

direct final rules section of this issue of the **Federal Register**.

### Electronic Submittal of Comments

Comments and data may be submitted in hard copy or electronically. Electronic submittals should be sent to A-and-R-Docket@epamail.epa.gov. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Electronic comments on this proposed rule may be filed online at many Federal Depository Libraries.

Comments and data will also be accepted on disks in WordPerfect 5.1 or 6.1 file format or ASCII file format. All comments and data for this proposal, whether in paper form or in electronic forms such as through e-mail or on disk, must be identified by the docket number A-90-45/Section VIII-D.

### Executive Order 12866 Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is "significant" and, therefore, subject to OMB review and the requirements of the Executive Order. The EPA considered the 1995 guidelines and standards to be significant and the rules were reviewed by OMB in 1995 (see 60 FR 65405). The amendments proposed today would not result in any additional control requirements and this regulatory action is considered "not significant" under Executive Order 12866.

### Unfunded Mandates Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a statement to accompany any rule where the estimated costs to State, local, or tribal governments, or to the private sector will be \$100 million or more in any 1 year. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly impacted by the rule. An unfunded mandates statement was prepared and published in the 1995 promulgation notice (see 60 FR 65405 to 65412).

The EPA has determined that the proposed amendments do not include any new Federal mandates. Therefore, the requirements of the Unfunded Mandates Act do not apply to this proposed rule.

### Regulatory Flexibility Act (RFA)

Section 605 of the RFA requires Federal agencies to give special consideration to the impacts of

regulations on small entities, which are small businesses, small organizations, and small governments. During the 1995 rulemaking, EPA estimated that few, if any, small entities would be affected by the promulgated guidelines and standards and, therefore, a regulatory flexibility analysis was not required (see 60 FR 65413). The rules as amended today would not establish any new requirements; therefore, pursuant to the provisions of 5 U.S.C. 605(b), EPA certifies that the amendments to the guidelines and standards will not have a significant impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

### List of Subjects in 40 CFR Part 60

Environmental protection, Air pollution control, Reporting and recordkeeping requirements.

Dated: August 15, 1997.

**Carol M. Browner,**

*Administrator.*

[FR Doc. 97-22371 Filed 8-22-97; 8:45 am]

BILLING CODE 6560-50-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[MM Docket No. 97-175; RM-9138]

### Radio Broadcasting Services; Presho, SD

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a petition filed by West Wind Broadcasting proposing the allotment of Channel 262A at Presho, South Dakota, as the community's first local aural transmission service. Channel 262A can be allotted to Presho in compliance with the Commission's minimum distance separation requirements at city reference coordinates. The coordinates for Channel 262A at Presho are North Latitude 43-54-24 and West Longitude 100-03-36.

**DATES:** Comments must be filed on or before October 6, 1997, and reply comments on or before October 21, 1997.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, his counsel, or consultant, as follows: Victor A. Michael, Jr., President, West Wind Broadcasting, c/o

Magic City Media, 1912 Capitol Avenue, Suite 300, Cheyenne, Wyoming 82001(Petitioner).

**FOR FURTHER INFORMATION CONTACT:** Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 97-175, adopted August 6, 1997, and released August 15, 1997. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857-3800, 1231 20th Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

**John A. Karousos,**

*Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.*

[FR Doc. 97-22406 Filed 8-22-97; 8:45 am]

BILLING CODE 6712-01-P

## DEPARTMENT OF VETERANS AFFAIRS

### 48 CFR Parts 810, 811, 812, 836, 852 and 870

RIN 2900-AI05

### VA Acquisition Regulations: Commercial Items

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** This document proposes to amend the Department of Veterans Affairs Acquisition Regulations (VAAR) concerning the acquisition of commercial items. It is proposed to amend VAAR provisions to conform to

the Federal Acquisition Regulation (FAR), to delete obsolete references and titles, to update references and titles, to reorganize material and to remove obsolete material. This document also proposes to set forth VAAR provisions and clauses for use by contracting officers for commercial item solicitations and contracts. These provisions and clauses appear to be warranted for use in commercial item solicitations and contracts. This document also requests Paperwork Reduction Act comments concerning collection of information regarding clauses and provisions for use in both commercial and non-commercial item, service, and construction solicitations and contracts.

**DATES:** Comments must be received on or before October 24, 1997.

**ADDRESSES:** Mail or hand deliver written comments to: Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1154, Washington, DC 20420. Comments should indicate that they are submitted in response to "RIN 2900-AI05." All written comments will be available for public inspection in the Office of Regulations Management, Room 1158, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays).

**FOR FURTHER INFORMATION CONTACT:** Don Kaliher, Acquisition Policy Team (95A), Office of Acquisition and Materiel Management, Department of Veterans Affairs, 810 Vermont Ave., NW, Washington DC 20420, (202) 273-8819.

**SUPPLEMENTARY INFORMATION:**

**Background**

This document proposes to transfer to Part 811 the material currently contained in Parts 810 and 812 to conform to the corresponding numbering of the FAR, to renumber and rename other provisions to conform to the FAR, to delete obsolete references and titles, and to update references and titles.

Regulations in the FAR that required the use of Federal specifications have been removed. Accordingly, implementing and supplementing regulations contained in VAAR Part 810 regarding mandatory use of Federal specifications are proposed to be removed to correspond with the FAR.

The VAAR contains a number of provisions and clauses set forth in Part 852. This document proposes to amend VAAR Part 812.301 to incorporate certain of those provisions and clauses specifically for use in VA commercial item solicitations and contracts.

Contracting officers would use these provisions and clauses where appropriate for commercial item solicitations and contracts that exceed the micro-purchase threshold. The provisions and clauses could be used by contracting officers for commercial item procurements below the micro-purchase threshold when determined by the contracting officer to be in the Government's best interest. The FAR, at 48 CFR 12.301(f), states that agencies may supplement the provisions and clauses prescribed in Part 12 of the FAR as necessary to reflect agency unique statutes applicable to the acquisition of commercial items or as may be approved by the agency senior procurement executive. These provisions and clauses have been approved by the VA Senior Procurement Executive specifically for use in commercial item solicitations and contracts. Accordingly, it is proposed that the following VAAR provisions and clauses, which are set forth at 48 CFR Chapter 8, Part 852, would apply to commercial item solicitations and contracts for the reasons stated.

*Veteran-Owned Small Business*

1. 852.219-70, Veteran-Owned Small Business (DEC 1990). The offeror represents that the firm submitting this offer (—) is (—) is not, a veteran-owned small business, (—) is (—) is not, a Vietnam era veteran-owned small business, and (—) is (—) is not, a disabled veteran-owned small business. A veteran-owned small business is defined as a small business, at least 51 percent of which is owned by a veteran who also controls and operates the business. Control in this context means exercising the power to make policy decisions. Operate in this context means actively involved in the day-to-day management. For the purpose of this definition, eligible veterans include:

(a) A person who served in the U.S. Armed Forces and who was discharged or released under conditions other than dishonorable.

(b) Vietnam era veterans who served for a period of more than 180 days, any part of which was between August 5, 1964, and May 7, 1975, and were discharged under conditions other than dishonorable.

(c) Disabled veterans with a minimum compensable disability of 30 percent, or a veteran who was discharged for disability. Failure to execute this representation will be deemed a minor informality and the bidder or offeror shall be permitted to satisfy the requirement prior to award (see FAR 14.405).

(End of Provision)

The above Veteran-Owned Small Business provision would help support VA's policy to assist small businesses owned by veterans or by disabled veterans. The information gathered would allow VA to ensure that such firms are given an opportunity to participate in VA acquisitions. Without such information, VA's outreach efforts would be hindered.

*Commercial Advertising*

2. 852.270-4, Commercial Advertising (NOV 1984).

The bidder or offeror agrees that if a contract is awarded to him/her, as a result of this solicitation, he/she will not advertise the award of the contract in his/her commercial advertising in such a manner as to state or imply that the Department of Veterans Affairs endorses a product, project or commercial line of endeavor.

(End of clause)

The above Commercial Advertising clause is required to ensure that firms do not imply or claim in their advertising that VA endorses the firms' products or services.

*Guarantee*

3. 852.210-71, Guarantee (NOV 1984).

The contractor guarantees the equipment against defective material, workmanship and performance for a period of [ ],\* said guarantee to run from date of acceptance of the equipment by the Government. The contractor agrees to furnish, without cost to the Government, replacement of all parts and material which are found to be defective during the guarantee period. Replacement of material and parts will be furnished to the Government at the point of installation, if installation is within the continental United States, or f.o.b. the continental U.S. port to be designated by the contracting officer if installation is outside of the continental United States. Cost of installation of replacement material and parts shall be borne by the contractor.\*\*

(End of clause)

\*Normally, insert one year. If industry policy covers a shorter or longer period, i.e., 90 days or for the life of the equipment, insert such period.

\*\*The above clause will be modified to conform to standards of the industry involved.

Regarding the above Guarantee clause, the FAR does not have a guarantee clause. Rather, contracting officers are expected to draft individual clauses for each acquisition. This clause is drafted to conform to commercial practices,

would reduce VA administrative costs when drafting solicitations, and would assist VA contracting officers by having a uniform guarantee clause for use in all acquisitions.

#### *Rejected Goods*

Contracting officers may include the following clause in contracts for property, except for contracts for packing house and dairy products, bread and bakery products, and for fresh and frozen fruits and vegetables.

4. 852.210-72, Rejected Goods (NOV 1984).

Rejected goods will be held subject to contractor's order for not more than 15 days, after which the rejected merchandise will be returned to the contractor's address at his/her risk and expense. Expenses incident to the examination and testing of materials or supplies which have been rejected will be charged to the contractor's account. (End of clause)

Contracts for packing house and dairy products, bread and bakery products, and for fresh and frozen fruits and vegetables would contain the following clause:

5. 852.210-72, Rejected Goods (NOV 1984).

The contractor shall remove rejected supplies within 48 hours after notice of rejection. Supplies determined to be unfit for human consumption will not be removed without permission of the local health authorities. Supplies not removed within the allowed time may be destroyed. The Department of Veterans Affairs will not be responsible for nor pay for products rejected. The contractor will be liable for costs incident to examination of rejected products. (End of clause)

Regarding the two above Rejected Goods clauses, the FAR does not include a clause on how to handle rejected goods. The Uniform Commercial Code (UCC) provides that a buyer (VA) is under a duty to hold rejected goods for a time sufficient to permit the seller to remove them. The clause numbered as "4" sets forth a 15-day limit on holding nonperishable goods and the clause numbered as "5" sets forth a 48-hour limit on holding perishable goods. We believe that these clauses do not conflict with commercial practices and that they set forth reasonable time limits for holding rejected goods.

#### *Frozen Processed Foods*

6. 852.210-73, Frozen Processed Foods (NOV 1984).

The products delivered under this contract shall be in excellent condition; shall not show evidence of defrosting, refreezing, or freezer burn; and shall be transported and delivered to the consignee at a temperature of 0 degrees Fahrenheit or lower.

(End of clause)

The above Frozen Processed Foods clause specifies the minimum acceptable condition of frozen foods upon delivery. The FAR does not contain similar requirements. VA purchases large quantities of frozen foods and this clause is proposed for use in VA's commercial item acquisitions to ensure receipt of acceptable products.

#### *Special Notice*

7. 852.210-74, Special Notice (APR 1984).

*Descriptive literature.* The submission of descriptive literature with offers is not required and voluntarily submitted descriptive literature which qualifies the offer will require rejection of the offer.

However, within 5 days after award of contract, the contractor will submit to the contracting officer literature describing the equipment he/she intends to furnish and indicating strict compliance with the specification requirements.

The contracting officer will, by written notice to the contractor within 20 calendar days after receipt of the literature, approve, conditionally approve, or disapprove the equipment proposed to be furnished. The notice of approval or conditional approval will not relieve the contractor from complying with all requirements of the specifications and all other terms and conditions of this contract. A notice of conditional approval will state any further action required of the contractor. A notice of disapproval will cite reasons therefor.

If the equipment is disapproved by the Government, the contractor will be subject to action under the Default provision of this contract. However, prior to default action the contractor will be permitted a period (at least 10 days) under that clause to submit additional descriptive literature on equipment originally offered or descriptive literature on other equipment.

The Government reserves the right to require an equitable adjustment of the contract price for any extension of the delivery schedule necessitated by additional descriptive literature evaluations.

(End of provision)

The above Special Notice provision concerns the submission of descriptive literature and is used only in telephone system acquisitions. There is no corresponding FAR coverage. This clause is proposed for use in VA's telephone system commercial item acquisitions. Because of the high installation costs for telephone equipment, the added emphasis on ensuring the capability of the equipment to meet specification requirements prior to installation appears to be warranted.

#### *Technical Industry Standards*

8. 852.210-75, Technical Industry Standards (APR 1984).

The supplies or equipment required by this invitation for bid or request for proposal must conform to the standards of the [ ]\* and [ ]\* as to [ ]\*\*. The successful bidder or offeror will be required to submit proof that the item(s) he/she furnishes conforms to this requirement. This proof may be in the form of a label or seal affixed to the equipment or supplies, warranting that they have been tested in accordance with and conform to the specified standards. The seal or label of any nationally recognized laboratory such as those listed by the National Fire Protection Association, Boston, Massachusetts, in the current edition of their publication "Research on Fire," is acceptable. Proof may also be furnished in the form of a certificate from one of these laboratories certifying that the item(s) furnished have been tested in accordance with and conform to the specified standards.

(End of provision)

\* Insert name(s) of organization(s), the standards of which are pertinent to the Government needs.

\*\* Insert pertinent standards, i.e., fire and casualty, safety and fire protection, etc.

The above Technical Industry Standards provision requires offerors to furnish evidence that the supplies or equipment they intend to provide meet the technical industry standards required by the solicitation. It is in VA's best interest, and the clause would be required, to ensure that the supplies or equipment VA procures meet certain standards, such as Underwriters Laboratory, to protect the safety of individuals coming in contact with or using those supplies or equipment.

#### *Caution to Bidders—Bid Envelopes*

9. 852.214-70, Caution to Bidders—Bid Envelopes (APR 1984)

It is the responsibility of each bidder to take all necessary precautions, including the use of proper mailing

cover, to insure that the bid price cannot be ascertained by anyone prior to bid opening. If a bid envelope is furnished with this invitation, the bidder is requested to use this envelope in submitting the bid. The bidder may, however, when it suits a purpose, use any suitable envelope, identified by the invitation number and bid opening time and date. If a bid envelope is not furnished, the bidder will complete and affix the enclosed Optional Form 17, Sealed Bid Label, to the lower left corner of the envelope used in submitting the bid.

(End of provision)

FAR Part 12 and FAR commercial item provisions do not contain any guidance to bidders regarding protection of their bid prices or on how to clearly identify their bids. This VAAR provision provides such guidance and may assist bidders in ensuring that their bid prices are protected from exposure prior to bid opening and that their bids are identified and received on time.

#### *Estimated Quantity(ies)*

The following clause would be used in estimated quantity contracts, except contracts for coal, orthopedic, prosthetic and optical supplies, or in National Cemetery Service contracts for monuments:

10. 852.216-70, Estimated Quantities (APR 1984).

As it is impossible to determine the exact quantities that will be required during the contract term, each bidder whose bid is accepted wholly or in part will be required to deliver all articles or services that may be ordered during the contract term, except as he/she otherwise indicates in his/her bid and except as otherwise provided herein. Bids will be considered if made with the proviso that the total quantities delivered shall not exceed a certain specified quantity. Bids offering less than 75 percent of the estimated requirement or which provide that the Government shall guarantee any definite quantity, will not be considered. The fact that quantities are estimated shall not relieve the contractor from filling all orders placed under this contract to the extent of his/her obligation. Also, the Department of Veterans Affairs shall not be relieved of its obligation to order from the contractor all articles or services that may, in the judgment of the ordering officer, be needed except that in the public exigency procurement may be made without regard to this contract.

(End of clause)

The following clause would be used in local coal-hauling contracts:

11. 852.216-70, Estimated Quantity (APR 1984).

The estimated requirement shown in this invitation for bids cover the requirements for the entire contract period. It is understood and agreed that during the period of this contract the Government may order and the contractor will haul such coal as may, in the opinion of the Government, be required, except that in the public exigency procurement may be made without regard to this contract.

(End of clause)

The following clause would be used for orthopedic, prosthetic, and optical supplies.

12. 852.216-70, Quantities (APR 1984).

The supplies and/or services listed in the attached schedule will be furnished at such time and in such quantities as they are required.

(End of clause)

The following clause would be used for National Cemetery Service contracts for monuments:

13. 852.216-70, Estimated Quantities (JUL 1989).

As it is impossible to determine the exact quantities that will be required during the contract term, each bidder whose bid is accepted wholly or in part will be required to deliver all articles that may be ordered during the contract term, except as he or she otherwise indicates in his or her bid and except as otherwise provided herein. Bids will be considered if made with the proviso that the total quantities delivered shall not exceed a certain specified quantity. The fact that quantities are estimated shall not relieve the contractor from filling all orders placed under this contract to the extent of his or her obligation. Also, the Department of Veterans Affairs shall not be relieved of its obligation to order from the contractor all articles that may, in the judgment of the ordering officer, be needed except that in the public exigency procurement may be made without regard to this contract.

(End of clause)

The above clauses regarding quantities would be for use in solicitations where definite quantities cannot be determined. They would require contractors to provide all quantities ordered under the contract, even if those quantities exceed the original estimate. These clauses appear to be necessary to ensure that VA is able to obtain the quantities that are ultimately needed.

#### *Sales or Use Taxes*

14. 852.229-70, Sales or Use Taxes (APR 1984).

The articles listed in this bid invitation will be purchased from personal funds of patients and prices bid herein include any sales or use tax heretofore imposed by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, applicable to the material in this bid.

(End of provision)

15. 852.229-71, Sales or Use Taxes (APR 1984).

Any article purchased from this contract, payable from personal funds of patients, will be subject to any applicable sales or use tax levied thereon by any State, or by duly constituted taxing authority therein having jurisdiction to levy such a tax; the total amount of the tax applicable to such purchase payable from personal funds of patients will be computed on the total amount of the order and will be shown as a separate item on the purchase order and invoice. The bidder shall identify the applicable taxes and rates in his/her bid.

(End of provision)

Regarding the two above provisions on taxes, VA contracting officers occasionally issue solicitations for goods or services that would be purchased from patient funds. Under such circumstances, the purchase is not exempt from state and local taxes. The standard FAR clause 52.212-4, paragraph (k), provides that the contract price shall include all applicable taxes but, if used in a solicitation for purchase from patient funds, does not advise bidders that the Federal Government is not the purchaser. Since the Federal Government is exempt from most taxes, this could result in a bidder failing to include taxes in such bids. These provisions appear to be necessary for use in solicitations for commercial items to be purchased from patient funds to protect the seller from possible losses.

#### *Protest Content*

16. 852.233-70, Protest Content (JUN 1987)

(a) Any protest filed by an interested party shall:

- (1) Include the name, address, and telephone number of the protester;
- (2) Identify the solicitation and/or contract number;
- (3) Include an original signed by the protester or his/her representative and at least one copy;
- (4) Set forth a detailed statement of the legal and factual ground of the protest including copies of relevant documents;

(5) Specifically request a ruling of the individual upon whom the protest is served; and

(6) State the form of relief requested.

(b) Failure to comply with the above may result in dismissal of the protest without further consideration.

(End of provision)

FAR 12.301(d) does not require contracting officers to include FAR provision 52.233-2, Service of Protest, in commercial item solicitations, but FAR 12.301(e) does allow optional use. If FAR provision 52.233-2 is used by contracting officers, this corresponding VAAR provision 852.233-70 should also be included in the solicitation. This provision advises interested parties of the information the FAR, at 33.103(d)(2), requires interested parties to include in a protest. This assists bidders/offerors by having the information readily available in the solicitation, without their having to refer back to the FAR.

#### *Contractor Responsibilities*

17. 852.237-70, Contractor Responsibilities (APR 1984) The contractor shall obtain all necessary licenses and/or permits required to perform this work. He/she shall take all reasonable precautions necessary to protect persons and property from injury or damage during the performance of this contract. He/she shall be responsible for any injury to himself/herself, his/her employees, as well as for any damage to personal or public property that occurs during the performance of this contract that is caused by his/her employee's fault or negligence, and shall maintain personal liability and property damage insurance having coverage for a limit as required by the laws of the State of [ ]. Further, it is agreed that any negligence of the Government, its officers, agents, servants and employees, shall not be the responsibility of the contractor hereunder with the regard to any claims, loss, damage, injury, and liability resulting therefrom.

(End of clause)

The above Contractor Responsibilities clause is used in service and construction contracts. This clause makes it the contractor's responsibility to obtain all necessary licenses and permits to perform the work covered by the contract and emphasizes that the contractor is responsible for safety.

#### *Indemnification and Insurance*

18. 852.237-71, Indemnification and Insurance (APR 1984)

(a) *Indemnification.* The contractor expressly agrees to indemnify and save

harmless the Government, its officers, agents, servants, and employees from and against any and all claims, loss, damage, injury, and liability, however caused, resulting from, arising out of, or in any way connected with the performance of work under this agreement. Further, it is agreed that any negligence or alleged negligence of the Government, its officers, agents, servants, and employees, shall not be a bar to a claim for indemnification unless the act or omission of the Government, its officers, agents, servants, and employees is the sole, competent, and producing cause of such claims, loss, damage, injury, and liability. At the option of the contractor, and subject to the approval by the contracting officer of the sources, insurance coverage may be employed as guaranty of indemnification.

(b) *Insurance.* Satisfactory insurance coverage is a condition precedent to award of a contract. In general, a successful bidder must present satisfactory evidence of full compliance with State and local requirements, or those below stipulated, whichever are the greater. More specifically, workmen's compensation and employer's liability coverage will conform to applicable State law requirements for the service contemplated, whereas general liability and automobile liability of comprehensive type, shall in the absence of higher statutory minimums, be required in the amounts per vehicle used of not less than \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage. State-approved sources of insurance coverage ordinarily will be deemed acceptable to the Department of Veterans Affairs installation, subject to timely certifications by such sources of the types and limits of the coverages afforded by the sources to the bidder. (In those instances where airplane service is to be used, substitute the word "aircraft" for "automobile" and "vehicle" and modify coverage to require aircraft public and passenger liability insurance of at least \$200,000 per passenger and \$500,000 per occurrence for bodily injury, other than passenger liability, and \$200,000 per occurrence for property damage. Coverage for passenger liability bodily injury shall be at least \$200,000 multiplied by the number of seats or passengers, whichever is greater.)

(End of clause)

The above Indemnification and Insurance clause would be for use on vehicle and aircraft service contracts. It

is critical that VA contractors carry appropriate insurance. The insurance protects both VA and VA beneficiaries using VA services.

#### *Representatives of Contracting Officers*

19. 852.270-1, Representatives of Contracting Officers (APR 1984) The contracting officer reserves the right to designate representatives to act for him/her in furnishing technical guidance and advice or generally supervise the work to be performed under this contract. Such designation will be in writing and will define the scope and limitation of the designee's authority. A copy of the designation shall be furnished the contractor.

(End of provision)

The above Representatives of Contracting Officers provision would be used whenever it may be necessary to designate another individual to act as the contracting officer's technical representative.

#### *Quantities*

20. 852.270-2, Quantities (APR 1984).

The bidder agrees to furnish up to 25 percent more or 25 percent less than the quantities awarded when ordered by the Department of Veterans Affairs.

(End of clause)

The above Quantities clause is similar to the clauses under 852.216-70 and would be used in bread and bakery products solicitations. It requires contractors to provide up to 25 percent more, or allows VA to order up to 25 percent less, than the estimated quantities shown in the solicitation. It is proposed for use in commercial item contracts for bread and bakery products to allow VA leeway in ordering such products, where exact usage is difficult to predict.

#### *Shellfish*

21. 852.270-3, Shellfish (APR 1984).

The bidder certifies that oysters, clams, and mussels will be furnished only from plants approved by and operated under the supervision of shellfish authorities of States whose certifications are endorsed currently by the U.S. Public Health Service, and the names and certificate numbers of those shellfish dealers must appear on current lists published by the U.S. Public Health Service. These items shall be packed and delivered in approved containers, sealed in such manner that tampering is easily discernible, and marked with packer's certificate number impressed or embossed on the side of such containers and preceded by the State abbreviation. Containers shall be tagged or labeled to show the name and address of the

approved producer or shipper, the name of the State of origin, and the certificate number of the approved producer or shipper.

(End of clause)

The above Shellfish clause specifies minimum standards that contractors must meet when furnishing shellfish to VA. There are no similar provisions in the FAR and the clause is proposed for use in commercial item solicitations for shellfish to ensure that such items meet minimum Federal standards.

#### *Service Data Manual*

The following Service Data Manual clause may be used, in accordance with the prescriptions contained in the VAAR, in requests for quotations, solicitations, or contracts for the acquisition of commercial items of technical medical equipment and devices, provided the contracting officer determines that use of the clause is consistent with customary commercial practice. Such use is permitted by FAR 12.301(a)(2).

22. 852.210-70, Service Data Manual (NOV 1984).

(a) The successful bidder will supply operation/service (maintenance) manuals with each piece of equipment in the quantity specified in the solicitation and resulting purchase order. As a minimum, the manual(s) shall be bound and equivalent to the manual(s) provided the manufacturer's designated field service representative as well as comply with all the requirements in paragraphs (b) through (i) of this clause. Sections, headings and section sequence identified in (b) through (i) of this clause are typical and may vary between manufacturers. Variances in the sections, headings and section sequence, however, do not relieve the manufacturer of his/her responsibility in supplying the technical data called for therein.

(b) Title Page and Front Matter—The title page shall include the equipment nomenclature, model number, effective date of the manual and the manufacturer's name and address. If the manual applies to a particular version of the equipment only, the title page shall also list that equipment's serial number. Front matter shall consist of the Table of Contents, List of Tables, List of Illustrations and a frontispiece (photograph or line drawing) depicting the equipment.

(c) Section I, General Description—This section shall provide a generalized description of the equipment or devices and shall describe its purpose or intended use. Included in this section will be a table listing all pertinent

equipment specifications, power requirements, environmental limitations and physical dimensions.

(d) Section II, Installation—Section II shall provide pertinent installation information. It shall list all input and output connectors using applicable reference designators and functional names as they appear on the equipment. Included in this listing will be a brief description of the function of each connector along with the connector type. Instructions shall be provided as to the recommended method of repacking the equipment for shipment (packing material, labeling, etc.)

(e) Section III, Operation—Section III will fully describe the operation of the equipment and shall include a listing of each control with a brief description of its function and step-by-step procedures for each operating mode. Procedures will use the control(s) nomenclature as it appears on the equipment and will be keyed to one or more illustrations of the equipment. Operating procedures will include any preoperational checks, calibration adjustments and operation tests. Notes, cautions and warnings shall be set off from the text body so they may easily be recognizable and will draw the attention of the reader. Illustrations should be used wherever possible depicting equipment connections for test, calibration, patient monitoring and measurements. For large, complex and/or highly versatile equipment capable of many operating modes and in other instances where the Operation Section is quite large, operational information may be bound separately in the form of an Operators Manual. The providing of a separate Operators manual does not relieve the supplier of his responsibility for providing the minimum acceptable maintenance data specified herein.

Where applicable, flow charts and narrative descriptions of software shall be provided. If programming is either built-in and/or user modifiable, a complete software listing shall be supplied. Equipment items with software packages shall also include diagnostic routines and sample outputs. Submission information shall be given in the Maintenance Section to identify equipment malfunctions which are software related.

(f) Section IV, Principles of Operation—This section shall describe in narrative form the principles of operation of the equipment. Circuitry shall be discussed in sufficient detail to be understood by technicians and engineers who possess a working knowledge of electronics and a general familiarity with the overall application of the devices. The circuit descriptions should start at the overall equipment

level and proceed to more detailed circuit descriptions. The overall description shall be keyed to a functional block diagram of the equipment. Circuit descriptions shall be keyed to schematic diagrams discussed in paragraph (i) below. It is recommended that for complex or special circuits, simplified schematics should be included in this section.

(g) Section V, Maintenance—The maintenance section shall contain a list of recommended test equipment, special tools, preventive maintenance instructions and corrective information. The list of test equipment shall be that recommended by the manufacturer and shall be designated by manufacturer and model number. Special tools are those items not commercially available or those that are designed specifically for the equipment being supplied. Sufficient data will be provided to enable their purchase by the Department of Veterans Affairs. Preventive maintenance instructions shall consist of those recommended by the manufacturer to preclude unnecessary failures. Procedures and the recommended frequency of performance shall be included for visual inspection, cleaning, lubricating, mechanical adjustments and circuit calibration. Corrective maintenance shall consist of the data necessary to troubleshoot and rectify a problem and shall include procedures for realigning and testing the equipment. Troubleshooting shall include either a list of test points with the applicable voltage levels or waveforms that would be present under a certain prescribed set of conditions, a troubleshooting chart listing the symptom, probable cause and remedy, or a narrative containing sufficient data to enable a test technician or electronics engineer to determine and locate the probable cause of malfunction. Data shall also be provided describing the preferred method of repairing or replacing discrete components mounted on printed circuit boards or located in areas where special steps must be followed to disassemble the equipment. Procedures shall be included to realign and test the equipment at the completion of repairs and to restore it to its original operating condition. These procedures shall be supported by the necessary waveforms and voltage levels, and data for selecting matched components. Diagrams, either photographic or line, shall show the location of printed circuit board mounted components.

(h) Section VI, Replacement Parts List—The replacement parts list shall list, in alphanumeric order, all electrical/electronic, mechanical and

pneumatic components, their description, value and tolerance, true manufacturer and manufacturers' part number.

(i) Section VII, Drawings—Wiring and schematic diagrams shall be included. The drawings will depict the circuitry using standard symbols and shall include the reference designations and component values or type designators. Drawings shall be clear and legible and shall not be engineering or production sketches.

(End of clause)

The following Service Data Manual clause may be used, in accordance with the prescriptions contained in the VAAR, in requests for quotations, solicitations, or contracts for the acquisition of commercial items of mechanical equipment (other than technical medical equipment and devices), provided the contracting officer determines that use of the clause is consistent with customary commercial practice. Such use is permitted by FAR 12.301(a)(2).

23. 852.210-70, Service Data Manual (NOV 1984).

The contractor agrees to furnish two copies of a manual, handbook or brochure containing operating, installation, and maintenance instructions (including pictures or illustrations, schematics, and complete repair/test guides as necessary). Where applicable, it will include electrical data and connection diagrams for all utilities. The instructions shall also contain a complete list of all replaceable parts showing part number, name, and quantity required.

(End of clause)

When the bid or proposal will result in the initial purchase (including each make and model) of a centrally procured item, the following clause would be used:

24. 852.210-70, Service Data Manual (NOV 1984).

The contractor agrees, when requested by the contracting officer, to furnish not more than three copies of the technical documentation required by paragraph 852.210-70(a) to the Service and Reclamation Division, VA Supply Depot, Hines, Ill. In addition, the contractor agrees to furnish two additional copies of the technical documentation required by 852.210-70(a) with each piece of equipment sold as a result of the invitation for bid or request for proposal.

(End of clause)

The above clauses concerning service data manuals would be required in support of VA's equipment acquisitions and equipment repair program. End-use operators of equipment need operator's

manuals to ensure that the equipment is operated properly and safely and that the equipment is properly cleaned. VA biomedical engineers repair many of the items of equipment at VA medical centers and must have the vendor's repair manuals to accomplish those repairs.

#### *Brand Name or Equal*

25. 852.210-77, Brand Name or Equal (NOV 1984).

(Note: as used in this clause, the term *brand name* includes identification of products by make and model.)

(a) If items called for by this invitation for bids have been identified in the schedule by a "brand name or equal" description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids offering "equal" products (including products of the brand name manufacturer other than the one described by brand name) will be considered for award if such products are clearly identified in the bids and are determined by the Government to meet fully the salient characteristics requirements listed in the invitation.

(b) Unless the bidder clearly indicates in his bid that he is offering an "equal" product, his bid shall be considered as offering a brand name product referenced in the invitation for bids.

(c) (1) If the bidder proposes to furnish an "equal" product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the Invitation or Bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality or the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his/her bid as well as other information reasonably available to the purchasing activity.

*Caution To Bidders.* The purchasing activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his/her bid all descriptive material (such as cuts, illustrations, drawings or other information) necessary for the purchasing activity to: (i) Determine whether the product offered meets the salient characteristics requirement of the Invitation for Bids, and (ii) Establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by

making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity.

(2) If the bidder proposes to modify a product so as to make it conform to the requirements of the Invitation for Bids, he/she shall:

(i) Include in his/her bid a clear description of such proposed modifications, and

(ii) Clearly mark any descriptive material to show the proposed modifications.

(3) Modifications proposed after bid opening to make a product conform to a brand name product referenced in the Invitation for Bids will not be considered.

(End of clause)

Although the FAR expresses a preference for use of performance specifications on Federal Government solicitations, the use of "brand name or equal" purchase descriptions is often necessary to simplify and expedite the acquisition process. The General Services Administration uses a similar clause and the Civilian Agency Acquisition Council is considering reinstating "brand name or equal" provisions in the FAR. Use of "brand name or equal" purchase descriptions is a commercial practice in many industries. If use of a "brand name or equal" purchase description is found by the contracting officer to be a commercial practice for a specific solicitation, a standard clause should be used to advise bidders/offerors that such descriptions are not intended to restrict the acquisition to brand name items. A standard clause would ensure uniformity and reduce the administrative costs of solicitation preparation.

#### *Nondiscrimination in Services Provided Beneficiaries*

The following clause would be used in all VA requests for quotations, solicitations and contracts for providing services to eligible beneficiaries:

26. 852.271-70, Nondiscrimination in Services Provided Beneficiaries (APR 1984)

The contractor agrees to provide all services specified in this contract for any person determined eligible by the Under Secretary for Health, or designee, regardless of the race, color, religion, sex, or national origin of the person for whom such services are ordered. The contractor further warrants that he/she will not resort to subcontracting as a means of circumventing this provision.

(End of clause)

The above nondiscrimination clause is proposed for use in commercial item contracts providing services to eligible beneficiaries to ensure that vendors do not discriminate against VA beneficiaries based on a veteran's race, color, religion, sex, or national origin.

#### Miscellaneous

This document proposes to add paragraph 812.301(f) to clarify that VAAR clauses are not required for use in micro-purchases, but may be used in micro-purchases at the option of the contracting officer when use is determined by the contracting officer to be in the Government's best interest.

This document proposes to add paragraph 812.302, in accordance with FAR 12.302(c), to provide agency procedures for approval of waivers. Waivers are required if contracting officers wish to tailor clauses or otherwise include additional terms and conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired. The criteria that must be used by the next higher level supervisor in approving the waiver is set forth at FAR 12.302(c), which provides that the waiver describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice, and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government.

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. The adoption of this proposed rule would not cause a significant effect on any entities. Costs to comply with any of the provisions of the proposed rule will be minimal. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), collections of information are contained in a number of the clauses and provisions set forth in the Supplementary Information portion of this proposed rule. Although this document proposes to add provisions

and clauses for commercial item solicitations and contracts, this Paperwork Reduction Act notice of this document seeks approval for collections of information for both commercial and non-commercial item, service, and construction solicitations and contracts. The provisions and clauses are used in both commercial and non-commercial item, service, and construction solicitations and contracts. As required under section 3507(d) of the Act, VA has submitted a copy of this proposed rulemaking action to the Office of Management and Budget (OMB) for its review of the collection of information.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Comments on the collection of information should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Comments should indicate that they are submitted in response to "RIN 2900-AI05."

*Title:* Commercial and Non-Commercial Items, Services and Construction.

*Title and Provision/Clause Number:* 852.219-70, Veteran-Owned Small Business.

*Summary of collection of information:* VAAR Provision 852.219-70, Veteran-Owned Small Business, requests that a firm submitting a quotation, bid, or offer furnish information regarding whether or not the firm is a small business owned by a veteran, a Vietnam era veteran, or a disabled veteran. The information required by this VAAR provision will be used by VA to identify veteran-owned businesses to ensure eligible veteran-owned firms are given an opportunity to participate in VA solicitations for goods and services. Without this information, there would be no way to properly monitor this program or conduct VA outreach efforts.

*Description of need for information and proposed use of information:* Public Law 93-237 amended the Small Business Act by directing the U.S. Small Business Administration (SBA) to give "special consideration" to veterans of the U.S. Armed Forces in all SBA programs. In September 1983, VA adopted the "special consideration" philosophy and directed all VA

contracting activities to take affirmative action to solicit and assist Vietnam era and disabled veteran-owned small businesses to participate in the VA acquisition process. On April 5, 1990, the Secretary approved an initiative to expand the Vietnam era and disabled veteran-owned small business program to include all veteran-owned small businesses. Title 38 United States Code vests the Secretary with broad authority to assist veterans. The information collected is a self-certification that a firm is veteran-owned. It allows VA to ensure that eligible veteran-owned firms are given an opportunity to participate in VA acquisitions and to monitor our success in implementing these regulatory provisions. The information requested will be solicited from respondents on a voluntary basis.

*Description of likely respondents:* All firms submitting written or electronic quotations, bids, or offers to VA.

*Estimated number of respondents:* 3,403,500 written quotations, bids, or offers.

*Estimated frequency of responses:* One response for each written quotation, bid, or offer submitted.

*Estimated average burden per collection:* 15 seconds.

*Estimated total annual reporting and recordkeeping burden:* 14,181 hours.

*Title and Provision/Clause Number:* Provision 852.210-74, Special Notice.

*Summary of collection of information:* This provision is used only in VA's telephone system acquisition solicitations and requires the contractor, after award of the contract, to submit descriptive literature on the equipment the contractor intends to furnish to show how that equipment meets the specification requirements of the solicitation.

*Description of need for information and proposed use of information:* The information is needed to ensure that the equipment proposed by the contractor meets the specification requirements. Failure to require the information could result in the installation of equipment that does not meet contract requirements, with significant loss to the contractor if the contractor subsequently had to remove the equipment and furnish equipment that did meet the specification requirements.

*Description of likely respondents:* Firms awarded VA contracts for telephone systems.

*Estimated number of respondents:* 30 per year.

*Estimated frequency of responses:* Once for each contract awarded.

*Estimated average burden per collection:* 5 hours.



*Estimated total annual reporting and recordkeeping burden:* 150 hours.

*Title and Provision/Clause Number:* Provision 852.210-75, Technical Industry Standards.

*Summary of collection of information:* This provision requires that items offered for sale to VA under the solicitation conform to certain technical industry standards, such as Underwriters Laboratory (UL) or the National Fire Protection Association, and that the contractor furnish evidence to VA that the items meet that requirement. The evidence is normally in the form of a tag or seal affixed to the item, such as the UL tag on an electrical cord or a tag on a fire-rated door. This requires no additional effort on the part of the contractor, as the items come from the factory with the tags already in place, as part of the manufacturer's standard manufacturing operation. Occasionally, for items not already meeting standards or for items not previously tested, a contractor will have to furnish a certificate from an acceptable laboratory certifying that the items furnished have been tested in accordance with, and conform to, the specified standards. Only those firms required to submit a separate certificate are noted below.

*Description of need for information and proposed use of information:* To ensure that the items being furnished meet minimum safety standards and to protect VA employees, VA beneficiaries, and the public.

*Description of likely respondents:* Firms whose products have not previously been tested to ensure the products meet the industry standards required under the solicitation.

*Estimated number of respondents:* 100.

*Estimated frequency of responses:* Once for each contract awarded.

*Estimated average burden per collection:* 30 minutes.

*Estimated total annual reporting and recordkeeping burden:* 50 hours.

*Title and Provision/Clause Number:* Provision 852.214-70, Caution to Bidders—Bid Envelopes.

*Summary of collection of information:* This provision advises bidders/offers that it is their responsibility to insure that their bid price cannot be ascertained by anyone prior to bid opening. It also advises bidders/offers to identify their bids by showing the invitation number and bid opening date on the outside of the bid envelope. A bid envelope or a label is often furnished by the Government for use by bidders/offers to identify their bids.

*Description of need for information and proposed use of information:* The

information is needed by the Government to identify which parcels of mail are bids/offers and which are other routine mail without having to open the envelopes to identify their intent and possibly exposing bid/offer prices before bid opening. The information will be used to identify which parcels of mail are bids and which are other routine mail. The information is also needed to help ensure that bids/offers are delivered to the proper bid opening room on time and prior to bid opening.

*Description of likely respondents:* All firms submitted sealed bids.

*Estimated number of respondents:* 346,000.

*Estimated frequency of responses:* Once for each sealed bid/offer submitted.

*Estimated average burden per collection:* 10 seconds.

*Estimated total annual reporting and recordkeeping burden:* 960 hours.

*Title and Provision/Clause Number:* Clause 852.237-71, Indemnification and Insurance.

*Summary of collection of information:* This clause is used in solicitations for vehicle or aircraft services. It requires the apparent successful bidder/offeror, prior to contract award, to furnish evidence that the firm possesses the types and amounts of insurance required by the solicitation. This evidence is in the form of a certificate from the firm's insurance company.

*Description of need for information and proposed use of information:* The information is required to protect VA by ensuring that the firm to which award will be made possesses the types and amounts of insurance required by the solicitation. It helps ensure that VA will not be held liable for any negligent acts of the contractor and ensures that VA beneficiaries and the public are protected by adequate insurance coverage.

*Description of likely respondents:* Apparent successful bidders/offers on solicitations for vehicle or aircraft services.

*Estimated number of respondents:* 500.

*Estimated frequency of responses:* Once for each contract awarded.

*Estimated average burden per collection:* 30 minutes.

*Estimated total annual reporting and recordkeeping burden:* 250 hours.

*Title and Provision/Clause Number:* Provision 852.270-3, Shellfish.

*Summary of collection of information:* This provision requires that a firm furnishing shellfish to VA must ensure that the shellfish is packaged in a container that is marked with the packer's State certificate number and

State abbreviation. In addition, the firm must ensure that the container is tagged or labeled to show the name and address of the approved producer or shipper, the name of the State of origin, and the certificate number of the approved producer or shipper. This information normally accompanies the shellfish from the packer and is not information that must be separately obtained by the seller.

*Description of need for information and proposed use of information:* The information is needed to ensure that shellfish purchased by VA comes from a State- and Federal-approved and inspected source. The information is used to help ensure that VA purchases healthful shellfish.

*Description of likely respondents:* Any firm selling shellfish to VA.

*Estimated number of respondents:* 1,000.

*Estimated frequency of responses:* Once for each shipment of shellfish.

*Estimated average burden per collection:* 1 minute.

*Estimated total annual reporting and recordkeeping burden:* 17 hours.

*Title and Provision/Clause Number:* Clause 852.210-70, Service Data Manual.

*Summary of collection of information:* When VA purchases technical medical equipment and devices, or mechanical equipment, VA also requires the contractor to furnish both operators manuals and maintenance/repair manuals. This clause sets forth those requirements and sets forth the minimum standards those manuals must meet to be acceptable. Generally, this is the same operator's manual furnished with each piece of equipment sold to the general public and the same repair manual used by company technicians in repairing the company's equipment. The cost of the manuals is included in the contract price or listed as a separately priced line item on the purchase order.

*Description of need for information and proposed use of information:* The operator's manual will be used by the individual actually operating the equipment to ensure proper operation and cleaning. The repair manual will be used by VA equipment repair staff to repair the equipment.

*Description of likely respondents:* Firms selling technical medical equipment or devices or mechanical equipment to VA.

*Estimated number of respondents:* 15,000.

*Estimated frequency of responses:* Once for each contract awarded.

*Estimated average burden per collection:* 10 minutes.

*Estimated total annual reporting and recordkeeping burden:* 2,500 hours.

*Title and Provision/Clause Number:* 852.210-77, Brand Name or Equal.

*Summary of collection of information:*

This clause advises bidders or offerors who are proposing to offer an item that is alleged to be equal to the brand name item stated in the bid, that it is the bidder's or offeror's responsibility to show that the item offered is in fact, equal to the brand name item. This evidence may be in the form of descriptive literature or material, such as cuts, illustrations, drawings, or other information. While submission of the information is voluntary, failure to provide the information may result in rejection of the firm's bid or offer if the Government cannot otherwise determine that the item offered is equal.

*Description of need for information and proposed use of information:* The information will be used by the contracting officer to evaluate whether or not the item offered meets the specification requirements.

*Description of likely respondents:* Any firm offering an "equal" item on a solicitation requesting bids or offers on a "brand name or equal" basis.

*Estimated number of respondents:* 10,000.

*Estimated frequency of responses:* Once for each solicitation on which the firm is proposed an "equal" item.

*Estimated average burden per collection:* 5 minutes.

*Estimated total annual reporting and recordkeeping burden:* 833 hours.

The Department considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
  - Enhancing the quality, usefulness, and clarity of the information to be collected; and
  - Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the proposed collection of information contained in this proposed

rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed regulation.

#### List of Subjects

*48 CFR Parts 810, 811, and 812*

Government procurement.

*48 CFR Parts 836 and 852*

Government procurement, Reporting and recordkeeping requirements.

*48 CFR Part 870*

Asbestos, Frozen foods, Government procurement, Telecommunications.

Approved: August 8, 1997.

**Hershel W. Gober,**

*Secretary-Designate of Veterans Affairs.*

For the reasons set forth in the preamble, and consistent with the authority in 38 U.S.C. 501 and 40 U.S.C. 486(c), 48 CFR Chapter 8 is proposed to be amended as follows:

#### PART 801—VETERANS AFFAIRS ACQUISITION REGULATIONS SYSTEM

1. The authority citation for parts 812, 836, and 852 continues to read as follows:

**Authority:** 38 U.S.C. 501 and 40 U.S.C. 486(c).

#### PART 810—[REMOVED]

2. Part 810 is removed.
3. Part 811 is added to read as follows:

#### PART 811—DESCRIBING AGENCY NEEDS

Sec.

811.001 Definitions.

##### Subpart 811.1—Selecting and Developing Requirements Documents

811.104 Items particular to one manufacturer.

811.104-70 Purchase descriptions.

811.104-71 Bid evaluation and award.

811.104-72 Procedure for negotiated procurements.

##### Subpart 811.2—Using and Maintaining Requirements Documents

811.202 Maintenance of standardization documents.

811.204 Solicitation provisions and contract clauses.

##### Subpart 811.4—Delivery or Performance Schedules

811.404 Contract clauses.

##### Subpart 811.5—Liquidated Damages

811.502 Policy.

811.504 Contract clauses.

#### Subpart 811.6—Priorities and Allocations

811.602 General.

**Authority:** 38 U.S.C. 501 and 40 U.S.C. 486(c).

##### 811.001 Definitions.

(a) *Brand name product* means a commercial product described by brand name and make or model number or other appropriate nomenclature by which such product is offered for sale to the public by the particular manufacturer, producer or distributor.

(b) *Salient characteristics* are those particular characteristics that specifically describe the essential physical and functional features of the material or service required. They are those essential physical or functional features which are identified in the specifications as a mandatory requirement which a proposed "equal" product or material must possess in order for the bid to be considered responsive. Bidders must furnish all descriptive literature and bid samples required by the solicitation to establish such "equality".

#### Subpart 811.1—Selecting and Developing Requirements Documents

##### 811.104 Items particular to one manufacturer.

(a) Specifications shall be written in accordance with FAR 11.002 unless otherwise justified by the specification writer and approved by the contracting officer as described in paragraph (b) of this section. The contract file shall be documented accordingly.

(b) When it is determined that a particular physical or functional characteristic of only one product will meet the minimum requirements of the Department of Veterans Affairs (see FAR 11.104) or that a "brand name or equal" purchase description will be used, the specification writer, whether agency personnel, architect-engineer, or consultant with which the Department of Veterans Affairs has contracted, shall separately identify the item(s) to the contracting officer and provide a full written justification of the reason the particular characteristic is essential to the Government's requirements or why the "brand name or equal" purchase description is necessary. The contracting officer shall make the final determination whether restrictive specifications or "brand name or equal" purchase descriptions will be included in the solicitation.

(c) Purchase descriptions that contain references to one or more brand name products may be used only in accordance with 811.104-70, 811.104-71, and 811.104-72. In addition,

purchase descriptions that contain references to one or more brand name products shall be followed by the words "or equal," except when the acquisition is fully justified under FAR 6.3 and (VAAR) 48 CFR 806.3. Acceptable brand name products should be listed in the solicitation. Where a "brand name or equal" purchase description is used, prospective contractors must be given the opportunity to offer products other than those specifically referenced by brand name if such other products are determined by the Government to fully meet the salient characteristics listed in the invitation. The contract file will be documented in accordance with paragraph (b) of this section, justifying the need for use of a brand name or equal description.

(d) "Brand name or equal" purchase descriptions shall set forth those salient physical, functional, or other characteristics of the referenced products which are essential to the minimum needs of the Government. For example, when interchangeability of parts is required, such requirement should be specified. Purchase descriptions shall contain the following information to the extent available and include such other information as is necessary to describe the item required:

(1) Complete common generic identification of the item required;

(2) Applicable model, make or catalog number for each brand name product referenced, and identity of the commercial catalog in which it appears; and

(3) Name of manufacturer, producer or distributor of each brand name product referenced (and address if not well known).

(e) When necessary to describe adequately the item required, an applicable commercial catalog description or pertinent extract may be used if such description is identified in the solicitation as being that of the particular named manufacturer, producer or distributor. The contracting officer will insure that a copy of any catalogs referenced (except parts catalogs) is available on request for review by bidders at the purchasing office.

(f) Except as noted in paragraph (d) of this section, purchase descriptions shall not include either minimum or maximum restrictive dimensions, weights, materials or other salient characteristics which are unique to a brand name product or which would tend to eliminate competition or other products which are only marginally outside the restrictions. However, purchase description may include restrictive dimensions, weights,

materials or other salient characteristic if such restrictions are determined in writing by the user to be essential to the Government's requirements, the brand name of the product is included in the purchase description, and all other determinations required by 811.104 are made.

#### 811.104-70 Purchase descriptions.

(a) When any purchase description, including a "brand name or equal" purchase description, is used in a solicitation for a supply contract to describe required items of mechanical equipment, the solicitation will include the clauses in 852.211-70 (Service Data Manual) and in 852.211-71 (Guarantee).

(b) Solicitations using "brand name or equal" purchase descriptions will contain the "brand name or equal" clause in 852.211-77, and the provision set forth at FAR 52.214-21, Descriptive Literature. Contracting officers are cautioned to review the requirements at FAR 14.202-5(d) when utilizing the descriptive literature provision.

(c) Except as provided in 811.104-70(d), when a "brand name or equal" purchase description is included in an invitation for bids, the following shall be inserted after each item so described in the solicitation, for completion by the bidder:

Bidding on:

Manufacturer name \_\_\_\_\_

Brand \_\_\_\_\_

No. \_\_\_\_\_

(d) (1) When component parts of an end item are described in the solicitation by a "brand name or equal" purchase description and the contracting officer determines that the clause in 811.104-70(b) is inapplicable to such component parts, the requirements of 811.104-70(c) shall not apply with respect to such component parts. In such cases, if the clause is included in the solicitation for other reasons, a statement substantially as follows also shall be included:

The clause entitled "Brand Name or Equal" does not apply to the following component parts (list the component parts to which the clause does not apply): and

(2) In the alternative, if the contracting officer determines that the clause in 811.104-70(b) shall apply to only certain such component parts, the requirements of 811.104-70(c) shall apply to such component parts and a statement substantially as follows also shall be included:

The clause entitled "Brand Name or Equal" applies to the following component parts (list the component parts to which the clause applies):

(e) When a solicitation contains "brand name or equal" purchase descriptions, bidders who offer brand name products, including component parts, referenced in such descriptions shall not be required to furnish bid samples of the referenced brand name products. However, solicitations may require the submission of bid samples in the case of bidders offering "or equal" products. If bid samples are required, the solicitation shall include the provision set forth at FAR 52.214-20, Bid Samples. The bidder must still furnish all descriptive literature in accordance with and for the purpose set forth in the "Brand Name or Equal" clause, 852.211-77(c)(1) and (2), even though bid samples may not be required.

#### 811.104-71 Bid evaluation and award.

(a) Bids offering products that differ from brand name products referenced in a "brand name or equal" purchase description shall be considered for award when the contracting officer determines in accordance with the terms of the clause at 852.211-77 that the offered products are clearly identified in the bids and are equal in all material respects to the products specified.

(b) Award documents shall identify, or incorporate by reference, an identification of the specific products which the contractor is to furnish. Such identification shall include any brand name and make or model number, descriptive material, and any modifications of brand name products specified in the bid. Included in this requirement are those instances when the descriptions of the end items contain "brand name or equal" purchase descriptions of component parts or of accessories related to the end item, and the clause at 852.211-77 was applicable to such component parts or accessories (see 811.104-70(d)(2)).

#### 811.104-72 Procedure for negotiated procurements.

(a) The policies and procedures prescribed in 811.104-70 and 811.104-71 should be used as a guide in developing adequate purchase descriptions for negotiated procurements.

(b) The clause at 852.211-77 may be adapted for use in negotiated procurements. If use of the clause is not practicable (as may be the case in unusual and compelling urgency purchases), suppliers shall be suitably informed that proposals offering products different from the products referenced by brand name will be considered if the contracting officer

determines that such offered products are equal in all material respects to the products referenced.

### Subpart 811.2—Using and Maintaining Requirements Documents

#### 811.202 Maintenance of standardization documents.

(a) *Military and departmental specifications.* Contracting officers may, when they deem it to be advantageous to the Department of Veterans Affairs, utilize these specifications when procuring supplies and equipment costing less than the simplified acquisition threshold. However, when purchasing items of perishable subsistence, contracting officers shall observe only those exemptions set forth in paragraphs (b)(3) and (b)(4) of this section.

(b) *Nutrition and food service specifications.* (1) The Department of Veterans Affairs has adopted for use in the procurement of packinghouse products, the purchase descriptions and specifications set forth in the Institutional Meat Purchase Specifications (IMPS), and the IMPS General Requirements, which have been developed by the U.S. Department of Agriculture. Purchase descriptions and specifications for dairy products, poultry, eggs, fresh and frozen fruits and vegetables, as well as certain packinghouse products selected from the IMPS especially for Department of Veterans Affairs use, are contained in the Federal Hospital Subsistence Guide. A copy of this guide and the IMPS may be obtained from any Department of Veterans Affairs contracting officer.

(2) Contract terms and conditions governing the procurement of subsistence items are listed in the Federal Hospital Subsistence Guide and IMPS. These provisions shall be made a part of each solicitation for such items when applicable.

(3) The military specifications for meat and meat products contained in the Federal Hospital Subsistence Guide shall be used by the Department of Veterans Affairs only when purchasing such items of subsistence from the Defense Logistics Agency (DLA). Military specifications for poultry, eggs, and egg products contained in the Federal Hospital Subsistence Guide may be used when purchasing either from DLA or from local dealers.

(4) Except as authorized in part 846 of this chapter, contracting officers shall not deviate from the specifications contained in the Federal Hospital Subsistence Guide and the IMPS without prior approval of the Deputy

Assistant Secretary for Acquisition and Materiel Management.

(5) Items of meat, cured pork and poultry not listed in either the Federal Hospital Subsistence Guide or the IMPS, will not be purchased without prior approval of the Deputy Assistant Secretary for Acquisition and Materiel Management.

(c) *Department of Veterans Affairs specifications.* (1) The Director, Publications Service, is responsible for developing, publishing, and distributing Department of Veterans Affairs specifications covering printing and binding.

(2) Department of Veterans Affairs specifications, as they are revised, are placed in stock in the VA Forms and Publications Depot. Facility requirements for these specifications will be requisitioned from that source.

(d) *Government paper specification standards.* (1) Invitations for bids, requests for proposals, purchase orders, or other procurement instruments covering the purchase of paper stocks to be used in duplicating or printing, or which specify the paper stocks to be used in buying printing, binding, or duplicating, will require that such paper stocks be in accordance with the Government Paper Specification Standards issued by the Joint Committee on Printing of Congress.

(2) All binding or rebinding of books, magazines, pamphlets, newspapers, slip cases and boxes will be procured in accordance with Government Printing Office (GPO) specifications and will be procured from the servicing GPO Regional Printing Procurement Office or, when appropriate, from commercial sources.

(3) There are three types of binding/rebinding:

- (i) Class A (hard cover);
- (ii) Perfect (glued); and
- (iii) Lumbinding (sewn). The most suitable type of binding will be procured to satisfy the requirements, based upon the intended use of the bound material.

#### 811.204 Solicitation provisions and contract clauses.

*Specifications.* When product specifications are cited in an invitation for bids or requests for proposals, the citation shall include desired options and shall conform to the following:

Shall be type \_\_\_\_\_, grade \_\_\_\_\_, in accordance with (type of specification) No. \_\_\_\_\_, dated \_\_\_\_\_ and \_\_\_\_\_, dated \_\_\_\_\_, except paragraphs \_\_\_\_\_ and \_\_\_\_\_ which are amended as follows:

### Subpart 811.4—Delivery or Performance Schedules

#### 811.404 Contract clauses.

When delivery is required by or on a particular date, the time of delivery clause set forth in FAR 52.211-8 as it relates to f.o.b. destination contracts will state that the delivery date specified is the date by which the shipment is to be delivered, not the shipping date. In f.o.b. origin contracts, the clause will state that the date specified is the date shipment is to be accepted by the carrier.

### Subpart 811.5—Liquidated Damages

#### 811.502 Policy.

Liquidated damages provisions will not be routinely included in supply or construction contracts, regardless of dollar amount. The decision to include liquidated damages provisions will conform to the criteria in FAR 11.502. In making this decision, consideration will be given to whether the necessity for timely delivery or performance as required in the contract schedule is so critical that a probable increase in contract price is justified. Liquidated damages provisions will not be included as insurance against selection of a non-responsible bidder, as a substitute for efficient contract administration, or as a penalty for failure to perform on time.

#### 811.504 Contract clauses.

When the liquidated damages clause prescribed in FAR 52.211-11 or 52.211-12 is to be used and where partial performance may be utilized to the advantage of the Government, the clause in 852.211-78 will be included in the contract.

### Subpart 811.6—Priorities and Allocations

#### 811.602 General.

(a) Priorities and allocations of critical materials are controlled by the Department of Commerce. Essentially, such priorities and allocations are restricted to projects having a direct connection with supporting current defense needs. The Department of Veterans Affairs is not authorized to assign a priority rating to its purchase orders or contracts involving the acquisition or use of critical materials.

(b) In those instances where it has been technically established that it is not feasible to use a substitute material, the Department of Commerce has agreed to assist us in obtaining critical materials for maintenance and repair projects. They will also, where possible, render assistance in connection with the purchase of new items, which may be in

short supply because of their use in connection with the defense effort.

(c) Contracting officers having problems in acquiring critical materials will ascertain all the facts necessary to enable the Department of Commerce to render assistance to the Department of Veterans Affairs in acquiring these materials. The contracting officer will submit a request for assistance containing the following information to the Deputy Assistant Secretary for Acquisition and Materiel Management (90):

- (1) A description of the maintenance and repair project or the new item, whichever is applicable;
- (2) The critical material and the amount required;
- (3) The contractor's sources of supply, including any addresses. If the source is other than the manufacturer or producer, also list the name and address of the manufacturer or producer;
- (4) The Department of Veterans Affairs contract or purchase order number;
- (5) The contractor's purchase order number, if known, and the delivery time requirement as stated in the solicitation or offer;
- (6) The additional time the contractor claims will be necessary to effect delivery if priority assistance is not provided;
- (7) The nature and extent of the emergency that will be generated at the station, e.g.,
  - (i) Damage to the physical plant,
  - (ii) Impairment of the patient care program,
  - (iii) Creation of safety hazards, and
  - (iv) Any other pertinent condition that will result because of failure to secure assistance in obtaining the critical materials; and

(8) If applicable, a statement that the item required is for use in a construction contract which was authorized by the Chief Facilities Management Officer, Office of Facilities Management, to be awarded and administered by the facility contracting officer.

4. Part 812 is revised to read as follows:

**PART 812—ACQUISITION OF COMMERCIAL ITEMS**

**Subpart 812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items**

**812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

(a) Notwithstanding prescriptions contained elsewhere in this chapter,

when acquiring commercial items, contracting officers shall be required to use only those provisions and clauses prescribed in this part.

(b) The provision and clause in the following VAAR sections shall be used, in accordance with the prescriptions contained therein or elsewhere in this chapter, in requests for quotations, solicitations, or contracts for the acquisition of commercial items:

- (1) 852.219-70, Veteran-owned small business.
- (2) 852.270-4, Commercial advertising.
- (c) The provisions and clauses in the following VAAR sections shall be used, when appropriate, in accordance with the prescriptions contained therein or elsewhere in this chapter, in requests for quotations, solicitations, or contracts for the acquisition of commercial items:
  - (1) 852.211-71, Guarantee clause.
  - (2) 852.211-72, Inspection.
  - (3) 852.211-73, Frozen processed foods.
  - (4) 852.211-74, Telecommunications equipment.
  - (5) 852.211-75, Technical industry standards.
  - (6) 852.214-70, Caution to bidders-bid envelopes.
  - (7) 852.216-70, Estimated quantities for requirements contracts.
  - (8) 852.229-70, Purchases from patient's funds.
  - (9) 852.229-71, Purchases for patients using Government funds and/or personal funds of patients.
  - (10) 852.233-70, Protest content.
  - (11) 852.237-70, Contractor responsibilities.
  - (12) 852.237-71, Indemnification and insurance (vehicle and aircraft service contracts).
  - (13) 852.270-1, Representatives of contracting officers.
  - (14) 852.270-2, Bread and bakery products.
  - (15) 852.270-3, Purchase of shell fish.

(d) The clauses in the following VAAR sections shall be used, when appropriate, in accordance with the prescriptions contained therein or elsewhere in this chapter, in requests for quotations, solicitations, or contracts for the acquisition of commercial items, provided the contracting officer determines that use of the clauses is consistent with customary commercial practices.

- (1) 852.211-70, Requirements for operating and maintenance manuals.
- (2) 852.211-77, Brand name or equal.
- (e) The contracting officer shall insert the clause in 852.271-70, Services provided eligible beneficiaries, by reference, in all requests for quotations, solicitations, and contracts meeting the prescription contained therein.

(f) Clauses are not required for micro-purchases using the procedures of this part or part 813. However, this does not prohibit the use of any clause prescribed in this part or elsewhere in this chapter in micro-purchases when determined by the contracting officer to be in the Government's best interest.

**812.302 Tailoring of provisions and clauses for the acquisition of commercial items.**

*Agency procedures for approval of waivers:* Waivers to tailor solicitations in a manner that is inconsistent with customary commercial practice shall be prepared by contracting officers in accordance with FAR 12.302(c). Waiver requests shall be submitted to the contracting officer's next higher level supervisor for approval. Approved requests shall be retained in the contract file.

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

**836.202 [Amended]**

5. In part 836, § 836.202(a) is amended by removing "part 810" and adding, in its place, "part 811".

**836.206 [Amended]**

6. In part 836, § 836.206 is amended by removing "812.202" and adding, in its place, "811.502"; by removing "852.212-70" and adding, in its place, "852.211-78"; and by removing "52.212-5" and adding, in its place, "52.211-12".

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

7. Part 852 is amended by redesignating the following sections as set forth below:

Old section	New section
852.210-70	852.211-70
852.210-71	852.211-71
852.210-72	852.211-72
852.210-73	852.211-73
852.210-74	852.211-74
852.210-75	852.211-75
852.210-76	852.211-76

**852.210-77 [Redesignated as 852.211-77]**

8. In part 852, § 852.210-77 is redesignated as § 852.211-77 and the introductory text is amended by removing "810.004" and adding, in its place, "811.104".

**852.212-70 [Redesignated as 852.211-78]**

9. In part 852, § 852.212-70 is redesignated as § 852.211-78, and the introductory text is amended by

removing "812.204" and adding, in its place, "811.504".

**852.219-70 [Amended]**

10. In part 852, § 852.219-70 introductory text is amended by removing "819.7003(a)" and adding, in its place, "819.7003(b)".

**852.229-70 [Amended]**

11. In part 852, § 852.229-70 introductory text is amended by adding "or, if the contract is for commercial items, in lieu of paragraph (k), Taxes, in FAR clause 52.212-4" immediately after "in FAR 52.229-1".

**852.229-71 [Amended]**

12. In part 852, § 852.229-71 introductory text is amended by adding

"or, if the contract is for commercial items, as an addendum to FAR clause 52.212-4" immediately after "in FAR 52.229-1".

**852.271-70 [Amended]**

13. In part 852, § 852.271-70 is amended by removing "Chief Medical Director" and adding, in its place, "Under Secretary for Health".

**PART 870—SPECIAL PROCUREMENT CONTROLS**

14. The authority citation for part 870 is revised to read as follows:

**Authority:** 38 U.S.C. 501 and 40 U.S.C. 486(c).

**870.112 [Amended]**

15. In part 870, § 870.112, paragraph (a) is amended by removing "852.210-74" and adding, in its place, "852.211-74", Footnote 1 is amended by removing "Veterans Administration" and adding, in its place, "Department of Veterans Affairs", paragraph (b) is amended by removing "852.210-74" and adding, in its place, "852.211-74", by removing "the Office of Information Resources Operations" and adding, in its place, "Telecommunications Support Service"; by removing "(93)" each time it appears in paragraphs (b) and (c)(1) and adding, in its place, "Acquisition Administration Team".

[FR Doc. 97-21869 Filed 8-22-97; 8:45 am]

BILLING CODE 8320-01-P