



DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Parts 817 and 852

RIN 2900-AQ19

VA Acquisition Regulation: Special Contracting Methods

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proposing to amend and update its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove any procedural guidance that is internal to VA into the VA Acquisition Manual (VAAM), and to incorporate new regulations or policies. These changes seek to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors. The VAAM incorporates portions of the removed VAAR as well as other internal agency acquisition policy. VA will rewrite certain parts of the VAAR and VAAM, and as VAAR parts are rewritten, VA will publish them in the Federal Register. VA will combine related topics, as appropriate. In particular, this rulemaking revises VAAR concerning Special Contracting Methods and Solicitation Provisions and Contract Clauses.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] to be considered in the formulation of the final rule.

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

Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AQ19—VA Acquisition Regulation: Special Contracting Methods.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Rafael N. Taylor, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 425 I Street, NW, Washington DC 20001, (202) 382-2787. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Background

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

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

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

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

The VA proposes to make the following changes to the VAAR in this phase of its revision and streamlining initiative. For procedural guidance cited below that is proposed to be deleted from the VAAR, each section cited for removal is being 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 it is not yet available on line.

VAAR Part 817—Special Contracting Methods

Under part 817, we propose to add 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, as an authority to the publishing of this part. We also propose to add 38 U.S.C. 8128 as the authority for the Veterans First Contracting Program which applies to this part. We also propose to add 41 U.S.C. 1303 which provides that executive agencies may issue regulations essential to implement Government-wide policies and procedures within the agency and additional policies and procedures required to satisfy the specific and unique needs of the agency. We also propose to add 48 CFR 1.301-1.304 as the basic authority for agencies to issue supplemental regulations and procedures to the FAR. The authorities cited for this part are 38 U.S.C. 8127-8128; 41 U.S.C. 1303; 41 U.S.C. 1702 and 48 CFR 1.301-1.304.

We propose to remove subpart 817.1, Multi-year Contracting, in its entirety since it deals with internal procedures about the uses of multi-year contracting and internal approvals to be obtained.

We propose to remove subpart 817.2 in its entirety by removing 817.202, Use of options, and 817.204, Contracts. 817.202 consists of internal procedures to develop

solicitations and cost comparisons under Office of Management and Budget Circular A-76. Since there is currently a moratorium on A-76 contracts this will not be moved to the VAAM. 817.204, Contracts, contains internal procedures and approvals to be obtained for contracts with option periods greater than five years, and this coverage will be moved to the VAAM.

We propose removing subpart 817.4, Leader Company Contracting, and 817.402, Limitations, since they include internal procedures and approval requirements for leader company contracts. The coverage will be moved to the VAAM.

We propose to revise the title of subpart 817.5 to read “Interagency Acquisitions.” In the newly added 817.501, General, we propose to require any governmental entity that acquires goods and services on behalf of the Department of Veterans Affairs shall comply, to the maximum extent feasible, with the provisions of 38 U.S.C. 8127 and 8128, and the Veterans First Contracting Program as implemented at subpart 819.70.

We propose to remove 817.502, General, which is replaced with updated policy in 817.501. The coverage was moved to comport with the numbering in the FAR.

We propose to add subpart 817.70, Undefined Contract Actions, to provide policy and procedures for use of this type of action. Coverage is proposed as undefined contract actions (UCAs) are a high-risk method of procurement; accordingly, we propose to add guidance to mitigate the risks associated with UCAs.

We proposed to add 817.7000, Scope, which describes the material being introduced in this subpart.

We propose to add 817.7001, Definitions, to provide definitions of four terms used in the subpart: contract action, definitization, definitization proposal, and undefinitized contract action.

We propose to add 817.7002, Exceptions, to exempt simplified acquisitions and congressionally mandated long-lead procurement contracts from this policy, but to require the contracting officer to apply the policy and procedures to the maximum extent practicable.

We propose to add 817.7003, Policy, which limits undefinitized contract actions to situations where it is not possible to negotiate a definitive contract action in time to meet the government's requirements, and where the interests of the government demand that the contractor be given a commitment so that contract performance can begin immediately.

We propose to add 817.7004, Limitations, with no text, and the following sections: 817.7004-1, Authorization, which provides guidance as to when the contracting officer must obtain approval to use an undefinitized contract action; and 817.7004-2, Price ceiling, which requires all undefinitized contract actions to include not-to-exceed price ceilings.

We propose to add 817.7004-3, Definitization schedule, which sets parameters for establishing definitization schedules and requires submission of a definitization proposal in accordance with the definitization schedule as a material element of the contract, where non-compliance may result in suspension or reduction of progress payments under FAR 32.503-6 or other appropriate action.

We propose to add 817.7004-4, Limitations on obligations, which provides guidance on setting limits on the obligations on undefinitized contract actions.

We propose to add 817.7004-5, Final price negotiation—profit, which provides guidance on negotiating profit that reflects the contractor's reduced cost risk prior to definitization.

We propose to add 817.7005, Contract clause, which prescribes new clause 852.217-70, Contract Action Definitization, for all UCAs, solicitations associated with UCAs, BOAs, IDIQ contracts, or any other type of contract providing for the use of UCAs.

VAAR Part 852—Solicitation Provisions and Contract Clauses

In subpart 852.2, Text of Provisions and Clauses, we propose to add clause 852.217-70, Contract Action Definitization, to provide specific procedures required to definitize UCAs.

Effect of Rulemaking

Title 48, Federal Acquisition Regulations System, Chapter 8, Department of Veterans Affairs, of the Code of Federal Regulations, as proposed to be revised by this rulemaking, would represent VA's implementation of its legal authority and publication of the VAAR for the cited applicable parts. Other than future amendments to this rule or governing statutes for the cited applicable parts, or as otherwise authorized by approved deviations or waivers in accordance with FAR subpart 1.4, Deviations from the FAR, and as implemented by VAAR subpart 801.4, Deviations from the FAR or

VAAR, no contrary guidance or procedures would be authorized. All existing or subsequent VA guidance would be read to conform with the rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking as pertains to the cited applicable VAAR parts.

Executive Orders 12866, 13563 and 13771

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 12866, Regulatory Planning and Review, defines "significant regulatory action" to mean any regulatory action that is likely to result in a rule that may: "(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal Governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

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

VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www.va.gov/orpm> by following the link for VA Regulations Published from FY 2004 Through Fiscal Year to Date. This proposed rule is not expected to be an EO 13771 regulatory action because this proposed rule is not significant under EO 12866.

Paperwork Reduction Act

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

Regulatory Flexibility Act

This proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The overall impact of the proposed rule would be of benefit to small businesses as the VAAR is being updated to remove extraneous procedural information that applies only to VA's internal operating procedures. VA estimates no cost impact to individual business would result from these rule updates. This rulemaking does not have an economic impact to individual businesses, and there are no increased or decreased

costs to small business entities. On this basis, the proposed rule would not have an economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, under 5 U.S.C. 605(b), this regulatory action is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal Governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal Governments or on the private sector.

List of Subjects

48 CFR Part 817

Government procurement.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

Signing Authority

The Secretary of Veterans Affairs approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on December 17, 2018, for publication.

Dated: December 17, 2018.

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

For the reasons set out in the preamble, VA is proposing to amend 48 CFR parts 817 and 852 as follows:

PART 817—SPECIAL CONTRACTING METHODS

1. The authority citation for part 817 is revised to read as follows:

Authority: 38 U.S.C. 8127-8128; 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301-1.304.

2. The Table of Contents is revised to read as follows:

PART 817—SPECIAL CONTRACTING METHODS

Sec.

Subpart 817.1 [RESERVED]

Subpart 817.2 [RESERVED]

Subpart 817.4 [RESERVED]

Subpart 817.5—Interagency Acquisitions

817.501 General.

Subpart 817.70—Undefinitized Contract Actions

817.7000 Scope.

817.7001 Definitions.

817.7002 Exceptions.

817.7003 Policy.

817.7004 Limitations.

817.7004-1 Authorization.

817.7004-2 Price ceiling.

817.7004-3 Definitization schedule.

817.7004-4 Limitations on obligations.

817.7004-5 Final price negotiation—profit.

817.7005 Contract clause.

Subpart 817.1 [Removed and Reserved]

3. Subpart 817.1 is removed and reserved.

Subpart 817.2 [Removed and Reserved]

4. Subpart 817.2 is removed and reserved.

Subpart 817.4 [Removed and Reserved]

5. Subpart 817.4 is removed and reserved.

6. Subpart 817.5 is revised to read as follows:

817.5—Interagency Acquisitions

817.501 General.

(d) Any contract, agreement, or other arrangement with any governmental entity to acquire goods and services, including construction, that permits the governmental entity to acquire goods and services on behalf of the Department of Veterans Affairs shall include a requirement that the entity will comply, to the maximum extent feasible, with the provisions of 38 U.S.C. 8127 and 8128, and the Veterans First Contracting Program as implemented at subpart 819.70. Accordingly, the governmental entity shall award contracts (see FAR 2.101 for the definition of contracts) to eligible service-disabled

veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) listed in the VA Vendor Information Pages (VIP) database to the maximum extent feasible.

817.502 [Removed]

7. Section 817.502 is removed.

8. Subpart 817.70 is added to read as follows:

Subpart 817.70—Undefinitized Contract Actions

817.7000 Scope.

This subpart prescribes policies and procedures for use of undefinitized contract actions.

817.7001 Definitions.

As used in this subpart—

(a) Contract action includes:

(1) Contracts and contract modifications for supplies or services.

(2) Task orders and delivery orders.

(3) It does not include change orders, administrative changes, funding modifications, or any other contract modifications that are within the scope and under the terms of the contract, e.g., engineering change proposals and value engineering change proposals.

(b) Definitization means the agreement on, or determination of, contract terms, specifications, and price, which converts the undefinitized contract action to a definitive contract.

(c) Definitization proposal means a proposal containing sufficient data for the VA to do complete and meaningful analyses and audits of the—

- (1) Data in the proposal; and
 - (2) Any other data that the contracting officer has determined VA needs to review in connection with the contract.
- (d) Undefinitized contract action means any contract action for which the contract terms, specifications, or price are not agreed upon before performance is begun under the action. Examples are letter contracts and orders under basic ordering agreements for which the final price has not been agreed upon before performance has begun.

817.7002 Exceptions.

- (a) The following undefinitized contract actions (UCAs) are not subject to this subpart:
- (1) Purchases at or below the simplified acquisition threshold.
 - (2) Congressionally mandated long-lead procurement contracts.
- (b) However, the contracting officer shall apply the policy and procedures to the contract actions in paragraph (a) to the maximum extent practicable.

817.7003 Policy.

Undefinitized contract actions shall—

- (a) Be used only when—
- (1) The negotiation of a definitive contract action is not possible in sufficient time to meet the Government's requirements; and
 - (2) The Government's interest demands that the contractor be given a binding commitment so that contract performance can begin immediately.
- (b) Be as complete and definite as practicable.

817.7004 Limitations.

817.7004-1 Authorization.

The contracting officer shall obtain approval one level above the contracting officer before—

(a) Entering into a UCA. The request for approval must fully explain the need to begin performance before definitization, including the adverse impact on the VA resulting from delays in beginning performance.

(b) Including requirements for non-urgent items and equipment in a UCA. The request should show that inclusion of the non-urgent items is consistent with good business practices and in the best interest of the Government.

(c) Modifying the scope of a UCA when performance has already begun. The request should show that the modification is consistent with good business practices and in the best interests of the Government.

817.7004-2 Price ceiling.

UCAs shall include a not-to-exceed price.

817.7004-3 Definitization schedule.

(a) UCAs shall contain definitization schedules that provide for definitization by the earlier of—

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

(2) The date on which the amount of funds paid to the contractor under the contract action is equal to more than 50 percent of the not-to-exceed price.

(b) Submission of a definitization proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a timely definitization proposal, the contracting officer may suspend or reduce progress payments under FAR 32.503-6, or take other appropriate action.

817.7004-4 Limitations on obligations. The Government shall not obligate more than 50 percent of the not-to-exceed price before definitization.

817.7004-5 Final price negotiation—profit.

Before the final price of a UCA is negotiated, contracting officers shall ensure the profit agreed to and documented in the contract negotiation memorandum reflects consideration of any risks incurred in performance of the work under the UCA.

817.7005 Contract clause.

(a) Use the clause at 852.217-70, Contract Action Definitization, in—

- (1) All UCAs;
- (2) Solicitations associated with UCAs;
- (3) Orders against basic ordering agreements;
- (4) Indefinite delivery task orders; and
- (5) Any other type of contract providing for the use of UCAs.

(b) Insert the applicable information in paragraphs (a), (b), and (d) of the clause.

(c) If, at the time of entering into the UCA, the contracting officer knows that the definitive contract action will meet the criteria of FAR 15.403-1, 15.403-2, or 15.403-3 for not requiring submission of certified cost or pricing data, the words “and certified cost or pricing data” may be deleted from paragraph (a) of the clause.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

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

10. Section 852.217-70 is added to read as follows:

852.217-70 Contract Action Definitization.

As prescribed in 817.7005(a), insert the following clause:

CONTRACT ACTION DEFINITIZATION (DATE)

(a) A ____ [Insert specific type of contract action] is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract action that will include (1) all clauses required by the Federal Acquisition Regulation (FAR) on the date of execution of the undefinitized contract action, (2) all clauses required by law on the date of execution of the definitive contract action, and (3) any other mutually agreeable clauses, terms, and conditions. The Contractor agrees to submit a _____ [Insert type of proposal, e.g., fixed-price, or cost-and-fee] proposal with cost or pricing data, as appropriate, supporting it.

(b) The schedule for definitizing this contract action is as follows [Insert target date for definitization of the contract action and dates for submission of proposal, beginning of negotiations, and, if appropriate, submission of the make-or-buy plans, subcontracting plans, and cost or pricing data].

(c) If agreement on a definitive contract action to supersede this undefinitized contract action is not reached by the target date in paragraph (b) of this clause, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of a Contracting Officer one level above, determine a reasonable price or fee in accordance with FAR subpart 15.4 and FAR part 31, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with completion of the contract, subject only to FAR 52.216-24, Limitation of Government Liability.

(1) After the Contracting Officer's determination of price or fee, the contract shall be governed by—

(i) All clauses required by the FAR on the date of execution of this undefinitized contract action for either fixed-price or cost-reimbursement contracts, as determined by the Contracting Officer under this paragraph (c);

(ii) All clauses required by law as of the date of the Contracting Officer's determination; and

(iii) Any other clauses, terms, and conditions mutually agreed upon.

(2) To the extent consistent with paragraph (c)(1) of this clause, all clauses, terms, and conditions included in this undefinitized contract action shall continue in effect, except those that by their nature apply only to an undefinitized contract action.

(d) The definitive contract action resulting from this undefinitized contract action will include a negotiated _____ [Insert “cost/price ceiling” or “firm-fixed-price”] in no event to exceed _____ [Insert the not-to-exceed amount].

(End of clause)

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