

## GENERAL SERVICES ADMINISTRATION

### 48 CFR Parts 538 and 552

[GSAR Case 2020–G511; Docket No. 2023–0019; Sequence No. 1]

RIN 3090–AK21

#### General Services Administration Acquisition Regulation; Updated Guidance for Non-Federal Entities Access to Federal Supply Schedules

**AGENCY:** Office of Acquisition Policy,  
General Services Administration (GSA).

**ACTION:** Proposed rule.

**SUMMARY:** GSA is proposing to amend the General Services Administration Acquisition Regulation (GSAR) to update and clarify the requirements for use of Federal Supply Schedule (FSS) contracts by eligible non-Federal entities, such as State and local governments.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before November 17, 2023 to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to GSAR Case 2020–G511 to <https://www.regulations.gov> via the Federal eRulemaking portal by searching for “GSAR Case 2020–G511”. Select the link “Comment Now” that corresponds with GSAR Case 2020–G511. Follow the instructions provided at the “Comment Now” screen. Please include your name, company name (if any), and “GSAR Case 2020–G511” on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

*Instructions:* Please submit comments only and cite GSAR Case 2020–G511, in all correspondence related to this case. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two-to-three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Mr. Thomas O’Linn, Procurement Analyst, at [gsarpolicy@gsa.gov](mailto:gsarpolicy@gsa.gov) or 202–445–0390. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at

[GSARegSec@gsa.gov](mailto:GSARegSec@gsa.gov) or 202–501–4755. Please cite GSAR Case 2020–G511.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

GSA conducts routine reviews of its acquisition regulations. Routine review of the GSAR, as well as feedback from GSA’s operational offices, prompted this change. The review indicated a need to update and clarify GSAR subpart 538.70, Purchasing by Non-Federal Entities.

GSAR subpart 538.70 prescribes the policies and procedures that implement statutory, regulatory, and other provisions that authorize eligible non-Federal entities (e.g., State or local governments as defined in 40 U.S.C. 502(c)(3)) use of Federal Supply Schedule (FSS) contracts.

The GSA Schedule, also known as FSS, and Multiple Award Schedule (MAS), is a long-term governmentwide contract with commercial companies that provide access to millions of commercial products and services at fair and reasonable prices to the Federal Government and other authorized ordering activities.

This change will update and clarify GSAR subpart 538.70, which supports use of FSS contracts by eligible non-Federal entities. This subpart is being revised to make administrative changes due to changes in some of the underlying authorities supporting use of FSS contracts by eligible non-Federal entities. This rule also updates and clarifies existing requirements supporting use of FSS contracts by eligible non-Federal entities, adds additional key authorities that support such use, and makes additional technical corrections to enhance clarity of existing requirements.

##### II. Discussion and Analysis

This rule proposes to revise GSAR subpart 538.70 in its entirety in an effort to: (1) update and clarify existing requirements supporting use of FSS contracts by eligible non-Federal entities; (2) clarify GSAR clause requirements (e.g., remove redundant information); (3) and reflect changes based on some of the underlying authorities that provide use of FSS contracts by eligible non-Federal entities; (4) add additional key authorities that support such use. A summary of these revisions is as follows:

A. Subpart 538.70—Purchasing by Non-Federal Entities, is being renamed as Subpart 538.70—Use of GSA’s Federal Supply Schedule Contracts by Eligible Non-Federal Entities. The purpose for renaming this subpart is to

provide clarity that this subpart deals only with Federal Supply Schedule contracts. The intent is to resolve any confusion around non-Federal entity access to other GSA programs and contracts.

B. Section 538.7000 Scope of subpart, is revised in its entirety to clarify the scope of this subpart. The change is intended to resolve confusion around the scope of this subpart and its relation to other GSA programs and contracts.

C. Section 538.7001 Definitions, is revised in its entirety to: add definitions for purposes of clarity, revise existing definitions for purposes of clarity or currency, and remove definitions determined to be no longer necessary. For example, the existing definitions for “preparedness”, “recovery”, and “response” are being revised to reflect updates to FEMA’s National Response Framework, which addresses disasters and other incidents. Definitions for “non-Federal entity” and “eligible”, are also being added. The definition for “non-Federal entity” provides needed clarity surrounding the use of this term within the FSS program. The definition for “eligible” provides a needed qualifier for understanding the difference between a non-Federal entity that is able to use FSS contracts and one that is not. The definitions for “relief”, “ordering activity”, and “state and local government entities” are being removed as they have been determined to be no longer necessary.

D. Section 538.7002 General, is being renamed as 538.7002 Authorities, and revised in its entirety. The revision: (1) renames the section to accurately reflect the content of the section, which is to provide a list of the authorities supporting use of FSS contracts by eligible non-Federal entities; (2) identifies and clarifies a number of existing authorities available to eligible non-Federal entities; (3) identifies additional authorities not currently identified in this section (e.g., the addition of the Indian Self-Determination and Education Assistance Act (ISDEAA) authority); (4) provides for the inclusion of additional future authorities that may impact the eligibility of non-Federal entities (i.e., currently 538.7002 provides only a limited enumerated list of authorities); and (5) provides a hyperlink to a GSA website that provides additional information about the authorities supporting the use of FSS contracts by eligible non-Federal entities.

E. Section 538.7003 Policy, is being renamed as 538.7003 Non-Federal entity requirements, and revised in its entirety. The revision: (1) removes the ability to deviate from various FAR provisions

and clauses; (2) provides clarity on the use of FSS contracts by eligible non-Federal entities; and (3) adds a hyperlink to GSA's website that provides GSA FSS ordering guidance to eligible non-Federal entities.

F. Section 538.7004 Solicitation provisions and contract clauses, is being renamed as 538.7004 GSA responsibilities, and revised in its entirety. The revision describes GSA's responsibilities concerning the use of FSS contracts by eligible non-Federal entities. These responsibilities reflect existing requirements, thus the intent of moving them to the GSAR is to enhance awareness of these requirements.

G. Section 538.7005 Contract clause, is a new section being added to the subpart. This new section provides for the prescription of GSAR clause 552.238–114, which is being revised under this proposed rule.

H. GSAR clause 552.238–105, Deliveries Beyond the Contractual Period—Placing of Orders, is being revised. The revision updates the citation to GSAR clause 552.238–113, which is being revised and renamed under this proposed rule. The revision changes the citation from “Clause 552.238–113, Scope of Contract (Eligible Ordering Activities)” to “the GSAR clause at 552.238–113, Authorities Supporting Use of Federal Supply Schedule Contracts.”

I. GSAR Clause 552.238–112, Definitions (Federal Supply Schedules) Non-Federal Entity, is being revised, and renamed as 552.238–112, Definitions—Federal Supply Schedule Contracts. The revision provides for a definition for the word ‘eligible’ and an updated definition for the term ‘ordering activity.’ The definition for “eligible” provides a needed qualifier for understanding the difference between a non-Federal entity that is authorized to use FSS contracts and one that is not. The update to the definition for the term ‘ordering activity’ is needed in order to capture the ability for ordering activities to establish blanket purchase agreements under FSS contracts.

J. GSAR clause 552.238–113, Scope of Contract (Eligible Ordering Activities), is being revised, and renamed 552.238–113, Authorities Supporting Use of Federal Supply Schedule Contracts. The revision: (1) renames the clause so as to clarify this clause applies to FSS contracts; (2) removes unnecessary or redundant information that is contained elsewhere in the FSS solicitation and resultant contracts; (3) streamlines the clause to focus solely on the authorities that support use of FSS contracts; and (4) provides an updated list of the

primary authorities supporting use of FSS contracts.

K. GSAR clause 552.238–114, Use of Federal Supply Schedule Contracts by Non-Federal Entities, is being revised and renamed 552.238–114, Use of Federal Supply Schedule Contracts by Eligible Non-Federal Entities. The revision: (1) renames the clause to add the word “eligible” to the clause title; (2) captures the ability for eligible non-federal entities to establish blanket purchase agreements under FSS contracts (which is currently not addressed in the existing clause); and (3) clarifies the requirements that apply to use of FSS contracts by eligible non-Federal entities.

L. Lastly, section 538.273, FSS solicitation provisions and contract clauses, is being revised to provide for the prescription of GSAR clauses 552.238–112 and 552.238–113, which are being revised and renamed under this proposed rule. Section 538.273 is appropriate because this is where FSS GSAR provisions and clauses are located.

### III. Expected Impact of the Rule

GSA believes that these changes benefit the FSS program as a whole. For example, these changes provide visibility into the resources and authorities available to eligible non-Federal entities who may be interested in using FSS contracts. Additionally, these changes clarify the requirements for FSS contractors interested in doing business with eligible non-Federal entities under their FSS contract. These changes do not alter the manner in which the FSS contractors conduct business, or the manner in which eligible non-Federal entities may access and use FSS contracts. The rule merely updates and clarifies requirements currently in use in the FSS program, such as updating and clarifying existing statutory, regulatory, and other authorities that enable eligible non-Federal entities use of FSS contracts. GSA assumes these changes will have a positive impact on the FSS program as a whole, including FSS contractors and eligible non-Federal entities.

The qualitative anticipated benefits include, but are not limited to, removal of outdated and redundant information; clarification of the requirements supporting use of FSS contracts by eligible non-Federal entities; clarification of the authorities providing use of FSS contracts by eligible non-Federal entities (e.g., adding the authority provided by the Indian Self-Determination and Education Assistance Act that allows tribal organizations and Indian tribes to use

FSS contracts under certain conditions); identification of some of the programs created for purpose of implementing some of these authorities (e.g., GSA's Disaster Purchasing program which implements 40 U.S.C. 502(d)); clarification on who is and who is not considered eligible to use FSS contracts (i.e., providing a definition for ‘eligible’ and ‘non-Federal entity’); and inclusion of hyperlinks to resources that provide additional information about eligibility and use of FSS contracts (e.g., <https://www.gsa.gov/eligibilitydeterminations> includes a list that FSS contractors can use to verify an entity's eligibility).

Due to these benefits, GSA estimates the following annual reduction in burden due to the proposed clarifications: GSA estimates it takes 3 hours for FSS contractors to familiarize (read and understand the applicable GSAR requirements of this proposed rule) themselves with the regulations. Therefore, for FSS contractors:

Prior to the revisions: the current estimated total cost is 3 hours \* \$61.29<sup>1</sup> (GS–12 Step 5 base pay plus “Rest of US Locality Pay” plus “Fringe”) \* 13,000 approximate number of current FSS contractors = \$2,390,310.00.

After the revisions: the estimated total cost is 2.5 hours \* \$61.29 (GS–12 Step 5 base pay plus “Rest of US Locality Pay” plus “Fringe”) \* 13,000 approximate number of current FSS contractors = \$2,191,117.50.

Resulting in a reduction in burden of \$199,192.50.

### IV. Executive Orders 12866, 13563 and 14094

Executive Order (E.O.) 12866 (Regulatory Planning and Review) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 14094 (Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in E.O. 12866 and E.O. 13563. OIRA has determined that

<sup>1</sup> The hourly rate for GS–12 is \$61.29 (\$44.98 as a GS–12/step 5 salary OPM 2023 pay scale Rest of US, with a 36.25% (\$16.31) fringe factor pursuant to OMB memorandum M–08–13).

this rule is not a significant regulatory action, and, therefore, is not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

### V. Regulatory Flexibility Act

GSA does not expect this proposed 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 this rule is to: (1) update and clarify existing requirements supporting use of FSS contracts by eligible non-Federal entities; (2) clarify GSAR clause requirements (*e.g.*, rename clauses, remove redundant or duplicative information); (3) reflect changes based on some of the underlying authorities that provide eligible non-Federal entities use of FSS contracts; (4) add additional authorities that support such use; and (5) include hyperlinks to resources that provide information about eligibility and use of FSS contracts.

The purpose of the changed text remains the same, and therefore any burden would have been identified previously. Additionally, participation by both FSS contractors and eligible non-Federal entities remains voluntary. However, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared consistent with 5 U.S.C. 603.

The Regulatory Secretariat will be submitting a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. GSA invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

GSA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (GSAR Case 2020–G511), in correspondence.

The analysis is summarized as follows:

The objective of the rule is to revise GSAR subpart 538.70 in its entirety in an effort to: (1) update and clarify existing requirements supporting use of FSS contracts by eligible non-Federal entities; (2) clarify GSAR clause requirements (*e.g.*, rename clauses, remove redundant or duplicative information); (3) reflect changes based on some of the underlying authorities that provide eligible non-Federal entities use of FSS contracts; (4) add additional authorities that support such use; and (5) include hyperlinks to resources that provide information about eligibility and use of FSS contracts.

Title 40 of the United States Code (U.S.C.) Section 121 authorizes GSA to issue regulations, including the GSAR, to control the relationship between GSA and contractors. In addition, 41 U.S.C. 152 provides GSA authority over the FSS program.

The rule applies to both large and small businesses, which are awarded FSS contracts and decide to do business with eligible non-Federal entities who decide to use FSS contracts (*i.e.*, participation by all parties is voluntary).

Information obtained from the FSS program was used as the basis for estimating the number of FSS contractors that the rule may apply. For fiscal year 2022, approximately 12,000 GSA FSS contractors reported over \$780 million in sales to eligible non-Federal entities. Of the number of FSS contractors that did business with eligible non-Federal entities approximately 10,700 (89%) were small business FSS contractors.

It is anticipated that these changes will increase awareness of the authorities that allow eligible non-Federal entities use of FSS contracts as well as the resources available. It is anticipated that these changes will clarify the requirements for FSS contractors choosing to do business with eligible non-Federal entities under their FSS contracts. Altogether, GSA assumes these changes will have a positive impact on the FSS program as a whole, including FSS contractors and eligible non-Federal entities.

The rule does not implement new or change reporting, recordkeeping, or other compliance requirements for FSS contracts. The rule merely updates and clarifies existing FSS requirements, such as updating and clarifying existing statutory, regulatory, and other authorities that enable eligible non-Federal entities use of FSS contracts. This rule does not implement new or changed requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives to this rule which would accomplish the stated objectives. This rule does not initiate or impose any new administrative or performance requirements on small business contractors because the policies and procedures prescribed in existing FSS clauses are already being followed. The rule merely updates and clarifies existing statutory, regulatory, and other authorities related to the use of FSS contracts by non-Federal entities.

### VI. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the GSAR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Parts 538 and 552

Government procurement.

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Therefore, GSA proposes to amend 48 CFR parts 538 and 552 as set forth below:

■ 1. The authority citation for 48 CFR parts 538 and 552 continues to read as follows:

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

### PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING

■ 2. Amend section 538.273 by—

- a. Redesignating paragraph (d)(36) as paragraph (d)(38); and
- b. Adding new paragraph (d)(36) and paragraph (d)(37) to read as follows:

#### 538.273 FSS solicitation provisions and contract clauses.

\* \* \* \* \*

(d) \* \* \*

(36) 552.238–112, Definitions—Federal Supply Schedule Contracts.

(37) 552.238–113, Authorities Supporting Use of Federal Supply Schedule Contracts.

\* \* \* \* \*

■ 3. Revise subpart 538.70 to read as follows:

#### Subpart 538.70—Use of Federal Supply Schedule Contracts by Eligible Non-Federal Entities

- 538.7000 Scope of subpart.
- 538.7001 Definitions.
- 538.7002 Authorities.
- 538.7002–1 Cooperative purchasing program.
- 538.7002–2 Disaster purchasing program.
- 538.7002–3 Public health emergencies program.
- 538.7002–4 Qualified nonprofit agencies for the blind or other severely disabled.
- 538.7002.5 Qualified relief or disaster assistance organizations.
- 538.7002–6 Indian Self-Determination and Education Assistance Act (ISDEEA).
- 538.7002–7 Native American Housing Assistance and Self-Determination Act (NAHASDA).
- 538.7002–8 Urban Indian organizations.
- 538.7002–9 Tribally controlled schools.
- 538.7002–10 1122 Program.
- 538.7003 Non-Federal entity requirements.
- 538.7004 GSA responsibilities.
- 538.7005 Contract clause.

#### Subpart 538.70—Use of Federal Supply Schedule Contracts by Eligible Non-Federal Entities

**538.7000 Scope of subpart.**

This subpart prescribes policies and procedures for implementing statutory,

regulatory, and other authorities that authorize use of Federal Supply Schedule (FSS) contracts by eligible non-Federal entities.

#### **538.7001 Definitions.**

As used in this subpart—

*Eligible* means an entity that meets the requirements prescribed by statute, regulation, or other authority for purposes of being able to use FSS contracts. Information about GSA's FSS eligibility process is available at <https://www.gsa.gov/eligibilitydeterminations>.

*Non-Federal entity* means any state, local, territorial, or tribal government, or any instrumentality thereof (including any local educational agency or institution of higher education); and any other non-Federal organization (e.g., a qualified nonprofit agency as defined in 40 U.S.C. 502(b)).

*Preparedness* means actions that may include, but are not limited to: planning, resourcing, organizing, equipping, training, and conducting exercises to improve, build and sustain the capabilities necessary to prevent, protect, mitigate, respond, and recover from disaster.

*Recovery* means actions taken to assist communities affected by an incident to recover effectively. This includes, but is not limited to, actions to restore, redevelop, and revitalize the health, social, economic, natural, and environmental fabric of the community. Recovery may begin while response is still occurring.

*Response* means actions taken during a disaster, or in its aftermath, in order to save lives, protect property and the environment, and meet basic human needs. Response also includes the execution of emergency plans and actions to enable recovery from a disaster.

#### **538.7002 Authorities.**

Various laws, regulations, and other authorities allow eligible non-Federal entities to use FSS contracts. This section identifies some of the common authorities allowing eligible non-Federal entities to use FSS contracts. See <https://www.gsa.gov/eligibilitydeterminations> for additional information about the authorities available.

#### **538.7002-1 Cooperative purchasing program.**

40 U.S.C. 502(c) allows State or local governments, as defined in 40 U.S.C. 502(c)(3), to purchase the types of supplies and services described in 40 U.S.C. 502(c). The supplies and services described in 40 U.S.C. 502(c) are limited to those available under the Information

Technology Category, and the Security and Protection Category (or successor category(ies)). The GSA program that implements this authority is called the Cooperative Purchasing program.

#### **538.7002-2 Disaster purchasing program.**

(a) 40 U.S.C. 502(d) allows State or local governments, as defined in 40 U.S.C. 502(c)(3), to purchase supplies or services that are to be used to facilitate—

(1) Disaster preparedness or response;

(2) Recovery from a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*); or

(3) Recovery from terrorism, nuclear, biological, chemical, or radiological attack.

(b) The GSA program that implements this authority is called the Disaster Purchasing program.

#### **538.7002-3 Public health emergencies program.**

42 U.S.C. 247d allows State or local governments, as defined in 40 U.S.C. 502(c)(3), to purchase supplies and services when expending Federal grant funds in response to a public health emergency declared by the Secretary of Health and Human Services under section 319 of the Public Health Services Act. The GSA program that implements this authority is called the Public Health Emergencies program.

#### **538.7002-4 Qualified nonprofit agencies for the blind or other severely disabled.**

40 U.S.C. 502(b) allows qualified nonprofit agencies for the blind or other severely disabled, as defined by 41 U.S.C. 8501, that are providing a commodity or service to the Government under 41 U.S.C. chapter 85, to purchase supplies or services. Purchases under this authority must be used directly in making or providing to the Government a commodity or service that has been determined by the Committee for Purchase From People Who Are Blind or Severely Disabled under 41 U.S.C. 8503 to be suitable for procurement by the Government.

#### **538.7002-5 Qualified relief or disaster assistance organizations.**

40 U.S.C. 502(e) allows the American National Red Cross and other qualified organizations, as defined in 40 U.S.C. 502(e)(3), to purchase supplies or services. Purchases under this authority shall be used in furtherance of the purposes of the American National Red Cross set forth in 36 U.S.C. 300102. Purchases under this authority by other qualified organizations shall be used in

furtherance of purposes determined to be appropriate to facilitate emergency preparedness and disaster relief and set forth in guidance by the Administrator of General Services, in consultation with the Administrator of the Federal Emergency Management Agency.

#### **538.7002-6 Indian Self-Determination and Education Assistance Act (ISDEAA).**

(a) 25 U.S.C. 5324 allows tribal organizations, as defined in 25 U.S.C. 5304, that have an active ISDEAA contract, grant, or cooperative agreement to purchase supplies or services for the purposes of carrying out the ISDEAA contract, grant, or cooperative agreement.

(b) 25 U.S.C. 5370 allows Indian Tribes, as defined in 25 U.S.C. 5304, that have an active ISDEAA compact or funding agreement to purchase supplies or services for the purposes of carrying out the ISDEAA compact or funding agreement.

(c) 25 U.S.C. 5396 allows Indian tribes, as defined in 25 U.S.C. 5304, that have an active ISDEAA compact or funding agreement to purchase supplies or services for the purposes of carrying out the ISDEAA compact or funding agreement.

#### **538.7002-7 Native American Housing Assistance and Self Determination Act (NAHASDA).**

25 U.S.C. 4111 allows Indian tribes, as defined in 25 U.S.C. 4103, and tribally designated housing entities, as defined in 25 U.S.C. 4103, that have an active NAHASDA contract, grant, or cooperative agreement to purchase supplies and services for the purposes of carrying out the NAHASDA contract, grant, or cooperative agreement.

#### **538.7002-8 Urban Indian organizations.**

25 U.S.C. 1660g(e) allows Urban Indian organizations, as defined in 25 U.S.C. 1603, that have an active contract or grant pursuant to 25 U.S.C. chapter 18 subchapter IV to purchase supplies and services for the purposes of carrying out the contract or grant.

#### **538.7002-9 Tribally controlled schools.**

25 U.S.C. 2507(a)(6) allows tribally controlled schools, as defined under 25 U.S.C. 2511, that have an active grant pursuant to 25 U.S.C. chapter 27 to purchase supplies or services for the purposes of carrying out the grant.

#### **538.7002-10 1122 Program.**

10 U.S.C. 281 allows States and units of local government, as defined in 10 U.S.C. 281, to purchase equipment suitable for counter-drug, homeland security, and emergency response activities through the Department of

Defense. GSA, in coordination with the Secretary of Defense, produces and maintains a catalog in accordance with the procedures established by the Secretary of Defense. The catalog includes access to equipment available under FSS contracts. States and units of local government interested in using the 1122 program should contact their designated State point of contact.

#### 538.7003 Non-Federal entity requirements.

Only non-Federal entities that are eligible may use FSS contracts. Use of FSS contracts by eligible non-Federal entities is voluntary. The following requirements apply to eligible non-Federal entities who decide to use FSS contracts:

(a) FSS contractors are not obligated to accept orders or enter into blanket purchase agreements; however, they are encouraged to do so.

(b) Purchases cannot be made for personal use.

(c) Purchases cannot be for resale, unless specifically authorized.

(d) At a minimum, purchases shall comply with—

(1) FSS ordering guidance. Information about GSA's FSS contracts, including ordering guidance is available at <https://www.gsa.gov/schedules>; and

(2) Any conditions of the underlying authority(ies) supporting the use of FSS contracts (e.g., 40 U.S.C. 502(c) limits purchases to specific supplies and services available under the FSS program).

(e) An eligible non-Federal entity's eligibility cannot be transferred to a third party (e.g., a subcontractor) or successor entity.

#### 538.7004 GSA responsibilities.

(a) *Eligibility determination process.* GSA may need to make a determination of eligibility to support a non-Federal entity's use of FSS contracts. See <https://www.gsa.gov/eligibility-determinations> for information about eligibility.

(b) *Oversight.* To ensure proper use of and access to FSS contracts by eligible non-Federal entities, GSA may take any action within its authority as deemed necessary to deny, limit, or restrict use of FSS contracts, in whole or in part. Reasons may include, but are not limited to—

(1) A change in an underlying authority;

(2) A change in the terms and conditions of the FSS program or FSS contracts;

(3) A failure by an eligible non-Federal entity to comply with the requirements of 538.7003; or

(4) Use by an ineligible non-Federal entity.

#### 538.7005 Contract clause.

Insert the clause at 552.238–114, Use of Federal Supply Schedule Contracts by Eligible Non-Federal Entities, in FSS solicitations and contracts.

### PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 552.238–105 by revising the date of the clause and the first sentence of the paragraph text to read as follows:

#### 552.238–105 Deliveries Beyond the Contractual Period—Placing of Orders.

\* \* \* \* \*

#### Deliveries Beyond the Contractual Period—Placing of Orders (Date)

In accordance with the GSAR clause at 552.238–113, Authorities Supporting Use of Federal Supply Schedule Contracts, this contract covers all requirements that may be ordered, as distinguished from delivered during the contract term. \* \* \*

■ 5. Revise sections 552.238–112 through 552.238–114 to read as follows:

#### 552.238–112 Definitions—Federal Supply Schedule Contracts.

As prescribed in 538.273(d) insert the following clause:

#### Definitions—Federal Supply Schedule Contracts (Date)

As used in this contract, *Eligible* means an entity that meets the requirements prescribed by statute, regulation, or other authority for purposes of being able to use Federal Supply Schedule (FSS) contracts. Information about FSS eligibility is available at <https://www.gsa.gov/eligibility-determinations>.

*Ordering activity* (also called “ordering agency” and “ordering office”) means an entity that is eligible to place orders or establish blanket purchase agreements (BPA) under this contract.

(End of clause)

#### 552.238–113 Authorities Supporting Use of Federal Supply Schedule Contracts.

As prescribed in 538.273(d), insert the following clause:

#### Authorities Supporting Use of Federal Supply Schedule Contracts (Date)

(a) Ordering activities are able to use Federal Supply Schedule (FSS) contracts based upon a number of statutes, regulations, and other authorities. Authorities allowing ordering activities use of FSS contracts include, but are not limited to:

(1) 25 U.S.C. 1660g(e), which provides for the use by urban Indian organizations, as defined in 25 U.S.C. 1603, for the purposes of carrying out a contract or grant pursuant to 25 U.S.C. chapter 18 subchapter IV.

(2) 25 U.S.C. 2507, which provides for the use by tribally controlled schools, as defined in 25 U.S.C. 2511, for the purposes of carrying out a grant pursuant to 25 U.S.C.

chapter 27 (known as the Tribally Controlled Schools Act).

(3) 25 U.S.C. 4111, which provides for the use by Indian tribes, as defined in 25 U.S.C. 4103, and tribally designated housing entities, as defined in 25 U.S.C. 4103, for the purposes of carrying out a contract, grant, or cooperative agreement pursuant to 25 U.S.C. chapter 43 (known as the Native American Housing Assistance and Self Determination Act (NAHASDA)).

(4) 25 U.S.C. 5324, which provides for the use by tribal organizations, as defined in 25 U.S.C. 5304, for the purposes of carrying out a contract, grant, or cooperative agreement pursuant to 25 U.S.C. chapter 46 (known as the Indian Self-Determination and Education Assistance Act (ISDEAA)).

(5) 25 U.S.C. 5370 and 25 U.S.C. 5396, which provides for the use by Indian tribes, as defined in 25 U.S.C. 5304, for the purpose of carrying out a compact or funding agreement pursuant to 25 U.S.C. chapter 46 (known as ISDEAA).

(6) 40 U.S.C. 113(d), which provides for the use by the Senate, the House of Representatives, and the Architect of the Capitol (including any building, activity, or function under the direction of the Architect of the Capitol).

(7) 40 U.S.C. 501, which provides for the use by executive agencies as defined in 5 U.S.C. 105.

(8) 40 U.S.C. 502(a), which provides for the use by Federal agencies as defined in 40 U.S.C. 102, the District of Columbia, and mixed-ownership Government corporations as defined in 31 U.S.C. 9101.

(9) 40 U.S.C. 502(b), which provides for the use by qualified nonprofit agencies for other severely disabled, as defined in 41 U.S.C. 8501(6), and qualified nonprofit agencies for the blind, as defined in 41 U.S.C. 8501(7), for the purposes of making or providing to the Government a commodity or service that has been determined by the Committee for Purchase From People Who Are Blind or Severely Disabled under 41 U.S.C. 8503 to be suitable for procurement by the Government.

(10) 40 U.S.C. 502(c), which provides for the use by State or local governments, as defined in 40 U.S.C. 502(c)(3)(A), for the purpose of purchasing the types of supplies and services described in 40 U.S.C. 502(c). The GSA program implementing this authority is the Cooperative Purchasing program.

(i) The types of supplies and services described in 40 U.S.C. 502(c) are limited to those available in the Information Technology Category and the Security and Protection Category (or any successor categories).

(11) 40 U.S.C. 502(d), which provides for the use by State or local governments, as defined in 40 U.S.C. 502(c)(3)(A), for the purposes of facilitating disaster preparedness or response, facilitating recovery from a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), or facilitating recovery from terrorism, nuclear, biological, chemical, or radiological attack. The GSA program implementing this authority is the Disaster Purchasing program.

(12) 40 U.S.C. 502(e), which provides for the use by the American National Red Cross and other qualified organizations, as defined in 40 U.S.C. 502(e)(3). Purchases under this authority by the American National Red Cross shall be used in furtherance of the purposes of the American National Red Cross set forth in 36 U.S.C. 300102. Purchases under this authority by other qualified organizations shall be used in furtherance of purposes determined to be appropriate to facilitate emergency preparedness and disaster relief and set forth in guidance by the Administrator of General Services, in consultation with the Administrator of the Federal Emergency Management Agency.

(13) 42 U.S.C. 247d, which provides for the use by State or local governments, as defined in 40 U.S.C. 502(c)(3)(A), when a public health emergency has been declared by the Secretary of Health and Human Services under section 319 of the Public Health Services Act. The GSA program implementing this authority is the Public Health Emergencies program.

(14) FAR subpart 51.1, which provides for the use by contractors, including subcontractors, when such use is authorized pursuant to FAR subpart 51.1.

(End of clause)

#### **552.238–114 Use of Federal Supply Schedule Contracts by Eligible Non-Federal Entities.**

As prescribed in 538.7005, insert the following clause:

#### **Use of Federal Supply Schedule Contracts by Eligible Non-Federal Entities (Date)**

##### *(a) Definition.*

*Non-Federal entity*, as used in this clause, means any state, local, territorial, or tribal government, or any instrumentality thereof (including any local educational agency or institution of higher education); and any other non-Federal organization (e.g., a qualified nonprofit agency as defined in 40 U.S.C. 502(b)).

*(b) Responsibilities.* Eligible non-Federal entities are responsible for complying with—

(1) FSS ordering guidance. Information about GSA's FSS contracts, including ordering guidance is available at <https://www.gsa.gov/schedules>; and

(2) Any conditions of the underlying authority(ies) supporting the use of FSS contracts (e.g., 40 U.S.C. 502(c) limits purchases to specific supplies and services available under FSS contracts).

*(c) Acceptance.* (1) The Contractor is encouraged, but not obligated, to accept orders from eligible non-Federal entities under this contract. The Contractor may, within 5 business days of receipt of an order, reject an order from an eligible non-Federal entity for any reason. However, purchase card orders must be rejected within 24 hours of receipt of the order. Failure to reject an order within these timeframes shall constitute acceptance.

(2) The Contractor is encouraged, but not obligated, to enter into blanket purchase agreements (BPAs) with eligible non-Federal entities under the terms of this contract. The Contractor should respond to any requests to

enter into a BPA within 5 business days of receipt of the request.

*(d) Conditions of acceptance.* If the Contractor accepts an order from or enters into a BPA with an eligible non-Federal entity under this contract, the following conditions apply:

(1) For orders, a separate contract is formed between the Contractor and the eligible non-Federal entity (herein "the parties"). For BPAs, a separate agreement is formed between the parties.

(2) The resultant order or BPA shall incorporate by reference all the terms and conditions of this contract except for:

(i) FAR clause 52.233–1, Disputes, and (ii) Paragraphs (d) Disputes, (h) Patent indemnity, and (r) Compliance with laws unique to Government contracts, of GSAR clause 552.212–4, Contract Terms and Conditions—Commercial Products and Commercial Services.

(3) The U.S. Government is not liable for the performance or nonperformance of any order or BPA entered into under this contract by the parties. Disputes which cannot be resolved by the parties may be litigated in any State or Federal court with jurisdiction over the parties, applying Federal procurement law, including statutes, regulations, and case law, and, if pertinent, the Uniform Commercial Code. To the extent authorized by law, the parties are encouraged to resolve disputes through alternative dispute resolution.

(4) Neither party will look to, primarily or in any secondary capacity, or file any claim against the U.S. Government or any of its agencies with respect to any failure of performance by the other party.

*(e) Additional terms and conditions.* Terms and conditions required by statute, ordinance, regulation, or as otherwise required by an eligible non-Federal entity may be made a part of an order or a BPA to the extent that these terms and conditions do not conflict with the terms and conditions of this contract. The Contractor should review any such additional terms and conditions prior to accepting an order or entering into a BPA with an eligible non-Federal entity.

*(f) Payment.* (1) The Contractor is responsible for obtaining all payments due to the Contractor from the eligible non-Federal entity under the terms and conditions of the order or the BPA entered into under this contract, without recourse to the U.S. Government or any of its agencies that awarded this contract or administer this contract.

(2) If an eligible non-Federal entity is subject to a State prompt payment law, the terms and conditions of the applicable State law apply to the orders placed under this contract by such entities. If an eligible non-Federal entity is not subject to a State prompt payment law, the terms and conditions of paragraph (i) of the GSAR clause at 552.212–4, apply to such entities in the same manner as to Federal entities.

*(g) Fee and sales reporting.* The requirements of the GSAR clause at 552.238–80, Industrial Funding Fee and Sales Reporting, apply to any sales to eligible non-Federal entities under this contract.

(End of clause)

[FR Doc. 2023–20098 Filed 9–15–23; 8:45 am]

**BILLING CODE 6820–61–P**

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## **SURFACE TRANSPORTATION BOARD**

### **49 CFR Part 1145**

[Docket No. EP 711 (Sub-No. 2)]

#### **Reciprocal Switching for Inadequate Service**

**AGENCY:** Surface Transportation Board.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This decision proposes, in a new subdocket, a new set of regulations that would provide for the prescription of reciprocal switching agreements to address inadequate rail service, as determined using objective standards based on a carrier's original estimated time of arrival, transit time, and first-mile and last-mile service. To help implement the new regulations, the Surface Transportation Board (Board or STB) proposes to require Class I carriers to submit certain data, which would be publicly accessible and generalized; and to adopt a new requirement that, upon written request by a customer, a rail carrier must provide to that customer individualized, machine-readable service data.

**DATES:** Comments are due by October 23, 2023. Replies are due by November 21, 2023.

**ADDRESSES:** All filings must be submitted to the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. Filings will be posted to the Board's website and need not be served on other commenters or any other party to the proceedings.

**FOR FURTHER INFORMATION CONTACT:** Valerie Quinn at (202) 740–5567. If you require accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

#### **SUPPLEMENTARY INFORMATION:**

*Overview.* In 2016, the Board issued a notice of proposed rulemaking in *Reciprocal Switching (2016 NPRM)*, EP 711 (Sub-No. 1) et al. (STB served July 27, 2016), under which the agency would exercise its statutory authority to require rail carriers to enter into reciprocal switching agreements under 49 U.S.C. 11102(c). Due to developments in the freight rail industry since the Board's 2016 notice, including critical and ongoing service problems, the Board has decided to focus, at this time, its reciprocal switching reforms on more specific and objective remedies for