

# FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

## GSA EVALUATING REGULATIONS TO IDENTIFY THOSE SUITABLE FOR REPEAL, REPLACEMENT, OR MODIFICATION

General Services Administration’s (GSA) Regulatory Reform Officer (RRO) Michael Downing is seeking comments on GSA’s regulations that may be appropriate for repeal, replacement, or modification. The GSA regulations on which Mr. Downing is seeking comments are the GSA Acquisition Regulation (GSAR), the GSA Acquisition Manual (GSAM), the Federal Travel Regulations (FTR), the Federal Management Regulation (FMR), and the Federal Property Management Regulations (FPMR) (which is being superseded and replaced by the FMR).

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These requests for comments are in response to President Trump’s Executive Order 13777, Enforcing the Regulatory Reform Agenda, which requires each agency to appoint an RRO and to establish a “Regulatory Reform Task Force,” the function of which is to attempt to identify regulations that:

- “(i) eliminate jobs, or inhibit job creation;
- “(ii) are outdated, unnecessary, or ineffective;
- “(iii) impose costs that exceed benefits;
- “(iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- “(v) are inconsistent with the requirements of...those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- “(vi) derive from or implement Executive Orders or other presidential directives that have been subsequently rescinded or substantially modified.”

Section 3(e) of Executive Order 13777 requires the Regulatory Reform Task Force of each agency to “seek input and other assistance, as permitted by law, from entities significantly affected by federal regulations, including state, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations.” These requests by the GSA RRO comply with the direction provided in Section 3(e). (For more on Executive Order 13777, see the March 2017 *Federal Contracts Perspective* article “Trump’s Executive Order Fleshes Out Regulatory Freeze Procedures.”)

The following are the areas of the RRO's concern for each request:

■ **Evaluation of Existing Acquisition Regulations:** The RRO is seeking comments on the GSAR, the GSAM (which includes the GSAR in gray shade), “or acquisition policies, standards, business practices and guidance that have not been codified through regulation, but may be still be appropriate for repeal, replacement, or modification...GSA is particularly interested in comments on areas not recently addressed, such as evergreen, price adjustments, catalogs, requirements relating to utilities, construction, and facilities. In addition, the recent Transactional Data Reporting rule is a final rule and is in a pilot stage. As such, comments on it, along with the Price Reduction clause and the Commercial Sales Practice format, are also encouraged” (see the July 2016 *Federal Contracts Perspective* article “GSA to Require Transactional Data Reporting for Federal Supply Schedule Orders”).

(**EDITOR'S NOTE:** GSA has recently received comments on Commercial Software Licenses and Order Level Materials (Other Direct Costs). These rules are currently in the final rulemaking stages and additional comments are not requested. For more on these, see the June 2016 *Federal Contracts Perspective* article “GSA Addresses Unenforceable Supplier Terms,” and the February 2014 *Federal Contracts Perspective* article “GSA Seeking Comments on FSS Order-Level Materials.”)

Comments must be submitted no later than July 31, 2017, identified as “Notice-MV-2017-01, Evaluation of Existing Acquisition Regulations,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) Google form found at: <https://goo.gl/forms/GahAhb2aT4MVIREo1>; or (3) mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405.

■ **Evaluation of Existing Leasing Acquisition Regulations:** The RRO is seeking comments on the GSAR, the GSAM, “the GSA Leasing Desk Guide, GSA Lease Acquisition Circulars, GSA Leasing Alerts, GSA Realty Services Letters, or other GSA leasing related acquisition policies, standards, and guidance that have not been codified through regulation, but may be still be appropriate for repeal, replacement, or modification.”

Comments must be submitted no later than July 31, 2017, identified as “Notice-MV-2017-02, Evaluation of Existing Leasing Regulations,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) Google form found at: <https://goo.gl/forms/4ilmzTHJ2HhDcmG23>; or (3) mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405.

■ **Evaluation of Existing Federal Travel Regulations (FTR):** The RRO is seeking comments from the public and individual federal employees who travel or are relocated in the best interest of the government, on the FTR, which is Title 41 of the Code of Federal Regulations (CFR), Public Contracts and Property Management, Subtitle F, Federal Travel Regulation System (<http://www.gsa.gov/fttr>). The FTR consists of Chapter 300, General; Chapter 301, Temporary

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The *Federal Contracts Perspective* is published monthly by Panoptic Enterprises, P.O. Box 11220, Burke, VA 22009-1220.

Duty Travel Allowances; Chapter 302, Relocation Allowances; Chapter 303, Payment of Expenses Connected with the Death of Certain Employees; and Chapter 304, Payment of Travel Expenses from a Non-Federal Source, and the RRO is seeking comments on the portions of these chapters that may be appropriate for repeal, replacement, or modification.

Comments must be submitted no later than July 31, 2017, identified as “Notice-MA-2017-02, Evaluation of Existing Federal Travel Regulations,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) Google form found at: <https://goo.gl/forms/ArUI1rxwIM8yuMkt1>; or (3) mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405.

■ **Evaluation of Existing Federal Management Regulations (FMR) and Federal Property Management Regulations (FPMR):** The RRO is seeking comments on the FMR (which is Chapter 102 of Title 41 of the CFR and is available at <http://www.gsa.gov/FMR>) and the FPMR (which is Chapter 101 of Title 41 of the CFR and is available at <https://www.ecfr.gov>; the FPMR is being superseded and replaced by the FMR). Regarding the FMR, the RRO is seeking comments specifically on the following subchapters of Chapter 102: Subchapter A, General; Subchapter B, Personal Property; Subchapter C, Real Property; Subchapter D, Transportation; Subchapter F, Telecommunications; and Subchapter G, Administrative Programs.

Comments must be submitted no later than July 31, 2017, identified as “Notice-MA-2017-03, Evaluation of Existing Federal Management and Federal Property Regulations,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) Google form found at: <https://goo.gl/forms/EzesI5HeTP7SGZpD3>; or (3) mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405.

## PHASE TWO OF VAAR REVISION PROPOSED

The Department of Veterans Affairs (VA) is proposing a second phase of its revision and streamlining of the VA Acquisition Regulation (VAAR). This effort is intended to revise or remove any policy that has been superseded by changes in the Federal Acquisition Regulation (FAR), to remove any procedural guidance that is internal to the VA, and to incorporate new regulations and policies. In addition, VA is proposing to correct inconsistencies within the VAAR, remove redundant and duplicate material already covered by the FAR, delete outdated material or information, and appropriately renumber VAAR text, clauses and provisions to conform to the FAR format, numbering, and arrangement.

The first phase of the VAAR revision addressed VAAR part 816, Types of Contracts, VAAR part 828, Bonds and Insurance, and the associated provisions and clauses in VAAR part 852, Text of Provisions and Clauses (see the April 2017 *Federal Contracts Perspective* article “Revision of VAAR to Adhere to FAR Proposed”).

This second phase addresses VAAR part 803, Improper Business Practices and Personal Conflicts of Interest; VAAR part 814, Sealed Bidding; and VAAR part 822, Application of Labor Laws to Government Acquisitions. In addition, this second phase would amend sections in VAAR part 801, Department of Veterans Affairs Acquisition Regulation System; VAAR part 802, Definitions of Words and Terms; VAAR part 812, Acquisition of Commercial Items; and VAAR part 852 to reflect changes made to, and ensure compliance with, the revised VAAR parts

803, 814, and 822. Procedural guidance that is proposed to be deleted from the VAAR will be considered for inclusion in VA's internal agency operating procedures. In addition, delegations of authorities that are removed from the VAAR will be included in the VA Acquisition Manual (VAAM) as internal agency guidance. (**NOTE:** The VAAM is currently under development.)

The following are the proposed changes to VAAR parts 803, 814, and 822 (and related changes to VAAR parts 801, 802, 812, and 852):

■ VAAR part 803, Improper Business Practices and Personal Conflicts of Interest

- VAAR subpart 803.1, Safeguards, would be removed and reserved because it consists of internal procedural guidance on standards of conduct and financial disclosure for VA employees that will be included in the VAAM. In addition, it contains a delegation of authority that will be included in the VAAM.
- In VAAR subpart 803.2, Contractor Gratuities to Government Personnel, VAAR 803.204, Treatment of Violations, would be amended by removing procedural guidance and a delegation of authority that is internal to the VA and moving them to the VAAM. To ensure contractors are apprised of their rights, VAAR 803.204 would be further amended to add the responsibility of the Suspension and Debarring Official (SDO) for determining whether or not a violation of FAR 52.203-3, Gratuities, has occurred and what action will be taken, as well as a paragraph that states that when the SDO determines that a violation has occurred and that debarment is being considered, the SDO shall follow the requirements at VAAR 809.406-3, Procedures (for debarment).

In conjunction with these changes, VAAR 802.101, Definitions, would be amended to add two new definitions: Debarment and Suspension Committee (“a committee authorized by the debarring official to assist the debarring official with debarment and suspension related matters”), and Suspension and Debarring Official (SDO) (“the Senior Procurement Executive [SPE] or Deputy Senior Procurement Executive [DSPE] if further delegated in writing by the SPE”).
- VAAR subpart 803.3, Reports of Suspected Antitrust Violations, would be removed and reserved because its contents, VAAR 803.303, Reporting Suspected Antitrust Violations, consists of guidance to VA employees that is internal and will be moved to the VAAM.
- VAAR subpart 803.4, Contingent Fees, would be removed and reserved because its contents, VAAR 803.405, Misrepresentations or Violations of the Covenant Against Contingent Fees, consists of guidance to VA employees that is internal and will be moved to the VAAM.
- In VAAR subpart 803.5, Other Improper Business Practices, VAAR 803.502, Subcontractor Kickbacks, would be removed because it provides direction to VA employees and will be moved to the VAAM. In addition, in VAAR 803.570, Commercial Advertising, VAAR 803.570-1, Policy, would be revised to clarify the intent of VA's prohibition of advertising that implies a government endorsement of the contractor's products or services (“VA policy prohibits contractors from making references in its commercial advertising to VA contracts in a manner that states or implies the government

approves or endorses the product or service or considers it superior to other products or services. The intent of this policy is to preclude the appearance of bias toward any product or service.”).

Related to these changes, VAAR 852.203-70, Commercial Advertising, would be revised to use plain language, remove gender-specific wording, and clarify the prohibition of advertising that implies a government endorsement of the contractor's products or services.

- VAAR subpart 803.6, Contracts with Government Employees or Organizations Owned or Controlled by Them, would be removed and reserved because its contents, VAAR 803.602, Exceptions, consists of a delegation of authority that will be moved to the VAAM.
- VAAR subpart 803.7, Voiding and Rescinding Contracts, would be removed and reserved because VAAR 803.703, Authority, consists of a delegation of authority that will be moved to the VAAM. In addition, VAAR 803.705, Procedures, would be removed because it duplicates FAR 3.705, Procedures.
- VAAR subpart 803.8, Limitation on the Payment of Funds to Influence Federal Transactions, would be removed and reserved because its contents, VAAR 803.804, Policy, and VAAR 803.806, Processing Suspected Violations, consist of internal VA procedural guidance that will be moved to the VAAM.
- VAAR subpart 803.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, would be added, and it would consist of VAAR 803.1103, Procedures, which would require the signing of a Non-Disclosure Agreement by certain contractor covered employees performing acquisition functions closely associated with inherently governmental functions. (“VAAR 803.1103, Procedures: By use of the contract clause at [FAR] 52.203-16, Preventing Personal Conflicts of Interest, the contracting officer shall require each contractor whose employees perform acquisition functions closely associated with inherently governmental functions to obtain from each covered employee a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract. See FAR 3.1103(a)(2)(iii) [Procedures].”)
- VAAR subpart 803.70, Contractor Responsibility to Avoid Improper Business Practices, would be removed and reserved because its contents, VAAR 803.7000, Display of the VA Hotline Poster, and VAAR 803.7001, Contract Clause, which is the prescription for VAAR 852.203-71, Display of Department of Veterans Affairs Hotline Poster, are unnecessary and duplicate FAR 52.203-14, Display of Hotline Poster(s), which provides adequate coverage for the VA.

VAAR 852.203-71 would be removed as well. FAR 52.203-14 permits insertion of fill-in language to identify an agency’s hotline poster, and VA will include language in the VAAM detailing the requirement to insert the information regarding its agency specific hotline poster.

■ VAAR part 814, Sealed Bidding

- VAAR subpart 814.1, Use of Sealed Bidding, would be removed and reserved because its contents, VAAR 814.104, Types of Contracts, and VAAR 814.104-70, Fixed-Price Contracts with Escalation, are unnecessary since both simply require compliance with FAR 16.203, Fixed-Price Contracts with Economic Price Adjustment (FAR 16.203-1 through 16.203-4), so no additional VAAR text is required.
- VAAR subpart 814.2, Solicitation of Bids
  - The contents of VAAR 814.201, Preparation of Invitations for Bid, would be removed so all that remains is the title. Paragraphs (a) and (b) would be removed because they deal with numbering of Invitations for Bids (IFB) and would be moved to the VAAM. Paragraphs (c), (d), (e), and (f) would be removed without replacement.
  - VAAR 814.201-2, Part I – The Schedule, would be added to explain how award will be made on summary bids and bids on groups of items. In addition, the information in the removed paragraphs (c), (d), (e), and (f) of VAAR 814.201 would be included in VAAR 814.201-2 to conform with FAR numbering and arrangement conventions.
  - In VAAR 814.201-6, Solicitation Provisions, paragraph (a) would be removed because it specifies the use of VAAR 852.214-70, Caution to Bidders – Bid Envelopes, which would be deleted because VA no longer issues bid envelopes or the Optional Form (OF) 17, Sealed Bid Label. Instead, most IFBs are issued via Federal Business Opportunities (<https://www.fbo.gov>). Current paragraph (b), which contains prescriptions for VAAR 852.214-71, Restrictions on Alternate Item(s); VAAR 852.214-72, Alternate Items; and VAAR 852.214-73, Alternate Packaging and Packing, would be redesignated as paragraph (a). Current paragraph (c), which contains a prescription for VAAR 852.214-74, Bid Samples, would be redesignated as paragraph (b).

In addition, VAAR 801.106, OMB [Office of Management and Budget] Approval Under the Paperwork Reduction Act, would be revised to remove OMB control number 2900-0593, which applies to VAAR 852.214-70.

Finally, the title of VAAR 852.214-74 would be revised to “Marking of Bid Samples” to better reflect the requirement of the provision, and its last two sentences would be removed. These two sentences state that the preparation and transportation of the bid sample must be prepaid by the bidder, but FAR 52.214-20, Bid Samples, already contains language covering the bidder's responsibilities in this regard. Finally, the title of VAAR 852.214-74, which is specified in paragraph (b)(13) of VAAR 812.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, would be revised to reflect the changed title.
  - VAAR 814.202, General Rules for Solicitation of Bids, would be added. It would consist of VAAR 814.202-4, Bid Samples, which would require samples to be produced by the manufacturer that would provide the supplies or services under the

- contract. This would ensure that the products to be delivered under the contract are the products that are submitted for evaluation.
- VAAR 814.203, Methods of Soliciting Bids, and its subsection VAAR 814.203-1, Transmittal to Prospective Bidders, would be deleted since the practice of furnishing a bid envelope or sealed bid label is not current practice.
  - VAAR 814.204, Records of Invitations for Bids and Records of Bids, would be deleted because it contains internal instructions that will be moved to the VAAM.
  - VAAR 814.208, Amendment of Invitation for Bids, would be deleted because the prescribed practices regarding sending amendments are obsolete.
- VAAR subpart 814.3, Submission of Bids
- VAAR 814.301, Responsiveness of Bids, would be deleted because the contracting officer does not have the authority to refer the question of timeliness to the Government Accountability Office (GAO). GAO may only address timeliness issues within the context of a protest.
  - VAAR 814.302, Bid Submission, would be deleted because it is duplicative of FAR 14.302(a).
  - VAAR 814.304, Submission, Modification, and Withdrawal of Bids, would be amended to move internal procedures to the VAAM and to stipulate a limited time period for a late bidder to submit evidence of timeliness (“within five calendar days of the date an electronic notice is sent to the bidder, or within ten calendar days of receipt by the bidder of a notice sent by other than electronic means”).
- VAAR subpart 814.4, Opening of Bids and Award of Contract, would be deleted because the information it contains is either redundant to the FAR (VAAR 814.401, Receipt and Safeguarding of Bids; VAAR 814.408, Award; VAAR 814.408-70, Award When Only One Bid is Received; and VAAR 814.409, Information to Bidders) or is comprised of agency internal procedures that will be incorporated into the VAAM (VAAR 814.402, Opening of Bids; VAAR 814.403, Recording of Bids; VAAR 814.404, Rejection of Bids; VAAR 814.404-1, Cancellation of Invitations After Opening; VAAR 814.404-2, Rejection of Individual Bids; VAAR 814.407, Mistakes in Bids; VAAR 814.407-3, Other Mistakes Disclosed Before Award; and VAAR 814.407-4, Mistakes After Award).
- In addition, VAAR 814.404-70, Questions Involving the Responsiveness of a Bid, would be deleted because the contracting officer does not have authority to refer questions of bid responsiveness to the GAO. GAO may only address responsiveness issues within the context of a protest.
- Finally, VAAR 814.408-71, Recommendation for Award (Construction), would be deleted because the procedures are no longer in use within the Office of Construction and Facilities Management.

■ VAAR Part 822, Application of Labor Laws to Government Acquisitions

- In VAAR subpart 822.3, Contract Work Hours and Safety Standards Act, VAAR 822.304, Variations, Tolerances, and Exemptions, would be revised to use plain language to state the conditions that must be met to permit use of the variation to Contract Work Hours and Safety Standards (the statute) (formerly known as the “Contract Work Hours and Safety Standards Act”) granted by the secretary of labor regarding the payment of overtime under contracts for nursing home care for veterans.

In addition, VAAR 822.305, Contract Clause, would be amended to reflect the proposed change to the title of VAAR 852.222-70 from “Contract Work-Hours and Safety Standards Act – Nursing Home Care Contract Supplement” to “Contract Work Hours and Safety Standards – Nursing Home Care for Veterans” to better reflect the substance and coverage of the clause.

Finally, in conjunction with these changes, VAAR 852.222-70 would be amended to clarify that the clause has flow-down requirements and applies to subcontractors at any tier when the stated conditions are met.

- VAAR subpart 822.4, Labor Standards for Contracts Involving Construction, which consists of VAAR 822.406, Administration and Enforcement, and VAAR 822.406-11, Contract Terminations, would be removed reserved because it consists of procedural guidance on the types of labor standards involved in construction contracting, internal agency guidance to the contracting officer, and other topics that are more appropriate for inclusion in the VAAM.

Comments on this proposed rule must be submitted no later than July 17, 2017, identified as “RIN 2900-AP50 – Revise and Streamline VA Acquisition Regulation to Adhere to Federal Acquisition Regulation Principles (VAAR Case 2014-V001 – parts 801, 802, 803, 812, 814, 822, and 852),” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) mail or hand-delivery to: Director, Regulation Policy and Management (OOREG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1068, Washington, DC 20420; or (3) fax to: 202-273-9026.

## **VA VOSB SET-ASIDES TAKE PRECEDENCE OVER ABILITYONE**

The Court of Federal Claims (COFC) has resolved a contradiction between the requirements of the Javits-Wagner-O’Day Act (JWOD – Title 41 of the U.S. Code, Sections 8501-8506), and the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VBA – Title 38 of the U.S. Code, Section 8127) by ruling that the Department of Veterans Affairs (VA) must first employ the VBA’s requirement that the VA conduct a “rule of two” analysis to determine whether it must restrict the acquisition to veteran-owned small businesses (VOSBs) or service-disabled VOSBs (SDVOSBs) before complying with the JWOD requirement that the VA use the products and services on the AbilityOne List (*PDS Consultants Inc. v. The United States and Winston-Salem Industries for the Blind*, No. 16-1063C, May 30, 2017 [originally filed under seal on May 12, 2017]).



The VBA requires that the VA first determine whether there are at least two SDVOSBs or VOSBs capable of providing the products or performing the services. If so, the VA must limit competition to SDVOSBs or VOSBs accordingly. This process is known as the “rule of two.” (Paragraph (d) of 38 USC 8127, Small Business Concerns Owned and Controlled by Veterans: Contracting Goals and Preferences, states: “a contracting officer of the [VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.”)

The JWOD requires government agencies, including the VA, to purchase products and services from designated non-profits that employ blind and otherwise severely disabled people (“AbilityOne”) when those products or services appear on the “AbilityOne List.”

A conflict arises when VA desires to procure a product or service that is on the List – should the VA acquire the product or service from the List, as required by the JWOD, or should it conduct the “rule of two” analysis as required by the VBA and set-aside the acquisition for competition restricted to SDVOSBs or VOSBs? Which statute takes precedence for VA?

Regarding this case, AbilityOne added eyewear and eyewear prescription services provided by Winston-Salem Industries for the Blind, to the List prior to the passage of the VBA in 2006. The eyewear and eyewear prescription services were added with the VA’s concurrence.

PDS Consultants is an SDVOSB that provides eyewear and other vision-related products to the VA under a number of contracts. When VA attempted to acquire eyewear from Winston-Salem Industries for the Blind, PDS protested, citing the recent unanimous Supreme Court decision *Kingdomware Technologies, Inc. v. United States* (No. 14-916), in which the Court noted that 38 USC 8127(d) contains the word “shall,” and “unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement...Accordingly, the [VA] shall (or must) prefer veteran-owned small businesses when the rule of two is satisfied” (*emphasis in original*) (for more on *Kingdomware Technologies, Inc. v. United States*, see the July 2016 *Federal Contracts Perspective* article “Supreme Court Issues Two Acquisition-Related Decisions”).

Senior Judge Nancy Firestone of the Court of Federal Claims found in favor of PDS Consultants. “The court finds that the VBA requires the VA to perform the rule of two analysis for all new procurements for eyewear, whether or not the product or service appears on the AbilityOne List, because the preference for veterans is the VA’s first priority. If the rule of two analysis does not demonstrate that there are two qualified veteran-owned small businesses willing to perform the contract, the VA is then required to use the AbilityOne List as a mandatory source...The VA is ordered not to enter into any new contracts for eyewear...from the AbilityOne List unless it first performs a rule of two analysis and determines that there are not two or more qualified veteran-owned small businesses capable of performing the contracts at a fair price.”

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