracts for Commercial Items and Commercial Components

844.402 Policy requirements.

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1702 and 48 CFR 1.301-1.304.

Subpart 844-2—Consent to Subcontracts

844.202-2 Considerations.

(a)(14) Where other than lowest price is the basis for subcontractor selection, has the contractor adequately substantiated the selection as being fair, reasonable, and representing the best value to the Government?

Subpart 844.3—Contractors' Purchasing Systems Reviews

844.303 Extent of review.

(f) Policies and procedures pertaining to the use of VA-verified Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and Veteran-Owned Small Businesses

(VOSBs) and utilization in accordance with subpart 819.70 and the Veterans First Contracting Program.

(l) Documentation of commercial item determinations to ensure compliance with the definition of “commercial item” in FAR 2.101; and

(m) For acquisitions involving electronic parts, that the contractor has implemented a counterfeit electronic part detection and avoidance system to ensure that counterfeit electronic parts do not enter the supply chain.

Subpart 844.4—Subcontracts for Commercial Items and Commercial Components

844.402 Policy requirements.

(a)(3) Determine whether a particular subcontract item meets the definition of a commercial item. This requirement does not affect the contracting officer’s responsibilities or determinations made under FAR 15.403-1(c)(3).

PART 845 GOVERNMENT PROPERTY

Sec.

Subpart 845.4—Title to Government Property

845.402 Title to contractor-acquired property.

845.402-70 Policy.

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1702 and 48 CFR 1.301-1.304.

Subpart 845.4—Title to Government Property

845.402 Title to contractor-acquired property.

845.402-70 Policy.

(a) For other than firm-fixed-price contracts, contractor-acquired property items not anticipated at time of contract award, or not otherwise specified for delivery on an existing line item, shall, by means of a contract modification, be specified for delivery to the Government on an added contract line item. The value of such contractor-acquired property item shall be recorded at the original purchase cost. Unless otherwise noted by the contractor at the time of delivery to the Government, the placed-in-service date shall be the date of acquisition or completed manufacture, if fabricated.

(b) Following delivery and acceptance by the Government of contractor-acquired property items, if these items are to be retained by the contractor for continued use under a successor contract, these items become Government-furnished property (GFP). The items shall be added to the successor contract as GFP by contract modification.

(c) Individual contractor-acquired property items should be recorded in the contractor's property management system at the contractor's original purchase cost.

(d) All other contractor inventory that is excess to the needs of the contract shall be disposed of in accordance with FAR subpart 45.6.

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