



DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Parts 802, 809, 841, 842, and 852

RIN 2900-AQ38

VA Acquisition Regulation: Contractor Qualifications; Acquisition of Utility Services; and Contract Administration and Audit Services

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proposing to amend and update its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove any procedural guidance internal to VA into the VA Acquisition Manual (VAAM), and to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 These changes seek to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors.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. This rulemaking revises VAAR coverage concerning Contractor Qualifications, Acquisition of Utility Services, and Contract Administration and Audit Services, as well as affected parts concerning Definitions of Words and Terms 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, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1064, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AQ38—VA Acquisition Regulation: Contractor Qualifications; Acquisition of Utility Services; and Contract Administration and Audit Services.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1064, 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 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

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 authority that are removed from the VAAR will be included in the VAAM as internal departmental guidance. The VAAM is being created in parallel with these revisions to the VAAR and is not subject to the rulemaking process as they are internal VA procedures and guidance. The VAAM will not be finalized until corresponding VAAR parts are finalized, and therefore the VAAM is not yet available online.

VAAR PART 802—DEFINITIONS OF WORDS AND TERMS

Under part 802, we propose to amend Section 802.101 to remove definitions of “Suspending and Debarring Official (SDO)” and “Suspension and Debarment Committee (S&D Committee).”

VAAR PART 809—CONTRACTOR QUALIFICATIONS

Under part 809, Contractor Qualifications, we propose to add the authority citation for 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 revise the authority citation of 40 U.S.C. 121 to remove the reference to paragraph (d), as paragraph (c) which will be retained comports with FAR and VAAR standard usage and reference to paragraph (d) is unnecessary. The authorities cited for this part are 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301-1.304.

In subpart 809.1, Responsible Prospective Contractors, we propose to delete 809.104, Standards (no text), and 809.104-2, Special standards, as it includes internal VA procedural guidance and will be moved to the VAAM.

We propose to delete subpart 809.2, Qualifications Requirements, as the policy and procedures relating to the establishment of qualification requirements are no longer being used by VA and have been deemed unnecessary. As a result of this change, 809.202, Policy, which designated the HCA as the authority for establishing a qualification requirement in accordance with FAR 9.202(a)(1) is also being removed.

This rulemaking also proposes to remove 809.206, Acquisitions subject to qualification requirements, which contained no text. We also propose to remove 809.206-1, General, consisting of one sentence that provided that HCAs may determine that an emergency exists as provided by FAR 9.206-1(b); and 809.270, Qualified products for convenience/labor-saving foods, which provided internal guidance to Veterans Integrated Service Networks. All of the sections are being deleted as the Department is no longer using Qualified Product Lists.

We propose to revise subpart 809.4, Debarment, Suspension, and Ineligibility. In section 809.400, Scope of subpart, we propose to clarify that the policy supplements the FAR coverage under FAR subpart 9.4 and prescribes VA's procedures for the

suspension and debarment of contractors. We propose to revise 809.402, Policy, which would establish that when VA is considering a debarment or suspension action, the Suspension and Debarment (S&D) Committee shall coordinate the action with the Interagency Committee on Debarment and Suspension in order to identify other agencies with an interest in the action, and to identify the agency that will take the lead on the action.

We propose to add 809.403, Definitions. This section would define the terms that are used through subpart 809.4, Debarment, Suspension, and Ineligibility, including the S&D Committee and the Suspending and Debarring Official (SDO).

We propose to remove 809.404, Excluded Parties List System, as this system has been replaced by the System for Award Management (SAM) and the FAR has sufficient coverage in this area.

We propose to revise 809.405, Effect of listing, to state that the authority to determine whether to solicit from, evaluate bids or proposals from, or award contracts to contractors with active exclusions in SAM is delegated to the Suspending and Debarring Official (SDO). The revised section also establishes that this authority is further delegated to the head of the contracting activity (HCA) or their designee. We propose to revise 809.405-1, Continuation of current contracts, and 809.405-2, Restrictions on subcontracting, to delegate the authority to the SDO, who further delegates the authority to the HCA or designee to make the determinations described under these sections.

Under 809.406, Debarment, we propose to revise 809.406-1, General, to delegate to the SDO the authority to determine whether to continue business dealings between VA and a contractor suspended, proposed for debarment, or debarred.

In 809.406-2, Causes for debarment, we propose to revise the title to comport with the FAR and to remove the existing language and reflect no text. The coverage would be moved to a new section that follows. We propose to add new section 809.406-270, Additional causes for debarment, to reflect VA's program that would conform with the governing statute 38 U.S.C. 8127(g), Enforcement Penalties for Misrepresentation, to state that any business concern that has willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by veterans or as a small business concern owned and controlled by service-disabled veterans pursuant to this section shall be debarred for no less than 5 years. It would also provide a definition for "willful and intentional" misrepresentations for the purposes of debarment actions taken pursuant to 38 U.S.C. 8127(g).

We propose to revise 809.406-3, Procedures, to provide to the public the updated procedures for debarments and to provide the responsibilities of the SDO and Suspension and Debarment (S&D) Committee. This section apprises contractors of their rights when they have been notified of their proposed debarment.

We propose to revise 809.406-4, Period of debarment, to inform prospective vendors that the period of debarment for willful and intentional misrepresentations of SDVOSB or VOSB status pursuant to 809.406-270(b) shall not be less than 5 years.

Under 809.407, Suspension, we propose to revise 809.407-1, General, to reflect that the authority to determine whether to continue to contract with a suspended contractor has been delegated to the HCAs. We propose to revise 809.407-3, Procedures, to apprise contractors of their rights when they have been notified of their proposed suspension. It has been revised to reflect the updated procedures. We

propose to revise section 809.470, Fact-finding procedures, to inform the contractor or individual that they may submit documentary evidence, present witnesses, and confront any person the agency presents in the case of a suspension or debarment.

We propose to delete 809.503, Waiver, and move it to the VAAM as it provides internal procedural guidance. We propose to delete 809.504, Contracting officer responsibilities, and move it to the VAAM as it provides procedural guidance to VA's contracting officers.

We propose to revise section 809.507-1, Solicitation provision, to correctly identify 852.209-70 as a provision that must be included in any solicitation for the contracts outlined in FAR 9.502 which might have the potential for conflicts of interest. It was previously incorrectly referred to as a clause.

VAAR PART 841—ACQUISITION OF UTILITY SERVICES

Under part 841, Acquisition of Utility Services, we propose to add the authority citation for 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 revise the authority citation of 40 U.S.C. 121, to remove the reference to paragraph (d), as paragraph (c) which will be retained comports with FAR and VAAR standard usage and reference to paragraph (d) is unnecessary. The authorities cited for this part are 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301-1.304.

We propose to revise subpart 841.1, General, by deleting 841.100, Scope of part, as the section limited the scope of the part to connection charges and since the revised part 841 would cover the full breadth of utility services, and 841.103, Statutory and delegated authority, and to move it to the VAAM as it represents internal guidance to contracting officers.

We propose to add section 841.102, Applicability, to clarify that the part applies to acquisitions of utility services from both regulated and nonregulated utility suppliers and that when energy is acquired as a commodity it is considered to be purchase of supplies rather than utility services.

We propose to delete subpart 841.2, Acquiring Utility Services, as its requirements for technical and legal review are redundant with Part 801.

We propose to add subpart 841.5, Solicitation Provision and Contract Clauses, and sections 841.501, Solicitation provision and contract clauses (no text), and 841.501-70, Disputes—Utility contracts, which prescribes the use of new clause 852.841-70, Disputes—Utility Contracts, in solicitations and contracts for utility services subject to the jurisdiction and regulation of a utility rate commission.

VAAR PART 842—CONTRACT ADMINISTRATION AND AUDIT SERVICES

We propose to revise section 842.000, Scope of part, to clarify that the part prescribes policies and procedures for contract administration and audit services for Department of Veteran Affairs (VA) contracts. We propose to revise 842.070, Definitions, to revise the definition of “Contract Administration” to provide more detail.

We also propose to add a definition for “Administrative Contracting Officer Letter of Delegation” to the section.

We propose to delete subpart 842.1, Contract Audit Services. Under the subpart, we propose to delete 842.101, Contract audit responsibilities, because the FAR guidance is sufficient in terms of policy, and the procedural guidance was moved to the VAAM. We also propose to remove 842.102, Assignment of contract audit services, from the VAAR as it provides internal guidance to VA’s contracting officers on how to obtain contract audit services and move coverage to the VAAM.

We propose to revise subpart 842.2, Contract Administration Services, to add section 842.270, Contracting Officer’s Representatives’ role in contract administration, to provide policy on the appointment of the Contracting Officer’s Representative in contract administration. We propose to redesignate 842.271, Contract clause for Government construction contract administration, to 842.272 as we propose to add a new section, title and content at 842.271. The new section 842.271, Administrative Contracting Officer’s role in contract administration and delegated functions, describes the requisite ACO Letter of Delegation and the limitations of ACO authority, and in paragraph (d) would prescribe clause 852.242-71, Administrative Contracting Officer. Under the revision to subpart 842.2, the newly added 842.272, Contract clause for Government construction contract administration, prescribes clause 852.242-70, Government Construction Contract Administration, and revises the prescription for use in solicitations and contracts for construction expected to exceed the micro-purchase threshold by adding the words “,when contract administration is delegated” at the end of the prescription to reflect that the clause would only be inserted by the contracting

officer when contract administration is delegated to another contracting activity or contracting officer.

We propose to revise section 842.705, Final indirect cost rates, to require contracting officers to request audits on proposed final indirect cost rates and billing rates for use in cost reimbursement and fixed-price incentive contracts except when quick closeout procedures are used. We propose to remove paragraph (b) of the existing text as internal procedural guidance and move it to the VAAM.

We propose to delete subpart 842.8, Disallowance of Costs. We propose to delete 842.801-70, Audit assistance prior to disallowing costs, as it references an office that no longer exists. We propose to delete 842.803, Disallowing costs after incurrence, which emphasizes that COs cannot exceed their contracting authority which is redundant to the FAR.

We propose to revise subpart 842.12, Novation and Change-of-Name Agreements, to add 842.1202, Responsibility for executing agreements, which provides detailed policy requirements regarding responsibilities for executing agreements related to a successor in interest to, or a change of name of a contractor. This is information that is relevant to the public at large as to how such modifications will be processed. We propose to remove 842.1203, Processing agreements, as the VAAR coverage provided is redundant to FAR 42.1203. Internal requirements for OGC legal counsel review have been moved to the VAAM.

VAAR PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

In subpart 852.2, Text of Provisions and Clauses, we propose to revise provision 852.209-70, Organizational Conflicts of Interest, to remove an outdated citation and to correct capitalization. The remaining language in the provision is unchanged.

We propose to add clause 852.241-70, Disputes—Utility Contracts, to provide that matters involving the interpretation of tariffed retail rates, tariff rate schedules, and tariffed terms provided under this contract are subject to any determinations by the independent regulatory body having jurisdiction.

We propose to revise clause 852.242-70, Government Construction Contract Administration, for use in all construction solicitations and contracts expected to exceed the micro-purchase threshold, when contract administration is delegated. The text of the clause remains the same, but the first sentence “As prescribed in 842.271,…” is revised to “As prescribed in 842.272,…” to reflect the new designation as this rule has added different content at 842.271. The clause authorizes the contracting officer to delegate contract administration authority to another contracting officer, and to designate another VA employee to act as resident engineer at the construction site with limited and specific authority.

We propose to add clause 852.242-71, Administrative Contracting Officer, for use in all construction solicitations and contracts expected to exceed the micro-purchase threshold, which states that the contracting officer reserves the right to designate an Administrative Contracting Officer (ACO) for the purpose of performing certain tasks/duties in the administration of the contract and that the designation will be in writing through an ACO Letter of Delegation.

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, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). E.O. 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 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 E.O. 13771 regulatory action because this proposed rule is not significant under E.O. 12866.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the

collection of information, nor may it impose an information collection requirement unless it displays a currently valid 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 809.507-1 and 48 CFR 852.209-70 which require offerors on solicitations for management support and consulting services to advise, as part of the firm's offer, whether or not award of the contract to the firm might involve a conflict of interest and, if so, to disclose all relevant facts regarding the conflict. The information is used by the contracting officer to determine whether or not to award a contract to the firm or, if a contract is to be awarded despite a potential conflict, whether or not additional contract terms and conditions are necessary to mitigate the conflict. No new collection of information is associated with this provision as a part of this proposed rule. The information collection requirement for 809.507-1 and 852.209-70 is currently approved by OMB and has been assigned OMB control number 2900-0418. This rule amends this information collection requirement to revise 809.507-1 to designate 852.209-70 as a provision instead of a clause. For the requested administrative amendments to VAAR 852.209-70, as required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA will submit this information collection amendment to OMB for its review.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612).

This rulemaking does not change VA's policy regarding small businesses, 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, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

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

List of Subjects

48 CFR Part 802

Government procurement.

48 CFR Part 809

Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 841

Government procurement, Utilities.

48 CFR Part 842

Accounting, Government procurement.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Pamela Powers, Chief of Staff, Performing the Delegable Duties of the Deputy Secretary, Department of Veterans Affairs, approved this document on April 8, 2020, for publication.

Consuela Benjamin,
Regulation 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 to revise parts 802, 809, 841, 842 and 852 as follows:

PART 802—DEFINITIONS OF WORDS AND TERMS

1. The authority citation for part 802 continues 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.

802.101 [AMENDED]

2. Section 802.101 is amended to remove the definitions for “Suspending and Debarring Official (SDO)” and “Suspension and Debarment Committee (S&D Committee).”

PART 809—CONTRACTOR QUALIFICATIONS

3. The authority citation for part 809 is revised to read as follows:

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

Subpart 809.1—Responsible Prospective Contractors

809.104 and 809.104-2 [Removed]

4. Sections 809.104 and 809.104-2 are removed.

Subpart 809.2 [Removed and Reserved]

5. Subpart 809.2, consisting of sections 809.201, 809.202, 809.204, 809.206, 809.206-1, and 809.270 is removed.

Subpart 809.4—Debarment, Suspension, and Ineligibility

6. Subpart 809.4 is revised to read as follows:

809.400 Scope of subpart.

This subpart implements FAR subpart 9.4 and prescribes VA's procedures and related actions for the suspension and debarment of contractors.

809.402 Policy.

(b) Statutory debarments pursuant to the authority of 38 U.S.C. 8127(g), Enforcement Penalties for Misrepresentation, are mandatory when the determination is made that a business concern has willfully and intentionally misrepresented its status as a service-disabled, Veteran-owned small business or Veteran-owned small business.

809.403 Definitions.

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

Suspending and Debarring Official (SDO) means the individual responsible for final decisions regarding suspension and debarment, as appointed by the agency.

809.405 Effect of listing.

The authority under FAR 9.405(a), 9.405(d)(2), and 9.405(d)(3) to determine whether to solicit from, evaluate bids or proposals from, or award contracts to contractors with active exclusions in the System for Award Management (SAM) is delegated to the Suspending and Debarring Official (SDO). This authority is further delegated to the HCAs, who may delegate this authority, in writing, to a designee.

809.405-1 Continuation of current contracts.

(a) Notwithstanding the suspension, proposed debarment, or debarment of a contractor, VA may continue contracts or subcontracts in existence at the time the

contractor was suspended, proposed for debarment, or debarred, unless the cognizant head of the contracting activity (HCA) directs otherwise. Examples of factors to be considered include, but are not limited to, potential costs associated with a termination, possible disruption to VA program objectives, and integrity of VA acquisition programs.

(b) Authority to make the determinations under FAR 9.405-1(b) is delegated to the SDO and is further delegated to the HCA, who may delegate this authority, in writing, to a designee. The HCA or their designee must make a written determination of the compelling reasons in accordance with FAR 9.405-1(b). Compelling reasons for the purposes of FAR 9.405-1(b) include, but are not limited to, urgency of the need for new or continued work, lengthy time period to acquire the new work from other sources and meeting estimated quantity for requirements contracts.

809.405-2 Restrictions on subcontracting.

Authority to make the written determination required under FAR 9.405-2 consenting to a contractor's use of a subcontractor who is suspended, proposed for debarment, or debarred is delegated to the SDO. This authority is further delegated to the HCA, who may delegate this authority, in writing, to a designee.

809.406 Debarment.

809.406-1 General.

(a) For the purposes of FAR 9.406-1, the SDO's authority includes debarments pursuant to the Federal Management Regulation at 41 CFR 102-117.295. In addition to the factors listed in FAR 9.406-1, the SDO may consider the following examples before arriving at a debarment decision:

(1) Whether the contractor had a mechanism, such as a hotline, by which employees could have reported suspected instances of improper conduct, and

instructions in place that encouraged employees to make such reports; or

(2) Whether the contractor conducted periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of Government contracting.

(c) As provided in FAR 9.406-1(c), authority to determine whether to continue business dealings between VA and a contractor suspended, proposed for debarment, or debarred is delegated to the SDO.

809.406-2 Causes for debarment.

809.406-270 Additional causes for debarment.

(a) *Discretionary causes.* (1) In addition to the causes listed in FAR 9.406-2 (a) through (c), the SDO may debar contractors, based upon a preponderance of the evidence (as defined at FAR 2.101), for the Government's protection, for—

(i) Any deliberate violation of the limitation on subcontracting clause requirements for acquisitions under subpart 819.70; or

(ii) Failure to observe the material provisions of a voluntary exclusion or an administrative agreement.

(2) The period of debarment shall be commensurate with the seriousness of the action.

(b) *Statutory cause.* (1) Pursuant to 38 U.S.C. 8127(g), Enforcement Penalties for Misrepresentation, the SDO shall debar, from contracting with VA, for a period of not less than five years, any business concern that has willfully and intentionally misrepresented the status of that concern as a small business concern owned and

controlled by Veterans or as a small business concern owned and controlled by service-disabled Veterans.

(2) Debarment of a business concern pursuant to 38 U.S.C. 8127(g) shall include the debarment of all principals in the business concern. Debarment shall be for a period of not less than five years.

(3) "Willful and intentional" misrepresentations, for the purpose of debarment actions taken pursuant to 38 U.S.C 8127(g), are defined as deliberate misrepresentations concerning the status of the concern as a small business concern owned and controlled by Veterans or as a small business concern owned and controlled by service-disabled Veterans as supported by the preponderance of evidence.

Examples of a preponderance of evidence for deliberate misrepresentation of SDVOSB and/or VOSB status include but are not limited to: criminal convictions, plea agreements, deferred prosecution agreements, Board of Contract Appeals decisions, and admissions of guilt.

809.406-3 Procedures.

(a) Any individual may submit a referral to debar an individual or contractor to the SDO or to the S&D Committee. The referral for debarment shall be supported with evidence of a cause for debarment listed in FAR 9.406-2, or 809.406-2. The SDO shall forward referrals for debarment to the S&D Committee. If the referring individual is a VA employee and the referral for debarment is based on possible criminal or fraudulent activities, the VA employee shall also refer the matter to the VA Office of Inspector General.

(b) When the S&D Committee finds preponderance of the evidence for a cause for debarment, as listed in FAR 9.406-2 or 809.406-2, it shall prepare a recommendation and draft notice of proposed debarment for the SDO's consideration.

(c) VA shall send the notice of proposed debarment to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery. In the case of a contractor, VA may send the notice of proposed debarment to any partner, principal, officer, director, owner or co-owner, or joint venture. The S&D Committee concurrently shall list the appropriate parties as excluded in the SAM in accordance with FAR 9.404.

(d) If VA does not receive a reply from the contractor within 30 days after sending the notice of proposed debarment, the S&D Committee shall prepare a recommendation and refer the case to the SDO for a decision on whether or not to debar based on the information available.

(e) If VA receives a reply from the contractor within 30 days after sending the notice of proposed debarment, the S&D Committee shall consider the information in the reply before the S&D Committee makes its recommendation to the SDO.

(f) The S&D Committee, upon the request of the contractor proposed for debarment, shall, as soon as practicable, allow the contractor an opportunity to appear before the S&D Committee to present information or argument personally or through a representative. The contractor may supplement the oral presentation with written information and argument. VA shall conduct the proceeding in an informal manner and without requirement for a transcript.

(g) If the S&D Committee finds the contractor's or individual's submission in opposition to the proposed debarment raises a genuine dispute over facts material to the proposed debarment and the debarment action is not based on a conviction or civil judgment, the S&D Committee shall submit to the SDO the information establishing the dispute of material facts. If the SDO agrees there is a genuine dispute of material facts, the SDO shall refer the dispute to a designee for a resolution pursuant to 809.470, Fact-finding procedures. The S&D Committee shall provide the contractor or individual the disputed material fact(s). Decisions and determinations of VA's Center for Verification and Evaluation (CVE) or Office of Small and Disadvantaged Business Utilization (OSDBU), such as status protest decisions, and size determinations of the SBA shall not be subject to dispute or fact-finding in proposed debarment actions. The S&D Committee and SDO shall accept these decisions and determinations as resolved facts.

(h) If the proposed debarment action is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to 809.470, Fact-finding procedures, the SDO shall make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written agreements presented or submitted to the S&D Committee by the contractor.

(i) In actions processed under FAR 9.406 where no suspension is in place and where fact finding is not required, the VA shall make the final decision on the proposed debarment within 30 working days after receipt of any information and argument submitted by the contractor, unless the SDO extends this period for a good cause.

(j) In actions processed under 809.406-270(b), the SDO notifies the individuals and/or contractors of the determination of willful and intentional misrepresentation in the notice of proposed debarment. VA shall issue the final decision, removing or upholding the determination, within 90 days after SDO's determination of willful and intentional misrepresentation.

809.406-4 Period of debarment.

(a) The SDO will base the period of debarment on the circumstances surrounding the cause(s) for debarment.

(b) The SDO may remove a debarment imposed under FAR 9.406, amend its scope, or reduce the period of debarment based on a S&D Committee recommendation if—

(1) VA has debarred the contractor; and

(2) The debarring official concurs with documentary evidence submitted by or on behalf of the contractor setting forth the appropriate grounds for granting relief.

Appropriate grounds include newly discovered material evidence, reversal of a conviction, bona fide change of ownership or management, elimination of the cause for which debarment was imposed, or any other appropriate grounds.

(c) The period of debarment for willful and intentional misrepresentations of SDVOSB or VOSB status pursuant to 809.406-270(b) shall not be less than 5 years.

809.407 Suspension.

809.407-1 General.

(a) As provided in FAR 9.407-1(d), authority to determine whether to continue business dealings between VA and a suspended contractor is delegated to the HCAs.

Compelling reasons include, but are not limited to, urgency of the need for new or continued work, lengthy time period to acquire the new work from other sources, and meeting estimated quantities for requirements contracts.

(b) For the purposes of FAR 9.407-1, the SDO is the suspending official under the Federal Management Regulation at 41 CFR 102-117.295.

809.407-3 Procedures.

(a) Any individual may submit a referral to suspend an individual or contractor to the SDO or to the S&D Committee. Referrals shall include supporting evidence of a cause for suspension listed in FAR 9.407-2. The SDO shall forward the referral to the S&D Committee. If the referring individual is a VA employee and the referral for suspension is based on possible criminal or fraudulent activities, the VA employee shall also refer the matter to the VA Office of Inspector General.

(b) When the S&D Committee finds adequate evidence of a cause for suspension, as listed in FAR 9.407-2, it shall prepare a recommendation and draft notice of suspension for the SDO's consideration.

(c) VA shall send the notice of suspension to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery. In the case of a contractor, VA may send the notice of suspension to any partner, principal, officer, director, owner or co-owner, or joint venture. The S&D Committee concurrently shall list the appropriate parties as excluded in SAM in accordance with FAR 9.404.

(d) If VA receives a reply from the contractor within 30 days after receipt of the notice of suspension, the S&D Committee shall consider the information in the reply before the Committee makes further recommendations to the SDO. The S&D Committee, upon the request of a suspended contractor, shall, as soon as practicable, allow the contractor an opportunity to appear before the S&D Committee to present information or argument personally or through a representative. The contractor may supplement the oral presentation with written information and argument. The proceeding will be conducted in an informal manner and without requirement for a transcript.

(e) For the purposes of FAR 9.407-3(b)(2), Decision making process, in actions not based on an indictment, if the S&D Committee finds that the contractor's submission in opposition to the suspension raises a genuine dispute over facts material to the suspension, the S&D Committee shall submit to the SDO the information establishing the dispute of material facts. However, the S&D Committee may first coordinate any further proceeding regarding the material facts in dispute with the Department of Justice or with a State prosecuting authority in a case involving a State jurisdiction. VA shall take no further action to determine disputed material facts pursuant to this section or 809.470 if the Department of Justice or a State prosecuting authority advises VA in writing that additional proceedings to make such a determination would prejudice Federal or State legal proceedings.

(f) If the SDO agrees that there is a genuine dispute of material facts, the SDO shall refer the dispute to the designee for resolution pursuant to 809.470.

809.470 Fact-finding procedures.

The provisions of this section constitute the procedures to be used to resolve genuine disputes of material fact pursuant to 809.406-3 and 809.407-3 of this subpart. The SDO shall appoint a designee to conduct the fact-finding. OGC shall represent VA at any fact-finding hearing and may present witnesses for VA and question any witnesses presented by the contractor. The proceedings before the fact-finder will be limited to a finding of the facts in dispute, as determined by the SDO. The fact-finder shall establish the date for the fact-finding hearing, normally to be held within 30 days after the S&D Committee notifies the contractor or individual that the SDO has established a genuine dispute of material fact(s) exists.

(a) The Government's representative and the contractor will have an opportunity to present evidence relevant to the material fact(s) identified by the SDO. The contractor or individual may appear in person or through a representative at the fact-finding hearing. The contractor or individual may submit documentary evidence, present witnesses, and confront any person the agency presents.

(b) Witnesses may testify in person. Witnesses will be reminded of the official nature of the proceedings and that any false testimony given is subject to criminal prosecution. Witnesses are subject to cross-examination. Hearsay evidence may be presented and will be given appropriate weight by the fact-finder.

(c) The proceedings shall be transcribed and a copy of the transcript shall be made available at cost to the contractor upon request, unless the contractor and the fact-finder, by mutual agreement, waive the requirement for a transcript.

(d) The fact-finder shall determine the disputed fact(s) by a preponderance of the evidence for proposed debarments, and by adequate evidence for suspensions.

Written findings of fact shall be prepared by the fact-finder. A copy of the findings of fact shall be provided to the SDO, the Government's representative, and the contractor or individual. The SDO will consider the written findings of fact in the decision regarding the suspension or proposed debarment.

Subpart 809.5—Organizational and Consultant Conflicts of Interest

809.503 [Removed]

7. Section 809.503 is removed.

809.504 [Removed]

8. Section 809.504 is removed.

9. Section 809.507-1 is revised to read as follows:

809.507-1 Solicitation provisions.

(a) While conflicts of interest may not presently exist, award of certain types of contracts may create potential future organizational conflicts of interest (see FAR 9.508 for examples). If a solicitation may create a potential future organizational conflict of interest, the contracting officer shall insert a provision in the solicitation imposing an appropriate restraint on the contractor's eligibility for award of contracts in the future. Under FAR 9.507-1, the restraint must be appropriate to the nature of the conflict and may exclude the contractor from award of one or more contracts in the future.

(b) The provision at 852.209-70, Organizational Conflicts of Interest, must be included in any solicitation for the services addressed in FAR 9.502.

PART 841—ACQUISITION OF UTILITY SERVICES

10. The authority citation for part 841 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 841.1—General

841.100 [Removed]

11. Section 841.100 is removed.

12. Section 841.102 is added to read as follows:

841.102 Applicability.

(a) This part applies to purchases of utility services from nonregulated and regulated utility suppliers when a delegation of authority from GSA for those services is requested and obtained.

(b)(4) The acquisition of energy, such as electricity, and natural or manufactured gas, when purchased as a commodity is considered to be acquisitions of supplies rather than utility services as described in FAR part 41.

841.103 [Removed]

13. Section 841.103 is removed.

841.2 [Removed and reserved]

14. Subpart 841.2 is removed and reserved.

15. Subpart 841.5 is added to read as follows:

Subpart 841.5—Solicitation Provision and Contract Clauses

841.501 Solicitation provision and contract clauses.

841.501-70 Disputes—Utility contracts.

The contracting officer shall insert the clause at 852.841-70, Disputes—Utility Contracts, in solicitations and contracts for utility services subject to the jurisdiction and regulation of a utility rate commission.

PART 842—CONTRACT ADMINISTRATION AND AUDIT SERVICES

16. The authority citation for part 842 continues to read as follows:

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

17. Section 842.000 is revised to read as follows:

842.000 Scope of part.

This part prescribes policies and procedures for contract administration and audit services for all Department of Veterans Affairs (VA) contracting activities.

18. Section 842.070 is revised to read as follows:

842.070 Definitions.

As used in this part—

Contract administration means Government actions taken after contract award to obtain compliance with such contract requirements as timely delivery of supplies or services, acceptance, payment, and closing of the contract. These actions include, but are not limited to, technical, financial, audit, legal, administrative, and managerial services in support of the contracting officer. It may include additional tasks requested of designated contract administration offices within VA in support of pre-award activities for solicitations issued by or awarded by other contracting activities through Interagency Acquisitions.

Administrative Contracting Officer Letter of Delegation means a delegation of functions as set forth in FAR 42.202, 42.302 and 842.271, Administrative Contracting Officer's role in contract administration and delegated functions, that is issued by a contracting officer to delegate certain contract administration or specialized support services.

842.1 [Removed and reserved]

19. Subpart 842.1 is removed and reserved.

20. Subpart 842.2 is added to read as follows:

Subpart 842.2—Contract Administration Services

842.270 Contracting Officer's Representatives' role in contract administration.

(a) A contracting officer may designate a qualified person to be the Contracting Officer's Representative (COR) for the purpose of performing certain technical functions in administering a contract.

(b) The COR acts solely as a technical representative of the contracting officer and is not authorized to perform any function that results in a change in the scope, price, terms or conditions of the contract.

(c) A COR designation must be made in writing by the contracting officer. The designation shall identify the responsibilities and limitations of the COR. A copy of the designation must be furnished to the contractor and the Administrative Contracting Officer (ACO), if separately assigned.

842.271 Administrative Contracting Officer's role in contract administration and delegated functions.

(a) Contracting officers are authorized to delegate certain contract administration

or specialized support services in accordance with FAR 42.202 and 42.302 to cognizant VA administrative contracting officers.

(b) The Administrative Contracting Officer's authority is limited to the actions detailed in the delegation.

(c) These delegations of authority shall be set forth in a written Administrative Contracting Officer (ACO) Letter of Delegation issued by the contracting officer to the accepting contract administration office and designated administrative contracting officer. The ACO Letter of Delegation shall contain the information required in FAR 42.202(a) through (c) and identify the responsibilities and limitations of the ACO. A copy of the delegation will be furnished to the contractor and the ACO.

(d) The contracting officer shall insert the clause at 852.242-71, Administrative Contracting Officer, in solicitations and contracts expected to exceed the micro-purchase threshold.

842.272 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, when contract administration is delegated.

21. Section 842.705 is revised to read as follows:

842.705 Final indirect cost rates.

Except when the quick-closeout procedures described in FAR 42.708 are used, contracting officers shall request contract audits on proposed final indirect cost rates and billing rates for use in cost reimbursement and fixed-price incentive contracts as

prescribed in FAR subpart 42.7.

842.8 [Removed and reserved]

22. Subpart 842.8 is removed and reserved.

Subpart 842.12—Novation and Change-of-Name Agreements

23. Section 842.1202 is added to read as follows:

842.1202 Responsibility for executing agreements.

To avoid duplication of effort on the part of VA contracting offices in preparing and executing agreements to recognize a change of name or successor in interest involving multiple contracts issued by VA activities, only one agreement will be prepared and executed between the Government and the parties (transferor and transferee) and will be processed as forth in FAR 42.1203. The Office of Acquisition and Logistics, Risk Management and Compliance Service will, in each case, designate a cognizant HCA responsible for assigning a contracting officer. The designated contracting officer shall be responsible for taking all necessary and appropriate actions with respect to either recognizing or not recognizing a successor in interest or recognizing a change of name agreement and processing and executing the agreements as set forth in VA procedures.

842.1203 [Removed]

24. Section 842.1203 is removed.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 852.2—Texts of Provisions and Clauses

25. Section 852.209-70 is revised to read as follows:

852.209-70 Organizational Conflicts of Interest.

As prescribed in 809.507-1(b), insert the following provision:

ORGANIZATIONAL CONFLICTS OF INTEREST (DATE)

(a) It is in the best interest of the Government to avoid situations which might create an organizational conflict of interest or where the Offeror's performance of work under the contract may provide the Contractor with an unfair competitive advantage. The term "organizational conflict of interest" means that because of other activities or relationships with other persons, a person is unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or the person has an unfair competitive advantage.

(b) The Offeror shall provide a statement with its offer which describes, in a concise manner, all relevant facts concerning any past, present, or currently planned interest (financial, contractual, organizational, or otherwise) or actual or potential organizational conflicts of interest relating to the services to be provided under this solicitation. The Offeror shall also provide statements with its offer containing the same information for any consultants and subcontractors identified in its proposal and which will provide services under the solicitation. The Offeror may also provide relevant facts that show how its organizational and/or management system or other actions would avoid or mitigate any actual or potential organizational conflicts of interest.

(c) Based on this information and any other information solicited or obtained by the Contracting Officer, the Contracting Officer may determine that an organizational conflict of interest exists which would warrant disqualifying the Contractor for award of

the contract unless the organizational conflict of interest can be mitigated to the Contracting Officer's satisfaction by negotiating terms and conditions of the contract to that effect. If the conflict of interest cannot be mitigated and if the Contracting Officer finds that it is in the best interest of the United States to award the contract, the Contracting Officer shall request a waiver in accordance with FAR 9.503.

(d) Nondisclosure or misrepresentation of actual or potential organizational conflicts of interest at the time of the offer or arising as a result of a modification to the contract, may result in the termination of the contract at no expense to the Government.

(End of provision)

26. Section 852.241-70 is added to read as follows:

852.241-70 Disputes—Utility Contracts.

As prescribed in 841.501-70, insert the following clause:

DISPUTES—UTILITY CONTRACTS (DATE)

(a) *Definition.* As used in this clause, *Independent regulatory body* means the Federal Energy Regulatory Commission, a state-wide agency, or an agency with less than state-wide jurisdiction when operating pursuant to state authority. The body has the power to fix, establish, or control the rates and services of utility suppliers.

(b) *Independent Regulatory Body determinations.* The requirements of the Disputes clause at FAR 52.233-1 are supplemented to provide that matters involving the interpretation of tariffed retail rates, tariff rate schedules, and tariffed terms provided under this contract are subject to any determinations by the independent regulatory body having jurisdiction.

(End of clause)

27. Section 852.242-70 is revised to read as follows:

852.242-70 Government Construction Contract Administration.

As prescribed in 842.272, 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]

[Note: If any of the functions set forth in FAR 42.302 are to be retained by the Contracting Officer, identify those as well with the notation: "With the exception of the following contract administration functions: _____."

Delete this notation if not required.]

(b) The following functions will be retained by the Contracting Officer or Administrative Contracting Officer (ACO) and are not redelegable to Resident Engineers:

(1) Award of contract modifications either through supplemental agreements or change orders that exceed the ACO's appointed warrant limitations.

(2) Issuance of default letters.

(3) Issuance of Cure or Show-Cause Notices.

(4) Suspension of work letters and/or modifications.

(5) Issuance of Contracting Officer final determination letters.

(6) Issuance of termination notices.

(7) Authorization of final payment.

(c) 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 who possesses limited warranted authority.

(d) 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.

(e) The Contracting Officer or an Administrative Contracting Officer identified in paragraph (a) may further delegate limited authority and specialized support services responsibilities below to the following warranted Resident Engineer personnel on site, not to exceed the dollar value and threshold of their warrant:

[Insert name and office address of Resident Engineer with limited authority]

(1) Conduct post-award orientation conferences.

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

(3) For actions not to exceed \$ *[Insert dollar amount]* negotiate and execute supplemental agreements 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)

28. Section 852.242-71 is added to read as follows:

852.242-71 Administrative Contracting Officer.

As prescribed in 842.271, insert the following clause:

ADMINISTRATIVE CONTRACTING OFFICER (DATE)

The Contracting Officer reserves the right to designate an Administrative Contracting Officer (ACO) for the purpose of performing certain tasks/duties in the administration of the contract. Such designation will be in writing through an ACO Letter of Delegation and will identify the responsibilities and limitations of the ACO. A copy of the ACO Letter of Delegation will be furnished to the Contractor.

(End of clause)

[FR Doc. 2020-07799 Filed: 4/17/2020 8:45 am; Publication Date: 4/20/2020]