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September 25, 2017

Mr. Ricky Clark
Office of Acquisition and Logistics
Department of Veterans Affairs
810 Vermont Avenue NW.
Washington, D.C. 20420

RE: OMB Control No. "2900-0422": Agency Information Collection Activity: Department of Veteran Affairs Acquisition Regulation (VAAR) Construction Provisions and Clauses 852.236-72, 852.236.80, 852.236-82, 852.236-83, 852.236-84 and 852.236-88

Dear Mr. Clark,

On behalf of the Associated General Contractors of America (AGC), I would like to thank you and Department of Veteran Affairs (VA) for soliciting comments on Department of Veteran Affairs Acquisition Regulation (VAAR) Construction Provisions and Clauses 852.236-72, 852.236.80, 852.236-82, 852.236-83, 852.236-84 and 852.236-88.

For your background, AGC is the leading association for the construction industry, representing both union and non-union prime and subcontractor/specialty construction companies. AGC represents more than 26,000 firms including over 6,500 of America's leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

As such, AGC has a unique knowledge of VA regulations concerning construction and procurement. Based on that experience and this request, AGC puts forth the following comments on the aforementioned VAAR clauses.

(1) VAAR clause 852.236-72, Performance of Work by the Contractor

VAAR 852.236-72 clause sits on top of FAR 52.236-1 which is the standard clause on most federal contracts. The FAR clause imposes a self-performance goal of the prime contractor of not less than 12%, with the general rate being 15% in most VA projects. While most prime contractors who contract with the VA find this rate to be reasonable given what the FAR requires, it becomes difficult to comply with when the types of work self-performed is restricted by the VA.

Unlike many agencies who rely solely on the FAR provision, the VA greatly limits prime contractors—under this VAAR clause—by eliminating certain essential activities towards the prime's self-performance goals. The VA excludes any of the prime contractor's executive, supervisory and clerical forces. Excluding such key functions that require significant prime contractor resources creates unnecessary burdens for prime contractors who do work on VA projects. For example, a VA large project with a

contract at \$400 million would require the prime contractor to self-perform \$60 million of the work, excluding all the executive, supervisory and clerical efforts that go into managing a large and complex VA project.

It is unclear, and it has never been adequately explained, why the VA has chosen to eliminate these functions from the prime contractor's self-performance goals. If the intention of VAAR clause is to prevent "fee collecting companies" then there are other, less disruptive, avenues to accomplish this goal. Further, contractors are threatened with a reduction of 15% of the value of that portion of the percentage requirement that is accomplished by others.¹ Disturbingly, contractors have reported this provision being used by the VA as a bargaining chip in order to persuade contractors to drop claims against the agency. Eliminating the seemingly arbitrary exclusion of prime contractor work to their self-performance goal would foster better relations

AGC recommends that the VA rescind VAAR 852.236-72 and simply defer to the well-established FAR 52.236-1.

(2) VAAR clause 852.236-80, Subcontracts and Work Coordination

The purpose of such coordination is to bring all the project parties together to determine project needs and to help ensure the architect/engineer and the VA remain active participants in the project process. Otherwise, meaningful coordination cannot occur. Coordination between the prime contractor and architect/engineer are always necessary for a successful project, especially on contract involving complex mechanical-electrical work.

VAAR clause 852.236-80 puts a high degree of responsibility on the prime contractor to coordinate work with all parties to the contract, furnish drawings showing the manner in which utility lines will fit into available space, and how it will relate to the existing building elements. It is important to remember that coordination does not mean the contractor is responsible for resolving, or paying for, design errors or omissions in the architect/engineer's designs and specifications. This high-level of coordination is almost required in the contract documents. Typically, the prime contractor will work with its major subcontractors to produce shop drawings, while incorporating additional information for lesser subcontractors. Any issue or discrepancy discovered by the contractor is communicated with the architect or engineer.

Additionally, the time to properly coordinate the work requires much more than VA's stated estimate of 10 hours. In the field it is often an ongoing exercise to coordinate, especially between prime contractors and the architects/engineers. A major factor requiring such level of coordination is due to the two-dimensional aspect of many architectural and engineering designs. A two-dimensional design does not always make it possible for the contractors to catch all the issues. Many times the only way a contractor can discover any errors or omissions in the architect/engineer's designs is through onsite verification. For instance, depending on the size of the project it could take the contractor several days to verify the architect/engineers' designs for utility lines. Given the high degree of responsibility contractors must bear, the VA should accurately account for the number of hours it requires for prime contractors to coordinate with contractors and the architect and engineers by drastically increasing the estimated average burden per response.

¹ VAAR 852.236-72(d)

AGC recommends the VA dramatically increase the VA's estimated average burden per respondent to accurately account for the lengthy time and efforts required by the contractor to coordinate with all the parties involved, including the trades, subcontractors, material suppliers, and architects/engineers. To do so, the agency should request further input from the industry through a formal information collection request specifically on this item.

(3) VAAR clause 852.236-84, Schedule of Work Progress

VAAR clause 852.236-84 requires construction contractors, on contracts that do not require the use of a Network Analysis System (NAS), to submit a progress schedule in order for the contracting officer (CO) to track the contractor's progress and determine whether or not the contractor is making sufficient progress. In practice, the VA requires these baseline schedule reports on a monthly basis in an effort to have an ongoing logic chain attached to the project. However, the logic changes must be discussed and approved by the VA for the maintenance of the progress schedule to make any sense. This is made difficult when the VA's reporting requirements do not line up with the realities on the ground.

Typically on the jobsite, the work is managed through a 3-week short term and 6-week long term schedule outlook. These outlooks are representative of the plan laid out in the master schedule. In order for a master schedule to be accurate it requires tracking of all factors affecting the project, such as RFIs submittals or change orders, to be done within the schedule. It takes significant time and resources away from the project complying on a monthly basis and communicating that information to the VA representatives. The VA would benefit from giving COs and contractors greater flexibility to determine when to submit a schedule of work, or at the very least extend the monthly reporting requirement to six weeks.

AGC recommends the VA allow for COs and contractors to determine how often the prime contractor should submit a progress schedule that best matches the requirements of the project.

(4) VAAR clause 852.236-88, Contract Changes

VAAR clause 852.236-88 requires construction contractors to submit cost proposals for changes ordered by the contracting officer or for changes by the contract. As with any construction project, unforeseen issues may emerge and it is reasonable for change orders to be issued. However, in the federal construction industry change orders have become a serious chokepoint. The issue is not the additional work that results from a change order, or the potential delay to the project schedule, but rather the financial hardship due to a lack of timely processing and payment of change orders. The financial impact of untimely processing and payment of change orders has a broad and far ranging ripple effect that extends beyond just the prime contractor. It impacts the prime contractor, its subcontractors, and the project as a whole.

There are many deadlines listed in VAAR clause 852.236-88 that requires the contractor to act. Noticeably absent from this VAAR clause are any deadlines required for the contracting officer to act. VA contractors are experiencing an increasing long amount of time for VA to process and pay change orders. When the VA fails to process and pay a change order in a timely manner, the contractor is left with few options. In the interim period, the contractor tries—as best as possible—to work around the issue. Depending on the issue, the contractor can be left in the precarious position of either (1) self-financing the work to meet project schedule; or (2) stopping work altogether. When work must be

stopped or slowed down because of untimely processing of change orders, overhead costs remain. Often, to keep the project moving, small businesses self-finance government projects and work that needs to be done to complete the project, to avoid unnecessary Miller Act or payment bond claims filed by subcontractors and suppliers. The VA can alleviate many of these problems by including in the VAAR clause 852.236-88 a deadline for which the contracting officer must approve or disapprove change orders.

Lastly, the VA estimated average burden per respondent of three hours is a not realistic timeframe for the information that the VA requires. In order to submit a change order for changes costing less than \$500,000, the contractor must submit itemized breakdown that will include material, quantities, unit prices, labor costs (separated into trades), construction equipment, etc. (Labor costs are to be identified with specific material placed or operation performed.) The contractor must obtain and furnish with a proposal an itemized breakdown as described above, signed by each subcontractor participating in the change regardless of tier. It would be the extreme exception for a contractor to be able to provide a proposal in three hours' time. For changes involving more than \$500,000, the VA requires even more additional information, however the VA's estimated average burden for responding remains the same, three hours. If it is a change issued by the VA, the contractor would have to generate a scope of work, and issue it to the contractor under cover of an RFP. The contractor would then have to review and respond with any questions it has and forward this information to the contractor's subcontractors impacted by the request for VA questions, pricing, and so forth.

AGC urges the VA to include a reasonable deadline for contracting officers to approve/disapprove a change order, a deadline for VA payment of a change order, and drastically increase the VA's estimated average burden requirements. As previously noted, the VA should request further input from the industry through a formal information collection request to gather more realistic data on this burden.

(5) VAAR clause 852.236-82, Payments under Fixed-Price Construction Contracts (without NAS-CPM), with its Alternate I

VAAR clause 852.236-82 requires construction contractors to submit a schedule of costs for work to be performed under the contract within 30 days after the receipt of notice to proceed. In addition, if the contract includes guarantee period services, "Alternate I" requires the contractor to submit information on the total and itemized costs of the guarantee period services and to submit a performance plan/program. It is reasonable to provide a schedule of values for the work, and this is true even when a construction schedule is also required. If the VA required construction schedule to include the cost schedules it would create a confusing and unyielding schedule document. Additionally, the way that work is scheduled for construction often does not match up exactly with how the work should be invoiced. The VA should allow greater flexibility for contractors to invoice work that deviates from the schedule but keeps the overall project in perspective.

This clause also requires the contracting officer to consider monthly progress payments on material and/or equipment procured by the contractor and stored on the construction site, as space is available, or at a local approved location off the site, under such terms and conditions as such officer approves.² However, burying general conditions and fee across line items in the schedule of values, or in a cost loaded

² VAAR clause 852.236-82(d)

schedule, does not benefit the VA, contractor, or parties to the contract. Instead, VA should modify this rule to require general conditions of the contract to be lined and invoiced at a flat rate monthly and to also have the contractors' fee lined out and invoiced to match the total percentage of work invoiced. This would benefit the VA and contractors by giving the VA more visibility to control the general contractor and subcontractors with respect to invoice for general conditions and fee rather than allowing contracting officers to allocate it within the schedule of activities. A cost loaded schedule is a burden that does not improve performance and does not create meaningful transparency on VA projects.

Lastly, the VA estimates the average burden to submit the above mention information as only one hour. However, it takes much longer for the contractor to gather and compile the information and the VA should account for the amount of time it takes contractors to comply with this VAAR.

AGC urges the VA to increase its estimated average burden requirements to more accurately reflect the needed time to comply with VAAR 852.236-82. Again, the VA should request further input from the industry through a formal information collection request to gather more realistic data on this burden.

(6) VAAR clause 852.236-83, Payments under Fixed-Price Construction Contracts (including NAS-CPM), with its Alternate I

VAAR clause 852.236-83 requires construction contractors to submit a schedule of costs for work to be performed under the contract. A schedule of costs should be provided by each subcontract to the prime contractor and from the prime contractor to the VA. As noted above this schedule of costs should not be exhaustive, but reasonably detailed so that all reviewing parties can be satisfied that the invoice is representative of the work performed. The prime contractor and subcontractors should not be expected to finance the work particularly in a slow performance or delay situation that is not the fault of the contractors. Having separate line items for startup costs, close out costs, fee, and general conditions for the prime contractor as well as for all subcontractors will help the contractors to invoice for their costs that don't directly translate to work in place and to provide transparency to the VA. The schedule will likely change and become more detailed over the course of the project to facilitate ongoing transparency and proper invoicing.

That being said, the VA's average burden of thirty minutes to provide all of the required information is underestimated. The VA should increase its estimated burden to reflect the true amount of time it takes the contractor to comply with this requirement. In general, it will take several hours for a prime contractor to set create a detailed schedule of costs for work to be performed. It then takes several weeks for a prime contractor to gather proper input from its subcontractors.

Finally, the contractor does not have control over how long it will take for approval to come from the VA. On top of this, each month there may be changes or greater detail necessary that should be highlighted and explained so that there is no confusion among the subcontractors or the VA. All of this should be accounted for in the VA's estimated burden to the contractor.

AGC urges the VA to increase its estimated average burden requirements to more accurately reflect the needed effort to comply with VAAR 852.236-83. Again, the VA should request further input from the industry through a formal information collection request to gather more realistic data on this burden.

Conclusion

We appreciate the opportunity to share our insights with you and to help advance our common goals of fair competition and of economic and efficient performance of VA construction projects. If you would like to discuss this matter with us further, please do not hesitate to contact AGC of America.

Sincerely,

/S/

Jordan Howard
Director, Federal & Heavy Construction Division
The Associated General Contractors of America