

Issued on: September 29, 2008.

David Kelly,

*Acting Administrator, National Highway
Traffic Safety Administration.*

Meredith Attwell Baker,

*Acting Assistant Secretary for
Communications and Information.*

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GENERAL SERVICES ADMINISTRATION

48 CFR Parts 501, 515, and 552

[GSAR Case 2008-G506; Docket 2008-0007;
Sequence 23]

RIN 3090-A176

General Services Acquisition Regulation; GSAR Case 2008-G506; Rewrite of GSAR Part 515, Contracting by Negotiation

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

ACTION: Proposed rule.

SUMMARY: The General Services
Administration (GSA) is proposing to
amend the General Services Acquisition
Regulation (GSAR) to revise language
that provides requirements for
contracting by negotiation.

DATES: Interested parties should submit
written comments to the Regulatory
Secretariat on or before December 2,
2008 to be considered in the
formulation of a final rule.

ADDRESSES: Submit comments
identified by GSAR Case 2008-G506 by
any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "GSAR Case 2008-G506" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with GSAR Case 2008-G506. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "GSAR Case 2008-G506" on your attached document.

- Fax: 202-501-4067.
- Mail: General Services

Administration, Regulatory Secretariat
(VPR), 1800 F Street, NW, Room 4041,
ATTN: Laurieann Duarte, Washington,
DC 20405.

Instructions: Please submit comments
only and cite GSAR Case 2008-G506 in
all correspondence related to this case.
All comments received will be posted
without change to <http://www.regulations.gov>

www.regulations.gov, including any
personal and/or business confidential
information provided.

FOR FURTHER INFORMATION CONTACT For
clarification of content, contact Mr.
Michael O. Jackson at (202) 208-4949.
For information pertaining to the status
or publication schedules, contact the
Regulatory Secretariat (VPR), Room
4041, GS Building, Washington, DC
20405, (202) 501-4755. Please cite
GSAR Case 2008-G506.

SUPPLEMENTARY INFORMATION:

A. Background

The General Services Administration
(GSA) is amending the General Services
Administration Acquisition Regulation
(GSAR) to revise sections of GSAR part
515 that provide requirements for
contracting by negotiation.

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 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.

GSA will rewrite each part of the
GSAR and GSAM, and as each GSAR
part is rewritten, will publish it in the
Federal Register.

This rule covers the rewrite of GSAR
Part 515. The specific changes are as
follows:

- GSAR 501.106 - Added Control
Number 3090-0163 as a cross reference
for 515.201-1.
- GSAR 515.204—Added a paragraph
to specify that the senior procurement
executive is the designee per FAR
15.204(e).
- GSAR 515.204-1—Moved
paragraph (a) to 515.204. Renumbered
remaining paragraphs and references
accordingly.
- GSAR 515.205—Added "or unless
the incumbent contractor is otherwise
ineligible for the award" to advise
contracting officers that they are not
obligated to include an offeror in the
competition if they are not eligible to
compete.

- GSAR 515.209-70, Examination of
records by GSA clause—
 - a. In paragraph (b), changed "You" to
"The contracting officer" eliminated the
dashes in "Assistant Inspector General-
Auditing" and "Regional Inspector
General-Auditing"; and replaced each
dash with a "for"; and
 - b. Paragraphs (c) and (d) were
transferred to Part 538 because they only

pertain to Federal Supply Schedule
(FSS) Multiple Award Schedule (MAS).

- 515.305, Proposal evaluation—
 - a. Transferred paragraph (a),
renumbered it 515.208-70 and made it
non-regulatory;
 - b. Transferred paragraph (b),
renumbered it 515.305-71 and made it
non-regulatory;
 - c. Made 515.305-70 non-regulatory;
and
 - d. The text made non-regulatory and
renumbered to 515.208-70 and
515.305-71, as well as the text that was
formerly regulatory at 515.305-70, the
team decided that it did not affect the
public and was only applicable
internally to GSA.
 - 515.408, Solicitation provisions
and contract clauses—Transferred to
GSAM Part 538 because it is only
applicable to the Multiple Award
Schedules Program. This proposed
revision also includes the CSP-1 form.
 - 515.7002, Procedures—
 - a. Replaced "You" with "Contracting
Officer" throughout the clause. Also
changed "Base your determination" to
"This determination should be based";
 - b. In paragraph (a) changed FAR
reference "14.202-4(g)" to "14.202-4(f)"
and changed "However, qualifications"
to "Samples are not requested. Any
samples submitted with". This is to
include minor editorial changes
suggested by the Advanced Notice of
Public Rulemaking; and
 - c. In paragraph (b)(1) deleted
"52.214-20" and replaced it with
"552.214-72". Deleted the remainder of
the paragraph.
 - 552.215-71—Transferred to Part
538 because of the proposed move in
515.209-70(c) and (d).
 - 552.215-72—Transferred to Part
538 because of the proposed move in
515.408.
- As a result of the rewrite of GSAM
Part 515, certain text and clauses such
as 552.215-71, Examination of Records
by GSA (Multiple Award Schedule), and
552.215-72, Price Adjustment—Failure
to Provide Accurate Information, were
transferred to the GSAM rewrite team
handling the rewrite of GSAM Part 538.
The 538 team was assembled with GSA
personnel who have experience in
dealing with GSAM Part 538, including
personnel from GSA's Federal
Acquisition Service, which is the GSA
component responsible for GSA's
Multiple Award Schedules. GSA
established a process in the rewrite
initiative where text and clauses that
were found more suited to be allocated
to other parts of the GSAM were sent to
the other rewrite teams for their analysis
and incorporation into their assigned
rewrite parts.

Discussion of Comments

Nine comments covering Part 515 were received in response to the Advanced Notice of Proposed Rulemaking published in the **Federal Register** at 71 FR 7910, February 15, 2006. A discussion of these comments is provided below:

1. *Comment:* One commenter focused on the GSAR 552.238–75, Price Reductions (currently May 2004) clause, the Commercial Sales Practices Format (CSPF) in GSAR 515.408, and the Figure 515.4 Instructions that accompany them.

Response: This comment was transferred to the GSAM part 538 rewrite team.

2. *Comment:* Another commenter believes there is value in consistency—a greater likelihood of driving fair prices among all contracts for a type of product or service. One area for consistency is in the data collected in CSPF charts. GSA's sample format does a commendable job toward that goal but can be improved.

Response: This comment was transferred to the GSAM part 538 rewrite team.

3. *Comment:* GSAR should resolve how the requirement to annually update the Central Contractor Registration (CCR) impacts the position that small business size status is as of the time the offer is submitted. The commenter recommends that GSAR prescribe language to insert in GSA Schedule price lists on this topic. The language would inform agencies that notwithstanding data in CCR, for purposes of ordering against the schedule a contractor is small for the 5 year period of the schedule contract. Schedule contractors are required to recertify size status at the time of a renewal.

Response: This comment was transferred to the GSAM part 538 rewrite team.

4. *Comment:* Section 515.305(d)(1) of the GSAM discusses the requirement of using (“must use”) PPIRS (Past Performance Information Retrieval System). It goes on to say that a contracting officer “may use” questionnaires tailored to the circumstances, interviews, and other sources. On the other hand, FAR Part 15.203(3) specifically indicates what past performance evaluations “shall address.” This includes contractor's record of conforming to contract requirements and to standards of good workmanship; contractor's record of forecasting and controlling costs; contractor's adherence to contract schedules, including administrative aspects of performance; contractor's

history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, contractor's business-like concern for interest of the customer. Additionally, FAR 9.105–1 and 42.15 provide steps to conducting past performance survey, including checking List of Parties Excluded from Federal Procurement and Non-Procurement Programs, reviewing previous pre-award survey reports, and requesting information from other government offices. The FAR seems to be substantially more specific in nature than the GSAM.

Response: PPIRS is a government wide system intended to supplement past performance evaluations. The use of PPIRS as directed by GSAM does not replace the requirement to follow the guidance in the applicable parts of the FAR regarding past performance evaluations. We also note that the FAR does not contain 15.203(3), as referenced in the commenter's comment.

5. *Comment:* 515.403–4, Requiring cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b) - To determine if a contract action meets the threshold at FAR 15.403–4 for requesting cost and pricing data, consider the value of the action plus any priced options. Exercise of a priced option is not a price adjustment and does not require submission of cost and pricing data. GSAR should be revised to state what the threshold is.

Response: Do not concur. The FAR specifies the threshold.

6. *Comment:* 515.306, Exchanges with offerors after receipt of proposals. Limit access to Government cost estimates to Government personnel whose official duties require knowledge of the estimate. During negotiations, you may disclose part or all of the Government estimate under FAR 15.306(e) when necessary to arrive at a fair and reasonable price. After award, you may reveal the total amount of the independent Government estimate. More information should be included to explain the various types of exchanges that can be conducted with offerors.

Response: Do not concur. FAR 15.306(e) only places limits on exchanges. It is up to the contracting officer to use their discretion based on the exceptions cited in the FAR to determine the content of any exchanges with offerors.

7. *Comment:* Appendix 515A—Source Selection Procedures (This Appendix will replace GSA Order, Source Selection Procedures (APD P 2800.2)). The source selection procedures are being updated based on the FAR Part 15

rewrite. Would be greatly beneficial to see this section completed.

Response: Concur. Comment is taken under advisement.

8. *Comment:* Clarify and revise the Commercial Sales Practices Format, including simplifying the provision and removing those requirements associated with the mechanism that represents the pricing relationship between the Government and the basis of award customer (or category of customers) that pose undue administrative burden.

Response: The Commercial Sales Practices format will be addressed in GSAM 538.

9. *Comment:* Revise the GSAR to address the procurement practice known as “reverse auctions”. While GSA supports innovative competitive techniques, GSA is concerned about the implication that auction techniques should be required even to the extent practicable, for the purchase of commercial items, and in particular not all commercial services, lend themselves to the “price only” bidding used in auction and reverse auction techniques.

Response: Office of Federal Procurement Policy (see memo, “Government-wide Survey on the Use of Reverse Auctions”, dated November 27, 2007) has initiated a review of the government's use of commercially available online procurement services, including reverse auctions. Based on their findings GSA may consider including guidance in the GSAR.

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 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 the revisions are not considered substantive. The revisions only update and reorganize existing coverage. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. GSA will consider comments from small entities concerning the affected GSAR Parts 501, 515, and 552 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (GSAR case 2008–G506), in all correspondence.

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 3090-0027.

List of Subjects in 48 CFR Parts 501, 515, and 552

Government procurement.

Dated: September 19, 2008.

Edward C. Loeb,

Deputy Director, Office of Acquisition Policy.

Therefore, GSA proposes to amend 48 CFR parts 501, 515, and 552 as set forth below:

1. The authority citation for 48 CFR parts 501, 515, and 552 is revised to read as follows:

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

PART 501—GENERAL SERVICES ADMINISTRATION ACQUISITION REGULATION SYSTEM

501.106 [Amended]

2. Amend section 501.106, in the table, by adding in numerical sequence, GSAR Reference “515.201-1” and its corresponding OMB Control Number “3090-0163”.

3. Revise Part 515 to read as follows:

PART 515—CONTRACTING BY NEGOTIATION

Subpart 515.2—Solicitation and Receipt of Proposals and Information

Sec.

515.204 Contract format.

515.204-1 Uniform contract format.

515.205 Issuing solicitations.

515.209 Solicitation provisions and contract clauses.

515.209-70 Examination of records by GSA clause.

Subpart 515.5—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

515.506 Postaward debriefing of offerors.

Subpart 515.70—Use of Samples

515.7002 Procedures.

Subpart 515.2—Solicitation and Receipt of Proposals and Information

515.204 Contract format.

(a) The uniform contract format is not required for leases of real property.

(b) The Senior Procurement Executive is the agency head's designee for the purposes of granting exemptions to the use of the Uniform Contract Format (see FAR 15.204(e)).

515.204-1 Uniform contract format.

Each solicitation and contract must include the two notices in paragraphs (a) and (b) of this subsection, except that acquisitions of leasehold interests in real property, must include only the notice in paragraph (a).

(a) The information collection requirements contained in this solicitation/contract are either required by regulation or approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act and assigned OMB Control No. 3090-0163.

(b) GSA's hours of operation are 8:00 a.m. to 4:30 p.m. Requests for preaward debriefings postmarked or otherwise submitted after 4:30 p.m. will be considered submitted the following business day. Requests for postaward debriefings delivered after 4:30 p.m. will be considered received and filed the following business day.

515.205 Issuing solicitations.

Potential sources, as used in FAR 15.205, include both of the following:

(a) The incumbent contractor, except when its written response to the notice of contract action under FAR Subpart 5.2 states a negative interest or unless the incumbent contractor is otherwise ineligible for the award.

(b) Offerors that responded to recent solicitations for the same or similar items.

515.209 Solicitation provisions and contract clauses.

515.209-70 Examination of records by GSA clause.

Clause for Other than Multiple Award Schedules

(a) For other than multiple award schedule (MAS) contracts, insert the clause at 552.215-70, Examination of Records by GSA, in solicitations and contracts over \$100,000, including acquisitions of leasehold interests in real property, that meet any of the conditions listed below:

(1) Involve the use or disposition of Government-furnished property.

(2) Provide for advance payments, progress payments based on cost, or guaranteed loan.

(3) Contain a price warranty or price reduction clause.

(4) Involve income to the Government where income is based on operations under the control of the contractor.

(5) Include an economic price adjustment clause where the adjustment is not based solely on an established, third party index.

(6) Are requirements, indefinite-quantity, or letter type contracts as defined in FAR Part 16.

(7) Are subject to adjustment based on a negotiated cost escalation base.

(8) Contain the provision at FAR 52.223-4, Recovered Material Certification.

(b) The contracting officer may modify the clause at 552.215-70 to define the specific area of audit (*e.g.*, the use or disposition of Government-furnished property, compliance with the price reduction clause). Counsel and the Assistant Inspector General for Auditing or Regional Inspector General for Auditing, as appropriate, must concur in any modifications to the clause.

(c) *Solicitation notice.* Include in the solicitation a notice substantially as follows:

Notice About Releasing Proposals

(1) The Government intends to disclose proposals received in response to this solicitation to nongovernment evaluators.

(2) Each evaluator will sign and provide to GSA a “Conflict of Interest Acknowledgment and Nondisclosure Agreement.”

Subpart 515.5—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

515.506 Postaward debriefing of offerors.

For purposes of determining the date of receipt of a request for a postaward debriefing, GSA's hours of operation are 8:00 a.m. to 4:30 p.m. Requests received after 4:30 p.m. will be considered received the following business day.

Subpart 515.70—Use of Samples

515.7002 Procedures.

(a) *Unsolicited samples.* The reference to FAR 14.404-2(d) in FAR 14.202-4(f) does not apply. Use the following when contracting by negotiation: “Samples are not requested. Any samples submitted with the proposal that are at variance with the Government's requirements, constitute deficiencies. Resolve these as provided in FAR 15.306.”

(b) *Solicitation requirements.* (1) Use the clause at GSAR 552.214-72.

(2) In addition to listing subjective characteristics that cannot adequately be described in the specification, the contracting officer may list and evaluate objective characteristics. To include objective characteristics, the contracting officer must determine that examination of such characteristics is essential to the acquisition of an acceptable product. This determination should be based on past experience or other valid considerations.

(c) FAR 52.215-1(c)(3) applies to samples received after the time set for receipt of offers.

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

552.215–71 [Redesignated as 552.238–XX]

552.215–72 [Redesignated as 552.238–YY]

4. Sections 552.215–71 and 552.215–72 are redesignated as 552.238–XX and 552.238–YY, respectively.

[FR Doc. E8–22745 Filed 10–2–08; 8:45 am]

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DEPARTMENT OF COMMERCE

**National Oceanic and Atmospheric
Administration**

50 CFR Part 226

[Docket No. 0809161218–81253–01]

RIN 0648–AX23

**Listing Endangered and Threatened
Wildlife and Designating Critical
Habitat; 90–day Finding for a Petition
to Revise the Critical Habitat
Designation for the Hawaiian Monk
Seal**

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

ACTION: Notice of petition finding; request for information and comments.

SUMMARY: We, the National Marine Fisheries Service (NMFS), announce a 90–day finding for a petition to revise Hawaiian monk seal (*Monachus schauinslandi*) critical habitat under the Endangered Species Act (ESA) of 1973, as amended. The Hawaiian monk seal is listed as endangered throughout its range, and currently designated critical habitat consists of all beach areas, sand spits, and islets, including all beach crest vegetation to its deepest extent inland, lagoon waters, inner reef waters, and ocean waters out to a depth of 20 fathoms (36.6m) around specific areas in the Northwestern Hawaiian Islands. The petition seeks to include key beach areas, sand spits, and islets, including all beach crest vegetation to its deepest extent inland, lagoon waters, inner reef waters, and ocean waters out to a depth of 200 meters around the main Hawaiian Islands, and to extend critical habitat designation in the Northwestern Hawaiian Islands to Sand Island and ocean waters out to a depth of 500 meters. We are initiating a review of currently designated critical habitat of the species to determine whether revision is warranted. To ensure a comprehensive review, we solicit

information and comments pertaining to this species' essential habitat needs from any interested party.

DATES: Written comments and information related to this petition finding must be received [see ADDRESSES] by December 2, 2008.

ADDRESSES: You may submit comments, identified by [0648–AX23], by any one of the following methods: (1) Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal at <http://www.regulations.gov>; (2) Fax: 808–973–2941, attention: Krista Graham; or (3) mail: addressed to Krista Graham, National Marine Fisheries Service, Pacific Islands Regional Office, Protected Resources Division, 1601 Kapiolani Boulevard Suite 1110, Honolulu, HI 96814.

All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Interested persons may obtain more information about critical habitat designated for the Hawaiian monk seal online at the NMFS Pacific Islands Regional Office website: http://www.fpir.noaa.gov/PRD/prd_critical_habitat.html

FOR FURTHER INFORMATION CONTACT: Krista Graham by phone 808–944–2238, fax 808–973–2941, or e-mail krista.graham@noaa.gov; Lance Smith by phone 808–944–2258, fax 808–973–2941, or e-mail lance.smith@noaa.gov; Lisa Van Atta by phone 808–944–2257, fax 808–973–2941, or e-mail alecia.vanatta@noaa.gov; or Marta Nammack by phone 301–713–1401.

SUPPLEMENTARY INFORMATION:

Background

Critical habitat is defined in the ESA (16 U.S.C. 1531 *et seq.*) as:

“(i) the specific areas within the geographical area currently occupied by the species, at the time it is listed... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection;

and (ii) specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species.”

Our implementing regulations (50 CFR 424.12) describe those essential physical and biological features to include, but not limited to: (1) space for individual and population growth, and normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring; and (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species. We are required to focus on the primary constituent elements (PCEs) which best represent the principal biological or physical features. PCEs may include, but are not limited to: nesting grounds, feeding sites, water quality, tide, and geological formation. Our implementing regulations (50 CFR 424.02) define “special management considerations or protection” as any method or procedure useful in protecting physical and biological features of the environment for the conservation of the species.

Section 4(b)(2) of the ESA requires us to designate and make revisions to critical habitat for listed species based on the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any particular area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned. We are required to consider whether the petition contains information indicating that areas petitioned contain physical and biological features essential to, and that may require special management to provide for, the conservation of the species. Section 4(b)(3)(D)(i) of the ESA requires us to make a finding as to whether a petition to revise critical habitat presents substantial scientific information indicating that the revision may be warranted. Our implementing regulations (50 CFR 424.14) define “substantial information” as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In determining whether substantial information exists, we take into account several factors, including