

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[CA 210-0103b; FRL-6185-2]

**Approval and Promulgation of State Implementation Plans; California State Implementation Plan Revision, Sacramento Metropolitan Air Quality Management District****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

**SUMMARY:** EPA is approving revisions to the California State Implementation Plan (SIP). This action is an administrative change which revises the definition of volatile organic compound (VOC) and updates the Exempt Compound list in rules from the Sacramento Metropolitan Air Quality Management District (SMAQMD).

The intended effect of proposing approval of this action is to incorporate changes to the definition of VOC and to update the Exempt Compound list in SMAQMD rules to be consistent with the revised federal and state VOC definitions. EPA is proposing approval of these revisions to be incorporated into the California SIP for the attainment of the national ambient air quality standards (NAAQS) for ozone under title I of the Clean Air Act (CAA or the Act). In the Final Rules Section of this **Federal Register**, the EPA is approving the state's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision and anticipates no adverse comments. A detailed rationale for this approval is set forth in the direct final rule. If no adverse comments are received, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period. Any parties interested in commenting should do so at this time.

**DATES:** Written comments must be received by December 9, 1998.

**ADDRESSES:** Comments should be addressed to: Andrew Steckel, Chief, Rulemaking Office (AIR-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

Copies of the rule revisions and EPA's evaluation report of each rule are available for public inspection at EPA's Region 9 office during normal business

hours. Copies of the submitted rule revisions are also available for inspection at the following locations:

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 "L" Street, Sacramento, CA 95812  
Sacramento Metropolitan Air Quality Management District, 8411 Jackson Rd., Sacramento, CA 95826

**FOR FURTHER INFORMATION CONTACT:**

Cynthia G. Allen, Rulemaking Office [Air-4], Air Division, U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, CA 94105-3901, Telephone: (415) 744-1189)

**SUPPLEMENTARY INFORMATION:** This document concerns Sacramento Metropolitan Air Quality Management District Rule 101, General Provisions and Definitions; Rule 442, Architectural Coatings; Rule 443, Leaks From Synthetic Organic Chemical and Polymer Manufacturing; Rule 447, Organic Liquid Loading; Rule 452, Can Coating; Rule 456, Aerospace Assembly and Component Coating Operations; Rule 458, Large Commercial Bread Bakeries. These rules were submitted to EPA on May 18, 1998 by the California Air Resources Board. For further information, please see the information provided in the direct final action that is located in the rules section of this **Federal Register**.

Dated: October 26, 1998.

**Sally Seymour,**

*Acting Regional Administrator, Region IX.*

[FR Doc. 98-29966 Filed 11-6-98; 8:45 am]

**BILLING CODE 6560-50-U**

**DEPARTMENT OF VETERANS AFFAIRS****48 CFR Parts 801, 806, 812, 837, 852, and 873**

**RIN 2900-AI71**

**VA Acquisition Regulations: Simplified Acquisition Procedures for Health Care Resources**

**AGENCY:** Department of Veterans Affairs.  
**ACTION:** Proposed rule.

**SUMMARY:** This document proposes to amend the Department of Veterans Affairs Acquisition Regulations (VAAR) to establish simplified procedures for the competitive acquisition of health-care resources, consisting of commercial services or the use of medical equipment or space, pursuant to 38 U.S.C. 8151-8153. Presently, the VAAR does not contain simplified procedures. In the absence of such procedures, the Department of Veterans Affairs (VA)

follows the Federal Acquisition Regulation (FAR) and the current VAAR. Public Law 104-262, the Veterans' Health Care Eligibility Reform Act of 1996, authorized VA to prescribe simplified procedures for the procurement of health-care resources. This proposed rule prescribes those procedures.

**DATES:** Comments on the proposed rule should be submitted on or before January 8, 1999, to be considered in the formulation of the final rule.

**ADDRESSES:** Mail or hand-deliver written comments to: Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1154, Washington, DC 20420. Comments should indicate that they are submitted in response to "RIN 2900-AI71." All written comments received will be available for public inspection at the above address 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:**

Dennis Foley, (202) 273-9225, Office of the General Counsel, Professional Staff Group V; or Don Kaliher, (202) 273-8819, Acquisition Resources Service, Office of Acquisition and Materiel Management, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420.

**SUPPLEMENTARY INFORMATION:** Currently, the acquisition of health-care resources that consist of commercial services or the use of medical equipment or space is governed by the Department of Veterans Affairs Acquisition Regulations (VAAR) and the Federal Acquisition Regulation (FAR). Statutory provisions at 38 U.S.C. 8153 (Pub. L. 104-262) specifically authorize the Secretary of Veterans Affairs, after consultation with the Administrator for Federal Procurement Policy, to establish simplified procedures for the competitive procurement of such health-care resources. VA has consulted with the Administrator for Federal Procurement Policy and VA proposes to establish simplified procedures as set forth in this document.

Under the provisions of the law, procurements under the simplified procedures may be conducted "without regard to any law or regulation that would otherwise require the use of competitive procedures." Accordingly, the competitive procedures of any laws and regulations (including the competitive procedures of FAR and VAAR and their underlying laws) would be superseded by the simplified

procedures. However, under the provisions of the law, with certain exceptions, the simplified procedures are required to "permit all responsible sources, as appropriate, to submit a bid, proposal, or quotation (as appropriate) for the resources to be procured and provide for the consideration by the Department of bids, proposals, or quotations so submitted." This allows VA to limit competition to the extent it determines reasonable for the circumstances of each particular acquisition. Consistent with the principles set forth above, this document proposes to establish a new VAAR Part 873 setting forth such simplified procedures.

Under the provisions of 38 U.S.C. 8153, health-care resources consisting of commercial services, the use of medical equipment or space, or research, acquired from an institution affiliated with VA in accordance with 38 U.S.C. 7302, including medical practice groups and other approved entities associated with affiliated institutions (entities will be approved if determined legally to be associated with affiliated institutions), blood banks, organ banks, or research centers, may be procured without regard to any law or regulation that would otherwise require the use of competitive procedures. The provisions at new VAAR Part 873.104 contain a statement explaining this sole source acquisition authority.

Proposed § 873.101, Policy, would provide that the procedures set forth in Part 873 would apply to the acquisition of health-care resources consisting of commercial services or the use of medical equipment or space. These procedures would be used in conjunction with FAR, but VAAR Part 873 would take precedence over FAR and other Parts of VAAR. Currently, VAAR implements and supplements FAR. However, Public Law 104-262 grants VA authority to procure health-care resources consisting of commercial services or the use of medical equipment or space "without regard to any other law or regulation that would require the use of competitive procedures. \* \* \*". Therefore, it is necessary to have Part 873 of VAAR take precedence over FAR and any other part of VAAR.

Proposed § 873.102 would add definitions for "health-care resource," "commercial service," and "health-care providers." These definitions restate provisions of 38 U.S.C. 8152 and 8153. Previously, because of limitations under 38 U.S.C. 8153, procurements of commercial services or the use of medical equipment or space were limited to "specialized medical

resources." Consistent with the new definitions, the simplified procedures would govern procurements of commercial services or the use of medical equipment or space.

FAR 8.001(a)(2) sets forth three levels of priority, above the base level, for the acquisition of services. The base level is Federal Prison Industries or commercial sources. Proposed § 873.103 would exempt VA from the provisions of FAR 8.001(a)(2) regarding two of these levels of priority, mandatory and optional use Federal Supply Schedule (FSS) contracts. FSS contracts ensure prices associated with volume buying and should be used, if determined to provide best value, but would not have a higher priority than any other source. It is not proposed to affect the priority status for the acquisition of services available from the Committee for Purchase from People Who Are Blind or Severely Disabled, as required by the Javits-Wagner-O'Day (JWOD) Act. JWOD Act programs offer a valuable source of services for VA and have proved to be highly beneficial for both VA and program participants. The JWOD Act programs support VA's and other Federal Government agencies' procurement needs, and generate employment and training opportunities for people who are blind or have other severe disabilities. It is in the best interest of the Government to continue to support these valuable programs.

Proposed § 873.104, paragraphs (a) and (b), would restate the authority provided in the Act to acquire commercial services or the use of medical equipment or space from entities affiliated with VA, in accordance with 38 U.S.C. 7302, or approved entities associated with an affiliate (entities will be approved if determined legally to be associated with affiliated institutions), on a sole source basis without public notice and without further justification. Proposed § 873.104, paragraph (c), would provide that, on VA acquisitions of commercial services or the use of medical equipment or space from other sources, contracting officers would be required to seek competition to the maximum extent practicable rather than using full and open competition. This is consistent with provisions of the Act which provide that procurements may be conducted without regard to any law or regulation that would otherwise require use of competitive procedures. Competition to the maximum extent practicable is required to ensure that VA's acquisitions of commercial services or the use of medical equipment or space are conducted in an efficient and expeditious manner.

Proposed § 873.104, paragraph (d), restates the requirements of the Act that sole source acquisitions from sources other than affiliates or approved associates of affiliates (entities will be approved if determined legally to be associated with affiliated institutions) be justified and approved.

Proposed § 873.105 would exempt VA acquisitions of commercial services or the use of medical equipment or space from the acquisition planning procedures in FAR Part 7. However, the section emphasizes the indispensable importance of acquisition planning when acquiring health-care resources and imposes a requirement to form a team to assure a comprehensive plan. The proposed section also would impose a requirement on the team to conduct market research. This proposed section is necessary to simplify and streamline the acquisition process.

Proposed § 873.106 would exempt VA acquisitions of commercial services or the use of medical equipment or space from the market research requirements of FAR Part 10 but would provide optional market research techniques tailored specifically for use in acquiring commercial services or the use of medical equipment or space. This information is necessary to simplify market research while ensuring that contracting officers have a full range of techniques available for use in conducting market research when acquiring commercial services or the use of medical equipment or space.

Proposed paragraph (a) of § 873.107 would require acquisitions of commercial services or the use of medical equipment or space to be set aside for small business concerns if, through market research, the contracting officer determines that there is a reasonable expectation that reasonably priced offers would be received from two or more responsible small business concerns. This proposed section would also provide additional authority, over and above that found at FAR 19.502, for waiving the requirement for small business set-asides. FAR 19.502 currently provides that contracting officers can elect to not set aside a procurement if, generally, the contracting officer determines that there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns at fair market prices. Under this proposed new section, in addition to that authority in FAR, the Head of the Contracting Activity would have the authority to approve a waiver from the requirement to set aside any procurement of commercial services or the use of medical equipment or space

based on a determination that it is in the best interest of the Government. Also, this proposed section provides that acquisitions of commercial services or the use of medical equipment or space valued between \$2,500 and \$100,000 would be exempt from the automatic reservation of acquisitions for small business concerns. These provisions are necessary to ensure that VA can procure commercial services or the use of medical equipment or space from the highest quality sources while still supporting small business concerns to the maximum practicable extent.

The rule would make certain changes to the administration of VA's small business program as it applies to the acquisition of health-care resources to reflect the fast-moving health-care market. For example, proposed paragraph (b) of § 873.107 would establish a streamlined process for handling disagreements between VA and the Small Business Administration regarding whether a procurement should be set aside for small business. These streamlined procedures would not alter VA's ongoing commitment to strong small business participation in its acquisition of health-care resources. Nor would they affect efforts to mitigate any potential negative impacts of contract consolidations on small businesses' ability to secure work. VA's Office of Small and Disadvantaged Business Utilization and Office of Acquisition and Materiel Management would jointly monitor the impact of the new procedures on small business participation to ensure opportunities are available for competitive small businesses.

Paragraph (c) of § 873.107 restates VA's intent to follow the FAR regarding the SBA 8(a) program. Paragraph (d) provides that VA's Office of Small and Disadvantaged Business Utilization and SBA's Office of Industrial Assistance shall serve as ombudsmen to assist VA contracting officers on any issues relating to Certificates of Competency.

FAR 5.101 currently requires, with certain exceptions, that acquisitions with values exceeding \$25,000 be announced in the Commerce Business Daily (CBD) for specified periods of time and states what must be included in the announcement. Proposed § 873.108 would exempt VA acquisitions of commercial services or the use of medical equipment or space below \$100,000 from this requirement; would modify the requirement for publication of acquisitions above \$100,000 to only require public announcement, utilizing a medium designed to obtain competition to the maximum extent practicable; would set the time

requirements for announcement to be a "reasonable time"; and would modify what must be included in the announcement. The medium to be used for announcements could be the CBD, the Internet, or any other means, as appropriate, depending on the complexity of the acquisition. This section also proposes, in accordance with authority provided in the Act, to conduct procurements for commercial services or the use of medical equipment or space without regard to any law or regulation that would otherwise require the use of competitive procedures and to exempt acquisitions from affiliates and entities associated with affiliates and sole source acquisitions from other sources from the requirement for publication of notice in the CBD. These provisions would streamline and simplify VA's acquisitions of commercial services or the use of medical equipment or space.

Proposed paragraphs (a) and (b) of § 873.109 would emphasize that the contracting officer (rather than the team) is the selecting official and would provide simplified guidance to contracting officers on statements of work and specifications. FAR requires certain documentation in contract files. Proposed paragraph (c) would provide simplified documentation requirements to be used in lieu of the FAR requirements. FAR requires specific time frames for announcing solicitations and procurement opportunities to the public and provides, for commercial solicitations, that quotations, bids, or proposals received late shall not be considered. Proposed paragraph (d)(1) would replace FAR announcement time requirements with a "reasonable" time requirement and paragraph (d)(2) would allow the contracting officer to accept late quotations or proposals if late receipt is determined by the contracting officer to be in the best interest of the Government. Late bids received in response to an Invitation for Bid (IFB) would not be considered. FAR provides certain minimum requirements that a contracting officer must meet before a solicitation can be canceled. Proposed paragraph (e) would exempt VA acquisitions of commercial services or the use of medical equipment or space from those minimum requirements and would provide that a contracting officer can cancel a solicitation if cancellation is determined to be in the best interest of the Government. All of these changes are proposed for the purpose of streamlining and simplifying VA's acquisitions of commercial services or the use of medical equipment or space.

Proposed § 873.110, paragraphs (a) through (e), would provide guidance to

contracting officers on when to use the provisions and clauses in Part 852 of VAAR in VA acquisitions for commercial services or the use of medical equipment or space. Paragraph (f) would propose to require use of FAR clause 52.207-3, Right of First Refusal, in a solicitation in which current VA employees might be displaced as a result of contract award. This FAR clause ensures that those employees have a right of first refusal to any employment openings created with the contractor as a result of the contract award. This requirement is necessary to protect VA employees and to reduce the cost of contract award by reducing or avoiding unemployment compensation costs.

FAR places certain restrictions on when each type of acquisition procedure can be used. For instance, a request for quotation (RFQ) can be used for non-commercial service acquisitions costing up to \$100,000 or for commercial service acquisitions costing up to \$5 million. Proposed § 873.111 would remove all such restrictions, allowing use of the RFQ process for any acquisition of commercial services or the use of medical equipment or space, regardless of dollar value. This change is necessary to simplify VA's acquisition of commercial services or the use of medical equipment or space and to provide maximum flexibility to contracting officers.

For non-commercial service acquisitions exceeding the simplified acquisition threshold (SAT) (currently \$100,000) or for commercial service acquisitions exceeding \$5 million, FAR requires the use of full and open competition unless other statutory authority exists to limit competition. Paragraph (a)(1) of § 873.111 would provide, for acquisitions of commercial services or the use of medical equipment or space using the RFQ process, regardless of the dollar value of the acquisition, that competition to the maximum extent practicable may be used in lieu of full and open competition. FAR provides, for acquisitions below \$25,000, that three quotations are considered sufficient to promote competition to the maximum extent practicable. Proposed paragraph (a)(2) would provide, for acquisitions of commercial services or the use of medical equipment or space below the SAT, that two quotations would be considered sufficient to promote competition to the maximum extent practicable. Proposed paragraph (a)(2) would also exempt VA acquisitions of commercial services or the use of medical equipment or space from any dollar value restrictions in FAR on the

use of RFQs, allowing VA to use the RFQ process for all acquisitions of commercial services or the use of medical equipment or space, regardless of the dollar value of the procurement. These changes are necessary to simplify and streamline VA's acquisition of commercial services or the use of medical equipment or space by allowing use of the RFQ process in any circumstance.

Proposed paragraph (b) of § 873.111 would provide that the procedures of FAR Part 14 would be used for VA sealed bid acquisitions of commercial services or the use of medical equipment or space. Proposed paragraph (c) of § 873.111 would provide that the negotiation procedures of FAR Parts 12, 13, and 15 would be used for negotiated acquisitions of commercial services or the use of medical equipment or space, except as modified in VAAR Part 873. These two paragraphs are informational only.

Proposed paragraph (d) of § 873.111 would provide an alternative negotiation procedure using a multiphase negotiation technique. This will supersede current FAR provisions for an advisory multi-step process that does not allow the Government to exclude offerors that are unlikely to be viable competitors. Multiphase acquisitions may be appropriate when the submission of full proposals at the beginning of an acquisition would be burdensome for offerors to prepare and for Government personnel to evaluate. Under a multiphase acquisition, VA would seek limited information on vendors' first submissions, make one or more down-selects based on the initial information, and request full proposals from the offerors remaining. This technique would ensure that only those firms most likely to receive awards would be required to expend the time and effort to prepare a full proposal. It would simplify and streamline the acquisition process and would save both vendors and the Government time and money.

Proposed paragraph (e) of § 873.111 would provide two additional alternative negotiation techniques, neither of which are currently provided for in FAR, for use by VA in acquiring commercial services or the use of medical equipment or space. The first technique would allow the contracting officer to indicate to all offerors, or to one or more offerors, a price, contract term or condition, commercially available feature, or other requirement that the offeror or offerors will have to improve upon or meet, as appropriate, in order to remain competitive. The second technique would allow

contracting officers to post prices received on offers electronically or otherwise, without disclosing the identity of the offerors, and allow offerors to revise their prices based on the posted information. These procedures are necessary to assist contracting officers in procuring the highest quality health-care services at best value prices.

Proposed § 873.112 sets forth the evaluation requirements that VA contracting officers must place in solicitations. Currently, FAR has rigid requirements that evaluation factors and subfactors, as appropriate, be spelled out in a solicitation. In particular, there is a requirement, over certain dollar thresholds, to include vendor past performance as an evaluation factor. The contracting officer must document the reasons why past performance would not be included in an evaluation. This proposed section relieves contracting officers from these rigid requirements and allows them the flexibility to fashion their own acquisition-specific evaluation scheme with whatever information they deem to be in the best interest of the Government. However, this proposed section retains the requirement from FAR that price or cost to the Government still must be included in any evaluation.

Proposed § 873.113 sets forth a new standard for exchanges with offerors in negotiated acquisitions. Currently, under FAR, any contact with a vendor about the vendor's proposal that goes to the substance of the offer constitutes "discussions." This causes a set of rules to go into effect, including a requirement that the Government hold "discussions" with every offeror, even if there is no need for discussions with those other offerors. Less important contact is referred to as "clarification" under existing rules. Moreover, there is another category called "communications" which goes to establishment of a competitive range. Under proposed § 873.113, the Government can have contact, called "exchanges," at any time with any vendor, as required. However, as with the current regulations, the Government cannot improperly disclose information contained in another offeror's proposal (except see proposed at § 873.111(e), Alternative negotiation techniques).

Proposed § 873.114 sets forth a new concept of the "best value pool." This is the "pool" of offeror(s) that, after initial evaluation, have the most highly rated proposals with the greatest likelihood of award. Although this is similar in concept to the "competitive range" of current regulation, the

differences are that the contracting officer may limit the best value pool to a specific number of offerors among which an efficient competition can be conducted. Under the existing rules, the Government must consider every offeror that is acceptable or capable of being made acceptable. Therefore, the Government is forced to keep any number of marginal proposals in the competition even though they may have little real chance of securing an award. This proposed rule would eliminate this requirement and simplify the procurement process for both VA and vendors.

Proposed § 873.115 sets forth new procedures governing proposal revisions. Currently, once a "competitive range" has been developed, all offerors therein must be given a chance to revise their proposals. All revisions must be requested and received at the same time. Finally, at the close of "discussions," all offerors remaining in the competition must be requested to submit a "best and final offer." Under this proposed section, contracting officers may request proposal revisions as often as needed during the acquisition process. There is no need to have a common cutoff for submission of these revisions. Moreover, there is no need for a requirement to request a "best and final offer" from each and every offeror in every acquisition. The proposed section ensures that proposal submissions will be safeguarded against improper disclosures.

Proposed § 873.116 would provide guidance to contracting officers on source selection. FAR 15.308 contains specific requirements for documenting the source selection decision. This proposed section provides a less onerous procedure for documenting source selection than is described in FAR at 15.308.

Proposed § 873.117 would provide additional guidance to contracting officers on contract award, over and above that contained in FAR at 15.504, specifically on the differences between awarding RFQs and requests for proposals.

FAR 15.505 currently requires the contracting officer to provide a preaward debriefing if a written request for a debriefing is received from the offeror no later than 3 days after receipt by the offeror of notice of exclusion from the competitive range. Proposed § 873.118 would make preaward debriefings optional on the part of the contracting officer when determined to be in the best interest of the Government. This is necessary to

simplify and streamline the acquisition process.

#### Miscellaneous Changes

Currently, VAAR 801.602-70(a)(4) provides that proposed contracts for the mutual use or exchange of use of "specialized medical resources" above specified dollar thresholds be submitted to VA Central Office for review. This proposed rule would revise the term "specialized medical resources" to "health-care resources" pursuant to 38 U.S.C. 8152. The review threshold levels specified in VAAR have been changed by class deviation in accordance with 801.404. This document proposes to incorporate that class deviation and to raise the review thresholds. This is necessary to allow streamlined and expedited processing of proposed contracts and to reduce the administrative burden on contracting officers.

This proposed rule would make minor editorial changes to 801.602-71 and 801.601-72 to correspond with the new language used in this proposed rule.

VAAR 806.302-5(b) currently provides that contracts for the mutual use or exchange of use of specialized medical resources to be acquired from health-care facilities are approved for other than full and open competition, but requires justification and approval in accordance with FAR 6.303 and VAAR 806.303. Section 301 of Public Law 104-262 revised 38 U.S.C. 8153(a)(3)(A), restricting and modifying this authority. Under this new authority, only those acquisitions of health-care resources consisting of commercial services, the use of medical equipment or space, or research, to be acquired from institutions affiliated with the Department in accordance with 38 U.S.C. 7302, from medical practice groups and other approved entities associated with affiliated institutions (entities will be approved if determined legally to be associated with affiliated institutions), or from blood banks, organ banks, or research centers, are approved for other than full and open competition. However, justification and approval is not required for contracts with these entities. This rule proposes to revise 806.302-5, paragraph (b), to incorporate this new authority into VAAR.

In addition, § 301 of Public Law 104-262 revised 38 U.S.C. 8153(a)(3)(B)(i) to provide that contracts for the acquisition of commercial services or the use of medical equipment or space, not procured from affiliated institutions or approved entities associated with affiliated institutions (entities will be

approved if determined legally to be associated with affiliated institutions), may be procured without regard to any law or regulation that would otherwise require the use of competitive procedures, provided the procurement is conducted in accordance with the simplified procedures proposed in this rule. Public Law 104-262 revised 38 U.S.C. 8153(a)(3)(B)(ii) to require that such acquisitions permit all responsible sources, as appropriate, to submit a bid, proposal, or quotation (as appropriate) and revised 38 U.S.C. 8153(a)(3)(D) to require that such acquisitions, if conducted on a sole source basis, shall be justified and approved. This rule proposes to renumber current 806.302-5, paragraph (c), as paragraph (d) and to add new paragraph (c) to incorporate these new authorities into VAAR.

Currently, VAAR Part 812 addresses the acquisition of commercial services. This rule proposes to list the Part 52.273 clauses contained herein in Part 812 for use in commercial service acquisitions, as authorized by FAR 12.301(f). This action is necessary, and is proposed based on the reasons set forth below, to permit use of these Part 52.273 clauses in VA's commercial service acquisitions.

This rule proposes to add VAAR clause 852.237-7, Indemnification and Medical Liability Insurance, as shown below in full text, to § 812.302(f) for use in VA commercial service solicitations and contracts issued under the authority of 38 U.S.C. 8151-8153. VAAR clause 852.237-7 is currently set forth in 48 CFR Part 852. VA acquisitions under the authority of 38 U.S.C. 8151-8153 are considered to be for commercial services and clause 852.237-7 is necessary for use in such acquisitions to ensure that VA contractors providing nonpersonal health-care services have adequate medical liability insurance. This insurance is required to protect both VA and veterans from medical malpractice.

#### Indemnification and Medical Liability Insurance (Oct 1996)

(a) It is expressly agreed and understood that this is a nonpersonal services contract, as defined in Federal Acquisition Regulation (FAR) 37.101, under which the professional services rendered by the Contractor or its health-care providers are rendered in its capacity as an independent contractor. The Government may evaluate the quality of professional and administrative services provided but retains no control over professional aspects of the services rendered, including by example, the Contractor's or its health-care providers' professional

medical judgment, diagnosis, or specific medical treatments. The Contractor and its health-care providers shall be liable for their liability-producing acts or omissions. The Contractor shall maintain or require all health-care providers performing under this contract to maintain, during the term of this contract, professional liability insurance issued by a responsible insurance carrier of not less than the following amount(s) per specialty per occurrence: *[Contracting Officer insert the dollar amount value(s) of standard coverage(s) prevailing within the local community as to the specific medical specialty, or specialties, concerned, or such higher amount as the Contracting Officer deems necessary to protect the Government's interests]*.

However, if the Contractor is an entity or a subdivision of a State that either provides for self-insurance or limits the liability or the amount of insurance purchased by State entities, then the insurance requirement of this contract shall be fulfilled by incorporating the provisions of the applicable State law.

(b) An apparently successful offeror, upon request of the Contracting Officer, shall, prior to contract award, furnish evidence of the insurability of the offeror and/or of all health-care providers who will perform under this contract. The submission shall provide evidence of insurability concerning the medical liability insurance required by paragraph (a) of this clause or the provisions of State law as to self-insurance, or limitations on liability or insurance.

(c) The Contractor shall, prior to commencement of services under the contract, provide to the Contracting Officer Certificates of Insurance or insurance policies evidencing the required insurance coverage and an endorsement stating that any cancellation or material change adversely affecting the Government's interest shall not be effective until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer. Certificates or policies shall be provided for the Contractor and/or each health-care provider who will perform under this contract.

(d) The Contractor shall notify the Contracting Officer if it, or any of the health-care providers performing under this contract, change insurance providers during the performance period of this contract. The notification shall provide evidence that the Contractor and/or health-care providers will meet all the requirements of this clause, including those concerning liability insurance and endorsements. These requirements may be met either

under the new policy, or a combination of old and new policies, if applicable.

(e) The Contractor shall insert the substance of this clause, including this paragraph (e), in all subcontracts for health-care services under this contract. The Contractor shall be responsible for compliance by any subcontractor or lower-tier subcontractor with the provisions set forth in paragraph (a) of this clause.

(End of Clause)

VAAR 837.403 currently requires the use of the above clause 852.237-7, Indemnification and Medical Liability Insurance, in lieu of FAR clause 52.237-7, in solicitations and contracts for nonpersonal health-care services. This rule proposes to clarify at 837.403 that this same VAAR clause must also be used in solicitations and contracts for nonpersonal health-care services awarded under the authority of 38 U.S.C. 8151-8153 and VAAR Part 873. The clause is necessary for use in VA solicitations and contracts to ensure that VA contractors providing nonpersonal health-care services have adequate medical liability insurance. This insurance is required to protect both VA and veterans from medical malpractice.

VAAR Part 852 does not currently contain any provisions specifically relating to the acquisition of commercial services under the simplified acquisition authority of 38 U.S.C. 8151-8153. This rule proposed to add four provisions to the VAAR, as set forth herein in Part 852. The following is an explanation of these proposed provisions.

The proposed provision at 852.273-70, Late offers, would replace paragraph (f) of FAR provision 52.212-1 in acquisitions for commercial services conducted in accordance with VAAR Part 873. Paragraph (f) of FAR provision 52.212-1 currently provides that offers or modifications of offers received after the exact time specified in the solicitation for receipt of offers will not be considered. VAAR provision 852.273-70 proposes to allow consideration of quotations, proposals, or modifications of proposals received after the time set forth in the request for quotations or request for proposals at the discretion of the contracting officer, if determined to be in the best interest of the Government. This will ensure that VA will be able to accept the best offer submitted on a solicitation, even if that offer is received after the time set forth in the solicitation.

Neither FAR nor VAAR currently contains provisions allowing alternative negotiation techniques. The provision at 852.273-71, Alternative negotiation

techniques, proposes to allow the use of the alternative negotiation techniques set forth at 873.111(e). The techniques listed therein include (1) allowing the contracting officer to indicate to an offeror how the offeror must improve its offer in order to be considered for award and (2) allowing the contracting officer to post prices and permit revisions of offers based on that information. We believe these alternative negotiation techniques will allow VA to conduct acquisitions on a basis more in line with commercial practices and will result in the acquisition of improved services at reduced prices.

The proposed provision at 852.273-72, Alternative evaluation, would implement the provision at 852.273-71, Alternative negotiation techniques, by advising offerors how prices would be posted and by providing guidance to offerors on how to submit offers. In addition, this proposed provision would advise offerors on how options would be evaluated, i.e., by adding the total price of all options to the total price for the basic requirement. It would also advise offerors that the Government is not obligated to exercise the options. The "options" paragraph is included in this proposed provision because this provision might be used alone, without a separate "options" provision.

The proposed provision at 852.273-73, Evaluation—health-care resources, would replace FAR provision 52.212-2 in acquisitions for commercial services conducted in accordance with VAAR Part 873. FAR provision 52.212-2 provides guidance to offerors on what factors the Government will use to evaluate offers and on how those factors are weighted. Under proposed VAAR 873, VA would not be required to use factors to evaluate offers. Rather, VA would include information in the solicitation on how offers will be evaluated. In addition, VA would not be required to state how the evaluation information is weighted. This proposed provision is written to replace FAR 52.212-2 with these authorities in mind. Also, paragraph (c) has been drafted to clarify that notice of acceptance of an offer will create a binding contract if the solicitation is a request for proposals. If the solicitation is a request for quotations, that would not be the case, as notice of acceptance would not create a binding contract.

Provision at 852.273-74, Award without exchanges, is proposed to be added to VAAR to advise offerors that VA intends to evaluate proposals and award a contract without exchanges with offerors. This provision is necessary in order to avoid any misunderstanding regarding award and

to help ensure that offerors provide their best prices and terms with their initial offer.

### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), collections of information are contained in clause 852.237-7, Indemnification and Medical Liability Insurance, as set forth in the Supplementary Information portion of this proposed rule. Although this document proposes to add this clause 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 and service contracts for this clause. The clause can be used in both commercial and non-commercial item and service solicitations and contracts. As required under § 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-A171."

*Title and Provision/Clause Number:* Clause 852.237-7, Indemnification and Medical Liability Insurance.

*Summary of collection of information:* This clause is used in solicitations for nonpersonal health-care services in lieu of FAR clause 52.237-7. 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 and to notify the contracting officer if there are any changes in the firm's insurance coverage during the contract period. Prior to award, this evidence is in the form of a certificate from the firm's insurance company. After award, it is in the form of a letter or other correspondence, plus additional certificates.

*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/offerors on solicitations for nonpersonal health-care services.

*Estimated number of respondents:* 10,000.

*Estimated frequency of responses:* Once for each contract awarded, plus once each time a contractor changes its insurance coverage.

*Estimated average burden per collection:* 30 minutes.

*Estimated total annual reporting and recordkeeping burden:* 5000 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.

#### Regulatory Flexibility Act

The Secretary hereby certifies that the adoption of this proposed rule would not have a significant economic impact on a substantial number of small entities

as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. This proposed rule would establish simplified procedures for the acquisition of health-care resources by VA. Costs, if any, to comply with the provisions of the proposed rule would 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 §§ 603 and 604.

#### List of Subjects

##### 48 CFR Parts 801 and 852

Government Procurement, Reporting and recordkeeping requirements.

##### 48 CFR Parts 806, 812, 837, and 873

Government Procurement.

Approved: November 2, 1998.

**Togo D. West, Jr.,**

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 48 CFR chapter 8 is proposed to be amended as follows:

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

1. The authority citations for Part 801 continues to read as follows:

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

##### 801.602–70 [Amended]

2. In § 801.602–70, paragraphs (a)(4)(vi) and (a)(4)(vii) are proposed to be revised to read as follows:

##### 801.602–70 Legal/technical review requirements to be met prior to contract execution.

(a) \* \* \*

(4) \* \* \*

(vi) Except as specified in paragraph (a)(4)(vii), competitive contracts exceeding \$1.5 million and noncompetitive contracts exceeding \$500,000 for scarce medical specialist services negotiated under the authority of 38 U.S.C. 7409 or for health-care resources acquired under the authority of Part 873 and 38 U.S.C. 8151–8153.

(vii) Any contract or agreement negotiated under the authority of 38 U.S.C. 8151–8153 for VA to provide inpatient services, administrative resources, the use of medical equipment or space, prosthetics, supplies, or laundry services.

\* \* \* \* \*

3. In § 801.602–71, paragraph (b)(2) is proposed to be revised to read as follows:

##### 801.602–71 Processing contracts for legal/technical review.

\* \* \* \* \*

(b) \* \* \*

(2) Proposed contracts and agreements for scarce medical specialist services or for the mutual use or exchange of use of health-care resources, as specified in 801.602–70(a)(4)(vi) and (a)(4)(vii), will be forwarded to Central Office in accordance with VHA Directive 97–015 and VA Manual M–1, Part 1, Chapter 34, for review and submission to the Office of the General Counsel (025).

\* \* \* \* \*

4. In § 801.602–72, paragraph (b) is proposed to be revised to read as follows:

##### 801.602–72 Documents to be submitted for legal review.

\* \* \* \* \*

(b) For proposed contracts and agreements for scarce medical specialist services or for the mutual use or exchange of use of health-care resources, as specified in 801.602–70(a)(4)(vi) and (a)(4)(vii), the documents referred to in VA Manual M–1, Part 1, Chapter 34.

\* \* \* \* \*

#### PART 806—COMPETITION REQUIREMENTS

5. The authority citations for Part 806 continues to read as follows:

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

6. In § 806.302–5, paragraph (b) is proposed to be revised to read as follows:

##### 806.302–5 Authorized or required by statute.

\* \* \* \* \*

(b) Contracts or agreements for the mutual use or exchange of use of health-care resources, consisting of commercial services, the use of medical equipment or space, or research, negotiated under the authority of 38 U.S.C. 8151–8153, are approved for other than full and open competition only when such contracts or agreements are with institutions affiliated with the Department of Veterans Affairs, pursuant to 38 U.S.C. 7302, with medical practice groups or other approved entities associated with affiliated institutions (entities will be approved if determined legally to be associated with affiliated institutions), or with blood banks, organ banks, or research centers. The justification and approval requirements of FAR 6.303 and VAAR 806.304 do not apply to such contracts or agreements.

\* \* \* \* \*



7. In § 806.302–5, paragraph (c) is proposed to be redesignated as paragraph (d) and a new paragraph (c) is proposed to be added to read as follows:

**806.302–5 Authorized or required by statute.**

\* \* \* \* \*

(c) Contracts or agreements for the mutual use or exchange of use of health-care resources, consisting of commercial services or the use of medical equipment or space, negotiated under the authority of 38 U.S.C. 8151–8153, and not acquired under the authority of paragraph (b) of this section, may be conducted without regard to any law or regulation that would otherwise require the use of competitive procedures for procuring resources, provided the procurement is conducted in accordance with the simplified procedures contained in part 873. The justification and approval requirements of FAR 6.303 and VAAR 806.304 shall apply to such contracts or agreements conducted on a sole source basis.

\* \* \* \* \*

**PART 812—ACQUISITION OF COMMERCIAL ITEMS**

8. The authority citations for Part 812 continues to read as follows:

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

**812.301 [Amended]**

9. In § 812.301, paragraph (g) is proposed to be added to read as follows:

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

\* \* \* \* \*

(g) When soliciting for commercial services or the use of medical equipment or space under the authority of part 873 and 38 U.S.C. 8151–8153, the provisions and clauses in the following VAAR sections may be used in accordance with the prescriptions contained in parts 837 and 873:

- (1) 852.237–7, Indemnification and Medical Liability Insurance.
- (2) 852.273–70, Late offers.
- (3) 852.273–71, Alternative negotiation techniques.
- (4) 852.273–72, Alternative evaluation.
- (5) 852.273–73, Evaluation—health-care resources.
- (6) 852.273–74, Award without exchanges.

**PART 837—SERVICE CONTRACTING**

10. The authority citations for Part 837 continues to read as follows:

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

**837.403 [Amended]**

11. Section 837.403 is proposed to be amended by adding, at the end of the first sentence, “, including solicitations and contracts for nonpersonal health-care services awarded under the authority of 38 U.S.C. 8151–8153 and VAAR Part 873”.

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

12. The authority citations for Part 852 continues to read as follows:

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

13. Section 852.273–70 is proposed to be added to read as follows:

**852.273–70 Late offers.**

As prescribed in 873.110(a), insert the following provision:

Late Offers (Date)

This provision replaces paragraph (f) of FAR Provision 52.212–1. Offers or modifications of offers received after the time set forth in a request for quotations or request for proposals may be considered, at the discretion of the contracting officer, if determined to be in the best interest of the Government. Late bids submitted in response to an Invitation for Bid (IFB) will not be considered.

(End of provision)

14. Section 852.273–71 is added to read as follows:

**852.273–71 Alternative negotiation techniques.**

As prescribed in 873.110(b), insert the following provision:

Alternative Negotiation Techniques (Date)

The contracting officer may elect to use the alternative negotiation techniques described in section 873.111(e) in conducting this procurement. If used, offerors may respond by maintaining offers as originally submitted, revising offers, or submitting an alternative offer. The Government may consider initial offers unless revised or withdrawn, revised offers, and alternative offers in making the award. Revising an offer does not guarantee an offeror an award.

(End of provision)

15. Section 852.273–72 is added to read as follows:

**852.273–72 Alternative evaluation.**

As prescribed in 873.110(c), insert the following provision:

Alternative Evaluation (Date)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror submitting the lowest priced offer that conforms to the solicitation. During the specified period for receipt of

offers, the amount of the lowest offer will be posted and may be viewed by—[Contracting officer insert description of how the information may be viewed electronically or otherwise]. Offerors may revise offers anytime during the specified period. At the end of the specified time period for receipt of offers, the responsible offeror submitting the lowest priced offer will be in line for award.

(b) Except when it is determined not to be in the Government's best interest, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are materially unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s). (End of provision)

16. Section 852.273–73 is added to read as follows:

**852.273–73 Evaluation—health-care resources.**

As prescribed in 873.110(d), in lieu of FAR provision 52.212–2, the contracting officer may insert a provision substantially as follows:

Evaluation—Health-Care Resources (Date)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer, conforming to the solicitation, will be most advantageous to the Government, price and other factors considered. The following information or factors shall be used to evaluate offers:

[Contracting officer insert evaluation information or factors, such as technical capability to meet the Government's requirements, past performance, or such other evaluation information or factors as the contracting officer deems necessary to evaluate offers. Price shall be evaluated in every acquisition. The contracting officer may include the evaluation information or factors in their relative order of importance, such as in descending order of importance.]

(b) Except when it is determined not to be in the Government's best interest, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are materially unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

(c) If this solicitation is a Request for Proposals (RFP), a written notice of award or acceptance of an offer, mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

(End of Provision)



17. Section 852.273-74 is added to read as follows:

**852.273-74 Award without exchanges.**

As prescribed in 873.110(e), insert the following provision:

Award Without Exchanges (Date)

The Government intends to evaluate proposals and award a contract without exchanges with offerors. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct exchanges if later determined by the contracting officer to be necessary.

(End of provision)

18. Part 873 is added to read as follows:

**PART 873—SIMPLIFIED ACQUISITION PROCEDURES FOR HEALTH-CARE RESOURCES**

Sec.

- 873.101 Policy.
- 873.102 Definitions.
- 873.103 Priority sources.
- 873.104 Competition requirements.
- 873.105 Acquisition planning.
- 873.106 Presolicitation exchanges with industry.
- 873.107 Socioeconomic programs.
- 873.108 Publicizing contract actions.
- 873.109 General requirements for acquisition of health-care resources.
- 873.110 Solicitation provisions.
- 873.111 Acquisition strategies for health-care resources.
- 873.112 Evaluation information.
- 873.113 Exchanges with offerors.
- 873.114 Best value pool.
- 873.115 Proposal revisions.
- 873.116 Source selection decision.
- 873.117 Award to successful offeror.
- 873.118 Debriefings.

**Authority:** 38 U.S.C. 8151-8153.

**873.101 Policy.**

The simplified acquisition procedures set forth in this VAAR part apply to the acquisition of health-care resources consisting of commercial services or the use of medical equipment or space. These procedures shall be used in conjunction with the Federal Acquisition Regulation (FAR). However, when a policy or procedure in FAR or another part of VAAR is inconsistent with the procedures contained in this part, this part shall take precedence. These procedures contain more flexibility than provided in FAR or elsewhere in VAAR.

**873.102 Definitions.**

*Commercial service* means a service, except construction exceeding \$2,000, that is offered and sold competitively in the commercial marketplace, is performed under standard commercial

terms and conditions, and is procured using firm-fixed price contracts.

*Health-care providers* includes health-care plans and insurers and any organizations, institutions, or other entities or individuals who furnish health-care resources.

*Health-care resource* includes hospital care and medical services (as those terms are defined in § 1701 of title 38 United States Code (U.S.C.)), any other health-care service, and any health-care support or administrative resource, including the use of medical equipment or space.

**873.103 Priority sources.**

Without regard to FAR 8.001(a)(2), except for the acquisition of services available from the Committee for Purchase From People Who Are Blind or Severely Disabled, pursuant to the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) and FAR Subpart 8.7, there are no priority sources for the acquisition of health-care resources consisting of commercial services or the use of medical equipment or space.

**873.104 Competition requirements.**

(a) Without regard to FAR Part 6, if the health-care resource required is a commercial service, the use of medical equipment or space, or research, and is to be acquired from an institution affiliated with the Department in accordance with § 7302 of title 38 U.S.C., including medical practice groups and other approved entities associated with affiliated institutions (entities will be approved if determined legally to be associated with affiliated institutions), or from blood banks, organ banks, or research centers, the resource may be acquired on a sole source basis.

(b) Acquisition of health-care resources identified in paragraph (a) are not required to be publicized as otherwise required by § 873.108 or FAR 5.101. In addition, written justification, as otherwise set forth in § 303(f) of the Federal Property and Administration Services Act of 1949 (41 U.S.C. 253(f)) and FAR Part 6, is not required.

(c) Without regard to FAR 6.101, if the health-care resource required is a commercial service or the use of medical equipment or space, and is to be acquired from an entity not described in paragraph (a) of this section, contracting officers shall seek competition to the maximum extent practicable and shall permit all responsible sources, as appropriate under the provisions of this part, to submit a bid, proposal or quotation (as appropriate) for the resources to be procured and provide for the consideration by the Department of

bids, proposals, or quotations so submitted.

(d) Without regard to FAR 5.101, acquisition of health-care resources identified in paragraph (c) of this section shall be publicized as otherwise required by § 873.108. Moreover, for any such acquisition described in paragraph (c) of this section to be conducted on a sole source basis, the contracting officer must prepare a justification that includes the information and is approved at the levels prescribed in § 303(f) of the Federal Property and Administration Services Act of 1949 (41 U.S.C. 253(f)) and FAR Part 6.

**873.105 Acquisition planning.**

(a) This section shall be used in lieu of FAR Part 7. Acquisition planning is an indispensable component of the total acquisition process. Acquisition planning may involve identifying requirements, available funding, and sources, and development of a statement or description of work, a Government estimate, and/or evaluation information.

(b) Within VA and for the acquisition of health-care resources consisting of commercial services or the use of medical equipment or space, an acquisition team shall be assembled. The team shall be tailored by the contracting officer for each particular acquisition and include the appropriate mix of contracting, fiscal, legal, administrative, and technical personnel, the small business advocate representing the contracting activity or a higher level designee, an SBA Procurement Center Representative, if available, and such other expertise to assure a comprehensive acquisition plan.

(c) Prior to determining whether a requirement is suitable for acquisition using these simplified acquisition procedures, the acquisition team shall conduct market research to identify interested businesses. It is the responsibility of the contracting officer to ensure the requirement is appropriately publicized and information about the procurement opportunity is adequately disseminated as set forth in § 873.108.

**873.106 Presolicitation exchanges with industry.**

(a) This section shall be used in lieu of FAR Part 10. In conducting market research, exchange of information by all interested parties involved in an acquisition, from the earliest identification of a requirement through release of the solicitation, is encouraged. Interested parties include potential offerors, end users, Government acquisition and support personnel, and

others involved in the conduct or outcome of the acquisition. The nature and extent of presolicitation exchanges between the Government and industry shall be a matter of the acquisition team's discretion, as coordinated by the contracting officer.

(b) Techniques to promote early exchange of information include—

- (1) Industry or small business conferences;
- (2) Public hearings;
- (3) Market research;
- (4) One-on-one meetings with potential offerors;
- (5) Presolicitation notices;
- (6) Draft Requests for Proposals (RFPs);
- (7) Requests for Information (RFIs);
- (8) Presolicitation or preproposal conferences;
- (9) Site visits;
- (10) Electronic notices (e.g., Internet); and
- (11) Use of the Procurement Marketing and Access Network (PRO-NET).

#### **873.107 Socioeconomic programs.**

(a) *Implementation.* This paragraph provides additional authority, over and above that found at FAR 19.502, to waive small business set-asides. If, through market research, there is reasonable expectation that reasonably priced bids, proposals, or quotations will be received from two or more responsible small businesses, a requirement for health-care resources shall be reserved for small business participation. The Head of the Contracting Activity may approve a waiver from the requirement for any set-aside for small business participation when it is determined to be in the best interest of the Government. For acquisitions between \$2,500 and \$100,000, the automatic reservation for small business concerns, as provided in FAR 19.502-2(a), is not applicable.

#### *(b) Rejecting Small Business Administration (SBA)*

*Recommendations.* (1) HCA's shall consider and respond to a recommendation from an SBA representative to set a procurement aside for small business within 5 working days. If the recommendation is rejected by the HCA and if SBA intends to appeal that determination, SBA shall, within 1 working day after receipt of the HCA's determination, notify the contracting officer of SBA's intention to appeal.

(2) Upon receipt of the notification of SBA's intention to appeal and pending issuance of a final appeal decision to SBA, the contracting officer shall suspend action on the acquisition

unless a determination is made in writing by the contracting officer that proceeding to contract award and performance is in the public interest. The contracting officer shall promptly notify SBA of the determination to proceed with the solicitation and/or contract award and shall provide a copy of the written determination to SBA.

(3) SBA shall be allowed 10 working days after receiving the rejection notice from the HCA for acquisitions not exceeding \$5 million, or 15 working days after receiving the rejection notice for acquisitions exceeding \$5 million, to file an appeal. SBA shall notify the contracting officer within this 10 or 15 day period whether an appeal has, in fact, been taken. If notification is not received by the contracting officer within the applicable period, it shall be deemed that an appeal was not taken.

(4) SBA shall submit appeals to the Secretary. Decisions shall be made by the Procurement Executive, whose decisions shall be final.

(c) *Contracting with the Small Business Administration (the 8(a) Program).* The procedures of FAR Part 19.8 shall be followed where a responsible 8(a) contractor has been identified.

(d) *Determinations of Responsibility and Small Business.* The Director, Office of Small and Disadvantaged Business Utilization (OSDBU), Department of Veterans Affairs (VA), and Director, Office of Industrial Assistance, Small Business Administration (SBA) shall serve as ombudsmen to assist VA contracting officers on any issues relating to Certificates of Competency (COC). Copies of all COC referrals to SBA shall be submitted to the Director, OSDBU.

#### **873.108 Publicizing contract actions.**

(a) Without regard to FAR 5.101, all acquisitions under this Part 873 for dollar amounts in excess of the simplified acquisition threshold (SAT), as set forth in FAR Part 13, shall be publicly announced utilizing a medium designed to obtain competition to the maximum extent practicable and to permit all responsible sources, as appropriate under the provisions of this Part, to submit a bid, proposal, or quotation (as appropriate).

(1) The publication medium may include the Commerce Business Daily; the Internet; and local, regional or national publications or journals, as appropriate, at the discretion of the contracting officer, depending on the complexity of the acquisition.

(2) Without regard to FAR 5.101 or 14.202-1, notice shall be published for a reasonable time prior to issuance of a

request for quotations (RFQ) or a solicitation, depending on the complexity or urgency of the acquisition, in order to afford potential offerors a reasonable opportunity to respond. If the notice includes a complete copy of the RFQ or solicitation, a prior notice is not required, and the RFQ or solicitation shall be considered to be announced and issued at the same time.

(3) The notice may include contractor qualification parameters, such as time for delivery of service, credentialing or medical certification requirements, small business or other socio-economic preferences, the appropriate small business size standard, and such other qualifications as the contracting officer deems necessary to meet the needs of the Government.

(b) The requirement for public announcement does not apply to sole source acquisitions, described in 873.104(a), from institutions affiliated with the Department in accordance with § 7302 of title 38 U.S.C., including medical practice groups and other approved entities associated with affiliated institutions (entities will be approved if determined legally to be associated with affiliated institutions), or from blood banks, organ banks, or research centers, or to sole source acquisitions of hospital care and medical services (as those terms are defined in § 1701 of title 38 U.S.C.) or any other health-care services.

(c) For acquisitions below the SAT, a public announcement is optional.

(d) Each solicitation issued under these procedures shall prominently identify that the requirement is being solicited under the authority of 38 U.S.C. 8153 and VAAR Part 873.

#### **873.109 General requirements for acquisition of health-care resources.**

(a) *Source Selection Authority.* Contracting officers shall be the source selection authority for acquisitions of health-care resources, consisting of commercial services or the use of medical equipment or space, utilizing the guidance contained in this VAAR Part 873.

(b) *Statement of work/Specifications.* Statements of work or specifications may define the requirement and include qualifications or limitations such as time limits for delivery of service, medical certification or credentialing restrictions, small business or other socio-economic preferences, or any other such terms as the contracting officer deems appropriate for each specific acquisition.

(c) *Documentation.* Without regard to FAR 13.106-3(b), 13.501(b), or 14.408-

7(a) and (b), the contract file shall include:

(1) A brief written description of the procedures used in awarding the contract;

(2) The market research, including the determination that the acquisition involves health-care resources;

(3) The number of offers received; and

(4) An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision.

(d) *Time for receipt of quotations or offers.* (1) Without regard to FAR 5.203, contracting officers shall set a reasonable time for receipt of quotations or proposals in requests for quotations (RFQs) and solicitations.

(2) Without regard to FAR 15.208 or 52.212-1(f), quotations or proposals received after the time set forth in a RFQ or request for proposals (RFP) may be considered at the discretion of the contracting officer if determined to be in the best interest of the Government. Contracting officers shall document the rationale for accepting quotations or proposals received after the time specified in the RFQ or RFP. This paragraph (d)(2) shall not apply to RFQs or RFPs if alternative evaluation techniques described in VAAR 873.111(e)(ii) are used. This paragraph (d)(2) does not apply to invitations for bid (IFBs).

(e) *Cancellation of procurements.* Any acquisition may be canceled by the contracting officer at any time during the acquisition process if cancellation is determined to be in the best interest of the Government.

#### **873.110 Solicitation provisions.**

(a) As provided in 873.109(d), contracting officers shall insert the provision at 852.273-70, Late offers, in all requests for quotations (RFQs) and requests for proposals (RFPs) exceeding the micro-purchase threshold.

(b) The contracting officer shall insert a provision in RFQs and solicitations, substantially the same as the provision at 852.273-71, Alternative negotiation techniques, when either of the alternative negotiation techniques described in 873.111(e)(1) will be used.

(c) The contracting officer shall insert the provision at 852.273-72, Alternative evaluation, in lieu of the provision at 52.212-2, Evaluation—Commercial Items, when the alternative negotiation technique described in 873.111(e)(1)(ii) will be used.

(d) When evaluation information, as described in 873.112, is to be used to select a contractor under an RFQ or RFP for health-care resources consisting of commercial services or the use of medical equipment or space, the

contracting officer may insert the provision at 852.273-73, Evaluation—health-care resources, in the RFQ or RFP in lieu of FAR provision 52.212-2.

(e) As provided at 873.113(f), if award may be made without exchange with vendors, the contracting officer shall include the provision at 852.273-74, Award without exchanges, in the RFQ or RFP.

(f) The contracting officer shall insert the clauses at FAR 52.207-3, Right of First Refusal of Employment, and at VAAR 852.207-70, Report of employment under commercial activities, in all RFQs, solicitations, and contracts issued under the authority of 38 U.S.C. 8151-8153 which may result in a conversion, from in-house performance to contract performance, of work currently being performed by Department of Veterans Affairs employees.

#### **873.111 Acquisition strategies for health-care resources.**

Without regard to FAR 13.003 or 13.500(a), the following acquisition processes and techniques may be used, singly or in combination with others, as appropriate, to design acquisition strategies suitable for the complexity of the requirement and the amount of resources available to conduct the acquisition. These strategies should be considered during acquisition planning. The contracting officer shall select the process most appropriate to the particular acquisition. There is no preference for sealed bid acquisitions.

(a) *Request for quotations.* (1) Without regard to FAR 6.1 or 6.2, contracting officers should solicit a sufficient number of sources to promote competition to the maximum extent practicable and to ensure that the purchase is advantageous to the Government, based, as appropriate, on either price alone or price and other factors (e.g., past performance and quality). RFQs should notify vendors of the basis upon which the award is to be made.

(2) Without regard to FAR 13.104(b), for acquisitions under the simplified acquisition threshold (SAT), two quotes meet the requirement for competition to the maximum extent practicable. For acquisitions in excess of the SAT, procedures set forth in FAR Part 13 concerning RFQs may be utilized without regard to the dollar thresholds contained therein.

(b) *Sealed bidding.* FAR Part 14 provides procedures for sealed bidding.

(c) *Negotiated acquisitions.* The procedures of FAR Parts 12, 13, and 15 shall be used for negotiated

acquisitions, except as modified in this VAAR part.

(d) *Multiphase acquisition technique—*(1) *General.* Without regard to FAR 15.202, multiphase acquisitions may be appropriate when the submission of full proposals at the beginning of an acquisition would be burdensome for offerors to prepare and for Government personnel to evaluate. Using multiphase techniques, the Government may seek limited information initially, make one or more down-selects, and request a full proposal from an individual offeror or limited number of offerors. Provided that the notice notifies offerors, the contracting officer may limit the number of proposals during any phase to the number that will permit an efficient competition among proposals offering the greatest likelihood of award. The contracting officer may indicate in the notice an estimate of the greatest number of proposals that will be included in the down-select phase. The contracting officer may down-select to a single offeror.

(2) *First phase notice.* In the first phase, the Government shall publish a notice (see 873.108) that solicits responses and that may provide, as appropriate, a general description of the scope or purpose of the acquisition and the criteria that will be used to make the initial down-select decision. The notice may also inform offerors of the evaluation criteria or process that will be used in subsequent down-select decisions. The notice shall contain sufficient information to allow potential offerors to make an informed decision about whether to participate in the acquisition. The notice shall advise offerors that failure to participate in the first phase will make them ineligible to participate in subsequent phases. The notice may be in the form of a Commerce Business Daily notice or a narrative letter or other appropriate method that contains the information required by this paragraph.

(3) *First phase responses.* Offerors shall submit the information requested in the notice described in paragraph (d)(2) of this section. Information sought in the first phase may be limited to a statement of qualifications and other appropriate information (e.g., proposed technical concept, past performance information, limited pricing information).

(4) *First phase evaluation and down-select.* The Government shall evaluate all offerors' submissions in accordance with the notice and make a down-select decision.

(5) *Subsequent phases.* Additional information shall be sought in the

second phase so that a down-select can be performed or an award made without exchanges, if necessary. The contracting officer may conduct exchanges with remaining offeror(s), request proposal revisions, or request best and final offers, as determined necessary by the contracting officer, in order to make an award decision.

(6) *Debriefing.* Without regard to FAR 15.505, contracting officers shall debrief offerors as required by 873.118 when they have been excluded from the competition.

(e) *Alternative negotiation techniques*—(1) Contracting officers may utilize alternative negotiation techniques for the acquisition of health-care resources. Alternative negotiation techniques may be used when award will be based on either price or price and other factors. Alternative negotiation techniques include but are not limited to:

(i) Indicating to offerors a price, contract term or condition, commercially available feature, and/or requirement (beyond any requirement or target specified in the solicitation) that offerors will have to improve upon or meet, as appropriate, in order to remain competitive.

(ii) Posting offered prices electronically or otherwise (without disclosing the identity of the offerors) and permitting revisions of offers based on this information.

(2) Except as otherwise permitted by law, contracting officers shall not conduct acquisitions under this section in a manner that reveals the identities of offerors, releases proprietary information, or otherwise gives any offeror a competitive advantage (see FAR 3.104).

#### **873.112 Evaluation information.**

(a) Without regard to FAR 15.304, the criteria, factors, or other evaluation information that apply to an acquisition, and their relative importance, are within the broad discretion of agency acquisition officials as long as the evaluation information is determined to be in the best interest of the Government.

(b) Price or cost to the Government shall be evaluated in every source selection.

(c) The quality of the product or service may be addressed in source selection through consideration of information such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience. The information required from quoters,

bidders, or offerors shall be included in notices or solicitations, as appropriate.

(d) The relative importance of any evaluation information included in a solicitation shall be set forth therein.

#### **873.113 Exchanges with offerors.**

(a) Without regard to FAR 15.201 or 15.306, negotiated acquisitions generally involve exchanges between the Government and competing offerors. Open exchanges support the goal of efficiency in Government by providing the Government with relevant information (in addition to that submitted in the offeror's initial proposal) needed to understand and evaluate the offeror's proposal. The nature and extent of exchanges between the Government and offerors is a matter of contracting officer judgment. Clarifications, communications, and discussions, as provided for in the FAR, are concepts not applicable to acquisitions under this VAAR part 873.

(b) Exchanges with all potential offerors may take place throughout the source selection process. Exchanges may start in the planning stages and continue through contract award. Exchanges should occur most often with offerors determined to be in the best value pool (see 873.114). The purpose of exchanges is to ensure there is mutual understanding between the Government and the offerors on all aspects of the acquisition, including offerors' submittals/proposals. Information disclosed as a result of oral or written exchanges with an offeror may be considered in the evaluation of an offeror's proposal.

(c) Exchanges may be conducted, in part, to obtain information that explains or resolves ambiguities or other concerns (e.g., perceived errors, perceived omissions, or perceived deficiencies) in an offeror's proposal.

(d) Exchanges shall only be initiated if authorized by the contracting officer and need not be conducted with all offerors.

(e) *Improper exchanges.* Except for acquisitions based on alternative negotiation techniques contained in 873.111(e)(1), the contracting officer and other Government personnel involved in the acquisition shall not disclose information regarding one offeror's proposal to other offerors without consent of the offeror in accordance with FAR Parts 3 and 24.

(f) Award may be made on initial proposals without exchanges if the solicitation states that the Government intends to evaluate proposals and make award without exchanges, unless the contracting officer determines that exchanges are considered necessary.

#### **873.114 Best value pool.**

(a) Without regard to FAR 15.306(c), the contracting officer may determine the most highly rated proposals having the greatest likelihood of award based on the information or factors and subfactors in the solicitation. These vendors constitute the best value pool. This determination is within the sole discretion of the contracting officer. Competitive range determinations, as provided for in the FAR, are not applicable to acquisitions under this VAAR part 873.

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the best value pool is expected to exceed the number at which an efficient, timely, and economical competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar supplies and services, and the resources available to conduct the source selection. Provided the solicitation notifies offerors that the best value pool can be limited for purposes of making an efficient, timely, and economical award, the contracting officer may limit the number of proposals in the best value pool to the greatest number that will permit an efficient competition among the proposals offering the greatest likelihood of award. The contracting officer may indicate in the solicitation the estimate of the greatest number of proposals that will be included in the best value pool. The contracting officer may limit the best value pool to a single offeror.

(c) If the contracting officer determines that an offeror's proposal is no longer in the best value pool, the proposal shall no longer be considered for award. Written notice of this decision shall be provided to unsuccessful offerors at the earliest practicable time.

#### **873.115 Proposal revisions.**

(a) Without regard to FAR 15.307, the contracting officer may request proposal revisions as often as needed during the proposal evaluation process at any time prior to award from vendors remaining in the best value pool. Proposal revisions shall be submitted in writing. The contracting officer may establish a common cutoff date for receipt of proposal revisions. Contracting officers may request best and final offers. In any case, contracting officers and acquisition team members shall safeguard proposals, and revisions

thereto, to avoid unfair dissemination of an offeror's proposal.

(b) If an offeror initially included in the best value pool is no longer considered to be among those most likely to receive award after submission of proposal revisions and subsequent evaluation thereof, the offeror may be eliminated from the best value pool without being afforded an opportunity to submit further proposal revisions.

(c) Requesting and/or receiving proposal revisions do not necessarily conclude exchanges. However, requests for proposal revisions should advise offerors that the Government may make award without obtaining further revisions.

#### **873.116 Source select decision.**

(a) An integrated comparative assessment of proposals should be performed before source selection is made. The contracting officer shall independently determine: which proposal(s) represents the best value, consistent with the evaluation information or factors and subfactors in the solicitation; and that the prices are fair and reasonable. The contracting officer may determine that all proposals should be rejected if it is in the best interest of the Government.

(b) The source selection team, or advisory boards or panels, may conduct comparative analysis(es) of proposals and make award recommendations, if the contracting officer requests such assistance.

(c) The basis for the source selection decision shall be documented and shall reflect the rationale for any cost/technical tradeoffs. Specific tradeoffs that cannot be reasonably quantified need not be described in terms of cost/price impacts.

#### **873.117 Award to successful offeror.**

(a) The contracting officer shall award a contract to the successful offeror by furnishing the contract or other notice of the award to that offeror.

(b) If a request for proposal (RFP) process was used for the solicitation and if award is to be made without exchanges, the contracting officer may award a contract without obtaining the offeror's signature a second time. The offeror's signature on the offer constitutes the offeror's agreement to be bound by the offer. If a request for quotation (RFQ) process was used for the solicitation, the contracting officer must obtain the offeror's acceptance signature on the contract to ensure formation of a binding contract.

(c) If the award document includes information that is different than the latest signed offer, both the offeror and

the contracting officer shall sign the contract award.

(d) When an award is made to an offeror for less than all of the items that may be awarded and additional items are being withheld for subsequent award, each notice shall state that the Government may make subsequent awards on those additional items within the offer acceptance period.

#### **873.118 Debriefings.**

Offerors excluded from multiphase acquisitions or best value pools may make a written request for a debriefing. Without regard to FAR 15.505, preaward debriefings will be conducted by the contracting officer when determined to be in the best interest of the Government. Post-award debriefings shall be conducted in accordance with FAR Part 15.506.

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## **DEPARTMENT OF ENERGY**

### **48 CFR Parts 909 and 970**

**RIN: 1991-AB44**

#### **Acquisition Regulations; Performance Guarantees**

**AGENCY:** Department of Energy.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The Department of Energy (DOE) is proposing to amend its acquisition regulations to formally require a performance guarantee under circumstances where a prospective awardee has been created solely for the performance of the instant contract and lacks sufficient financial or other resources to fulfill its obligations under the prospective contract. In circumstances where the newly created entity likely will be dependent upon the resources of the parent organization, this proposal would allow Contracting Officers to consider the resources of the parent in a determination of the newly created entity's responsibility only when the parent provides a performance guarantee or other undertaking satisfactory to the Contracting Officer. While this situation occurs most often in the award of contracts for the management and operation of DOE facilities, this proposal would make a form of performance guarantee necessary whenever these circumstances are encountered.

**DATES:** Written comments on the proposed rulemaking must be received on or before close of business December 9, 1998.

**ADDRESSES:** Comments (3 copies) should be addressed to: Robert M. Webb at the address indicated below.

**FOR FURTHER INFORMATION CONTACT:** Robert M. Webb, U.S. Department of Energy, Office of Procurement and Assistance Management, 1000 Independence Avenue, SW., Washington, D.C. 20585, (202) 586-8264.

#### **SUPPLEMENTARY INFORMATION:**

I. Background.

II. Section by Section Analysis.

III. Procedural Requirements.

A. Review Under Executive Order 12866.

B. Review Under Executive Order 12988.

C. Review Under the Regulatory Flexibility Act.

D. Review Under the Paperwork Reduction Act.

E. Review Under the National Environmental Policy Act.

F. Review Under Executive Order 12612.

G. Review Under Small Business Regulatory Enforcement Fairness Act of 1996.

H. Review Under the Unfunded Mandates Reform Act of 1995.

#### **I. Background**

The Department of Energy in certain cases requires that the contractor be a corporate entity organized specifically for the performance of the contract at a specific DOE site. This requirement occurs regularly in the award of management and operating contracts and is intended (1) to assure the dedication of the contractor to the performance of the contract; (2) to limit involvement of the Department with the corporate parent; (3) to isolate the contractor from the parent for purposes of security and classification matters; (4) to limit the flow of information between the contractor and its parent, limiting a potential source of organizational conflict of interest; (5) to isolate the accounting system of the contractor, since often the budget and accounting systems of such contractors are integrated into DOE's budget and accounting systems; and (6) to limit the necessity of corporate support thereby reducing or negating a basis for charging general and administrative expense to the contract.

Such dedicated contractors, however, generally have limited assets. In most cases, without consideration of the corporate assets of the parent entity(ies), the DOE Contracting Officer would not be able to make a determination that the contractor was financially responsible and had sufficient resources available to assure successful performance of the contract.

It has been a common practice of the Department in such instances for the parent entity(ies) to provide some form