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(11) In Canada Border Regions 1, 2, 3, 4, 5 and 6, the following General Category channels are available for licensing to all entities except as described below in paragraphs (c)(11)(i) and (c)(11)(ii): in Regions 1, 4, 5 and 6, channels 261–560; in Region 2, channels 231–620 and in Region 3, channels 321–500.

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## GENERAL SERVICES ADMINISTRATION

### 48 CFR Parts 537 and 552

[GSAR Amendment 2009–03; GSAR Case 2008–G510 (Change 29) Docket 2008–0007; Sequence 4]

RIN 3090–A154

### General Services Administration Acquisition Regulation; GSAR Case 2008–G510; Rewrite of GSAR Part 537, Service Contracting

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

**ACTION:** Final rule.

**SUMMARY:** The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) by revising the text addressing service contracting. 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 utilize when entering into and administering contractual relationships. The GSAM incorporates the GSAR as well as internal agency acquisition policy.

**DATES:** *Effective Date:* June 4, 2009.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Michael O. Jackson, Procurement Analyst, at (202) 208–4949. 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 2009–03, GSAR case 2008–G510 (Change 29).

**SUPPLEMENTARY INFORMATION:**

### A. Background

An Advance Notice of Proposed Rulemaking (ANPR) with request for comments on all parts of the GSAM was published in the **Federal Register** at 71 FR 7910 on February 15, 2006. No comments were received on Part 537. However, 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 32276 on June 6, 2008. In addition, GSA Acquisition Letter V–05–11, entitled, “Exclusion of Leases or Leasehold Interest in Real Property from the Use of Performance-Based Contracting,” dated June 6, 2005, was incorporated into Subpart 537.102–70. The public comment period for the proposed rule on GSAR Part 537 closed on August 5, 2008, and four (4) comments were received from one (1) commenter.

#### The Rewrite of Part 537

This final rule contains the revisions made to GSAR Subpart 537, Service Contracting. The rule revises GSAR Subpart 537 to address the text at GSAR 537.101, Definitions; GSAR 537.110 Solicitation provisions and contract clauses; provision GSAR 552.237–70, Qualifications of Offerors; and clause GSAR 552.237–73, Restriction on Disclosure of Information. The language in GSAR 537.101, Definitions, is removed from inclusion in the GSAR. This language clarifies the definition for “contracts for building services” for contracting officers; therefore, this language is being incorporated as non-regulatory GSAM language. In addition, because these definitions may have impact beyond the agency, GSAM 537.201, Definitions, is being made regulatory with deletions in the definitions where the GSAM language was redundant with the FAR. GSAR clauses 552.237–71, Qualifications of Employees and 552.237–72, Prohibition Regarding “Quasi-Military Armed Forces” are retained with no changes, except minor edits to correct clause prescription references.

GSAR 537.102–70 was written to incorporate the policy that GSA contracting activities are not required to use performance-based acquisition (PBA) methods for leases and leasehold interests in real property from GSA Acquisition Letter V–05–11, dated June 6, 2005.

#### Discussion of Comments

A proposed rule was published in the **Federal Register** at 73 FR 32276 on June 6, 2008. The comment period closed August 5, 2008, and four (4) comments were received from one (1) commenter. Also, GSA Acquisition Letter V–05–11,

published on June 6, 2005, was incorporated in the final rule.

*Comment 1:* One commenter responded that GSAM 552.237–70 clause is misleading in that it refers to “qualifications” within the same context that it discusses determinations of “responsibility” which the commenter believes are two totally different requirements with separate applications and procedures. The commenter believes this clause is inappropriate for the reasons cited below.

- The issues of “financial resources” and “performance capability” both fall under FAR 9.1’s responsibility standards. Conversely, “qualifications” go to the “quality” of the service that must “be addressed in every source selection through consideration of one or more non-cost evaluation factors such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience” and references FAR 15.304(c)(2) and FAR 15.202(a). Consequently, factors dealing with “comparable contracts,” “experience,” and “competency in performing comparable...contracts” fall under the realm of quality or qualifications as outlined in FAR 15 rather than FAR 9.1 responsibility standards. Qualifications must be “evaluated” as part of the technical factors, and related standards/criteria that are outlined in the RFP/solicitation.

- Since “qualifications” must be specifically addressed in the RFP, as required under FAR 15.3’s Source Selection procedures, and responsibility standards are already addressed in FAR 9.1, the commenter recommends GSA delete this clause on the basis that it is inappropriate, ambiguous, impractical, and unnecessary.

- If the clause is retained, the commenter questions its applicability only to building service contracts. The commenter’s position is that qualifications and responsibility matters could apply to all contracts including supply, construction, A–E, as well as all professional services. If retained, the commenter recommends that GSA consider moving the clause under GSAM 509.2 to align with FAR 9.2’s “Qualifications Requirements.”

*Response:* Nonconcur. The information summarizes the requirements for the performance of building service contracts that is not found in other parts of the FAR and GSAM. The GSA position is that the FAR and GSAM coverage is adequate for responsibility and qualifications matters.

Comment 2: The commenter stated that FAR 9.1 deals with "responsibility" requirements that apply to all "prospective contractors" including sealed bid competitors. However, competitors' qualifications cannot be considered in a sealed bid procurement which is limited to "only price and the price-related factors" per FAR 14.408-1(a). Pursuant to FAR 14.103-2(d), "An award is made to the responsible bidder (see 9.1)"... Also see FAR 14.408-2(a) which says, "The contracting officer shall determine that a prospective contractor is responsible (per FAR 9.1)..." Therefore, GSA should consider revising the GSAM/GSAR 537.110(a) prescription to prohibit its use, for qualifying firms, on sealed bid procurements.

Response: Nonconcur. Contracting activities are encouraged not to use sealed bidding procedures for building service contracts, however, some activities still use the sealed bidding procedures for smaller building service contract actions.

Comment 3: The commenter refers to comments covering GSAM 509 which allows Contracting Officers to use the GSA Form 527 to "furnish a statement of its financial resources," yet fails to require Contracting Officers to document any analytical report to reflect review of same with conclusory findings.

Response: This comment is outside the scope of this GSAR case.

Comment 4: Commenter stated that they considered it a "reporting burden" for GSA to not allow comments to be submitted electronically on this notice.

Response: Comments on this case were accepted electronically.

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 does not expect this final rule to 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 changes in the final rule are editorial in nature, e.g., changing a definition from regulatory to non-regulatory, adding the new name of the Javits-Wagner-O'Day (JWOD) program of Ability One, eliminating redundancy with regard to GSAR and FAR definitions at GSAR 537.201 and making minor edits to GSAR 552.237-70 and 552.237-73.

**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 537 and 552**

Government procurement.

Dated: March 11, 2009

**Rodney P. Lantier,**

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

Therefore, GSA amends 48 CFR parts 537 and 552 as set forth below:

**PART 537—SERVICE CONTRACTING**

1. The authority citation for 48 CFR part 537 is revised to read as follows:

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

**537.101 [Removed]**

2. Remove section 537.101.

**537.110 [Amended]**

3. Amend section 537.110 by removing from the introductory text of paragraph (a) "initiated under" and adding "initiated with Ability One under" in its place.

4. Add section 537.201 to read as follows:

**537.201 Definitions.**

As used in this subpart—

*Evaluation or analysis of a proposal* means proposal evaluation as described in FAR 15.305. It includes: Cost or price evaluation using cost or price analysis, as defined in FAR 15.404.

*Proposal* means a proposal submitted for an initial contract award. (See FAR 37.203(d)). It does not include proposals submitted after contract award, such as value engineering proposals, proposals related to contract modifications, claims, or other contract administration actions.

*Readily available* means that employees with the requisite training and capability are employed by the agency, capable of handling additional work relating to other duties as assigned by management, and that the travel and other costs associated with using covered personnel does not exceed the projected cost of a contract for evaluation and analysis services.

*Requisite training and capability* means training and capability necessary to successfully perform the task or contract at issue in the time and in the manner required. It may include relevant experience, recent performance

of work of similar size and scope, specific training and other factors that the contracting officer determines are necessary to the successful performance of the task or contract at issue.

**PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

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

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

6. Amend section 552.237-70 by revising the date of the provision and the second sentence in paragraph (a) to read as follows:

**552.237-70 Qualifications of Offerors.**

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**QUALIFICATIONS OF OFFERORS (May 2009)**

(a) \* \* \* To determine an Offeror's qualifications, the Offeror may be requested to furnish a narrative statement listing comparable contracts which it has performed; a general history of its operating organization; and its complete experience. \* \* \*

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7. Amend section 552.237-71 by revising the introductory paragraph to read as follows:

**552.237-71 Qualifications of Employees.**

As prescribed in 537.110(a), insert the following clause:

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8. Amend section 552.237-72 by revising the introductory paragraph to read as follows:

**552.237-72 Prohibition Regarding "Quasi-Military Armed Forces."**

As prescribed in 537.110(b), insert the following clause:

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9. Amend section 552.237-73 by revising the date of the clause and paragraph (b) to read as follows:

**552.237-73 Restriction on Disclosure of Information.**

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**RESTRICTION ON DISCLOSURE OF INFORMATION (May 2009)**

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(b) The Contractor shall not disclose any information concerning the work under this contract to any persons or entity unless the Contractor obtains prior written approval from the Contracting Officer.

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