



DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Parts 801, 802, 803, 812, 814, 822, and 852

RIN 2900–AP50

Revise and Streamline VA Acquisition Regulation to Adhere to Federal Acquisition Regulation Principles (VAAR Case 2014-V001)

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) in this final rule amends six clauses or provisions and removes one clause which duplicates current FAR coverage and is not needed, provides updated policy on variations, tolerances and exemptions regarding overtime in contracts providing nursing home care for veterans, removes an information collection burden on an outdated practice of using bid envelopes; clarifies language regarding the prohibition of contractors from making reference in their commercial advertising, and revises definitions relating to D&S Committee, Debarring Official and Suspending Official currently contained in the VAAR. This document adopts as a final rule, with three technical non-substantive changes, the proposed rule published in the Federal Register on May 17, 2017.

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

FOR FURTHER INFORMATION CONTACT: Mr. Ricky Clark, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 425 I Street, NW, Washington, DC, 20001, (202) 632-5276. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: On May 17, 2017, VA published a proposed rule in the Federal Register (82 FR 22635), which announced VA's intent to amend regulations for VAAR Case 2014-V001. In addition to the revisions outlined in the summary, this final rule also updates the policy governing improper business practices and personal conflicts of interests, and provides the agency's procedures on due process rights and who in VA determines whether or not a violation of the Gratuities clause has occurred. The rule adds clarifying information on sealed bidding including preparation of invitations for bids and other general rules for solicitation of bids. 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 July 17, 2017 and VA received no comments. The proposed rule is being adopted as final, with three technical non-substantive changes and minor stylistic and grammatical edits.

Technical Non-Substantive Changes to the Proposed Rule

The final rule makes administrative changes to two of the authorities for the parts on the recommendation of counsel, specifically the removal of 38 U.S.C. 501, and the addition of 41 U.S.C. 1702 which addresses overall direction of procurement policy, acquisition planning and management responsibilities of Chief Acquisition Officers and Senior Procurement Executives, including implementation of unique procurement policies,

regulations, and standards of the agency. 38 U.S.C. 501 is a more general authority of the Secretary of the Department of Veterans Affairs to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department. The Title 41 authority is the more appropriate authority to cite when publishing the VA Acquisition Regulation.

The final rule, in section 802.101, will remove definitions and titles relating to D&S Committee, Debarring official, and Suspending official and replaces them with two definitions/titles and the acronyms now in use in the agency: Suspending and Debarring Official (SDO) and Suspension and Debarment Committee (S&D Committee). These were properly updated via VAAR Class Deviation issued on June 2, 2017, after the proposed rule was published for public comment.

This final rule has Federal Register administrative format changes in the amendatory text which makes 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

Although this action contains provisions constituting collections of information at 48 CFR 814.201-6(a) and 852.214-70, under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), no new or proposed revised collections of information are associated with this final rule. The information collection requirements for 48 CFR 814.201-6(a) and 852.214-70 are currently approved by OMB, have been assigned OMB control number 2900-0593, and are being removed and discontinued. This results in a removal of 2 estimated annual burden hours to respondents.

Regulatory Flexibility Act

This final rule will 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 rule text does not change VA’s policy regarding small businesses. Therefore, the rule does not have a significant economic impact on substantial number of small entities. There are no increased and/or decreased costs to small entities. The overall impact of this final rule will 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 resulting from these rule updates. On this basis, this final rule will 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 final rule 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 this rule is not a significant regulatory action under E.O. 12866. 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.

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.

List of Subjects

48 CFR Part 801

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

48 CFR Parts 802, 812 and 814

Government procurement.

48 CFR Part 803

Antitrust, Conflict of interest, Government procurement.

48 CFR Part 822

Government procurement, Labor.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on February 23, 2018, for publication.

Dated: March 13, 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 amends 48 CFR parts 801, 802, 803, 812, 814, 822, and 852 as follows:

PART 801—DEPARTMENT OF VETERANS AFFAIRS ACQUISITION REGULATION SYSTEM

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

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.

801.106 [Amended]

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 remove the references to section 852.214-70 and the corresponding OMB Control Number 2900-0593.

PART 802—DEFINITIONS OF WORDS AND TERMS

3. The authority citation for part 802 is revised to read as follows:

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.

4. Section 802.101 is amended to remove definitions of “D&S Committee,” “Debarring Official,” and “Suspending official,” and to add definitions of “Suspending and Debarring Official (SDO)” and “Suspension and Debarment Committee (S&D Committee)” in alphabetical order to read as follows:

802.101 Definitions.

* * * * *

Suspending and Debarring Official (SDO) means the Senior Procurement Executive (SPE) or Deputy Senior Procurement Executive (DSPE) if further delegated in writing by the SPE.

Suspension and Debarment Committee (S&D Committee) means a committee authorized by the SDO to assist the SDO with suspension and debarment related matters.

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PART 803—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

5. The authority citation for part 803 is revised to read as follows:

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 803.1 [Removed and reserved]

6. Subpart 803.1 is removed and reserved.

7. Section 803.204 is revised to read as follows:

In providing the notice and hearing required by FAR 3.204, the following applies—

803.204 Treatment of violations.

(a) The SDO shall determine whether or not a violation of the Gratuities clause, 52.203-3 has occurred and what action will be taken under FAR 3.204(c).

(c) When the SDO determines that a violation has occurred and that debarment is being considered, he or she shall follow procedures at 809.406-3.

Subpart 803.3 [Removed and reserved]

8. Subpart 803.3 is removed and reserved.

Subpart 803.4 [Removed and reserved]

9. Subpart 803.4 is removed and reserved.

803.502 [Removed]

10. Section 803.502 is removed.

11. Section 803.570-1 is revised to read as follows:

803.570-1 Policy.

VA policy prohibits contractors from making references in its commercial advertising to VA contracts in a manner that states or implies the Government approves or endorses the product or service or considers it superior to other products or services. The intent of this policy is to preclude the appearance of bias toward any product or service.

Subpart 803.6 [Removed and reserved]

12. Subpart 803.6 is removed and reserved.

Subpart 803.7 [Removed and reserved]

13. Subpart 803.7 is removed and reserved.

Subpart 803.8 [Removed and reserved]

14. Subpart 803.8 is removed and reserved.

15. Subpart 803.11 is added to read as follows:

Subpart 803.11—Preventing Personal Conflicts of Interest for Contractor Employees

Performing Acquisition Functions

803.1103 Procedures.

(a) By use of the contract clause at 52.203-16, Preventing Personal Conflicts of Interest, the contracting officer shall require each contractor whose employees perform acquisition functions closely associated with inherently Governmental functions to obtain from each covered employee a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract. See FAR 3.1103(a)(2)(iii).

Subpart 803.70 [Removed and reserved]

16. Subpart 803.70 is removed and reserved.

PART 812—ACQUISITION OF COMMERCIAL ITEMS

17. The authority citation for part 812 is revised to read as follows:

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.

18. Section 812.301 is amended by revising paragraph (b)(13) to read as follows:

812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(b) * * *

(13) 852.214-74, Marking of Bid Samples.

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PART 814—SEALED BIDDING

19. The authority citation for part 814 is revised to read as follows:

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 814.1 [Removed and reserved]

20. Subpart 814.1 is removed and reserved.

21. Section 814.201 is revised to read as follows:

814.201 Preparation of invitations for bids.

22. Section 814.201-2 is added to read as follows:

814.201-2 Part I—The Schedule.

(b) Section B, Supplies or services and prices.

(1) When the contracting officer determines that it will be to the Government's advantage to make an award on the basis of a summary bid, the IFB shall include the following statement in Part I—The Schedule, Section B:

The award will be made on either the bid price for individual items or the summary bid price summary for all items, whichever results in the lowest price to the Government. Therefore, to assure proper evaluation of all bids, a bidder quoting a summary bid price must also quote a price on each individual item included in the summary bid price.

(2) When a contracting officer determines that it will be to the Government's advantage to make an award by group or groups of items, the IFB shall include the following statement in Part I—The Schedule, Section B:

Award shall be made on the basis of the bid price for each identified group of

items. The individual price of each line item in the group does not have to be the lowest bid received for that item. This may apply when the items in the group or groups are readily available from sources to be solicited; and one of the following applies:

- (i) Furniture or fixtures are required for a single project and uniformity of design is desirable.
- (ii) The articles required will be assembled and used as a unit.

23. Section 814.201-6 is revised to read as follows:

814.201-6 Solicitation provisions.

(a) In an invitation for bid for supplies, equipment, or services (other than construction), the contracting officer shall define the extent to which VA will authorize and consider alternate bids.

(1) The contracting officer shall include the provision at 852.214-71, Restrictions on Alternate Item(s), in the invitation when VA will consider an alternate item only where acceptable bids on a desired item are not received or the bids do not satisfy the total requirement. (For construction projects, VA will consider for acceptance an alternate specified only as a part of the basic item.)

(2) The contracting officer shall include the provision at 852.214-72, Alternate Item(s), in the invitation, when VA will consider an alternate item on an equal basis with the item specified. (For construction projects, VA will consider for acceptance an alternate specified only as a part of the basic item.)

(3) In addition to either of the provisions referenced in paragraphs (a)(1) or (2) of this

section, the contracting officer shall include the provision at 852.214-73, Alternate Packaging and Packing, in the invitation when bids will be allowed based on different packaging, unit designation, etc.

(b) The contracting officer shall include the provision at 852.214-74, Marking of Bid Samples, in the invitation, along with the provision at FAR 52.214-20, Bid Samples, when the contracting officer determines that samples are necessary to the proper awarding of a contract.

24. Sections 814.202 and 814.202-4 are added to read as follows:

814.202 General rules for solicitation of bids.

814.202-4 Bid samples.

(a) Policy. When bid samples are required, the contracting officer shall include a notice in the contract Schedule that requires bidders to submit samples produced by the manufacturer whose products will be supplied under the contract.

(g) Handling bid samples.

(1) Samples from successful bids shall be retained for the period of contract performance.

(2) If the contracting officer anticipates a claim regarding the contract, the contracting officer shall require that the bid samples be retained until the claim is resolved. If there are no outstanding claims regarding the contract, the contracting officer may authorize disposal of the samples at the end of the contract term in accordance with the bidder's instructions.

(3) The contracting officer shall require that samples from unsuccessful bids be retained until award. After award, these samples may be disposed of in accordance with the bidder's instructions.

814.203 and 814.203-1 [Removed]

25. Sections 814.203 and 814.203-1 are removed.

814.204 [Removed]

26. Section 814.204 is removed.

814.208 [Removed]

27. Section 814.208 is removed.

814.301 [Removed]

28. Section 814.301 is removed.

814.302 [Removed]

29. Section 814.302 is removed.

30. Section 814.304 is revised to read as follows:

814.304 Submission, modification, and withdrawal of bids.

(f) A notification to late bidders shall specify the final date by which VA must receive evidence of timeliness. This date shall be within five calendar days of the date an electronic notice is sent to the bidder, or within ten calendar days of receipt by the bidder of a notice sent by other than electronic means.

Subpart 814.4 [Removed and reserved]

31. Subpart 814.4 is removed and reserved.

PART 822—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

32. The authority citation for part 822 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 29 CFR 5.15(d); 41 U.S.C. 1702; and 48 CFR 1.301-1.304.

33. Section 822.304 is revised to read as follows:

822.304 Variations, tolerances, and exemptions.

For contracts providing nursing home care for veterans, the Secretary of Labor has allowed a variation to the requirements of Contract Work Hours and Safety Standards (the statute) (40 U.S.C. 3701, et seq.) regarding the payment of overtime (see 29 CFR 5.15(d)(2)). The variation provides that overtime may be calculated on a basis other than a 40 hour workweek (as an alternate work period) when—

(a) Due to operational necessity or convenience a work period of 14 consecutive days may be accepted in lieu of the workweek of 7 consecutive days for the purpose of computing overtime compensation, pursuant to an agreement or understanding arrived at between the contractor and the contractors' employees before performance of the work; and

(b) If The contractor's employees receive compensation for employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period at a rate not less than 1 1/2 times the regular rate at which the individual is employed, computed in accordance with the requirements of the Fair Labor Standards Act of 1938, as amended.

34. Section 822.305 is revised to read as follows:

822.305 Contract clause.

The contracting officer shall insert the clause at 852.222-70, Contract Work Hours and Safety Standards—Nursing Home Care for Veterans, in solicitations and contracts for

nursing home care for veterans. The contractor shall flow down this clause and insert in all subcontracts, at any tier.

Subpart 822.4 [Removed and reserved].

35. Subpart 822.4 is removed and reserved.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

36. 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.

Subpart 852.2—Texts of Provisions and Clauses

37. Section 852.203-70 is revised to read as follows:

852.203-70 Commercial advertising.

As prescribed in 803.570-2, insert the following clause:

COMMERCIAL ADVERTISING (MAY 2018)

The Contractor shall not make reference in its commercial advertising to Department of Veterans Affairs contracts in a manner that states or implies the Department of Veterans Affairs approves or endorses the Contractor's products or services or considers the Contractor's products or services superior to other products or services.

(End of clause)

852.203-71 [Removed and reserved]

38. Section 852.203-71 is removed and reserved.

852.214-70 [Removed and reserved].

39. Section 852.214-70 is removed and reserved.

40. Section 852.214-71 is revised to read as follows:

852.214-71 Restrictions on alternate item(s).

As prescribed in 814.201-6(a)(1), insert the following provision:

RESTRICTIONS ON ALTERNATE ITEM(S) (MAY 2018)

Bids on []* will be considered only if acceptable bids on []** are not received or do not satisfy the total requirement.

*Contracting Officer will insert an alternate item that is considered acceptable.

**Contracting Officer will insert the required item and item number.

(End of provision)

41. Section 852.214-72 is revised to read as follows:

852.214-72 Alternate item(s).

As prescribed in 814.201-6(a)(2), insert the following provision:

ALTERNATE ITEM(S) (MAY 2018)

Bids on []* will be given equal consideration along with bids on []** and any such bids received may be accepted if to the advantage of the Government. Tie bids will be decided in favor of [].**

*Contracting Officer will insert an alternate item that is considered acceptable.

**Contracting Officer will insert the required item and item number.

(End of provision)

42. Section 852.214-73 is revised to read as follows:

852.214-73 Alternate packaging and packing.

As prescribed in 814.201-6(a)(3), insert the following provision:

ALTERNATE PACKAGING AND PACKING (MAY 2018)

The bidders offer must clearly indicate the quantity, package size, unit, or other different feature upon which the quote is made. Evaluation of the alternate or multiple alternates will be made on a common denominator such as per ounce, per pound, etc., basis.

(End of provision)

43. Section 852.214-74 is revised to read as follows:

852.214-74 Marking of bid samples.

As prescribed in 814.201-6(b), insert the following provision:

MARKING OF BID SAMPLES (MAY 2018)

Any bid sample(s) furnished must be in the quantities specified in the solicitation. Cases or packages must be plainly marked 'Bid Sample(s)' with the complete lettering/numbering and description of the related bid item(s), the number of the Invitation for Bids, and the name of the bidder submitting the bid sample(s).

(End of provision)

44. Section 852.222-70 is revised to read as follows:

852.222-70 Contract work-hours and safety standards—nursing home care for veterans.

As prescribed in 822.305, insert the following clause:

CONTRACT WORK HOURS AND SAFETY STANDARDS—NURSING HOME CARE

FOR VETERANS (MAY 2018)

(a) No Contractor and subcontractor under this contract shall prohibit the payment of

overtime wages to their employees for work in excess of 40 hours in any workweek, which would otherwise be a violation of Contract Work Hours and Safety Standards (the statute) (40 U.S.C. 3701, et seq.), provided—

(1) The Contractor or subcontractor is primarily engaged in the care of nursing home patients residing on the contractor's or subcontractor's premises;

(2) There is an agreement or understanding between the Contractor or subcontractor and their employees, before performance of work, that a work period of 14 consecutive days is acceptable in lieu of a work period of 7 consecutive days for the purpose of overtime compensation;

(3) Employees receive overtime compensation at a rate no less than 1 1/2 times the employees' regular hourly rate of pay for work in excess of 80 hours in any 14 day period; and

(4) Pay is otherwise computed in accordance with the requirements of the Fair Labor Standards Act of 1938, as amended.

(b) *Subcontracts*. The Contractor shall insert the text of this clause, including this paragraph (b), in subcontracts at any tier. The Contractor shall be responsible for compliance by any subcontractor or lower-tier subcontractor with the provisions set forth in paragraphs (a) through (b) of this clause.

(End of clause)

[FR Doc. 2018-07833 Filed: 4/13/2018 8:45 am; Publication Date: 4/16/2018]