

**DEPARTMENT OF VETERANS AFFAIRS****48 CFR Parts 801, 823, 824, 826, 836, 843, and 852****RIN 2900-AQ24****VA Acquisition Regulation: Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace; Protection of Privacy and Freedom of Information; Other Socioeconomic Programs; and Contract Modifications****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(VA) is amending and updating its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove procedural guidance internal to VA into the VA Acquisition Manual (VAAM), and to incorporate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 These changes seek to align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors.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 adds or revises VAAR coverage concerning Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace; Protection of Privacy and Freedom of Information; Other Socioeconomic Programs; and Contract Modifications, as well as affected parts covering Department of Veterans Affairs Acquisition Regulation System, Construction and Architect-Engine Contracts and Solicitation Provisions and Contract Clauses.

**DATES:** This rule is effective on September 30, 2019.**FOR FURTHER INFORMATION CONTACT:** Mr. Rafael N. Taylor, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 425 I Street NW, Washington, DC 20001, (202) 382-2787. (This is not a toll-free number.)**SUPPLEMENTARY INFORMATION:** On November 29, 2018, VA published a proposed rule in the **Federal Register** (83 FR 61365) which announced VA's intent to amend regulations for VAAR

Case RIN 2900-AQ24—Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace; Protection of Privacy and Freedom of Information; Other Socioeconomic Programs; and Contract Modifications. 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 January 28, 2019 and VA received 3 comments from two commenters. This rule adopts as a final rule, with changes, the proposed rule published in the **Federal Register** on November 29, 2018, with minor formatting and/or grammatical edits, as well as the non-substantive changes described below.

In particular, this final rule adds part 823, Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace. This final rule adds 823.103-70, Policy, to give contracting officers the option to include an evaluation factor for an offeror's Sustainable Action Plan when acquiring products and services.

This rule adds 823.103-71, Solicitation provision, which prescribes use of a new provision at 852.223-70, Instruction to Offerors—Sustainable Acquisition Plan, when the contracting officer requires an offeror to submit a Sustainable Action Plan with its proposal.

In subpart 823.3, Hazardous Material Identification and Material Safety Data, this regulatory action adds 823.300, Scope of subpart, and 823.303-70, Contract clause, to prescribe the use of clause 852.223-71, Safety and Health, for use in administering safety and health requirements in solicitations and contracts for research, development, or test projects; transportation of hazardous materials; and construction.

This rule, under VAAR part 824, Protection of Privacy and Freedom of Information, adds 824.103, Procedures, to implement the procedures in FAR 24.103, by citing specific VA Handbooks in solicitations and contracts that require the design, development, or operation of a system of records; and by requiring the contracting officer to include in Statements of Work and Performance Work Statements procedures to follow in the event of a Personally Identifiable Information (PII) breach.

This final rule revises 824.203, Policy, to add coverage advising the public that the VA FOIA Service Office handles all Freedom of Information Act (FOIA) requests, and to provide the centralized website and a link to the list of FOIA

contacts where FOIA requests can be submitted electronically.

This rule adds part 826—Other Socioeconomic Programs, with a single subpart 826.2, Disaster or Emergency Assistance Activities. This part includes 826.202-1, Local area set-aside, to require the contracting officer to determine whether a local area set-aside should be further restricted to verified Service-Disabled Veteran-Owned Small Businesses (SDVOSB) or Veteran-Owned Small Businesses (VOSB), because, while the FAR allows further restriction to socioeconomic programs in FAR part 19, it does not mention the VA specific requirements under 38 U.S.C. 8127 and 8128. This regulatory action also adds 826.202-2, Evaluation preference, which has been revised on the basis of a public comment as described below.

This rule adds part 843, Contract Modifications, with a single subpart 843.2, Change Orders. This final rule adds 843.205, Contract clauses, which provides contracting officers with guidance for establishing the number of days (up to 60 days), the contractor may be granted to assert its right to an equitable adjustment within the Changes clause. This rule also adds 843.205-70, Contract changes—supplement, which prescribes the use of the clause 852.243-70, Construction Contract Changes—Supplement, (formerly numbered 852.236-88), which has been revised and moved to this part from VAAR 836.578.

**Technical Non-Substantive Change to the Proposed Rule**

This final rule makes three technical non-substantive changes:

At section 823.103-70, Policy, VA has removed specific examples of the types of products or services which might be classified “sustainable” products and services as it is unnecessary to list out all the possible types of products or services and FAR subpart 23.1 provides sufficient guidance.

Under sections 823.303-70, Contract clause, and 852.223-71, Safety and Health, VA has removed the term “hazardous operations” because the term is unnecessary.

VA is no longer proposing to add section 823.103-72, Contract file, which would have required the contracting officer to place the contractor's final Sustainable Acquisition Plan, if one is required, into the official contract file. This information is procedural in nature and has been moved to the VAAM.

VA provided a 60-day comment period for the public to respond to the proposed rule. As stated previously, VA received 3 comments from two

commenters. The issues raised in the comments as well as the changes made to the proposed rule based on those comments are provided as follows:

The commenter believes the proposed language in VAAR 826.202–2 creates confusion regarding the contracting officer's obligations to evaluate and give preference to SDVOSBs and VOSBs in procurements not set aside for SDVOSBs or VOSBs. The commenter states that “VA should not use the phrase “shall consider” because this suggests that VA contracting officers have discretion in whether to provide evaluation preferences for SDVOSBs and VOSBs, which they do not.” The commenter recommends that the VA change the language at 826.202–2 to alleviate any confusion it may cause.

VA concurs with the recommendation and has revised 826.202–2, Evaluation preference, to reflect that contracting officers shall include evaluation factors in accordance with VAAR 815.304 and the evaluation criteria clause prescribed at 815.304–71(a): 852.215–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

The commenter also recommends that VA should revise the proposed VAAR 815.304–71(a), which currently states that contracting officers shall insert VAAR 852.215–70, SDVOSB and VOSB Evaluation Factors, in competitively negotiated solicitations that are not set aside for SDVOSBs or VOSBs.

VA appreciates the comment and it is VA policy that SDVOSBs have priority over VOSBs when contracting under the authority of 38 U.S.C. 8127(i). However, the intent of the evaluation preference is to provide additional preference to veteran-owned small businesses when a procurement is performed outside of the authority under 38 U.S.C. 8127. This is in recognition of the requirement in 38 U.S.C. 8128(a) that small business concerns “owned and controlled by veterans” have a priority over other small businesses. 38 U.S.C. 8128(a) does not make a distinction between SDVOSB or VOSB. Therefore, the proposed language will remain unchanged.

Another commenter takes exception to the coverage at 843 pertaining to undefinitized change orders. The commenter expressed concern that the proposed coverage would have allowed contracting officers to obligate funds in an amount less than the legal obligation created when a contract modification is issued and requested that VA provide clarification on this matter.

VA appreciates the comment and after careful consideration, VA has removed 843.204–70, Definitization of unpriced

change orders, on the basis that the FAR has sufficient coverage in this area and to alleviate any confusion.

#### **Unfunded Mandates**

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

#### **Paperwork Reduction Act**

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 Office of Management and Budget (OMB) control number. See also 5 CFR 1320.8(b)(3)(vi).

The information collection requirements for 852.236–88, which is currently prescribed by 836.578, is currently approved by OMB and has been assigned OMB control number 2900–0422. As a part of this final rule, this information collection has been submitted to OMB to revise the title, redesignate the collection and renumber the clause currently numbered as section 852.236–88, Contract Changes—Supplement. Accordingly, if approved, the clause would reflect the new designation and revised title as set forth in the preamble and the amendatory language of this final rule to read: 852.243–70, Construction Contract Changes—Supplement, as prescribed by 843.205–70, Contract changes—supplement, under the associated OMB control number 2900–0422. The reference to the old number—852.236–88, would accordingly be removed. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA has submitted these information collection amendments to OMB for its review and approval.

#### **Regulatory Flexibility Act**

This final rule does not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The overall impact of the rule is of benefit to small businesses owned by Veterans or service-disabled Veterans as the

VAAR is being updated to remove extraneous procedural information that applies only to VA's internal operating processes or procedures. VA estimates no cost impact to individual businesses will result from these rule updates. On this basis, the final rule does not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, under 5 U.S.C. 605(b), this regulatory action is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### **Executive Orders 12866, 13563 and 13771**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, of harmonizing rules, and of promoting flexibility. 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 website at <http://www.va.gov/orpm> by following the link for VA Regulations Published from FY 2004 Through Fiscal Year to Date. This final rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

#### **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 801*

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

##### *48 CFR Part 823*

Air pollution control, Drug abuse, Energy conservation, Government

procurement, Hazardous substances, Recycling, Water pollution control.

*48 CFR Part 824*

Freedom of information, Government procurement, Privacy.

*48 CFR Part 826*

Disaster assistance, Government procurement, Indians.

*48 CFR Part 836*

Government procurement, Reporting and recordkeeping requirements.

*48 CFR Part 843*

Government procurement.

*48 CFR Part 852*

Government procurement, Reporting and recordkeeping requirements.

**Signing Authority**

The Secretary of Veterans Affairs approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on August 23, 2019, for publication.

Dated: August 23, 2019.

**Michael P. Shores,**

*Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.*

For the reasons set out in the preamble, VA amends 48 CFR parts 801, 824, 836 and 852 and adds parts 823, 826, and 843 as follows:

**PART 801—DEPARTMENT OF VETERANS AFFAIRS ACQUISITION REGULATION SYSTEM**

- 1. The authority citation for part 801 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 41 U.S.C. 1121; 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

**Subpart 801.1—Purpose, Authority, Issuance**

**801.106 [Amended]**

- 2. In 801.106, in the table, under the columns titled “48 CFR part or section where identified and described” and “Current OMB Control Number”:

Revise the reference to “852.236–88” to read “852.243–70”. The corresponding OMB Control Number 2900–0422 remains unchanged.

- 3. Part 823 is added to read as follows:

**PART 823—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE**

Sec.

**Subpart 823.1—Sustainable Acquisition Policy**

823.103–70 Policy.  
823.103–71 Solicitation provision.

**Subpart 823.3—Hazardous Material Identification and Material Safety Data**

823.300 Scope of subpart.  
823.303–70 Contract clause.

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

**Subpart 823.1—Sustainable Acquisition Policy**

**823.103–70 Policy.**

(a) For new contracts and orders above the micro-purchase threshold, contracting officers may insert a solicitation provision to include an evaluation factor for an offeror’s Sustainable Acquisition Plan.

(b) When a solicitation includes the provision at 852.223–70, Instruction to Offerors—Sustainable Acquisition Plan, offerors shall include a Sustainable Acquisition Plan in their technical proposal addressing the sustainable products and services for delivery under any resulting contract.

**823.103–71 Solicitation provision.**

The contracting officer shall insert the provision at 852.223–70, Instruction to Offerors—Sustainable Acquisition Plan, in solicitations above the micro-purchase threshold.

**Subpart 823.3—Hazardous Material Identification and Material Safety Data**

**823.300 Scope of subpart.**

This subpart provides a contract clause for use in administering safety and health requirements.

**823.303–70 Contract clause.**

Contracting officers shall insert clause 852.223–71, Safety and Health, in solicitations and contracts that involve hazardous materials for the following types of requirements:

- (a) Research, development, or test projects.  
(b) Transportation of hazardous materials.  
(c) Construction.

**PART 824—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION**

- 4. The authority citation for part 824 is revised to read as follows:

**Authority:** 5 U.S.C. 552a; 40 U.S.C. 121(c); 41 U.S.C. 1121(c); 41 U.S.C. 1702; 38 CFR 1.550–1.562 and 1.575–1.584; and 48 CFR 1.301–1.304.

- 5. Section 824.102 is revised to read as follows:

**824.102 General.**

VA rules implementing the Privacy Act of 1974 are in 38 CFR 1.575 through 1.584, Safeguarding Personal Information in Department of Veterans Affairs Records.

- 6. Section 824.103 is added to subpart 824.1 to read as follows:

**824.103 Procedures.**

(c) The contracting officer shall reference the following documents in solicitations and contracts that require the design, development, or operation of a system of records—

(1) VA Handbook 6500.6, Contract Security;

(2) VA Handbook 6508.1, Procedures for Privacy Threshold Analysis and Privacy Impact Assessment;

(3) VA Handbook 6510, VA Identity and Access Management—

(i) The contracting officer will ensure that statements of work or performance work statements that require the design, development, or operation of a system of records include procedures to follow in the event of a Personally Identifiable Information (PII) breach; and

(ii) The contracting officer shall ensure that Government surveillance plans for contracts that require the design, development, or operation of a system of records include monitoring of the contractor’s adherence to Privacy Act/PII regulations. The assessing official should document contractor-caused breaches or other incidents related to PII in past performance reports. Such incidents include instances in which the contractor did not adhere to Privacy Act/PII contractual requirements.

**Subpart 824.2—Freedom of Information Act**

- 7. Section 824.203 is revised to read as follows:

**824.203 Policy.**

(a) VA rules implementing the Freedom of Information Act (FOIA) are in 38 CFR 1.550 through 1.562.

(b) Upon receipt of a request, the contracting officer shall provide the requester with the name of the cognizant VA FOIA Service Office. The VA FOIA Service Office (see <http://www.oprm.va.gov/foia/>) is the focal point for all FOIA requests and official information may only be released

through the cognizant FOIA Service or their authorized designee.

■ 8. Part 826 is added to read as follows:

### **PART 826—OTHER SOCIOECONOMIC PROGRAMS**

Sec.

#### **Subpart 826.2—Disaster or Emergency Assistance Activities**

826.202–1 Local area set-aside.  
826.202–2 Evaluation preference.

**Authority:** 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1702; 38 CFR 1.550–1.562 and 1.575–1.584; and 48 CFR 1.301–1.304.

#### **Subpart 826.2—Disaster or Emergency Assistance Activities**

##### **826.202–1 Local area set-aside.**

(c) The contracting officer shall determine whether a local area set-aside should be further restricted to verified Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) or Veteran-Owned Small Businesses (VOSBs) pursuant to subpart 819.70.

##### **826.202–2 Evaluation preference.**

Pursuant to 38 U.S.C. 8128, the contracting officer shall include evaluation factors in accordance with 815.304 and the evaluation criteria clause prescribed at 815.304–71(a), 852.215–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

### **PART 836—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

■ 9. The authority citation for part 836 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3), 1303(a)(2) and 1702; and 48 CFR 1.301–1.304.

#### **836.578 [Removed]**

■ 10. Section 836.578 is removed.

■ 11. Part 843 is added to read as follows:

### **PART 843—CONTRACT MODIFICATIONS**

Sec.

#### **Subpart 843.2—Change Orders**

843.205 Contract clauses.  
843.205–70 Contract changes—supplement.

**Authority:** 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

#### **Subpart 843.2—Change Orders**

##### **843.205 Contract clauses.**

As authorized in the introductory text of clauses FAR 52.243–1, Changes—Fixed-Price; FAR 52.243–2, Changes—Cost-Reimbursement; and FAR 52.243–

4, Changes, and in the prescription at FAR 43.205(c) for FAR 52.243–3, Changes—Time-and-Materials or Labor-Hours, the contracting officer may vary the period within which a contractor must assert its right to an equitable adjustment but the extended period shall not exceed 60 calendar days.

##### **843.205–70 Contract changes—supplement.**

The contracting officer shall insert the clause at 852.243–70, Construction Contract Changes—Supplement, in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction.

### **PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 12. The authority citation for part 852 is revised to read as follows:

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

■ 13. Section 852.223–70 is added to read as follows:

##### **852.223–70 Instructions to offerors—Sustainable Acquisition Plan.**

As prescribed in 823.103–71, when the Contracting Officer deems a Sustainable Acquisition Plan necessary, the Contracting Officer shall insert the following provision:

##### **Instructions to Offerors—Sustainable Acquisition Plan (SEP 2019)**

Offerors shall include a Sustainable Acquisition Plan in their technical proposals. The plan must describe the approach and quality assurance mechanisms for applying FAR subpart 23.1, Sustainable Acquisition Policy and other Federal laws, regulations and Executive Orders governing sustainable acquisition. The plan shall clearly identify those products and services included in the proposal.

(End of provision)

■ 14. Section 852.223–71 is added to read as follows:

##### **852.223–71 Safety and Health.**

As prescribed by 823.303–70, the Contracting Officer shall insert the following clause:

##### **Safety and Health (SEP 2019)**

(a) To help ensure the protection of the life and health of all persons, and to help prevent damage to property, the Contractor shall comply with all Federal, State, and local laws and regulations applicable to the work being performed under this contract. These laws are implemented or enforced by the Environmental Protection Agency (EPA), Occupational Safety and Health

Administration (OSHA) and other regulatory/enforcement agencies at the Federal, State, and local levels.

(1) Additionally, the Contractor shall comply with the following regulations when developing and implementing health and safety operating procedures and practices for both personnel and facilities involving the use or handling of hazardous materials and the conduct of research, development, or test projects:

(i) 29 CFR 1910.1030, Bloodborne pathogens; 29 CFR 1910.1450, Occupational exposure to hazardous chemicals in laboratories. These regulations are available at <https://www.osha.gov/>.

(ii) Nuclear Regulatory Commission Standards and Regulations, pursuant to the Energy Reorganization Act of 1974 (42 U.S.C. 5801 *et seq.*) Copies are available from the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

(2) The following Government guidelines are recommended for developing and implementing health and safety operating procedures and practices for both personnel and facilities:

(i) Biosafety in Microbiological and Biomedical Laboratories, Centers for Disease Control and Prevention (CDC), available at <http://www.cdc.gov/biosafety/publications/index.htm>.

(ii) Prudent Practices in the Laboratory, National Research Council, National Academy Press, Washington, DC 20001, available at <http://www.nap.edu>.

(b)(1) The Contractor shall maintain an accurate record of, and promptly report to the Contracting Officer, all accidents or incidents resulting in the exposure of persons to toxic substances, hazardous materials; the injury or death of any person; or damage to property incidental to work performed under the contract resulting from toxic or hazardous materials and resulting in any or all violations for which the Contractor has been cited by any Federal, State or local regulatory/enforcement agency.

(2) The report shall include a copy of the notice of violation and the findings of any inquiry or inspection, and an analysis addressing the impact these violations may have on the work remaining to be performed. The report shall also state the required action(s), if any, to be taken to correct any violation(s) noted by the Federal, State, or local regulatory/enforcement agency and the time frame allowed by the agency to accomplish the necessary corrective action.

(c) If the Contractor fails or refuses to comply with the Federal, State or local regulatory/enforcement agency's directive(s) regarding any violation(s) and prescribed corrective action(s), the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action (as approved by the Federal, State, or local regulatory/enforcement agencies) has been taken and documented to the Contracting Officer. No part of the time lost due to any such stop work order shall form the basis for a request for extension or costs or damages by the Contractor.

(d) The Contractor shall insert this clause in each subcontract involving toxic substances or hazardous materials. The

Contractor is responsible for the compliance of its subcontractors with the provisions of this clause.

(End of clause)

#### 852.236–88 [Removed and Reserved]

■ 15. Section 852.236–88 is removed and reserved.

■ 16. Section 852.243–70 is added to read as follows:

#### 852.243–70 Construction Contract Changes—Supplement.

As prescribed in 843.205–70, the Contracting Officer shall insert this clause in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold. The Contracting Officer shall fill in the number of days in which a Contractor must assert its right to an equitable adjustment; however, such amount shall not exceed 60 calendar days.

#### Construction Contract Changes—Supplement (SEP 2019)

The FAR clauses 52.236–2, Differing Site Conditions; 52.243–4, Changes; and 52.243–5, Changes and Changed Conditions, are supplemented as follows:

(a) Submission of request for equitable adjustment proposals. When directed by the Contracting Officer or requested by the Contractor, the Contractor shall, in accordance with FAR 15.403–5, submit proposals for changes in the work exceeding \$500,000 in writing to the Contracting Officer or Administrative Contracting Officer (ACO), and to the resident engineer.

(1) The Contractor must provide an itemized breakdown for changes exceeding the micro-purchase threshold (see FAR 2.101).

(2) The itemized breakdown shall include materials, quantities, unit prices, labor costs (separated into trades), construction equipment, etc. Labor costs shall be identified with specific material placed or operation performed.

(3) Proposals shall be submitted to the Contracting Officer or ACO and the resident engineer as expeditiously as possible, but not later than [fill-in] calendar days, after receipt of a written change order by the Contracting Officer.

(4) Proposals shall be signed by each subcontractor participating in the change.

(5) The Contracting Officer will consider issuing a settlement by determination to the contract if the Contractor's proposal required by paragraph (a)(3) of this clause is not received within the time period specified in paragraph (a)(3), or if agreement has not been reached.

(b) Paragraphs (a)(1) through (5) of this clause and the following paragraphs (b)(1) and (2) apply to proposals for changes in the work \$500,000 or less:

(1) As a basis for negotiation, allowances not to exceed 10 percent each for overhead and profit for the party performing the work will be based on the value of labor, material, and equipment required to accomplish the change. As the value of the change increases,

a declining scale will be used in negotiating the percentage of overhead and profit. This declining scale will also be used to negotiate the prime Contractor's or upper-tier subcontractor's fee when work is performed by lower-tier subcontractors (to a maximum of three tiers) and will be based on the net increased cost to the prime or upper-tier subcontractor, as applicable. Profit (fee) shall be computed by multiplying the profit percentage by the sum of the direct costs and computed overhead costs. Allowable percentages on changes will not exceed the following:

(i) 10 percent overhead and/or 10 percent profit (fee) on the first \$20,000.

(ii) 7.5 percent overhead and/or 7.5 percent profit (fee) on the next \$30,000.

(iii) 5 percent overhead and/or 5 percent profit (fee) on a balance over \$50,000.

(2) The Contracting Officer will consider issuing a settlement by determination to the contract if the Contractor's proposal required by paragraph (3) is not received within 30 calendar days, or if agreement has not been reached.

(c)(1) Overhead and Contractor's fee percentages shall be considered to include insurance other than mentioned herein, field and office supervisors and assistants, security police, use of small tools, incidental job burdens, and general home office expenses and no separate allowance will be made. Assistants to office supervisors include all clerical, stenographic and general office help. Incidental job burdens include, but are not necessarily limited to, office equipment and supplies, temporary toilets, telephone and conformance to OSHA requirements. Items such as, but not necessarily limited to, review and coordination, estimating and expediting relative to contract changes are associated with field and office supervision and are considered to be included in the Contractor's overhead and/or fee percentage.

(2) Where the Contractor's or subcontractor's portion of a change involves credit items, such items must be deducted prior to adding overhead and profit for the party performing the work. The Contractor's fee is limited to the net increase to Contractor or subcontractors' portions of cost computed in accordance with this clause.

(3) Where a change involves credit items only, a proper measure of the amount of downward adjustment in the contract price is the reasonable cost to the Contractor if it had performed the deleted work. A reasonable allowance for overhead and profit are properly includable as part of the downward adjustment for a deductive change. The amount of such allowance is subject to negotiation.

(End of clause)

[FR Doc. 2019–18524 Filed 8–29–19; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 270

[Docket No. FRA–2011–0060, Notice No. 11]

RIN 2130–AC81

#### System Safety Program

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule; stay of regulations.

**SUMMARY:** On August 12, 2016, FRA published a final rule requiring commuter and intercity passenger railroads to develop and implement a system safety program (SSP) to improve the safety of their operations. FRA has stayed the SSP final rule's requirements until September 4, 2019. FRA is issuing this final rule to extend that stay until March 4, 2020.

**DATES:** Effective August 29, 2019, 49 CFR part 270, stayed February 13, 2017, at 82 FR 10443, and further stayed March 21, 2017, at 82 FR 14476, May 22, 2017, at 82 FR 23150, June 7, 2017, at 82 FR 26359, November 30, 2017, at 82 FR 56744, and December 7, 2018, at 83 FR 63106, is further stayed until March 4, 2020.

**ADDRESSES:** *Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and follow the online instructions for accessing the docket.

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**SUPPLEMENTARY INFORMATION:** On August 12, 2016, FRA published a final rule requiring commuter and intercity passenger railroads to develop and implement an SSP to improve the safety of their operations. See 81 FR 53850. On February 10, 2017, FRA stayed the SSP final rule's requirements until March 21, 2017, consistent with the new Administration's guidance issued January 20, 2017, intended to provide the Administration an adequate opportunity to review new and pending regulations. See 82 FR 10443 (Feb. 13, 2017). To provide additional time for that review, FRA extended the stay until May 22, 2017, June 5, 2017, December 4, 2017, December 4, 2018, and then September 4, 2019. See 82 FR 14476 (Mar. 21, 2017); 82 FR 23150 (May 22, 2017); 82 FR 26359 (June 7, 2017); 82 FR