

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: January 22, 2009.

Michael K. Buckley,

Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.

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GENERAL SERVICES ADMINISTRATION

48 CFR Parts 509 and 552

[GSAR Amendment 2009-01; GSAR Case 2006-G512 (Change 27); Docket 2008-0007; Sequence 9]

RIN 3090-A157

General Services Acquisition Regulation; GSAR Case 2006-G512; Rewrite of GSAR Part 509, Contractor Qualifications

AGENCY: Office of the Chief Acquisition Officer, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is amending the General Services Administration Acquisition Manual (GSAM) to update the text addressing contractor qualifications. This rule is a result of the General Services Administration Acquisition Manual (GSAM) rewrite initiative undertaken by GSA to revise the GSAM to maintain consistency with the Federal Acquisition Regulation (FAR), and to implement streamlined and innovative acquisition procedures that contractors, offerors, and GSA contracting personnel can use when entering into and administering contractual relationships. The GSAM incorporates the General Services Administration Acquisition Regulation (GSAR) as well as internal agency acquisition policy.

DATES: Effective Date: April 24, 2009.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Meredith Murphy, Procurement Analyst, at (202) 208-6925. For information pertaining to status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4041, GS Building, Washington, DC, 20405, (202) 501-4755. Please cite Amendment 2009-01, GSAR case 2006-G512 (Change 27).

SUPPLEMENTARY INFORMATION:

A. Background

The GSAR Rewrite Project and Process

On February 15, 2006, GSA published an Advance Notice of Proposed Rulemaking (ANPR) with request for comments on all parts of the GSAM. As a result, two comments were received on Part 509. These are addressed below. In addition, internal review comments have been incorporated as appropriate. A proposed rule for the regulatory portion of the GSAM was published in the **Federal Register** at 73 FR 36013, June 25, 2008. In addition, GSA Acquisition Letter V-08-06, entitled "Changes to Procedures for Conducting Fact-Finding in a Debarment/Suspension Case Under GSAM Subpart 509.4," dated June 20, 2008, was incorporated into Subpart 509.4 (see below). The public comment period for GSAR Part 509 closed on August 25, 2008, and six comments were received from five commenters.

The Rewrite of Part 509

This final rule contains the revisions made to Part 509, Contractor Qualifications. GSA Form 353, Performance Evaluation and Facilities Report, is deleted so that similar FAR forms will be used instead. Subpart 509.2, subsection 509.405-1(b), and clauses 552.209-70 through 552.209-73 are deleted because they are deemed unnecessary. The explanation of "auditor" in 509.105-1 is removed because it is partly duplicative (credit and finance) and too restrictive (does not allow use of DCAA). Subsection 509.406-3(b)(7) is deleted as duplicative of 509.406-3(b)(5). The debarment legal authorities in 509.401 are updated. The term "Suspension and Debarment Official" is used consistently throughout the Part. Subparagraph 509.406-3(d) was rewritten to incorporate the procedures for conducting fact finding in a debarment or suspension case from GSA Acquisition Letter V-08-06, dated June 20, 2008.

Discussion of Comments

A proposed rule was published in the **Federal Register** at 73 FR 36013, June 25, 2008. The comment period closed August 25, 2008, and six comments were received from five commenters. Also, GSA Acquisition Letter V-08-06, published on June 20, 2008, was incorporated in the final rule.

1. No new guidelines on teaming.

Comment: Four commenters wrote in support of the revisions to GSAR Part 509 and to advocate not creating new guidelines that would make it more difficult for small businesses to work as teams.

Response: Concur. There are no plans to create new guidelines for teaming.

2. *Revise rules for GSA Form 527 so as not to make it a last resort for contracting officers.*

Comment: The GSA Form 527, Contractor Qualifications and Financial Information, was retained, but associated text was modified to authorize its use "only after exhausting other available sources of information." While acknowledging that the GSA Form 527 is lengthy, the commenter does not think that making the preaward process longer by having contracting officers research all other sources of information prior to seeking needed information from the contractor is helpful to either party. The commenter said he would not be entirely comfortable making a responsibility determination based only on information external to the offeror, without providing the offeror an opportunity to tell its own story about qualifications and abilities.

Response: Nonconcur. FAR 9.105 includes the standards and procedures for requesting and obtaining information sufficient to determine the responsibility of a prospective contractor, *i.e.*, that an offeror meets the standards at FAR 9.104. A careful reading of FAR 9.105-1 nets a long list of potential sources for objective information, none of which are the offeror itself. While there is nothing wrong with obtaining information directly from an offeror, the offeror itself should not be the first, or the only, source of information for making a responsibility determination. GSA acquisition personnel should make greater use of the information sources listed in the FAR, and appropriate use of such sources would not extend the length of time needed to make a responsibility determination.

3. *Consider eliminating GSA Form 527.*

Comment: A commenter proposed to eliminate GSA Form 527, as long as GSA Finance will continue to perform financial reviews without it. Rather than using a lengthy form, the commenter said, perhaps a brief GSAR solicitation provision could be written detailing the type of information an offeror may be requested to provide to support a responsibility determination.

Response: Nonconcur. While this is a good concept, made in the spirit of eliminating unnecessary agency-level supplementation of the FAR, the GSA Office of Finance, at this time, will not agree to perform financial reviews without it.

4. *GSA Acquisition letter V-08-06, entitled "Changes to Procedures for*

Conducting Fact-Finding in a Debarment/Suspension Case Under GSAM Subpart 509.4.”

Comment: In accordance with the GSAM rewrite drafting principles, a GSA acquisition letter published after the Part 509 proposed rule was sent for publication, was incorporated into the final GSAM Part 509.

Response: The revisions made by the Acquisition Letter, published on June 20, 2008, were included in the draft final rule. Subpart 509.4 was revised at 509.403 to incorporate the definition of “fact-finding official,” and the procedures for fact finding replaced the earlier version of 509.406–3, Procedures, in accordance with the authority granted at FAR 9.406–3(b).

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The General Services Administration certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the only changes are minor ones, *i.e.*, deleting a GSA-unique form and four GSA-unique clauses in favor of using the FAR forms and clauses.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the GSAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 3090–0007.

List of Subjects in 48 CFR Parts 509 and 552

Government procurement.

Dated: December 15, 2008.

David A. Drabkin,

Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.

■ Therefore, GSA amends 48 CFR parts 509 and 552 as set forth below:

■ 1. The authority citation for 48 CFR part 509 is revised to read as follows:

Authority: 40 U.S.C. 121(c).

PART 509—CONTRACTOR QUALIFICATIONS

■ 2. Revise sections 509.105, 509.105–1, and 509.105–2 to read as follows:

509.105 Procedures.

509.105–1 Obtaining information.

(a) *From a prospective contractor.* FAR 9.105–1 lists a number of sources of information that a contracting officer may utilize before making a determination of responsibility. The contracting officer may request information directly from a prospective contractor using GSA Form 527, Contractor’s Qualifications and Financial Information, but only after exhausting other available sources of information.

(b) *From Government personnel.* The contracting officer may solicit and consider information from any appropriate activities, *e.g.*, legal counsel, quality control, contract management, credit and finance, and auditors before determining that an offeror is responsible.

509.105–2 Determinations and documentation.

(a) The contracting officer shall provide written notification to a prospective contractor determined not responsible. Include the basis for the determination. Notification provides the prospective contractor with the opportunity to correct any problem for future solicitations.

(b) Due to the potential for de facto debarment, the contracting officer shall avoid making repeated determinations of nonresponsibility based on the same past performance information.

(c) To provide for timely consideration of the need to institute action to debar a contractor, the contracting officer shall submit a copy of each nonresponsibility determination, other than those based on capacity or financial capability, to the Suspension and Debarment Official in the Office of the Chief Acquisition Officer.

509.106 [Removed]

■ 3. Section 509.106 is removed.

Subpart 509.2 [Removed]

■ 4. Subpart 509.2 is removed.

■ 5. Revise section 509.306 to read as follows:

509.306 Solicitation requirements.

The clauses at FAR 52.209–3 and 52.209–4 do not cover all the solicitation requirements described in FAR 9.306. If a solicitation contains a testing and approval requirement, the contracting officer must address the requirements in FAR 9.306(d) and (f) through (j) in the solicitation’s Section H, special contract requirements.

509.308 [Removed]

■ 6. Section 509.308 is removed.

■ 7. Revise section 509.401 to read as follows:

509.401 Applicability.

This subpart applies to all the following:

(a) Acquisitions of personal property, nonpersonal services, construction, and space in buildings.

(b) Acquisition of transportation services (Federal Management Regulation (FMR) Parts 102–117 and 102–118 (41 CFR parts 102–117 and 102–118)).

(c) Contracts for disposal of personal property (FMR Parts 102–36 through 102–38 (41 CFR parts 102–36 through 102–38)).

(d) Covered transactions as defined by 41 CFR part 105–68.

■ 8. Amend section 509.403 by adding, in alphabetical order, the definitions “Debarring official” and “Suspending official”; and, by revising the definition “Fact-finding official. The added and revised text reads as follows:

509.403 Definitions.

Debarring official means the Suspension and Debarment Official within the Office of the Chief Acquisition Officer.

Fact-finding official, means the Suspension and Debarment Official or a designee.

* * * * *

Suspending official means the Suspension and Debarment Official within the Office of the Chief Acquisition Officer.

■ 9. Revise sections 509.405, 509.405–1 and 509.405–2 to read as follows:

509.405 Effect of listing.

509.405–1 Continuation of current contracts.

(a) When a contractor appears on the current EPLS, consider terminating a contract under any of the following circumstances:

(1) Any circumstances giving rise to the debarment or suspension also constitute a default in the contractor’s performance of the contract.

(2) The contractor presents a significant risk to the Government in completing the contract.

(3) The conduct that provides the cause of the suspension, proposed debarment, or debarment involved a GSA contract.

(b) Before terminating a contract when a contractor appears on the current EPLS, consider the following factors:

(1) Seriousness of the cause for debarment or suspension.

- (2) Extent of contract performance.
- (3) Potential costs of termination and reprocurement.
- (4) Need for or urgency of the requirement, contract coverage, and the impact of delay for reprocurement.
- (5) Availability of other safeguards to protect the Government's interest until completion of the contract.
- (6) Availability of alternate competitive sources to meet the requirement (e.g., other multiple award contracts, readily available commercial items.)
- (c) The responsibilities of the agency head under FAR 9.405-1 are delegated to the GSA Suspension and Debarment Official.

509.405-2 Restrictions on subcontracting.

The responsibilities of the agency head under FAR 9.405-2(a) are delegated to the GSA Suspension and Debarment Official.

- 10. Revise section 509.406-1 to read as follows:

509.406-1 General.

The Suspension and Debarment Official is the designee under FAR 9.406-1(c).

- 11. Amend section 509.406-3 by—
 - a. Removing from paragraphs (a) and (b), the words “debarment official” and adding the words “Suspension and Debarment Official” in its place each time it appears;
 - b. Removing from paragraph (b)(2), the word “Number” and adding the word “Numbers” in its place;
 - c. Removing paragraph (b)(7);
 - d. Revising paragraph (c); and
 - e. Removing from paragraphs (d)(1) and (d)(2) the words “debarment official” and adding the words “Suspension and Debarment Official” in its place each time it appears; and
 - f. Revising paragraph (d)(3).
- The revised text reads as follows:

509.406-3 Procedures.

* * * * *

(c) *Review.* The Suspension and Debarment Official will review the report, and after coordinating with assigned legal counsel—

- (1) Initiate debarment action;
- (2) Decline debarment action;
- (3) Request additional information; or
- (4) Refer the matter to the OIG for further investigation and development of a case file.

(d) * * *

(3) Following a review of the record and, if needed, a presentation by the contractor in opposition to the proposed action, the Suspension and Debarment Official will determine whether there is a genuine dispute of material fact. If so,

the Suspension and Debarment Official will initiate the fact-finding process. The fact-finding official will:

- (i) Establish a date for a fact-finding proceeding, normally to be held within 45 days of the determination of who will function as the fact-finding official.
- (ii) Grant extensions for good cause.
- (iii) Provide notice of the scheduled hearing.
- (iv) Provide the parties with a schedule for exchange of documents and witness lists.
- (v) Develop an official transcript of the fact-finding proceeding.
- (vi) Provide the Government's representative and the contractor with an opportunity to present evidence relevant to the facts at issue. The contractor may appear in person or through a representative.
- (vii) Conduct hearings under rules consistent with FAR 9.406-3 pertaining to fact finding. Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure govern fact finding. Hearsay evidence may be presented and will be given appropriate weight by the fact-finding official.
- (viii) Provide for witness testimony. Witnesses may testify in person. Witnesses are subject to cross examination.

(ix) Prepare written findings of fact based on a preponderance of the evidence and submit them to both the Suspension and Debarment Official and the contractor within 20 calendar days following the conclusion of the fact-finding proceeding.

509.407-1 [Amended]

- 12. Amend section 509.407-1 by removing the words “suspending official” and adding “Suspension and Debarment Official” in its place.

509.407-3 [Amended]

- 13. Amend section 509.407-3 by removing the words “suspending official” and adding “Suspension and Debarment Official” in its place each time it appears.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 14. The authority citation for 48 CFR part 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

552.209-70 through 552.209-73 [Removed]

- 15. Sections 552.209-70 through 552.209-73 are removed.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0810141351-9087-02]

RIN 0648-XN18

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch for Vessels in the Bering Sea and Aleutian Islands Trawl Limited Access Fishery in the Eastern Aleutian District of the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch for vessels participating in the Bering Sea and Aleutian Islands (BSAI) trawl limited access fishery in the Eastern Aleutian District of the BSAI. This action is necessary to prevent exceeding the 2009 Pacific ocean perch total allowable catch (TAC) specified for vessels participating in the BSAI trawl limited access fishery in the Eastern Aleutian District of the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), March 22, 2009, through 2400 hrs, A.l.t., December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907-586-7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2009 Pacific ocean perch TAC allocated as a directed fishing allowance to vessels participating in the BSAI trawl limited access fishery in the Eastern Aleutian District of the BSAI is 365 metric tons as established by the 2009 and 2010 final harvest specifications for groundfish in the BSAI (74 FR 7359, February 17, 2009).

In accordance with § 679.20(d)(1)(iii), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2009 Pacific ocean perch TAC allocated to vessels