

DEPARTMENT OF VETERANS AFFAIRS**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:** Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending and updating its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove procedural guidance internal to VA into the VA Acquisition Manual (VAAM), and to incorporate any new agency specific regulations or policies. These changes seek to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors. The VAAM incorporates portions of the removed VAAR as well as other internal agency acquisition policy. VA will rewrite certain parts of the VAAR and VAAM, and as VAAR parts are rewritten, VA will publish them in the **Federal Register**. In particular, this rulemaking revises VAAR concerning Contractor Qualifications, Acquisition of Utility Services, and Contract Administration and Audit Services, and affected parts Definitions of Words and Terms and Solicitation Provisions and Contract Clauses.

DATES: This rule is effective on October 26, 2020.**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**

On April 20, 2020, VA published a proposed rule in the **Federal Register** (85 FR 21811) which announced VA's intent to amend regulations for VAAR Case RIN 2900-AQ38 (Parts 809, 841 and 842). VA provided a 60-day comment period for the public to respond to the proposed rule and submit comments. The comment period for the proposed rule ended on June 19, 2020 and VA received no comments. This rule adopts as a final rule, without

changes, the proposed rule published in the **Federal Register** on April 20, 2020.

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, distributive impacts; and equity). E.O. 13563 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 Regulatory Impact Analysis (RIA) are available on VA's website at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published from FY 2004 Through Fiscal Year to Date."

This rule is not an E.O. 13771 regulatory action because this 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 final 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 final 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 final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). 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 final 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 as they 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 final rule will have no such effect on State, local, and tribal governments or on the private sector.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

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. Brooks D. Tucker, Acting Chief of Staff, Department of Veterans Affairs, approved this document on August 14, 2020, for publication.

Consuela Benjamin,

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

For the reasons set out in the preamble, VA amends 48 CFR, parts 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 Debarment 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 and reserved.

■ 6. Subpart 809.4 is revised to read as follows:

Subpart 809.4—Debarment, Suspension, and Ineligibility

Sec.

809.400 Scope of subpart.

809.402 Policy.

809.403 Definitions.

809.405 Effect of listing.

809.405–1 Continuation of current contracts.

809.405–2 Restrictions on subcontracting.

809.406 Debarment.

809.406–1 General.

809.406–2 Causes for debarment.

809.406–270 Additional causes for debarment.

809.406–3 Procedures.

809.406–4 Period of debarment.

809.407 Suspension.

809.407–1 General.

809.470 Fact-finding procedures.

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 (SDVOSB) or veteran-owned small business (VOSB).

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 Debarment 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 Debarment 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.

Subpart 841.2 [Removed and reserved]

- 14. Subpart 841.2, consisting of sections 841.100 and 841.103, 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.

Subpart 842.1 [Removed and reserved]

- 19. Subpart 842.1, consisting of sections 842.101 and 842.102, is removed and reserved.
- 20. Subpart 842.2 is added to read as follows:

Subpart 842.2—Contract Administration Services

Sec.

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

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

842.272 Contract clause for Government construction contract administration.

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.

Subpart 842.8 [Removed and reserved]

■ 22. Subpart 842.8, consisting of sections 842.801, 842.801–70, and 842.803, 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

■ 25. 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 through 1.304.

Subpart 852.2—Texts of Provisions and Clauses

■ 26. 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 (OCT 2020)

(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)

■ 27. 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 (SEP 2020)

(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)

■ 28. 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 (OCT 2020)

(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 require 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)

■ 29. 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 (OCT 2020)

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)

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Chapters II, III, and VI

[RTID 0648-XA387]

Plan for Periodic Review of Regulations

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Request for comments.

SUMMARY: NMFS announces the availability of a list of the rules it is reviewing, as required, under section 610 of the Regulatory Flexibility Act. We are required to notify the public of our review of existing regulations that we have determined had, or will have, a significant impact on a substantial number of small entities, such as small businesses, small organizations, and small governmental jurisdictions. The intended effect of this notice is to inform the public of the rules under review, to outline NMFS' review process, and to provide an opportunity to comment.

DATES: Written comments must be received by October 26, 2020.

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2020-0128, by the following method:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0128>, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

Instructions: Comments must be submitted by the above method to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Tara Scott, Industry Economist, (301) 427-8579.

SUPPLEMENTARY INFORMATION:

Background

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires that Federal agencies, including NMFS, take into account how their regulations affect "small entities," including small businesses, small Governmental jurisdictions, and small organizations. Under the RFA, we must either prepare a Regulatory Flexibility Analysis or certify that the regulation, if put in place, will not have a significant economic impact on a substantial number of small entities. This requirement has been in place for any regulation proposed after January 1, 1981. Section 602 of the RFA requires that NMFS issue an Agenda of Regulations identifying rules under development that are likely to have a significant economic impact on a substantial number of small entities.

Section 610 of the RFA requires Federal agencies to review existing regulations. It requires that NMFS publish a plan in the **Federal Register** explaining how it will review its existing regulations, which have or will have a significant economic impact on a substantial number of small entities. Regulations that became effective after January 1, 1981, must be reviewed within 10 years of the publication date of the final rule. Section 610(c) requires that we annually publish a list of final rules we will review during the succeeding 12 months in the **Federal Register**. The list must describe, explain the need for, and provide the legal basis for the rules being reviewed, as well as invite public comment on the rules contained in the list.

Criteria for Review of Existing Regulations

The purpose of the required review is to determine whether existing rules should be left unchanged, or whether they should be revised or rescinded to minimize significant economic impacts on a substantial number of small entities, consistent with the objectives of other applicable statutes. In deciding whether change is necessary, the RFA establishes five factors that NMFS must consider:

- (1) Whether the rule is still needed;
- (2) What type of complaints or comments were received concerning the rule from the public;
- (3) The complexity of the rule;
- (4) How much the rule overlaps, duplicates or conflicts with other