



8320-01

DEPARTMENT OF VETERANS AFFAIRS

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: 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proposing to amend and update its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove procedural guidance internal to VA into the VA Acquisition Manual (VAAM), and to incorporate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 These changes seek to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors.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, will publish them in the Federal Register. VA will combine related topics, as appropriate. 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: 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](http://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-AQ18 – VA Acquisition Regulation: Construction and Architect-Engineer Contracts.” 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](http://www.Regulations.gov).

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 number.)

SUPPLEMENTARY INFORMATION:

Background

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

VA is proposing to revise the VAAR to add new policy or regulatory requirements and to remove any redundant guidance and guidance that is applicable only to VA's internal operating processes or procedures. Codified acquisition regulations may be amended and revised only through rulemaking. All amendments, revisions, and removals have been reviewed and concurred with by VA's Integrated Product Team of agency stakeholders.

The VAAR uses the regulatory structure and arrangement of the FAR and headings and subject areas are consistent with the 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 agency guidance. The VAAM is being created in parallel with these revisions to the VAAR and is not subject to the rulemaking process as they are internal VA procedures and guidance. Therefore, the VAAM will not be finalized until corresponding VAAR parts are finalized, and the VAAM is not yet available on line.

## VAAR Part 801—Department of Veterans Affairs Acquisition Regulation System

This proposed rule contains existing information collection requirements. The proposed rule results in multiple actions affecting these information collections, including outright removal of the information collection.

In 801.106, OMB approval under the Paperwork Reduction Act, we propose to amend 801.106 table columns titled "48 CFR part or section where identified and described," and "Current OMB control number." We propose to remove the reference to 852.236-84, Schedule of Work Progress, and discontinue the associated corresponding OMB Control Number 2900-0422 as the information is adequately covered in agency specifications and its use in a clause is not required or appropriate. For access to agency specifications where such information is adequately covered, see the VA

Technical Information Library (TIL), VA's source for Electronic Design and Construction Information, at <https://www.cfm.va.gov/TIL/>, including Master Specification Division 01, General Requirements: 01 32 16.01, Architectural and Engineering CPM Schedules; 01 32 16.13, Network Analysis Schedules; 01 16.15, Project Schedules (Small Projects-Design/Bid/Build); 01 32 16.16, Network Analysis Schedules (Design-Build Only); and, 01 32 16.17, Project Schedules (Small Projects-Design/Build).

In 801.106, in reference to table described, we propose to remove the reference to 852.236-89, Buy American Act, and discontinue the associated corresponding OMB Control Number 2900-0622 as the clause is being removed as set forth in the preamble when describing actions under VAAR part 852 as it duplicates FAR clauses and is unnecessary.

In 801.106, in reference to the table described, we propose to remove the reference to 852.236-91, Special Notes, and discontinue the associated corresponding OMB Control Number 2900-0623. Paragraph (a) of the clause is already covered via required System for Award Management (SAM) representations and certifications. Paragraphs (b), (c) and (d) are addressed in Section 01 00 00, General Requirements, contained in all construction contract specifications (reference the VA Office of Construction and Facilities Management, Technical Information Library (TIL), VA Numbered Standards for Construction, PG-18-1, Master Construction Specifications, Division 01 - General Requirements). Paragraph (e), which references claims by the contractor for delay attributed to unusually severe weather under FAR 52.249-14, Excusable Delays, is governed by the Network Analysis System specifications—Section 01 32 16.13, Network Analysis Schedules – Major Projects; 01 32 16.15, Project

Schedules (Small Projects Design-Bid-Build); 01 32 16.16, (Network Analysis System (Design-Build Only); or 01 32 16.17, Project Schedule (Small Projects Design-Build), as applicable, which provide details of the requirements the contractor must follow to justify time extensions. VA internal procedures related to how contracting officers and Government Resident Engineers or technical reviewers should analyze contractor data and which records to review to support such claims for time extensions due to unusually severe weather, not having a significant effect beyond the internal operating procedures of the VA, would be moved to the VAAM.

#### VAAR Part 825—Foreign Acquisition

We propose to revise the authority citations under part 825 to include a reference to 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.

We propose to remove 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. Clause 852.236-89, Buy American Act, along with its Alternate I and II, is proposed for removal as set forth in VAAR part 852 of the preamble. The clause and its alternates are referenced in a table in 825.1102, Acquisition of construction. As the clause is proposed for removal, this table which prescribes the use of the clause is also proposed for removal. In accordance with FAR drafting standards and the requirement in FAR 1.304(b)(1) that

agency acquisition regulations shall not unnecessarily repeat, paraphrase, or otherwise restate material contained in the FAR, these subparts are therefore proposed for removal.

### VAAR Part 836—Construction and Architect-Engineer Contracts

We propose to revise the authority citations under part 836 to include a reference to 41 U.S.C. 1121(c)(3) and 1303(a)(2), which is from Title 41, Public Contracts, and speaks to the authority of an executive agency under another law to prescribe policies, regulations, procedures, and forms for procurement that are subject to the authority conferred in the cited section, as well as other sections of Title 41 as shown therein. 41 U.S.C. 1303(a)(2) is added to reflect VA's authority as an executive agency to issue regulations that are essential to implement Governmentwide policies and procedures in the agency, as well as to issue additional policies and procedures required to satisfy the specific needs of the VA.

We propose to revise the authority citations under part 836 to include a reference to 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.

In 836.202, Specifications, we propose to remove paragraphs (a) and (b) as internal procedural guidance, and to redesignate and renumber it to 836.202-70 to indicate that it is a VA supplement to FAR 36.202. The title would be revised from "Specifications" to "Specifications—use of equal products" to reflect the topic that fits intelligibly under this section of the FAR. The existing paragraph (c) would be revised to

reflect that use of clause 852.236-90, Restriction on Submission and Use of Equal Products, in solicitations and contracts requires approval of the justification documentation required by FAR 11.105, Items peculiar to one manufacturer. The paragraph reference to (c) under this section would be removed as the VAAR is being supplemented and only one paragraph will be reflected which would be unnumbered and unlettered. The existing VAAR language which is proposed for revision with this rule is necessary as the FAR speaks to “brand name or equal” and the purpose of the VA’s clause is to be clear that when the VA enters products for items peculiar to one manufacturer (brand name), “or equal” products are not permissible substitutes.

In 836.203, Government estimate of construction costs, we propose to renumber and retitle the section to 836.203-70, Protection of the independent government estimate—sealed bid, and would revise it to more specifically clarify VA procedures to protect the independent government estimate in sealed bid acquisitions when bid openings are held. This would also provide policy regarding marking the Independent Government Estimate (IGE) as “For Official Use Only (FOUO)” as well as procedures for filing the document and later removing the protective marking after a public bid opening.

In 836.204, Disclosure of the magnitude of construction projects, we propose to revise 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.

In 836.206, Liquidated damages, we propose to remove the entire section since the subject matter is adequately covered in the FAR.

In 836.209, Construction contracts with architect-engineer firms, we propose to remove the entire section as internal procedures of VA not having a significant effect beyond the internal operating procedures of the VA (see FAR 1.301(b)), and which would be moved to the VAAM.

In 836.213, Special procedures for sealed bidding in construction contracting, we propose to remove the section title as the underlying subsections are proposed for removal.

We propose to remove 836.213-4, Notice of award, as internal procedures of VA not having a significant effect beyond the internal operating procedures of the VA (see FAR 1.301(b)), and which would be moved to the VAAM.

We propose to remove 836.213-70, Notice to proceed, as procedural information internal to VA which would be moved to the VAAM.

We propose to revise 836.500, Scope of subpart, to remove paragraphs (b) and (c) which duplicate the authority to use other clauses and provisions as already provided for in FAR 36.500. We propose to redesignate paragraph (a) as an unnumbered paragraph in keeping with FAR Drafting Guidelines and formatting style.

We propose to revise 836.501, Performance of work by the contractor, to make minor edits and to add a reference to VAAR subpart 819.70, which implements the Veterans First Contracting Program.

In 836.513, Accident prevention, we propose to remove the entire section since the prescribed clause is duplicative of coverage in FAR clause 52.236-1, Accident Prevention.

We propose to revise 836.521, Specifications and drawings for construction, only to make minor edits for capitalization.

We propose to remove 836.570, Correspondence, as the clause it prescribes 852.236-76, Correspondence, is proposed for removal. The subject matter will be addressed more appropriately in a “Notice to Proceed” letter to the contractor from the contracting officer. Therefore, the clause and its prescription are unnecessary.

We propose to remove 836.571, Reference to “standards,” since the clause it prescribes 852.236-77, Reference to “Standards”, is proposed for removal. The subject matter is addressed in the VA Master Specifications (located at: <https://www.cfm.va.gov/til/>), and the clause and therefore its prescription is unnecessary.

In 836.572, Government supervision, we propose to remove the entire section and redesignate the numbering and placement to the more appropriate VAAR part 842, Contract Administration and Audit Services, by adding a new section 842.204, Contract clause for Government construction contract administration. The clause would be therefore renumbered and revised accordingly.

In 836.573, Daily report of workers and materials, we propose to amend the title of the section and report to “Contractor production report,” and would prescribe a revised clause 852.236-79, Contractor Production Report.

We propose to revise 836.574, Subcontracts and work coordination, only to make minor edits for capitalization.

We propose to remove 836.575, Schedule of work progress, since the subject matter of the prescribed clause 852.236-84, Schedule of Work Progress, is addressed

in the VA Master Specifications, Division 01, General Requirements: 01 32 16.01, Architectural and Engineering CPM Schedules; 01 32 16.13, Network Analysis Schedules; 01 16.15, Project Schedules (Small Projects-Design/Bid/Build); 01 32 16.16, Network Analysis Schedules (Design-Build Only); and, 01 32 16.17, Project Schedules (Small Projects-Design/Build). The clause is proposed for removal and therefore its prescription would be unnecessary.

We propose to remove 836.576, Supplementary labor standards provisions, since the subject matter of the prescribed clause 852.236-85, Supplementary Labor Standards Provisions, is addressed in FAR clauses 52.222-6, Construction Wage Rate Requirements (formerly known as Davis-Bacon Act) and 52.222-8, Payrolls and Basic Records. The clause is proposed for removal and therefore its prescription would be unnecessary.

We propose to remove 836.577, Workers' compensation, which prescribes clause 852.236-86, Workers' Compensation. The clause is unnecessary since it merely cites a Public Law regarding applicability of States' workers' compensation laws. The VAAR is not required to cite individual States' workers' compensation laws to make them applicable to companies performing work in individual states. The clause is proposed for removal and therefore its prescription would be unnecessary.

We propose to remove 836.579, Special Notes, which prescribes the clause at 852.236-91, Special Notes. As stated under VAAR part 801 in the preamble of this proposed rule, the clause's paragraph (a) is already covered via required System for Award Management (SAM) representations and certifications. Paragraphs (b), (c) and (d) are addressed in Section 01 00 00, General Requirements, contained in all

construction contract specifications (reference the VA Office of Construction and Facilities Management, Technical Information Library (TIL), VA Numbered Standards for Construction, PG-18-1, Master Construction Specifications, Division 01 - General Requirements). And, paragraph (e), which references claims by the contractor for delay attributed to unusually severe weather under FAR 52.249-14, Excusable Delays, is governed by the Network Analysis System specifications—Section 01 32 16.13, Network Analysis System; 01 32 16.13, Project Schedules (Small Projects Design-Bid-Build); 01 32 16.16, (Network Analysis System (Design-Build Only)); or 01 32 16.17, Project Schedule (Small Projects Design-Build), as applicable, which provide details of the requirements the contractor must follow to justify time extensions. VA internal procedures related to how contracting officers and Government Resident Engineers or technical reviewers should analyze contractor data and which records to review to support such claims for time extensions due to unusually severe weather, not having a significant effect beyond the internal operating procedures of the VA, would be moved to the VAAM. The clause is proposed for removal and therefore its prescription as contained in this section would be unnecessary.

We propose to add 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.

We propose to remove 836.602, Selection of firms for architect-engineer contracts. Previously there was no text under this heading/title. As all sections under this are now proposed for removal, no heading/title would be required.

We propose to remove 836.602-1, Selection criteria, as internal procedural information which will be revised and moved to the VA Acquisition Manual.

We propose to remove 836.602-2, Evaluation boards; 836.602-4, Selection authority; and 836.602-5, Short selection process for contracts not to exceed the simplified acquisition threshold, as internal procedural information which will be revised and moved to the VA Acquisition Manual.

We propose to revise 836.603, Collecting data on and appraising firms' qualifications. The title would be revised to correct a typo and the text would be revised to include a Veterans Benefits Administration point of contact for filing and maintaining Standard Form (SF) 330 Files as required by the FAR.

In 836.606, Negotiations, we propose to revise the section in its entirety to remove internal agency procedural guidance in section 836.606-70, General, as unnecessary, and to remove the title, "General," by redesignating section 836.606-71, Architect-Engineer's proposal, to 836.606-70, and retitling it to read "Architect-Engineer firms' proposal." We propose to revise the text which requires use of the VA Form 6298, Architect-Engineer Fee Proposal, which has been updated with the new form number and updating FAR citation references and thresholds. This form is used for the submission of a contractor's proposal and supporting cost data from the selected firm during negotiation of an A-E contract for design services estimated at \$50,000 or more.

And, we propose to change the word “must” to “shall” when requiring the use of the form as prescribed in this section.

In 836.606-72, Contract price, we propose to remove the section in its entirety and move it to the companion VA Acquisition Manual as internal operating procedures of the VA.

We propose to redesignate and revise 836.606-73, Application of 6 percent architect-engineer fee limitation, to section 836.606-71, and retain the same title, “Application of 6 percent architect-engineer fee limitation,” to place all text now under section 836.606 in sequential subsections. 836.606-71, Application of 6 percent architect-engineer fee limitation, would provide policy explaining when the limitation applies, what costs the 6 percent fee limitation does and does not cover, and delete use of VA Form 10-1193, Application for Health Care Facility Program, and VA Form 10-6238, EMIS Construction Program Estimate Worksheet. The forms proposed for deletion are not required for use in this instance.

We propose to add subpart 836.70—Unique Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements, and the sections falling under that subpart—836.7000, Scope of subpart; and 836.7001, Unique construction and architect-engineer services forms. This would prescribe forms contracting officers may use for construction, architect-engineer services or dismantling, demolition or removal of improvements.

In 836.7000, Scope of subpart, it sets forth the requirements for use of VA unique forms.

In the new proposed 836.7001, Unique construction and architect-engineer services forms, we propose to add the following forms as prescribed elsewhere in the VAAR or as reflected in the individual prescriptions—

In paragraph (a) we propose to add information referencing VA Form 6298, Architect-Engineer Fee Proposal (see 853.236-70), and pointing information to the prescription. VA Form 6298, Architect-Engineer Fee Proposal, shall be used as prescribed in 836.606-71.

In paragraph (b) we propose to add the prescription for 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.

In paragraph (c) we propose to add information referencing VA Form 10101, Contractor Production Report (see 853.236-72), and pointing information to the prescription. 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.

#### VAAR Part 842—Contract Administration and Audit Services

We propose to revise the authority citations under part 842 to include a reference to 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.

We propose to add 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 would describe contract administration functions to be delegated under construction contracts that exceed the micro-purchase threshold for construction. It would describe 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. The information more properly falls under FAR part 42 and the VAAR supplement, so the new clause number more properly follows FAR drafting conventions, to include placing the prescription in the same part where the clause itself is located.

#### VAAR Part 846—Quality Assurance

We propose to revise the part 846 authorities to replace the 38 U.S.C. 501 citation with 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. We also propose to add 41 U.S.C. 1121(c)(3) which is from Title 41, Public Contracts, Positive Law codification that speaks to the authority of an executive

agency under another law to prescribe policies, regulations, procedures, and forms for procurement that are subject to the authority conferred in the cited section, as well as other sections of Title 41 as shown therein.

In 846.312, Construction contracts, which prescribes clause 852.236-74, Inspection of construction, we propose to remove the entire section since VA Master Specifications provide the requirements for performing inspections. The clause is proposed for removal and therefore its prescription would be unnecessary.

#### VAAR Part 852—Solicitation Provisions and Contract Clauses

In 852.236-71, Specifications and Drawings for Construction, we propose to amend the clause to place with the contractor the responsibility for checking all drawings furnished immediately upon receipt, and comparing them and verifying figures before laying out the work. It would also require the prompt notification of the contracting officer of any discrepancies. It would hold the contractor responsible for any errors that might have been avoided by complying with these requirements, for identifying errors or omissions that are necessary to carry out the intent of the drawings and specifications, and for performing such work as if fully and correctly set forth.

In 852.236-72, Performance of Work by the Contractor, we propose to amend the clause and Alternate 1 to make the text gender-neutral, to update terminology and to clarify language.

In 852.236-74, Inspection of Construction, we propose to remove and reserve the clause in its entirety since VA Master Specifications provide the requirements for performing inspections.

In 852.236-76, Correspondence, we propose to remove and reserve the clause since it is administrative guidance covered in the Notice to Proceed letter.

In 852.236-77, Reference to “Standards,” we propose to remove and reserve the clause as unnecessary since VA Master Specifications are used in VA contracts.

In 852.236-78, Government Supervision, we propose to remove and reserve the clause and would propose to include a revised version at 852.242-70, Government Construction Contract Administration.

In 852.236-79, Daily Report of Workers and Materials, we propose to amend the title of the clause to “Contractor Production Report” and would revise the clause to reflect use of VA Form 10101 which is based on industry reporting standards.

In 852.236-80, Subcontracts and Work Coordination, we propose to make minor capitalization corrections for Contractor and Contracting Officer, and to clarify in paragraph (d) that 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. The words “or subcontractor employee” and “careless” would be added that were previously missing from the text.

In 852.236-84, Schedule of Work Progress, we propose to remove the clause in its entirety and reserve it since the subject is already covered in the Network Analysis Schedules section of the VA Master Specifications.

In 852.236-85, Supplementary Labor Standards Provisions, we propose to remove the clause in its entirety and reserve it since it is procedural and is addressed in

FAR clauses 52.222-6, Construction Wage Rate Requirements, and 52.222-8, Payrolls and Basic Records.

In 852.236-86, Workers' Compensation, we propose to remove the clause in its entirety and reserve it since it merely cites a Public Law regarding applicability of States' workers' compensation laws. The VAAR is not required to cite individual States' workers' compensation laws to make them applicable to companies performing work in individual states.

In 852.236-87, Accident Prevention, we propose to remove the clause in its entirety and reserve it since the subject is already covered in the Accident Prevention Plan section of the VA Master Specifications.

In 852.236-89, Buy American Act, along with its Alternate I and II, we propose to remove and reserve the clause as it is redundant to the FAR and is unnecessary.

In 852.236-90, Restriction on Submission and Use of Equal Products, we propose to revise the clause to clarify the language to reinforce that the submission of "equal" products is not permitted; and to reformat the clause to standard FAR drafting convention and specify that notwithstanding any other clause or provision, only brand name products for the items listed in the fill-in clause will be authorized for use on the contract. The prescription for this clause would require compliance with the documentation and authorizations required by FAR 11.105 when it is determined that only one product will meet the Government's minimum needs.

In 852.236-91, Special Notes, we propose to remove the clause in its entirety and reserve it since the material addressed is covered by the certification under the

System for Award Management or under the Shop Drawings, Product Data & Submittals section of the VA Master Specifications.

We propose to add a new clause 852.236-92, Notice to Bidders—Additive or Deductive Bid Line Items, to provide guidance on how such bid items will be evaluated to determine the low bidder.

We propose to add a new clause 852.242-70, Government Construction Contract Administration, to enumerate the responsibilities being delegated.

#### VAAR Part 853—Forms

We propose to amend the authority of part 853 to add 41 U.S.C. 1121(c)(3) which is from Title 41, Public Contracts, that speaks to the authority of an executive agency under another law to prescribe policies, regulations, procedures, and forms for procurement that are subject to the authority conferred in the cited section, as well as other sections of Title 41 as shown therein. We also propose to replace the 38 U.S.C. 501 citation with 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.

In subpart 853.1—General, in 853.107, Obtaining forms, we propose to revise the text to provide the current website address where VA forms are obtained now: <https://www.va.gov/vaforms/>. The outdated address for an old VA office would be removed, as well as the outdated practice of requesting forms in hard copy directly from the agency policy office. All forms will be available online.

In subpart 853.2—Prescription of Forms, we propose to revise 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.

In 853.236, Construction and architect-engineer contracts, in section 853.236-70, VA Form 6298, Architect-Engineer Fee Proposal, we are revising the number of the form and changing the location of the prescription reference from 836.606-71 to 836.7001(a).

In 853.236 we also propose to add the following sections identifying forms applicable to part 836:

853.236-71, VA Form 2138, Order for Supplies or Services (Including Task Orders for Construction or A-E Services) which provides the prescription reference for use of the form for ordering supplies or services, including task orders for Construction or A-E services, to include dismantling, demolition, or removal of improvements.

853.236-72, VA Form 10101, Contractor Production Report, which provides the prescription reference for use of the form or a contractor generated form containing the same type of information contained in the form.

### 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.) 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 expected to be an E.O. 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule’s economic analysis.

#### Paperwork Reduction Act

This proposed rule impacts eight existing information collection requirements associated with four Office of Management and Budget (OMB) control number approvals. The proposed actions in this rule result in multiple actions affecting some of these information collections, such as: the proposed 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 proposed 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 proposed to be revised with updated thresholds and FAR citations, as well as an updated number to remove the "10-" currently part of the 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 proposed 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 would remain unchanged. There would be no change in the information collection burden that is associated with this proposed request. However, we are proposing to amend the 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 would be 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. Further proposed revision to the associated OMB control number relating to other provisions of this proposed rule are identified separately in this submittal.

This proposed rule also contains two provisions constituting a collection of information at 48 CFR 852.236-72, Performance of Work by the Contractor; and 48 CFR 852.236-88, Contract Changes—Supplement, that would remain unchanged. Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), no new or proposed revised collection of information is associated with these provisions as a part of this proposed rule. The information collection requirements for 852.236-72 and 852.236-88 are currently approved by OMB and have been assigned OMB control number 2900-0422. The burden of these information collections would remain unchanged. 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 clause at 852.236-72 and 852.236-88 cited above and against the assigned OMB control number. Further proposed revision to the associated OMB control number relating to other information collections and provisions of this proposed rule are identified separately in this submittal.

This proposed rule would impose the following amended information collection requirements to one of the four existing information collection approval numbers associated with this proposed 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 proposed collection of

information is associated with this provision as a part of this proposed rule. The information collection requirement for 852.236-79 is currently approved by OMB and has been assigned OMB control number 2900-0208. There would be no change in the information collection burden that is associated with this proposed request. However, we are proposing to amend the information collection requirement to revise the title and to renumber the form currently numbered and titled as VA Form 10-6131, Daily Log (Contract Progress Report – Formal Contract) to replace this form, along with replacing the number and title of VA Form 10-6001a, Supplement Contract Progress Report with one new number, title and format—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 proposed 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 would remain 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 proposed rule would remove 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 proposed rule, there would be a removal in the information collection burden that is associated with it. For 48 CFR 852.236-84, Schedule of Work Progress, as now included on OMB control number 2900-0422, 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)), 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.

This proposed rule would remove 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 proposed rule, there would be a removal in the information collection burden that is associated with it. For 48 CFR 852.236-89, Buy American Act, and its corresponding OMB control number 2900-0622, this would result in a 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 would result in a 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 proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The overall impact of the proposed rule would be of benefit to small businesses owned by Veterans or service-disabled Veterans as the VAAR is being updated to remove extraneous procedural information that applies only to VA’s internal operating processes or procedures. VA estimates no cost impact to individual business would 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, 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 would 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 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 August 20, 2018, for publication.

Dated: August 21, 2018.

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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 proposes to amend 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: 38 U.S.C. 8123; 38 U.S.C. 8153; 38 U.S.C. 8303; 40 U.S.C. 121(c); 41 U.S.C. 1702; 41 U.S.C. 1707; and 48 CFR 1.301-1.304.

Subpart 801.1—Purpose, Authority, Issuance

801.106 [Amended]

2. In section 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 852.236-84 and add in its place 852.236-83.

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 is removed and reserved.

Subpart 825.11 [Removed and Reserved]

5. Subpart 825.11 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 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 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 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, 836.606-70, and 836.606-71 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 paragraph (c) of this section.

(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 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 part or 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 revised 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 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(c)(3); 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 (DATE)

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 (DATE)

(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 (DATE). 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 (DATE)

(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 (DATE)

(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 (DATE). 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 2 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 (DATE)

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

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(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 to read 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 (DATE)

(a) Additive or deductive line items in the 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 (DATE)

(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) of this clause 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 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 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 853.236-71 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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