

GENERAL SERVICES ADMINISTRATION

48 CFR Part 538

[GSAR Case 2022–G514; Docket No. GSA–GSAR–2023–0009; Sequence No. 1]

RIN 3090–AK58

General Services Administration Acquisition Regulation; Standardizing Federal Supply Schedule Clause and Provision Prescriptions

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

ACTION: Final rule.

SUMMARY: The General Services Administration is issuing this final rule amending the General Services Administration Acquisition Regulation (GSAR) to clarify when GSAR clauses apply to Federal Supply Schedule contracts.

DATES: *Effective:* February 12, 2024.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Adina Torberntsson, Procurement Analyst, at gsarpolicy@gsa.gov or 720–475–0568. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at gsaregsec@gsa.gov or 202–501–4755. Please cite GSAR Case 2022–G514.

SUPPLEMENTARY INFORMATION:

I. Background

GSA published a proposed rule in the *Federal Register* at 88 FR 15941 on March 15, 2023 to amend the GSAR to address when the GSAR clauses apply to Federal Supply Schedule contracts established by a delegated agency.

The GSA Schedule, also known as Federal Supply Schedule (FSS), and/or 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. GSA may delegate certain responsibilities to other agencies (*i.e.*, GSA has delegated authority to the Department of Veterans Affairs (VA) to procure medical supplies under the VA Federal Supply Schedules Program).

Such delegation provides the authorized agency autonomy over their resulting contract. The contract is published on the FSS website, and often looks like every other available FSS contract apart from the naming convention. Contracts administered solely by GSA have a “GS” naming convention.

This change will streamline the prescription language. Prescription

language is the language that instructs when a clause is to be applied, when establishing a Schedule contract.

II. Discussion and Analysis

Analysis of Public Comments

GSA provided the public a 60-day comment period (March 15, 2023, to May 15, 2023). GSA did not receive any comments from the public.

Summary of Changes

GSA did not make any significant changes, or changes of any kind, since publication of the proposed rule.

III. Expected Impact of the Rule

This final rule will ensure GSA’s contracting officers are using the clauses correctly, clarifies how GSA’s delegation to other Government agencies work, provides instruction on how to document the contract file, and the procedures for requesting a deviation. This change will have no impact on the approximately 13,000 FSS contractors already using the existing clauses. The changes do not alter the manner in which the contractors conduct business.

IV. Executive Orders 12866, 13563 and 14094

Executive Orders (E.O.s) 12866 and 13563 direct 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 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. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has determined that 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.

V. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a “major rule” may take effect, the agency promulgating the rule must submit a rule report, which

includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The General Services Administration will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. OIRA has determined this rule is not to be a “major rule” under 5 U.S.C. 804.

VI. Regulatory Flexibility Act

GSA does not expect this 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 described changes clarify the language and only slightly modify the current text. The meaning behind the changed text remains the same, and therefore any burden would have been identified previously. However, a Final Regulatory Flexibility Analysis (FRFA) has been prepared. The FRFA has been prepared consistent with the criteria of 5 U.S.C. 604 and is summarized as follows:

The objective of the final rule is to improve the understanding of delegation and coordination expectations of FSS policies for delegated agencies. There were no comments submitted and therefore no significant issues raised by the public in response to the initial regulatory flexibility analysis.

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 final rule applies to large and small businesses, which are awarded FSS contracts. Information generated from the System for Award Management (SAM), for Fiscal Year 2022 has been used as the basis for estimating the number of contractors that may be involved. Specifically, FSS contracts for delegated agencies (*i.e.*, Department of Veteran Affairs) were analyzed. Examination of this data revealed 1,700 applicable FSS contracts were awarded. Of these 1,700 new awards, 1,417 (83 percent) contract awards were to small business entities.

The final rule does not change reporting, recordkeeping, or other compliance requirements for FSS contracts. The rule merely clarifies requirements currently in use in FSS solicitations and contracts, and does not implement new or changed requirements.

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

There are no known alternatives to this final 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 are already being followed. The final rule merely clarifies language in the GSAR to make it more accessible to the reader by removing references to outdated clauses or excessive language.

The Regulatory Secretariat Division will be submitting a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the FRFA may be obtained from the Regulatory Secretariat Division.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 538

Government procurement.

Jeffrey A. Koses,

Senior Procurement Executive, Office of Acquisition Policy, Office of Government-wide Policy, General Services Administration.

Therefore, GSA amends 48 CFR part 538 as set forth below:

PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING

■ 1. The authority citation for part 538 continues to read as follows:

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

■ 2. Add sections 538.000 and 538.001 to read as follows:

538.000 Scope of part.

(a) This part prescribes policies and procedures for contracting for supplies and services under the Federal Supply Schedule (FSS) program. GSA may delegate certain responsibilities for other agency acquisition programs as they relate to the establishment of individual federal supply schedules.

(b) The authority of other agencies to award FSS contracts can only be accomplished through delegation from GSA. An agency delegated authority by GSA to award contracts under the FSS program is responsible for complying with GSA regulations and policies that apply to the FSS program, unless an exception is approved by GSA (see 538.001).

538.001 General.

If a policy, regulation, or clause is identified as not applicable or in conflict to what is delegated by GSA, the delegated agency shall submit a determination and finding supporting the rationale as to why it does not apply, or is in conflict, in accordance with the delegation that was already

received from GSA. The determination and finding must be approved by the GSA Senior Procurement Executive, the Commissioner of the Federal Acquisition Service (FAS) or a designee.

■ 3. Add section 538.201 to subpart 538.2 to read as follows:

538.201 Coordination requirements.

GSA will coordinate with other agencies who administer FSS contracts specific to their delegated authority (*i.e.*, the Department of Veterans Affairs). Coordination will ensure adherence to policies and procedures at the program level, such as providing guidance on approved exceptions (see 538.001).

■ 4. Revise section 538.273 to read as follows:

538.273 FSS solicitation provisions and contract clauses.

The following clauses and provisions apply to FSS solicitations and contracts, unless otherwise excepted (see 538.001) or as otherwise stated below. For example, if only used in solicitations, the prescription will clearly state this. If the language does not specify “solicitations” then the clause applies to both FSS solicitations and contracts.

(a) Insert the following provisions in FSS solicitations:

(1) 552.238–70, Cover Page for Worldwide Federal Supply Schedules. Use in all FSS solicitations.

(2) 552.238–71, Notice of Total Small Business Set-Aside. Use in FSS solicitations containing special item numbers (SINs) that are set aside for small business.

(3) 552.238–72, Information Collection Requirements. Use in all FSS solicitations.

(b) Insert the following clauses and provisions in FSS solicitations and contracts as an addendum to FAR 52.212–1, Instructions to Offerors—Commercial Products and Commercial Services:

(1) 552.238–73, Identification of Electronic Office Equipment Providing Accessibility for Individuals with Disabilities, the Handicapped. Use only in FSS solicitations for electronic office equipment.

(2) 552.238–74, Introduction of New Supplies/Services (INSS). Only for those solicitations allowing the introduction of new supplies/services. Note: GSA Form 1649, Notification of Federal Supply Schedule Improvement, may be required if revising a Special Item Number (SIN).

(c) Insert the following provisions in FSS solicitations as an addendum to FAR 52.212–2, Evaluation—Commercial Products and Commercial Services:

(1) 552.238–75, Evaluation—Commercial Products and Commercial Services (Federal Supply Schedule).

(2) 552.238–76, Use of Non-Government Employees to Review Offers. Use only in FSS solicitations when non-government employees may be utilized to review solicitation responses.

(d) Insert the following clauses in FSS solicitations and contracts as an addendum to Clause FAR 52.212–4, Contract Terms and Conditions—Commercial Products and Commercial Services:

(1) 552.238–77, Submission and Distribution of Authorized Federal Supply Schedule Price Lists.

(2) 552.238–78, Identification of Products that have Environmental Attributes. Use only in solicitations and contracts that contemplate products with environmental attributes.

(3) 552.238–79, Cancellation.

(4) 552.238–80, Industrial Funding Fee and Sales Reporting. Use Alternate I for FSS with Transactional Data Reporting requirements.

(5) 552.238–81, Price Reductions. Use Alternate I for FSS with Transactional Data Reporting requirements.

(6) 552.238–82, Modifications (Federal Supply Schedules).

(i) Use Alternate I for FSS that only accept eMod.

(ii) Use Alternate II for FSS with Transactional Data Reporting requirements.

(7) 552.238–83, Examination of Records by GSA (Federal Supply Schedules).

(8) 552.238–84, Discounts for Prompt Payment.

(9) 552.238–85, Contractor's Billing Responsibilities.

(10) 552.238–86, Delivery Schedule. Use only for supplies.

(11) 552.238–87, Delivery Prices.

(12) 552.238–88, GSA Advantage!®. This clause is not required for the Department of Veterans Affairs Federal Supply Schedules.

(13) 552.238–89, Deliveries to the U.S. Postal Service. Use only for mailable articles when delivery to a U.S. Postal Service (USPS) facility is contemplated.

(14) 552.238–90, Characteristics of Electric Current. Use only when the supply of equipment which uses electrical current is contemplated.

(15) 552.238–91, Marking and Documentation Requirements for Shipping. Use only for supplies when the need for outlining the minimum information and documentation required for shipping is contemplated.

(16) 552.238–92, Vendor Managed Inventory (VMI) Program. Use only for supplies when a VMI Program is contemplated.

(17) 552.238–93, Order Acknowledgement. Use only for supplies.

(18) 552.238–94, Accelerated Delivery Requirements. Use only for supplies.

(19) 552.238–95, Separate Charge for Performance Oriented Packaging (POP). Use only for products defined as hazardous under Federal Standard No. 313.

(20) 552.238–96, Separate Charge for Delivery within Consignee's Premises. Use only for supplies when allowing offerors to propose separate charges for deliveries within the consignee's premises.

(21) 552.238–97, Parts and Service.

(22) 552.238–98, Clauses for Overseas Coverage. Use only when overseas acquisition is contemplated. Choose the most appropriate clause(s) to the contract scenario. For example there are multiple free on board (F.o.b.) clauses. Select those that apply best to what is being procured. The following clauses and provisions shall also be inserted in full text, when applicable.

(i) FAR 52.214–34 Submission of Offers in the English Language.

(ii) FAR 52.214–35 Submission of Offers in U.S. Currency.

(iii) 552.238–90 Characteristics of Electric Current.

(iv) 552.238–91 Marking and Documentation Requirements for Shipping.

(v) 552.238–97 Parts and Service.

(vi) 552.238–99 Delivery Prices Overseas.

(vii) 552.238–100 Transshipments.

(viii) 552.238–101 Foreign Taxes and Duties.

(ix) FAR 52.247–29 F.o.b. Origin.

(x) FAR 52.247–34 F.o.b. Destination.

(xi) FAR 52.247–48 F.o.b.

Destination—Evidence of Shipment.

(23) 552.238–99, Delivery Prices Overseas. Use only when overseas acquisition is contemplated.

(24) 552.238–100, Transshipments. Use only when overseas acquisition is contemplated.

(25) 552.238–101, Foreign Taxes and Duties. Use only when overseas acquisition is contemplated.

(26) 552.238–102, English Language and U.S. Dollar Requirements.

(27) 552.238–103, Electronic Commerce. This clause is not required for Department of Veterans Affairs Federal Supply Schedules.

(28) 552.238–104, Dissemination of Information by Contractor.

(29) 552.238–105, Deliveries Beyond the Contractual Period—Placing of Orders.

(30) 552.238–106, Interpretation of Contract Requirements.

(31) 552.238–107, Export Traffic Release (Supplies). Use in FSS

solicitations and contracts for supplies. This clause is not required for vehicles.

(32) 552.238–108, Spare Parts Kit. Use only for products requiring spare part kits. This information is to be specified at the order level.

(33) 552.238–109, Authentication Supplies and Services. Use only for information technology associated with the Homeland Security Presidential Directive 12 (HSPD–12).

(34) 552.238–110, Commercial Satellite Communication (COMSATCOM) Services. Use only for COMSATCOM services.

(35) 552.238–111, Environmental Protection Agency Registration Requirement. Use only for supplies when products may require registration with the Environmental Protection Agency.

(36) 552.238–116, Option to Extend the Term of the FSS Contract. Use when appropriate.

(e) Insert the following fill-in information within the blank of paragraph (d) of FAR clause 52.216–22, Indefinite Quantity: “the completion of customer order, including options, 60 months following the expiration of the FSS contract ordering period”.

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SURFACE TRANSPORTATION BOARD

49 CFR Part 1022

[Docket No. EP 716 (Sub-No. 9)]

Civil Monetary Penalties—2024 Adjustment

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (Board) is issuing a final rule to implement the annual inflationary adjustment to its civil monetary penalties, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES: This final rule is effective January 12, 2024.

FOR FURTHER INFORMATION CONTACT:

Amy Ziehm at (202) 245–0391. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), enacted as part of the Bipartisan Budget Act of 2015, Public Law 114–74, 701, 129 Stat. 584, 599–

601, requires agencies to adjust their civil penalties for inflation annually, beginning on July 1, 2016, and no later than January 15 of every year thereafter. In accordance with the 2015 Act, annual inflation adjustments are to be based on the percent change between the Consumer Price Index for all Urban Consumers (CPI–U) for October of the previous year and the October CPI–U of the year before that. Penalty level adjustments should be rounded to the nearest dollar.

II. Discussion

The statutory definition of civil monetary penalty covers various civil penalty provisions under the Rail (Part A); Motor Carriers, Water Carriers, Brokers, and Freight Forwarders (Part B); and Pipeline Carriers (Part C) provisions of the Interstate Commerce Act, as amended. The Board's civil (and criminal) penalty authority related to rail transportation appears at 49 U.S.C. 11901–11908. The Board's penalty authority related to motor carriers, water carriers, brokers, and freight forwarders appears at 49 U.S.C. 14901–14916. The Board's penalty authority related to pipeline carriers appears at 49 U.S.C. 16101–16106.¹ The Board has regulations at 49 CFR pt. 1022 that codify the method set forth in the 2015 Act for annually adjusting for inflation the civil monetary penalties within the Board's jurisdiction.

As set forth in this final rule, the Board is amending 49 CFR part 1022 to make an annual inflation adjustment to the civil monetary penalties in conformance with the requirements of the 2015 Act. The adjusted penalties set forth in the rule will apply only to violations that occur after the effective date of this regulation.

In accordance with the 2015 Act, the annual adjustment adopted here is calculated by multiplying each current penalty by the cost-of-living adjustment factor of 1.03241, which reflects the percentage change between the October 2023 CPI–U (307.671) and the October 2022 CPI–U (298.012). The table at the end of this decision shows the statutory citation for each civil penalty, a description of the provision, the adjusted statutory civil penalty level for 2023, and the adjusted statutory civil penalty level for 2024.

¹ The Board also has various criminal penalty authority, enforceable in a federal criminal court. Congress has not, however, authorized federal agencies to adjust statutorily prescribed criminal penalty provisions for inflation, and this rule does not address those provisions.