



DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Parts 801, 823, 824, 826, 836, 843, and 852

RIN 2900-AQ24

VA Acquisition Regulation: Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace; Protection of Privacy and Freedom of Information; Other Socioeconomic Programs; and Contract Modifications

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proposing to amend and update its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove procedural guidance that is internal to VA into the VA Acquisition Manual (VAAM), and to incorporate any new agency specific 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 These changes seek to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors.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 will publish them in the Federal Register. VA will combine related topics, as appropriate. In particular, this rulemaking would add VAAR coverage concerning Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace; Other Socioeconomic Programs; and Contract Modifications. This rulemaking revises VAAR concerning Protection of Privacy

and Freedom of Information, Department of Veterans Affairs Acquisition Regulation System, Construction and Architect-Engineer Contracts and Solicitation Provisions and Contract Clauses.

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. (This is not a toll-free number.) Comments should indicate that they are submitted in response to “RIN 2900-AQ24–VA Acquisition Regulation: Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace; Protection of Privacy and Freedom of Information; Other Socioeconomic Programs; and Contract Modifications.” 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: Mr. Rafael N. 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 number.)

SUPPLEMENTARY INFORMATION:

Background

This rulemaking is issued under the authority of the Office of Federal Procurement Policy 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, and sections.

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

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 VAAM as internal departmental 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. The VAAM will not be finalized until corresponding VAAR parts are finalized, and therefore the VAAM is not yet available on line.

VAAR Part 801—Department of Veterans Affairs Acquisition Regulation System

In the table in section 801.106, this proposed rule would renumber section 852.236-88 to read 852.243-70 against OMB Control Number 2900-0422.

VAAR Part 823—Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace

We propose to add part 823, Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace. The authorities cited for this part are: 40 U.S.C. 121(c), which grants the authority for the head of each executive agency to issue orders and directives that the agency head considers necessary to carry out the regulations; 41 U.S.C. 1702, which addresses the acquisition planning and management responsibilities of Chief Acquisition Officers and Senior Procurement Executives, to include implementation of unique procurement policies, regulations and standards of the executive agency; and 48 CFR 1.301-1.304, which authorizes agencies to issue acquisition regulations that implement or supplement the FAR.

Under subpart 823.1, Sustainable Acquisition Policy, we propose to add 823.103-70, Policy, to give contracting officers the option to include an evaluation factor for an offeror's Sustainable Action Plan when acquiring sustainable products and services. This section would also require offerors to provide their Sustainable Action Plan in their technical proposals when required by the solicitation.

We propose to add 823.103-71, Solicitation provision, which prescribes use of a new provision at 852.823-70, Instruction to Offerors—Sustainable Acquisition Plan, when the contracting officer requires an offeror to submit a Sustainable Action Plan with its proposal.

We propose to add 823.103-72, Contract file, to require the contracting officer to place the contractor's final Sustainable Acquisition Plan, if one is required, into the official contract file.

In subpart 823.3, Hazardous Material Identification and Material Safety Data, we propose to add 823.300, Scope of subpart, and 823.303-70, Contract clause, to prescribe the use of clause 852.223-71, Safety and Health, for use in administering safety and health requirements in solicitations and contracts for research, development, or test projects; transportation of hazardous materials; and construction.

VAAR Part 824—Protection of Privacy and Freedom of Information

We propose to amend the authority citation for this part to include 5 U.S.C. 552a, the statute governing use and maintenance of records on individuals, conditions of disclosure, and the authority for agencies to promulgate rules governing such records; 41 U.S.C. 1121(c), which speaks to the authority of an executive agency under another law to prescribe policies, regulations, procedures, and forms for procurement; 41 U.S.C. 1702, which addresses the acquisition planning and management responsibilities of Chief Acquisition Officers and Senior Procurement Executives, to include implementation of unique procurement policies, regulations and standards of the executive agency. The authorities cited for this part are 5 U.S.C. 552a; 40 U.S.C. 121(c), which grants the authority for the head of each executive agency to issue orders and directives that the agency head considers necessary to carry out the regulations; 41 U.S.C. 1121(c); 41 U.S.C. 1702; 38 CFR 1.550–1.562, and 1.575–1.584, which contain the rules followed by VA in processing requests for records under the Freedom of Information Act; and 48 CFR 1.301–1.304, which authorizes agencies to issue acquisition regulations that implement or supplement the FAR.

We propose to revise 824.102, General, to add the title of the sections of 38 CFR chapter 1 (1.575 through 1.584), that addresses VA's implementation of the Privacy Act of 1974 (Safeguarding Personal Information in Department of Veterans Affairs Records).

We propose to add 824.103, Procedures, to implement the procedures in FAR 24.103, by citing specific VA Handbooks in solicitations and contracts that require the design, development, or operation of a system of records; and by requiring the contracting officer to include in Statements of Work and Performance Work Statements procedures to follow in the event of a PII breach. This section also calls for Government surveillance plans for contracts that require the design, development, or operation of a system of records to include monitoring of the contractor's adherence to the Privacy Act and PII regulations.

We propose to revise 824.203, Policy, to designate the first sentence as paragraph (a), to update the CFR reference for rules implementing the Freedom of Information Act (FOIA), and to add paragraph (b) to advise the public that the VA FOIA Service Office handles all FOIA requests, and to provide the centralized website and a link to the list of FOIA contacts where FOIA requests can be submitted electronically.

Part 826—Other Socioeconomic Programs

We propose to add part 826, Other Socioeconomic Programs, with a single subpart 826.2, Disaster or Emergency Assistance Activities. The authorities cited for this part are 38 U.S.C. 8127-8128, under which the Secretary may establish goals for awarding to Service-Disabled Veteran-Small Businesses and Veteran-Owned Small-

Businesses; 40 U.S.C. 121(c), which grants the authority for the head of each executive agency to issue orders and directives that the agency head considers necessary to carry out the regulations; 41 U.S.C. 1702, which addresses the acquisition planning and management responsibilities of Chief Acquisition Officers and Senior Procurement Executives, to include implementation of unique procurement policies, regulations and standards of the executive agency; 38 CFR 1.550-1.562, and 1.575-1.584, which contain the rules followed by VA in processing requests for records under the Freedom of Information Act; and 48 CFR 1.301-1.304, which authorizes agencies to issue acquisition regulations that implement or supplement the FAR.

We propose to add 826.202-1, Local area set-aside, to require the contracting officer to determine whether a local area set-aside should be further restricted to verified Service-Disabled Veteran-Owned Small Businesses (SDVOSB) or Veteran-Owned Small Businesses (VOSB), because, while the FAR allows further restriction to socioeconomic programs in FAR part 19, it does not mention the VA specific requirements under 38 U.S.C. 8127 and 8128.

We propose to add 826.202-2, Evaluation preference, which would require that, to the extent market research does not support an SDVOSB or VOSB set-aside, the contracting officer shall consider including evaluation factors in accordance with 815.304, and the evaluation criteria clause 852.215-70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors, prescribed at 815.304-71(a).

VAAR Part 836—Construction and Architect-Engineer Contracts

We propose to remove 836.578, Changes—supplement, which prescribes clause 852.236-88, Contract changes—supplement. This clause has been revised, retitled and renumbered as 852.243-70, Construction Contract Changes—Supplement, and its prescription has been moved to 843.205-70.

Part 843—Contract Modifications

We propose to add part 843, Contract Modifications, with a single subpart 843.2, Change Orders. The authorities cited for this part are 40 U.S.C. 121(c), which grants the authority for the head of each executive agency to issue orders and directives that the agency head considers necessary to carry out the regulations; 41 U.S.C. 1121(c)(3), which grants the authority of an executive agency under another law to prescribe policies, regulations, procedures, and forms for procurement; 41 U.S.C. 1702, which addresses the acquisition planning and management responsibilities of Chief Acquisition Officers and Senior Procurement Executives, to include implementation of unique procurement policies, regulations and standards of the executive agency;. and 48 CFR 1.301-1.304, which authorizes agencies to issue acquisition regulations that implement or supplement the FAR.

We propose to add 843.204-70, Definitization of unpriced change orders, to provide policy on price ceilings, definitization schedules, submission of a definitization proposal, required file documentation, limitations on obligations before definitization, and determining allowable profit depending on costs incurred during contract performance before negotiation of the final price.

We propose to add 843.205, Contract clauses, which would provide contracting officers with guidance for establishing the number of days (up to 60 days), the contractor may be granted to assert its right to an equitable adjustment within the Changes clause. This section would also provide direction to use clause 52.216-24, Limitation of Government Liability, in unpriced change orders estimated to exceed \$5 million.

We propose to add 843.205-70, Contract changes—supplement, which prescribes the use of the clause 852.243-70, Construction Contract Changes—Supplement, (formerly numbered 852.236-88), which has been revised and proposed to be moved to this part from VAAR 836.578.

VAAR Part 852—Solicitation Provisions and Contract Clauses

In subpart 852.2, Text of Provisions and Clauses, we propose to add provision 852.223-70, Instructions to Offerors—Sustainable Acquisition Plan, for use when the contracting officer decides to include an evaluation factor for an offeror’s Sustainable Action Plan when acquiring sustainable products and services in accordance with 823.103-72, Solicitation provision.

We propose to add clause 852.223-71, Safety and Health, which cites several references requiring contractors to comply with all Federal, State, and local laws and regulations applicable to the work being performed in accordance with 823.303-70, Contract clause.

We propose to amend clause 852.236-88, Contract Changes—Supplement, by renumbering it as 852.243-70, and retitling it as Construction Contract Changes—

Supplement. It would clarify the basis for allowing overhead and profit under change orders on construction contracts, add definitization schedule requirements, and reinforce the need for the contractor's timely response with a proposal to definitize the change order. This clause is prescribed in 843.205-70, Contract changes—supplement.

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 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 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 this rule is not 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

The Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. See also 5 CFR 1320.8(b)(3)(vi).

The proposed actions in this rule result in the proposed redesignation of the existing approved OMB collection number and the associated burden as a result of one clause we propose to both retitle and renumber.

This proposed rule would impose the following amended information collection requirement to one of the existing information collection approval numbers associated with this proposed rule. Although this action contains provisions constituting collections of information at 48 CFR at 48 CFR 836.578 and 852.236-88, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501-3521), no new proposed collections of information are associated with this clause. The information collection requirements for 852.236-88, which is currently prescribed by 836.578, is currently approved by OMB and has been assigned OMB control number 2900-0422. This information collection will be submitted to OMB to revise the title, redesignate the collection and renumber the one clause currently numbered as section 852.236-88, Contract Changes—Supplement. Accordingly, if approved, the clause would reflect the new designation and revised title as set forth in the preamble and the amendatory language of this proposed rule to read: 852.243-70, Construction Contract Changes—Supplement, as prescribed by 843.205-

70, Contract changes—supplement, under the associated OMB control number 2900-0422. The reference to the old number—852.236-88, would accordingly be removed. There is no change in the information collection burden that is associated with this proposed request. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA will submit these information collection amendments to OMB for its review. Notice of OMB approval for this information collection will be published in a future notice from the Office of Information and Regulatory Affairs at Reginfo.gov.

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. This proposed rule would generally be small business neutral. 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 estimates no cost impact to individual business would result from these rule updates. On this basis, 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. 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 will have no such effect on State, local, and tribal Governments or on the private sector.

List of Subjects

48 CFR Part 801

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 823

Air pollution control, Drug abuse, Energy conservation, Government procurement, Hazardous substances, Recycling, Water pollution control.

48 CFR Part 824

Freedom of information, Government procurement, Privacy.

48 CFR Part 826

Disaster assistance, Government procurement, Indians.

48 CFR Part 836

Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 843

Government procurement.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

Signing Authority

The Secretary of Veterans Affairs 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. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on November 15, 2018, for publication.

Dated: November 20, 2018

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

For the reasons set out in the preamble, VA is proposing to amend 48 CFR parts 801, 824, 836 and 852 and adding parts 823, 826, and 843 as follows:

PART 801—DEPARTMENT OF VETERANS AFFAIRS ACQUISITION REGULATION SYSTEM

1. The authority citation for part 801 continues to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121; 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301-1.304.

2. In section 801.106, table columns titled “48 CFR part or section where identified and described” and “Current OMB Control Number,” are amended to renumber the reference to section 852.836-88 to read 852.243-70 against the corresponding OMB Control Number 2900-0422.

3. Part 823 is added to read as follows:

PART 823—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Sec.

Subpart 823.1—Sustainable Acquisition Policy

823.103-70 Policy.

823.103-71 Solicitation provision.

823.103-72 Contract file.

Subpart 823.3—Hazardous Material Identification and Material Safety Data

823.300 Scope of subpart.

823.303-70 Contract clause.

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

Subpart 823.103—Sustainable Acquisition Policy

823.103-70 Policy.

(a) For new contracts and orders above the micro-purchase threshold, VA contracting officers may insert a solicitation provision to include an evaluation factor for an offeror's Sustainable Acquisition Plan when acquiring sustainable products and services. Such contracts and orders include, but are not limited to: office supplies; construction, renovation or repair; building operations and maintenance; landscaping services; pest management; electronic equipment, including leasing; fleet maintenance; janitorial services; laundry services; cafeteria operations; and meetings and conference services.

(b) When required in the solicitation, offerors shall include a Sustainable Acquisition Plan in their technical proposal addressing the sustainable products and services for delivery under the resulting contract.

823.103-71 Solicitation provision.

When the contracting officer requires a Sustainable Acquisition Plan in accordance with 823.103-70, Policy, the contracting officer shall insert the provision at 852.823-70, Instruction to Offerors—Sustainable Acquisition Plan, in solicitations above the micro-purchase threshold.

823.103-72 Contract file.

When one is required, the contracting officer shall place the contractor's final Sustainable Acquisition Plan into the contract file (Electronic Contract Management System (eCMS)).

Subpart 823.3—Hazardous Material Identification and Material Safety Data

823.300 Scope of subpart.

This subpart provides a contract clause for use in administering safety and health requirements.

823.303-70 Contract clause.

Contracting officers shall insert clause 852.223-71, Safety and Health, in solicitations and contracts that involve hazardous materials or hazardous operations for the following types of requirements:

- (1) Research, development, or test projects.
- (2) Transportation of hazardous materials.
- (3) Construction.

PART 824—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

4. The authority citation for part 824 is revised to read as follows:

Authority: 5 U.S.C. 552a; 40 U.S.C. 121(c); 41 U.S.C. 1121(c); 41 U.S.C. 1702; 38 CFR 1.550–1.562 and 1.575–1.584; and 48 CFR 1.301–1.304.

5. Section 824.102 is revised to read as follows:

824.102 General.

VA rules implementing the Privacy Act of 1974 are in 38 CFR 1.575 through 1.584, Safeguarding Personal Information in Department of Veterans Affairs Records.

6. Section 824.103 is added to read as follows:

824.103 Procedures.

(c) The contracting officer shall reference the following documents in solicitations and contracts that require the design, development, or operation of a system of records—

(1) VA Handbook 6500.6, Contract Security;

(2) VA Handbook 6508.1, Procedures for Privacy Threshold Analysis and Privacy Impact Assessment;

(3) VA Handbook 6510, VA Identity and Access Management—

(i) The contracting officer will ensure that statements of work or performance work statements that require the design, development, or operation of a system of records include procedures to follow in the event of a PII breach; and

(ii) The contracting officer shall ensure that Government surveillance plans for contracts that require the design, development, or operation of a system of records include monitoring of the contractor's adherence to Privacy Act/PII regulations. The assessing official should document contractor-caused breaches or other incidents related to PII in past performance reports. Such incidents include instances in which the contractor did not adhere to Privacy Act/PII contractual requirements.

Subpart 824.2—Freedom of Information Act

7. Section 824.203 is revised to read as follows:

824.203 Policy.

(a) VA rules implementing the Freedom of Information Act are in 38 CFR 1.550 through 1.562.

(b) Upon receipt of a request, the contracting officer shall provide the requester with the name of the cognizant VA Freedom of Information Act (FOIA) Service Office. The VA FOIA Service Office (see <http://www.oprm.va.gov/foia/default.aspx>) is the focal point for all FOIA requests and official information may only be released through the cognizant FOIA Service or their authorized designee. FOIA requests may be submitted electronically, see the VA FOIA website at http://www.oprm.va.gov/foia/foia_contacts.aspx.

8. Part 826 is added to read as follows:

PART 826—OTHER SOCIOECONOMIC PROGRAMS

Sec.

Subpart 826.2—Disaster or Emergency Assistance Activities

826.202-1 Local area set-aside.

826.202-2 Evaluation preference.

Authority: 38 U.S.C. 8127-8128; 40 U.S.C. 121(c); 41 U.S.C. 1702; 38 CFR 1.550-1.562 and 1.575-1.584; and 48 CFR 1.301-1.304.

Subpart 826.2—Disaster or Emergency Assistance Activities

826.202-1 Local area set-aside.

(c) The contracting officer shall determine whether a local area set-aside should be further restricted to verified Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) or Veteran-Owned Small Businesses (VOSBs) pursuant to subpart 819.70.

826.202-2 Evaluation preference.

Pursuant to 38 U.S.C. 8128 and if market research does not support an SDVOSB or VOSB set-aside, the contracting officer shall consider including evaluation factors in accordance with 815.304 and the evaluation criteria clause prescribed at 815.304-71(a), 852.215-70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

PART 836—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

9. The authority citation for part 836 continues to read as follows:

Authority: 40 U.S.C. 121(c); 48 CFR 1.301–1.304.

836.578 [Removed]

10. Section 836.578 is removed.

11. Part 843 is added to read as follows:

PART 843—CONTRACT MODIFICATIONS

Sec.

Subpart 843.2—Change Orders

843.204-70 Definitization of unpriced change orders.

843.205 Contract clauses.

843.205-70 Contract changes—supplement.

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702 and 48 CFR 1.301-1.304.

Subpart 843.2—Change Orders

843.204-70 Definitization of unpriced change orders.

(a) Scope. This subsection applies to unpriced change orders with an estimated value exceeding \$5 million unless the cognizant HCA establishes a lower level.

(b) Price ceiling. Unpriced change orders shall include a not-to-exceed cost or price.

(c) Definitization schedule. Unpriced change orders shall contain definitization schedules that provide for definitization by the earlier of—

(1) The date that is 180 days after issuance of the change order (this date may be extended but may not exceed the date that is 180 days after the contractor submits a definitization proposal); or

(2) The date on which the amount of funds obligated under the change order is equal to more than 50 percent of the not-to-exceed price.

(d) Definitization proposal. Submission of a definitization proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a timely definitization proposal, the contracting officer may suspend or reduce payments in accordance with the contract payment clause or take other appropriate action.

(e) File documentation for definitization delays. Contracting officers must document the contract file with the justification for any delay and revised definitization milestone schedule.

(f) Limitations on obligations.

(1) The Government shall not obligate more than 50 percent of the not-to-exceed price before definitization. However, if a contractor submits a definitization proposal before 50 percent of the not-to-exceed price has been obligated by the Government, the limitation

on obligations before definitization may be increased to no more than 75 percent of the not-to-exceed cost or price.

(2) Obligations should be consistent with the contractor's authorized and scheduled work performed during the undefinitized period.

(g) Allowable profit.

(1) When the final cost or price of an unpriced change order is negotiated after a substantial portion of the required performance has been completed, the head of the contracting activity shall ensure the fee or profit allowed reflects—

(i) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final cost or price; and

(ii) The contractor's reduced cost risk for costs incurred during performance of the remainder of the contract; and

(iii) The extent to which costs have been incurred prior to definitization of the contract action.

(2) If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as zero (0) percent, regardless of contract type. The risk assessment shall be documented in the contract file.

843.205 Contract clauses.

As authorized in the introductory text of clauses FAR 52.243-1, Changes—Fixed-Price; FAR 52.243-2, Changes—Cost-Reimbursement; and FAR 52.243-4, Changes, and in the prescription at FAR 43.205(c) for FAR 52.243-3, Changes—Time-and-Materials or Labor-Hours, the contracting officer may vary the period within which a contractor must

assert its right to an equitable adjustment but the extended period shall not exceed 60 calendar days.

843.205-70 Contract changes—supplement.

The contracting officer shall insert the clause at 852.243-70, Construction Contract Changes—Supplement, in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

12. The authority citation for part 852 continues to read as follows:

Authority: 38 U.S.C. 8127-8128, and 8151-8153; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301-1.304.

13. Section 852.223-70 is added to read as follows:

852.223-70 Instructions to offerors—Sustainable Acquisition Plan.

As prescribed in 823.103-71, when the Contracting Officer deems a Sustainable Acquisition Plan necessary, the Contracting Officer shall insert the following provision:

INSTRUCTIONS TO OFFERORS—SUSTAINABLE ACQUISITION PLAN (DATE)

Offerors shall include a Sustainable Acquisition Plan in their technical proposals. The plan must describe the approach and quality assurance mechanisms for applying FAR subpart 23.1, Sustainable Acquisition Policy and other Federal laws, regulations and Executive Orders governing sustainable acquisition. The plan shall clearly identify those products and services included in the proposal.

(End of provision)

14. Section 852.223-71 is added to read as follows:

852.223-71 Safety and Health.

As prescribed by 823.303-70, the Contracting Officer shall insert the following clause:

SAFETY AND HEALTH (DATE)

(a) To help ensure the protection of the life and health of all persons, and to help prevent damage to property, the Contractor shall comply with all Federal, State, and local laws and regulations applicable to the work being performed under this contract. These laws are implemented or enforced by the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA) and other regulatory/enforcement agencies at the Federal, State, and local levels.

(1) Additionally, the Contractor shall comply with the following regulations when developing and implementing health and safety operating procedures and practices for both personnel and facilities involving the use or handling of hazardous materials and the conduct of research, development, or test projects:

(i) 29 CFR 1910.1030, Bloodborne pathogens; 29 CFR 1910.1450, Occupational exposure to hazardous chemicals in laboratories. These regulations are available at <https://www.osha.gov/>.

(ii) Nuclear Regulatory Commission Standards and Regulations, pursuant to the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.) Copies are available from the U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

(2) The following Government guidelines are recommended for developing and implementing health and safety operating procedures and practices for both personnel and facilities:

(i) Biosafety in Microbiological and Biomedical Laboratories, Centers for Disease Control and Prevention (CDC), available at <http://www.cdc.gov/biosafety/publications/index.htm>.

(ii) Prudent Practices in the Laboratory, National Research Council, National Academy Press, Washington, DC 20001, available at <http://www.nap.edu>.

(b)(1) The Contractor shall maintain an accurate record of, and promptly report to the Contracting Officer, all accidents or incidents resulting in the exposure of persons to toxic substances, hazardous materials or hazardous operations; the injury or death of any person; or damage to property incidental to work performed under the contract resulting from toxic or hazardous materials and resulting in any or all violations for which the Contractor has been cited by any Federal, State or local regulatory/enforcement agency.

(2) The report shall include a copy of the notice of violation and the findings of any inquiry or inspection, and an analysis addressing the impact these violations may have on the work remaining to be performed. The report shall also state the required action(s), if any, to be taken to correct any violation(s) noted by the Federal, State, or local regulatory/enforcement agency and the time frame allowed by the agency to accomplish the necessary corrective action.

(c) If the Contractor fails or refuses to comply with the Federal, State or local regulatory/enforcement agency's directive(s) regarding any violation(s) and prescribed corrective action(s), the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action (as approved by the Federal, State, or local regulatory/enforcement agencies) has been taken and documented to the Contracting

Officer. No part of the time lost due to any such stop work order shall form the basis for a request for extension or costs or damages by the Contractor.

(d) The Contractor shall insert this clause in each subcontract involving toxic substances, hazardous materials, or hazardous operations. The Contractor is responsible for the compliance of its subcontractors with the provisions of this clause.

(End of clause)

852.236-88 [Removed]

15. Section 852.236-88 is removed.

16. Section 852.243-70 is added to read as follows:

852.243-70 Construction Contract Changes—Supplement.

As prescribed in 843.205-70, the Contracting Officer shall insert this clause in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold. The Contracting Officer shall fill in the number of days in which a Contractor must assert its right to an equitable adjustment; however, such amount shall not exceed 60 calendar days.

CONSTRUCTION CONTRACT CHANGES—SUPPLEMENT (DATE)

The FAR clauses 52.243-4, Changes; 52.243-5, Changes and Changed Conditions; and 52.236-2, Differing Site Conditions, are supplemented as follows:

(a) Submission of request for equitable adjustment proposals. When directed by the Contracting Officer or requested by the Contractor, the Contractor shall, in accordance with FAR 15.403-5, submit proposals for changes in the work exceeding \$500,000 in

writing to the Contracting Officer or Administrative Contracting Officer (ACO), and to the resident engineer.

(1) The Contractor must provide an itemized breakdown for changes exceeding the micro-purchase threshold (see FAR 2.101).

(2) The itemized breakdown shall include materials, quantities, unit prices, labor costs (separated into trades), construction equipment, etc. Labor costs shall be identified with specific material placed or operation performed.

(3) Proposals shall be submitted to the Contracting Officer or ACO and the resident engineer as expeditiously as possible, but not later than [fill-in] ____ calendar days, after receipt of a written change order by the Contracting Officer.

(4) Proposals shall be signed by each subcontractor participating in the change.

(5) The Contracting Officer will consider issuing a settlement by determination to the contract if the Contractor's proposal required by paragraph (3) is not received within 30 calendar days, or if agreement has not been reached.

(b) Paragraphs (a)(1) through (5) and the following apply to proposed contract changes costing \$500,000 or less:

(1) As a basis for negotiation, allowances not to exceed 10 percent each for overhead and profit for the party performing the work will be based on the value of labor, material, and equipment required to accomplish the change. As the value of the change increases, a declining scale will be used in negotiating the percentage of overhead and profit. This declining scale will also be used to negotiate the prime Contractor's or upper-tier subcontractor's fee when work is performed by lower-tier subcontractors (to a maximum of three tiers) and will be based on the net increased cost to the prime or

upper-tier subcontractor, as applicable. Profit (fee) shall be computed by multiplying the profit percentage by the sum of the direct costs and computed overhead costs.

Allowable percentages on changes will not exceed the following:

- (i) 10 percent overhead and/or 10 percent profit (fee) on the first \$20,000.
- (ii) 7.5 percent overhead and/or 7.5 percent profit (fee) on the next \$30,000.
- (iii) 5 percent overhead and/or 5 percent profit (fee) on a balance over \$50,000.

(2) The Contracting Officer will consider issuing a settlement by determination to the contract if the Contractor's proposal required by paragraph (3) is not received within 30 calendar days, or if agreement has not been reached.

(c) (1) Overhead and Contractor's fee percentages shall be considered to include insurance other than mentioned herein, field and office supervisors and assistants, security police, use of small tools, incidental job burdens, and general home office expenses and no separate allowance will be made. Assistants to office supervisors include all clerical, stenographic and general office help. Incidental job burdens include, but are not necessarily limited to, office equipment and supplies, temporary toilets, telephone and conformance to OSHA requirements. Items such as, but not necessarily limited to, review and coordination, estimating and expediting relative to contract changes are associated with field and office supervision and are considered to be included in the Contractor's overhead and/or fee percentage.

(2) Where the Contractor's or subcontractor's portion of a change involves credit items, such items must be deducted prior to adding overhead and profit for the party performing the work. The Contractor's fee is limited to the net increase to Contractor or subcontractors' portions of cost computed in accordance with this clause.

(3) Where a change involves credit items only, a proper measure of the amount of downward adjustment in the contract price is the reasonable cost to the Contractor if it had performed the deleted work. A reasonable allowance for overhead and profit are properly includable as part of the downward adjustment for a deductive change. The amount of such allowance is subject to negotiation.

(End of clause)

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