



DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Parts 801, 825, 836, 842, 846, 852 and 853

RIN 2900-AQ18

VA Acquisition Regulation: Construction and Architect-Engineer Contracts

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending and updating its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove procedural guidance internal to VA into the VA Acquisition Manual (VAAM), and to incorporate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 These changes seek to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors.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. In particular, this rulemaking revises VAAR concerning Construction and Architect-Engineer Contracts, as well as affected parts covering the Department of Veterans Affairs Acquisition Regulations System, Foreign Acquisition, Contract Administration and Audit Services, Quality Assurance, Solicitation Provisions and Contract Clauses, and Forms.

DATES: This rule is effective on [insert date 30 days after date of publication in the FEDERAL REGISTER].

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: On September 7, 2018, VA published a proposed rule in the Federal Register (83 FR 45384) which announced VA's intent to amend regulations for VAAR Case RIN 2900-AQ18 (part 836). In particular, this final rule removes subpart 825.2, Buy American Act—Construction Materials, and the associated prescribed clauses under subpart 825.11, Solicitation Provisions and Contract Clauses, as it is duplicative of the FAR.

In part 836, under 836.203, Government estimate of construction costs, this rule renumbers and retitles the section to 836.203-70, Protection of the independent government estimate—sealed bid, and revises it to more specifically clarify VA procedures to protect the independent government estimate in sealed bid acquisitions when bid openings are held. Section 836.204, Disclosure of the magnitude of construction projects, revises the estimated price ranges to provide a better measure for contractors to gauge estimated construction costs for projects of the National Cemetery Administration and the Office of Construction and Facilities Management.

This rule removes 836.206, Liquidated damages, since the subject matter is adequately covered in the FAR, as well as 836.209, Construction contracts with architect-engineer firms, as it contains internal procedures and moves the coverage to the VAAM. For the same reason, this rule removes 836.213-4, Notice of award, and 836.213-70, Notice to proceed.

This rule removes 836.513, Accident prevention, since the prescribed clause is duplicative of coverage in FAR clause 52.236-1, Accident Prevention, as well as 836.570, Correspondence, as the clause it prescribes, 852.236-76, Correspondence, is being removed. The subject matter will be addressed in the VAAM by directing contracting officers to include this information in a “Notice to Proceed” letter to the contractor from the contracting officer.

This rule adds 836.580, Notice to bidders—additive or deductive bid line items, and a prescription requiring the contracting officer to insert the provision 852.236-92, Notice to Bidders—Additive or Deductive Bid Line Items, in invitations for bids when the contracting officer determines that funds may not be available for all the desired construction features at contract award.

This rule adds coverage under VAAR subpart 842.2, Contract Administration Services, and 842.271, Contract clause for Government construction contract administration, to prescribe clause 852.242-70, Government Construction Contract Administration, that describes contract administration functions to be delegated under construction contracts that exceed the micro-purchase threshold for construction. It describes the role of the designated contracting officer performing contract administration, as well as certain functions that are delegated to VA resident engineers, if assigned. It also contains some language found under the previous clause, 852.236-78, Government Supervision.

This rule removes 846.312, Construction contracts, which prescribes clause 852.236-74, Inspection of Construction, as well as the clause.

Under part 852, this rule removes 852.236-74, Inspection of Construction, since VA Master Specifications provide the requirements for performing inspections. This rule also removes 852.236-77, Reference to “Standards,” as VA Master Specifications are used in VA contracts. This rule removes 852.236-78, Government Supervision, and adds a revised version at 852.242-70, Government Construction Contract Administration. This rule amends clause 852.236-79, Daily Report of Workers and Materials, by changing the title to “Contractor Production Report” and revises the clause to reflect use of VA Form 10101 which is based on industry reporting standards.

In subpart 853.1—General, this rule revises the text of 853.107, Obtaining forms, to provide the current website address where VA forms are obtained now:

<https://www.va.gov/vaforms/>. It removes the outdated address for an old VA office and discontinues the outdated practice of requesting forms in hard copy directly from the agency policy office. All forms will now be available online. This rule, under subpart 853.2—Prescription of Forms, revises the list of forms applicable to VAAR part 836 that are used between VA and its contractors, potential offerors or bidders, or the general public.

Technical Non-Substantive Change to the Proposed Rule

This rule makes one technical non-substantive change to correct the amendatory instruction at 801.106 to remove the reference to 852.236-82 through 852.236-84, and its corresponding OMB Control Number.

VA provided a 60-day comment period for the public to respond to the proposed rule. The comment period for the proposed rule ended on November 6, 2018 and VA received no comments. This document adopts as a final rule the proposed rule

published in the Federal Register on September 7, 2018, with the technical non-substantive change noted above and other minor formatting and/or grammatical edits. This final rule has Federal Register administrative format changes in the amendatory text which make no substantive text changes at the affected sections.

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 final rule will have no such effect on State, local, and tribal Governments or on the private sector.

Paperwork Reduction Act

This final rule impacts seven existing information collection requirements associated with four Office of Management and Budget (OMB) control number approvals. The actions in this rule result in multiple actions affecting some of these information collections, such as: the outright removal of the information collection; no change in information collection burdens although titles and number of the information collection would be slightly revised; or no change to the existing OMB control number and associated burden.

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 OMB control number. See also 5 CFR 1320.8(b)(3)(vi).

This final rule contains one provision constituting a collection of information at 48 CFR 836.606-71, Architect-engineer's proposal, concerning use of and prescription for VA Form 10-6298, Architect-Engineer Fee Proposal, which is revised with updated thresholds and FAR citations, as well as an updated form number. Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), no new collection of information is associated with this provision as a part of this final rule. The information collection requirement for 836.606-71 is currently approved by OMB and has been assigned OMB control number 2900-0208. The burden of this information collection remains unchanged. However, this rule does amend this information collection requirement to renumber the form currently numbered and titled as VA Form 10-6298, Architect-Engineer Fee Proposal, to now read: VA Form 6298, Architect-Engineer Fee Proposal. Additionally, older dollar thresholds and FAR citations in the form are updated to current levels and correct citations. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), OMB has approved the reporting or recordkeeping provisions that are included in the text and form under 836.606-71 cited above against the assigned OMB control number. For the requested administrative amendments to the form, as required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA has submitted this information collection amendment to OMB for its review. Notice of OMB approval for this information collection will be published in a future Federal

Register document. Other revisions to the associated OMB control number relating to other provisions of this rule are identified separately in this submittal.

This final rule also contains one provision constituting a collection of information at 48 CFR 852.236-72, Performance of Work by the Contractor, that will remain unchanged. Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), the collection of information associated with this provision remains unchanged. The information collection requirement for 852.236-72 is currently approved by OMB and has been assigned OMB control number 2900-0422. The burden of this information collection remains unchanged. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), OMB has approved the reporting or recordkeeping provision that is included in the clause at 852.236-72 cited above and against the assigned OMB control number.

This final rule imposes the following amended information collection requirements to one of the four existing information collection approval numbers associated with this rule. Although this action contains the following provision constituting a collection of information at 48 CFR 852.236-79, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501-3521), no new collection of information is associated with this provision as a part of this final rule. The information collection requirement for 852.236-79 is currently approved by OMB and has been assigned OMB control number 2900-0208. The burden of this information collection remains unchanged. However, this rule does amend this information collection requirement to prescribe the new form—VA Form 10101, Contractor Production Report. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA has submitted this

information collection amendment to OMB for its review. Notice of OMB approval for this information collection will be published in a future Federal Register document. The currently approved burden remains unchanged.

This action also contains a provision constituting a collection of information at 48 CFR 852.236-80, however, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501-3521), no new proposed collection of information is associated with this provision as a part of this final rule. The information collection requirement for 852.236-80 is currently approved by OMB and has been assigned OMB control number 2900-0422. The currently approved burden associated with this clause remains unchanged. However, this information collection has been submitted to OMB to amend the information collection requirement to make a minor correction to the title of the clause, as stated in paragraph 1 of the Supporting Statement, to reflect the full name of the clause—"Subcontracts and Work Coordination" in lieu of an abbreviated title reflected on the Supporting Statement—"Work Coordination." The clause was otherwise referenced correctly in the remainder of the supporting statement. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA has submitted this information collection amendment to OMB for its review to revise the title in paragraph 1 of the submitted statement. Notice of OMB approval for this information collection will be published in a future Federal Register document.

This final rule removes one of the existing information collection requirements associated with this action at 48 CFR 852.236-84, Schedule of Work Progress. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501-3521), while the actual OMB control number will remain in existence due to other information collections on the

same OMB control number that are approved and active, it discontinues the inclusion of 852.236-84 under the associated corresponding approved OMB control number, 2900-0422. As a result of this final rule, the information collection burden that is associated with clause 852.236-84 is removed. For 48 CFR 852.236-84, Schedule of Work Progress, this would result in a removal of 1828.5 estimated annual burden hours and an annual cost savings of \$70,800.

As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), this final rule removes two of the existing information collection requirements associated with this action at 48 CFR 852.236-89, Buy American Act; and 852.236-91, Special Notes. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501-3521), it discontinues the associated corresponding approved OMB control numbers, 2900-0622 and 2900-0623, respectively. As a result of this final rule, the information collection burden that is associated with them is removed. For 48 CFR 852.236-89, Buy American Act, and its corresponding OMB control number 2900-0622, this results in the removal of 22 estimated annual burden hours and an annual cost savings to respondents of \$852. For 48 CFR 852.236-91, Special Notes, and its corresponding OMB control number 2900-0623, this results in the removal of 778 estimated annual burden hours and an annual cost savings of \$30,122. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA has submitted these information collection amendments to OMB for its review. Notice of OMB approval for this information collection will be published in a future Federal Register document.

Regulatory Flexibility Act

This final rule does 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 rule is 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 processes or procedures. VA estimates no cost impact to individual business will result from these rule updates. This rulemaking clarifies VA’s policy regarding the contracting order of priority for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs) as a result of VA’s implementation of 38 U.S.C. 8127-8128 as a result of the U.S. Supreme Court’s decision in *Kingdomware Technologies, Inc. vs. the United States*, July 25, 2018, only as it pertains to the application of the VA Rule of Two to contracts for construction and architect-engineer contracts in accordance with Pub. L. 109-461 as codified at 38 U.S.C. 8127-8128. It 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 final rule does 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.

Executive Orders 12866, 13563 and 13771

Executive Orders (E.O.) 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 be a significant regulatory action under E.O. 12866 because it does not 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'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 final rule is considered an

EO 13771 deregulatory action. Details on the estimated cost savings of this final rule can be found in the rule's economic analysis and in the PRA section below.

List of Subjects

48 CFR Part 801

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

48 CFR Part 825

Customs duties and inspection, Foreign currencies, Foreign trade, Government procurement.

48 CFR Parts 836 and 852

Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 842

Accounting, Government procurement.

48 CFR Parts 846 and 853

Government procurement.

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 January 8, 2019, for publication.

Dated: March 12, 2019

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 amends 48 CFR, parts 801, 825, 836, 842, 846, 852, and 853 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.

Subpart 801.1—Purpose, Authority, Issuance

801.106 [Amended]

2. In 801.106, under the table, columns titled “48 CFR part or section where identified and described” and “Current OMB control number”:

a. Remove the reference to 852.236-82 through 852.236-84 and “the corresponding OMB Control Number 2900-0422.

b. Remove the reference to 852.236-89 and the corresponding OMB Control Number 2900-0622.

c. Remove the reference to 852.236-91 and the corresponding OMB Control Number 2900-0623.

PART 825—FOREIGN ACQUISITION

3. The authority citation for part 825 is revised to read as follows:

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

Subpart 825.2 [Removed and Reserved]

4. Subpart 825.2, consisting of sections 825.103 and 825.104, is removed and reserved.

Subpart 825.11 [Removed and Reserved]

5. Subpart 825.11, consisting of section 825.1102, is removed and reserved.

PART 836—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

6. The authority citation for part 836 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3), 1303(a)(2) and 1702; and 48 CFR 1.301-1.304.

Subpart 836.2—Special Aspects of Contracting for Construction

7. Section 836.202 is revised to read as follows:

836.202 Specifications.

8. Section 836.202-70 is added to read as follows:

836.202-70 Specifications—use of equal products.

Upon approval of the justification documentation required by FAR 11.105, items peculiar to one manufacturer, the contracting officer shall include the clause found at 852.236-90, Restriction on Submission and Use of Equal Products, in solicitations and contracts. The contracting officer shall complete the clause by inserting the items which have been approved for restriction to a brand name. This clause also places offerors or bidders on notice that the “brand name” provisions of

any clause or provision that may authorize the submission of an “equal” product, shall not apply to the specific items listed in clause 852.236-90.

9. Section 836.203 is revised to read as follows:

836.203 Government estimate of construction costs.

10. Section 836.203-70 is added to read as follows:

836.203-70 Protection of the independent government estimate—sealed bid.

For sealed bid acquisitions the contracting officer or bid custodian is not authorized to release the basis for calculating the estimate at any time. The person preparing the independent government estimate (IGE) shall—

(a) Designate the IGE as “For Official Use Only (FOUO)”;

(b) The contracting officer or bid custodian shall file a sealed copy of the IGE with the bids. (In the case of two-step acquisitions, the contracting officer or bid custodian accomplishes this during the second step);

(c) After the bids are read and recorded during a Public Bid Opening, remove the “For Official Use Only (FOUO)” designation then read and record the estimate as if it were a bid, in the same detail as the bids; and

(d) In instances where only one bid has been received, the government estimate shall not be read by the contracting officer as it may be needed to conduct negotiations with the offeror.

11. Section 836.204 is revised to read as follows:

836.204 Disclosure of the magnitude of construction projects.

The contracting officer shall utilize the estimated price ranges defined in FAR 36.204(a) through (e) as further supplemented below when identifying the magnitude of a VA project in advance notices and solicitations:

(f) For estimated price ranges between \$1,000,000 and \$5,000,000, the contracting officer shall identify the magnitude of a VA project in advance notices and solicitations in terms of the following price ranges:

(1) Between \$1,000,000 and \$2,000,000.

(2) Between \$2,000,000 and \$5,000,000.

(g) Between \$5,000,000 and \$10,000,000.

(h) For estimated price ranges greater than \$10,000,000, the contracting officer shall identify the magnitude of a VA project in advance notices and solicitations in terms of one of the following price ranges:

(1) Between \$10,000,000 and \$20,000,000.

(2) Between \$20,000,000 and \$50,000,000.

(3) Between \$50,000,000 and \$100,000,000.

(4) Between \$100,000,000 and \$150,000,000.

(5) Between \$150,000,000 and \$200,000,000.

(6) Between \$200,000,000 and \$250,000,000.

(7) More than \$250,000,000.

836.206 [Removed]

12. Section 836.206 is removed.

836.209 [Removed]

13. Section 836.209 is removed.

836.213, 836.213-4, and 836.213-70 [Removed]

14. Sections 836.213, 836.213-4, and 836.213-70 are removed.

Subpart 836.5—Contract Clauses

15. Section 836.500 is revised to read as follows:

836.500 Scope of subpart.

The clauses and provisions prescribed in this subpart are set forth for use in fixed-price construction contracts in addition to those prescribed in FAR subpart 36.5.

16. Section 836.501 is revised to read as follows:

836.501 Performance of work by the contractor.

The contracting officer shall insert the clause at 852.236-72, Performance of Work by the Contractor, in solicitations and contracts for construction that contain the FAR clause at 52.236-1, Performance of Work by the Contractor, except those awarded pursuant to subpart 819.70. When the solicitations or contracts include a section entitled “Network Analysis System (NAS),” the contracting officer shall use the clause with its Alternate I.

836.513 [Removed]

17. Section 836.513 is removed.

18. Section 836.521 is revised to read as follows:

836.521 Specifications and drawings for construction.

The contracting officer shall insert the clause at 852.236-71, Specifications and Drawings for Construction, in solicitations and contracts for construction that include the FAR clause at 52.236-21, Specifications and Drawings for Construction.

836.570 [Removed]

19. Section 836.570 is removed.

836.571 [Removed]

20. Section 836.571 is removed.

836.572 [Removed]

21. Section 836.572 is removed.

22. Section 836.573 is revised to read as follows:

836.573 Contractor production report.

The contracting officer shall insert the clause at 852.236-79, Contractor Production Report, in solicitations and contracts for construction expected to exceed the simplified acquisition threshold. The contracting officer may, when in the best interest of the Government, insert the clause in solicitations and contracts for construction when the contract amount is expected to be at or below the simplified acquisition threshold.

23. Section 836.574 is revised to read as follows:

836.574 Subcontracts and work coordination.

The contracting officer shall insert the clause at 852.236-80, Subcontracts and Work Coordination, in invitations for bids and contracts for construction expected to exceed the micro-purchase threshold for construction. When the solicitations or contracts are for new construction work with complex mechanical-electrical work, the contracting officer may use the clause with its Alternate I.

836.575 [Removed]

24. Section 836.575 is removed.

836.576 [Removed]

25. Section 836.576 is removed.

836.577 [Removed]

26. Section 836.577 is removed.

836.579 [Removed]

27. Section 836.579 is removed.

28. Section 836.580 is added to read as follows:

836.580 Notice to bidders—additive or deductive bid line items.

The contracting officer may include the provision 852.236-92, Notice to Bidders—Additive or Deductive Bid Line Items, in invitations for bids when the contracting officer determines that funds may not be available for all the desired construction features at contract award.

Subpart 836.6—Architect-Engineer Services

836.602, 836.602-1, 836.602-2, 836.602-4, and 836.602-5 [Removed]

29. Sections 836.602, 836.602-1, 836.602-2, 836.602-4, and 836.602-5 are removed.

30. Section 836.603 is revised to read as follows:

836.603 Collecting data on and appraising firms' qualifications.

The Associate Executive Director, Office of Facilities Engineering, for Central Office; the Director, Office of Construction Management, for National Cemetery Administration; the Senior Executive Service (SES) official for Administration and Facilities for Veterans Benefits Administration; and the Chief, Engineering Service, for field facilities, are responsible for collecting Standard Forms 330 and maintaining a data file on architect-engineer qualifications.

31. Sections 836.606, 86.606-70, and 86.606-71 are revised to read as follows:

836.606 Negotiations.

836.606-70 Architect-engineer firms' proposal.

(a) When the contract price is estimated to be \$50,000 or more, the contracting officer shall use VA Form 6298, Architect-Engineer Fee Proposal, to obtain the proposal and supporting cost data from the proposed contractor and subcontractor in the negotiation of an A-E contract for design services.

(b) In obtaining A-E services for research study, seismic study, master planning study, construction management and other related services contracts, the contracting officer shall use VA Form 6298, supplemented or modified as needed for the particular project type.

836.606-71 Application of 6 percent architect-engineer fee limitation.

(a) The production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction. Other A-E fees are not included in this 6 percent. Such fees are delineated in reference (c) below.

(b) The 6 percent limit also applies to contract modifications, including modifications involving:

(1) Work not initially included in the contract. Apply the 6 percent limit to the revised total estimated construction cost.

(2) Redesign. Apply the 6 percent limit as follows—

(i) Add the estimated construction cost of the redesign features to the original estimated construction cost;

(ii) Add the contract cost for the original design to the contract cost for redesign;
and

(iii) Divide the total contract design cost by the total estimated construction cost.

The resulting percentage may not exceed the 6 percent statutory limitation.

(c) The 6 percent fee limitation does not apply to the following architect or engineer services:

(1) Investigative services including but not limited to—

(i) Determination of program requirements, including schematic or preliminary plans and estimates;

(ii) Determination of feasibility of proposed project;

(iii) Preparation of measured drawings of existing facility;

(iv) Subsurface investigation;

(v) Structural, electrical, and mechanical investigation of existing facility;

(vi) Surveys: topographic, boundary, utilities, etc.;

(vii) Environmental services;

(viii) Geo-Tech studies; and

(ix) Feasibility studies.

(2) Special consultant services that are not normally available in organizations of architects or engineers and that are not specifically applied to the actual preparation of working drawings or specifications of the project for which the service are required.

(3) Other—

(i) Reproduction of approved designs through models, color renderings, photographs, or other presentation media;

(ii) Travel and per diem allowances other than those required for the development and review of working drawings and specifications;

(iii) Supervision or inspection of construction, review of shop drawings or samples, and other services performed during the construction phase;

(iv) All other services that are not an integral part of the production and delivery of plans, designs, and specifications; and

(v) The cost of reproducing drawings and specifications for bidding and their distribution to prospective bidders and plan file rooms.

836.606-72 and 836.606-73 [Removed]

32. Sections 836.606-72 and 836.606-73 are removed.

33. Subpart 836.70, consisting of sections 836.7000 and 836.7001, is added to read as follows:

Subpart 836.70—Unique Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements

836.7000 Scope of subpart.

This subpart sets forth requirements for the use of VA unique forms, as prescribed in this part, for contracting for construction, architect-engineer services, or dismantling, demolition, or removal of improvements. See part 853.

836.7001 Unique construction and architect-engineer services forms.

Contracting officers may use the following forms, as prescribed in this subpart, for construction, architect-engineer services or dismantling, demolition, or removal of improvements contracts as set forth below and in the referenced prescriptions:

(a) VA Form 6298, Architect-Engineer Fee Proposal (see 853.236-70).

VA Form 6298, Architect-Engineer Fee Proposal, shall be used as prescribed in 836.606-70.

(b) VA Form 2138, Order for Supplies or Services (Including Task Orders for Construction or A-E Services) (see 853.236-71). VA Form 2138, Order for Supplies or

Services (Including Task Orders for Construction or A-E Services), may be used for ordering supplies or services, including task orders for Construction or A-E services, to include dismantling, demolition, or removal of improvements.

(c) VA Form 10101, Contractor Production Report (see 853.236-72). Contractors may use VA Form 10101, Contractor Production Report or a contractor generated form containing the same type of information contained in the form, as required by 836.573 which prescribes the clause at 852.236-79, Contractor Production Report.

PART 842—CONTRACT ADMINISTRATION AND AUDIT SERVICES

34. The authority citation for part 842 is amended to read as follows:

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

35. Subpart 842.2, consisting of section 842.271, is added to read as follows:

Subpart 842.2—Contract Administration Services

842.271 Contract clause for Government construction contract administration.

The contracting officer shall insert the clause at 852.242-70, Government Construction Contract Administration, in solicitations and contracts for construction expected to exceed the micro-purchase threshold for construction.

PART 846—QUALITY ASSURANCE

36. The authority citation for part 846 is revised 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.

846.312 [Removed]

37. Section 846.312 is removed.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

38. 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. 1702; and 48 CFR 1.301-1.304.

39. Section 852.236-71 is revised to read as follows:

852.236-71 Specifications and Drawings for Construction.

As prescribed in 836.521, insert the following clause:

SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 2019)

The clause entitled "Specifications and Drawings for Construction" in FAR

52.236-21 is supplemented as follows:

(a) The Contracting Officer's interpretation of the drawings and specifications will be final, subject to the Disputes clause.

(b) The Contractor shall—

(1) Check all drawings and specifications furnished immediately upon receipt;

(2) Compare all drawings and the specifications, and verify the figures before laying out the work;

(3) Promptly notify the Contracting Officer of any discrepancies;

(4) Be responsible for any errors that might have been avoided by complying with this paragraph (b); and

(5) Reproduce and print contract drawings and specifications as needed.

(c) In general—

(1) Drawings of greater detail shall govern over drawings of lesser detail unless specifically noted otherwise; and

(2) Figures and numerical quantities noted on drawings govern over scale

measurements.

(d) Omissions from the drawings or specifications or the misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications, or that are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work. The Contractor shall perform such details as if fully and correctly set forth and described in the drawings and specifications.

(e) The work shall conform to the specifications and the contract drawings identified on the following index of drawings:

<u>Title</u>	<u>File</u>	<u>Drawing No.</u>
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(End of clause)

40. Section 852.236-72 is revised to read as follows:

852.236-72 Performance of Work by the Contractor.

As prescribed in 836.501, insert the following clause:

PERFORMANCE OF WORK BY THE CONTRACTOR (APR 2019)

(a) In accordance with FAR 52.236-1, the contract work accomplished on the site by laborers, mechanics, and foreman/superintendent on the Contractor's payroll and under their direct supervision shall be used in establishing the percent of work to be performed by the Contractor. Cost of material and equipment installed by such labor may be included. The work by the Contractor's executive, administrative and clerical forces shall be excluded in establishing compliance with the requirements of this clause.

(b) The Contractor shall submit, simultaneously with the schedule of costs required by the Payments under Fixed-Price Construction Contracts clause of the contract, a statement designating the portions of contract work to be performed with the Contractor's own forces. The approved schedule of costs will be used in determining the value of a work activity/event, or portions thereof, of the work for the purpose of this article.

(c) Changes to established activity/event identifiers or responsibility codes for Contractor activities shall not be made without approval from the Contracting Officer.

(d) In the event the Contractor fails to comply with FAR 52.236-1, Performance of Work by the Contractor, the Contracting Officer will withhold retention in the amount of 15% of the value of any work activity/element being invoiced that was not authorized by the Contracting Officer to be performed by someone other than the prime Contractor's own workforce.

(End of clause)

Alternate I (APR 2019). For requirements which include a Network Analysis System (NAS), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) The Contractor shall submit, simultaneously with the cost per activity of the construction schedule required by Section 01310 or 01311, NETWORK ANALYSIS SYSTEM, a responsibility code for all activities of the network for which the Contractor's forces will perform the work. The cost of these activities will be used in determining the portions of the total contract work to be executed by the Contractor's forces for the purpose of this article.

852.236-74 [Removed and Reserved]

41. Section 852.236-74 is removed and reserved.

852.236-76 [Removed and Reserved]

42. Section 852.236-76 is removed and reserved.

852.236-77 [Removed and Reserved]

43. Section 852.236-77 is removed and reserved.

852.236-78 [Removed and Reserved]

44. Section 852.236-78 is removed and reserved.

45. Section 852.236-79 is revised to read as follows:

852.236-79 Contractor Production Report.

As prescribed in 836.573, insert the following clause:

CONTRACTOR PRODUCTION REPORT (APR 2019)

(a) The Contractor shall furnish to the resident engineer, for each workday, a consolidated report for the preceding workday. Reporting shall begin from date of mobilization until the date of final acceptance except for authorized holidays. VA Form 10101, Contractor Production Report, or a Contractor generated form containing the same type of information shall be signed, dated and submitted by the Contractor superintendent.

(b) Each report shall include and specifically identify at least one safety topic germane to the jobsite that day.

(End of clause)

46. Section 852.236-80 is revised to read as follows:

852.236-80 Subcontracts and Work Coordination.

As prescribed in 836.574, insert the following clause:

SUBCONTRACTS AND WORK COORDINATION (APR 2019)

(a) Nothing contained in this contract shall be construed as creating any contractual relationship between any subcontractor and the Government. Divisions or sections of specifications are not intended to control the Contractor in dividing work among subcontractors, or to limit work performed by any trade.

(b) The Contractor shall be responsible to the Government for acts and omissions of his/her own employees, and of the subcontractors and their employees. The Contractor shall also be responsible for coordination of the work of the trades, subcontractors, and material suppliers.

(c) The Government or its representatives will not undertake to settle any differences between the Contractor and subcontractors or between subcontractors.

(d) The Government reserves the right to refuse to permit employment on the work, or require dismissal from the work, of any subcontractor or subcontractor employee who, by reason of previous unsatisfactory work on Department of Veterans Affairs projects or for any other reason, is considered by the Contracting Officer to be incompetent, careless, or otherwise objectionable.

(End of clause)

Alternate I (APR 2019). For new construction work with complex mechanical-electrical work, the following paragraph relating to work coordination may be substituted for paragraph (b) of the basic clause:

(b) The Contractor shall be responsible to the Government for acts and omissions of his/her own employees, and subcontractors and their employees. The Contractor shall also be responsible for coordination of the work of the trades,

subcontractors, and material suppliers. The Contractor shall, in advance of the work, prepare coordination drawings showing the location of openings through slabs, the pipe sleeves and hanger inserts, as well as the location and elevation of utility lines, including, but not limited to, conveyor systems, pneumatic tubes, ducts, and conduits and pipes two inches and larger in diameter. These drawings, including plans, elevations, and sections as appropriate, shall clearly show the manner in which the utilities fit into the available space and relate to each other and to existing building elements. Drawings shall be of appropriate scale to satisfy the previously stated purposes, but not smaller than $\frac{3}{8}$ -inch scale. Drawings may be composite (with distinctive colors for the various trades) or may be separate but fully coordinated drawings (such as sepias or photographic paper reproducibles) of the same scale. Separate drawings shall depict identical building areas or sections and shall be capable of being overlaid in any combination. The submitted drawings for a given area of the project shall show the work of all trades that will be involved in that particular area. Six complete composite drawings or six complete sets of separate reproducible drawings shall be received by the Government not less than 20 days prior to the scheduled start of the work in the area illustrated by the drawings, for the purpose of showing the Contractor's planned methods of installation. The objectives of such drawings are to promote carefully planned work sequence and proper trade coordination, in order to assure the expeditious solutions of problems and the installation of lines and equipment as contemplated by the contract documents while avoiding or minimizing additional costs to the Contractor and to the Government. In the event the Contractor, in coordinating the various installations and in planning the method of installation, finds a

conflict in location or elevation of any of the utilities with themselves, with structural items or with other construction items, he/she shall bring this conflict to the attention of the Contracting Officer immediately. In doing so, the Contractor shall explain the proposed method of solving the problem or shall request instructions as to how to proceed if adjustments beyond those of usual trades' coordination are necessary. Utilities installation work will not proceed in any area prior to the submission and completion of the Government review of the coordinated drawings for that area, nor in any area in which conflicts are disclosed by the coordination drawings, until the conflicts have been corrected to the satisfaction of the Contracting Officer. It is the responsibility of the Contractor to submit the required drawings in a timely manner consistent with the requirements to complete the work covered by this contract within the prescribed contract time.

852.236-84 [Removed and Reserved]

47. Section 852.236-84 is removed and reserved.

852.236-85 [Removed and Reserved]

48. Section 852.236-85 is removed and reserved.

852.236-86 [Removed and Reserved]

49. Section 852.236-86 is removed and reserved.

852.236-87 [Removed and Reserved]

50. Section 852.236-87 is removed and reserved.

852.236-89 [Removed and Reserved]

51. Section 852.236-89 is removed and reserved.

52. Section 852.236-90 is revised to read as follows:

852.236-90 Restriction on Submission and Use of Equal Products.

As prescribed in 836.202-70, insert the following clause in solicitations and contracts when it is determined that only one product will meet the Government's minimum needs and the submission of "equal" products is not permitted:

RESTRICTION ON SUBMISSION AND USE OF EQUAL PRODUCTS (APR 2019)

(a) This clause applies to the following items: [Contracting Officer fill-in]

(b) Notwithstanding the "Material and Workmanship" clause of this contract, FAR 52.236-5(a), nor any other clause or provision, only brand name products for the items listed above will be authorized for use on this contract.

(End of clause)

852.236-91 [Removed and Reserved]

53. Section 852.236-91 is removed and reserved.

54. Section 852.236-92 is added as follows:

852.236-92 Notice to Bidders—Additive or Deductive Bid Line Items.

As prescribed in 836.580, insert the following provision:

NOTICE TO BIDDERS—ADDITIVE OR DEDUCTIVE BID LINE ITEMS (APR 2019)

(a) Additive or deductive line items in the bid schedule shall be evaluated to determine the low offeror and the items to be awarded. The evaluation shall be

made as follows—

(1) Prior to the opening of bids, the Government will determine the amount of funds available for the project.

(2) The low bid shall be the Bidder that—

(i) Is otherwise eligible for award; and

(ii) Offers the lowest aggregate amount for the first or base line item, plus or minus (in the order stated in the list of priorities in the bid schedule) those additive or deductive line items that provide the most features within the funds determined available.

(3) All bids shall be evaluated on the basis of the same additive or deductive line items.

(i) If adding another item from the bid schedule list of priorities would make the award exceed the available funds for all offerors, the Contracting Officer will skip that item and go to the next item from the bid schedule of priorities; and

(ii) Add that next item if an award may be made that includes that line item and is within the available funds.

(b) The Contracting Officer will use the list of priorities in the bid schedule only to determine the low offeror. After determining the low offeror, an award may be made on any combination of items if—

(1) It is in the best interest of the Government;

(2) Funds are available at the time of award; and

(3) The low offeror's price for the combination to be awarded is less than the price offered by any other responsive, responsible offeror.

(c) Example: “The amount available is \$100,000. Offeror A's base bid and four additives (in the order stated in the list of priorities in the bid schedule) are \$85,000, \$10,000, \$8,000, \$6,000, and \$4,000. Offeror B's base bid and four additives are \$80,000, \$16,000, \$9,000, \$7,000, and \$4,000. Offeror A is the low offeror. The aggregate amount of offeror A's bid for purposes of award would be \$99,000, which includes a base bid plus the first and fourth additives. The second and third additives were skipped because each of them would cause the aggregate bid to exceed \$100,000.”

(End of provision)

55. Section 852.242-70 is added as follows:

852.242-70 Government Construction Contract Administration.

As prescribed in 842.271, insert the following clause. This is a fill-in clause.

GOVERNMENT CONSTRUCTION CONTRACT ADMINISTRATION (APR 2019)

(a) Contract administration functions set forth in FAR 42.302 are hereby delegated to:

[Insert name and office address of Contracting Officer]

(b) The work will be under the direction of a Department of Veterans Affairs Contracting Officer, who may designate another VA employee to act as resident engineer at the construction site.

(c) Except as provided below, the resident engineer's directions will not conflict with or change contract requirements. Within the limits of any specific authority delegated by the Contracting Officer, the resident engineer may, by written direction, make changes in the work. The Contractor shall be advised of the extent

of such authority prior to execution of any work under the contract.

(d) The Contracting Officer identified in paragraph (a) may further delegate the responsibilities below to the following warranted personnel on site:

[Insert name and office address of individual with limited authority]

(1) Conduct post-award orientation conferences.

(2) Issue administrative changes, correcting errors or omissions in typing, Contractor address, facility or activity code, remittance address, computations which do not require additional contract funds, and other such changes (see FAR 43.101).

(3) For actions not to exceed \$ [insert dollar amount] negotiate and execute supplemental agreements incorporating Contractor proposals resulting from change orders issued under the Changes clause.

(4) Negotiate and execute supplemental agreements changing contract delivery schedules where the time extension does not exceed [insert number] calendar days.

(End of clause)

PART 853—FORMS

56. The authority citation for part 853 is amended to read as follows:

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

Subpart 853.1—General

57. Section 853.107 is revised to read as follows:

853.107 Obtaining forms.

VA forms may be obtained online at <https://www.va.gov/vaforms/> or upon request from any VA contracting office.

Subpart 853.2—Prescription of Forms

58. Sections 853.236 and 853.236-70 are revised to read as follows:

853.236 Construction and architect-engineer contracts.

853.236-70 VA Form 6298, Architect-Engineer Fee Proposal.

See 836.7001(a).

59. Sections 836.236-71 and 853.236-72 are added to read as follows:

853.236-71 VA Form 2138, Order for Supplies or Services (Including Task Orders for Construction or A-E Services).

See 836.7001(b).

853.236-72 VA Form 10101, Contractor Production Report.

See 836.7001(c).

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